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CHARLES DERR, APPELLANT, v. COLUMBUS CONVENTION CENTER, INC., A NEBRASKA CORPORATION, APPELLEE.

604 N.W.2d 414

Filed January 14, 2000. No. S-98-256.

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 of summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
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. ___: ___. 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.
5. **Negligence: Invitor-Invitee: Licensee.** The common-law distinction between licensee and business invitee was prospectively abolished in *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996).
6. **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.
7. **Negligence: Liability: Invitor-Invitee: Proximate Cause: Proof.** A possessor of land is subject to liability for injury caused to a business invitee by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to 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. The first part of the above test may be met by proving any one of the three subparts, namely, that the defendant created the condition, knew of the condition, or would have discovered the condition by the exercise of reasonable care.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and MUES and INBODY, Judges, on appeal thereto from the District Court for Platte County, ROBERT

R. STEINKE, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

James C. Stecker for appellant.

Amy Sherman LaFollette, of Nolan, Roach, Olson, Fieber & Lautenbaugh, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Charles Derr slipped and fell on some ice while he was a guest at the New World Inn in Columbus, Nebraska, a hotel operated by the Columbus Convention Center, Inc. (CCC). Derr sued CCC, but the district court granted summary judgment for CCC. Derr appealed, and the Nebraska Court of Appeals reversed the judgment of the district court. *Derr v. Columbus Convention Ctr.*, No. A-98-256, 1999 WL 4200064 (Neb. App. June 22, 1999) (not designated for permanent publication). CCC petitioned this court for further review, which we granted on August 25, 1999. For the reasons stated below, we reverse the judgment of the Court of Appeals.

FACTUAL AND PROCEDURAL BACKGROUND

Derr's deposition testimony indicates he was, at the time of his accident, employed as a crew foreman by Hommon Cooling Towers. Derr was in Columbus to work on a cooling tower for Minnesota Corn Processors and had been staying at the New World Inn for about 2 months at the time of his accident.

Derr's accident occurred on August 31, 1995. Derr testified that he was going down the stairs to get some ice from the ice machine and fell when he slipped on some ice spilled on the last step of the stairway and felt a snap in his left ankle. Derr testified that the stairway was an interior, carpeted stairway and that the reason for his fall was a "few pieces" of ice from the ice machine.

The ice machine, according to Derr, was located on the ground floor of the hotel and was positioned against a wall about 3 or 4 feet to the right of the bottom of the stairway. Derr stated

that although he had seen ice on the floor around the ice machine during his stay at the hotel, he had not previously seen ice on the steps. Derr admitted that he had no idea how long the ice on which he slipped had been on the step prior to his fall. Derr knew of no facts that would indicate that CCC knew of the presence of the ice on the step.

In its answers to interrogatories, CCC stated that the stairs were vacuumed and that the floor at the base of the stairs was mopped at least once a day and sometimes more. CCC also stated that there were always regular housekeeping, maintenance, and inspections of the area performed by all of CCC's employees throughout the day. While CCC could not state the number of employees who passed through that area on any day, it opined that numerous employees of CCC passed by that area on a daily basis, often multiple times in a day. CCC stated that all its employees are instructed and trained to keep the entire premises in a clean and safe condition regardless of their particular job duties or description.

As a result of the fall, Derr suffered torn ligaments in his left ankle, which required surgical repair. Derr alleged in his petition that he had suffered a torn anterior talofibular ligament, a severely hypertrophied synovium, and a compressed anterior tibia nerve in his left ankle. Derr prayed for damages based upon pain and suffering, medical expenses, lost wages, and a permanent impairment to his left foot.

The district court, in entering summary judgment, found no evidence in the record to indicate that CCC had created the dangerous condition that led to Derr's accident or that CCC had actual or constructive notice of the condition. The Court of Appeals reversed, finding evidence to support the conclusion that CCC had created the dangerous condition by placing the ice machine near the base of the stairs and failing to regularly patrol the area for spills. *Derr v. Columbus Convention Ctr.*, No. A-98-256, 1999 WL 4200064 (Neb. App. June 22, 1999) (not designated for permanent publication).

ASSIGNMENTS OF ERROR

CCC assigns on further review, as consolidated and restated, that the Court of Appeals erred in finding that there was suffi-

cient evidence upon which a jury could infer that CCC had created the dangerous condition.

STANDARD OF REVIEW

[1] 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. *Ferguson v. Union Pacific RR. Co., ante* p. 78, 601 N.W.2d 907 (1999); *Nebraska Popcorn v. Wing, ante* p. 60, 602 N.W.2d 18 (1999).

[2] In reviewing an order of summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Nebraska Popcorn v. Wing, supra*; *Knudsen v. Mutual of Omaha Ins. Co.*, 257 Neb. 912, 601 N.W.2d 725 (1999).

[3] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Id.*

[4] 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. *Fackler v. Genetzky*, 257 Neb. 130, 595 N.W.2d 884 (1999); *Stiver v. Allsup, Inc.*, 255 Neb. 687, 587 N.W.2d 77 (1998). At that point, the burden of producing evidence shifts to the party opposing the motion. *Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997); *Brown v. American Tel. & Tel. Co.*, 252 Neb. 95, 560 N.W.2d 482 (1997).

ANALYSIS

[5,6] Derr's accident occurred prior to this court's prospective abolition of the common-law distinction between licensee and business invitee in *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996). However, in this case, it is clear that Derr, as a guest of the hotel, was a business invitee. 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. *Chelberg v. Guitars & Cadillacs*, 253 Neb. 830, 572 N.W.2d 356 (1998); *Young v. Eriksen Constr. Co.*, 250 Neb. 798, 553 N.W.2d 143 (1996).

[7] A possessor of land is subject to liability for injury caused to a business invitee by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to 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. *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 256 Neb. 406, 591 N.W.2d 532 (1999); *Chelberg v. Guitars & Cadillacs, supra.* The first part of the above test may be met by proving any one of the three subparts, namely, that the defendant created the condition, knew of the condition, or would have discovered the condition by the exercise of reasonable care. *Chelberg v. Guitars & Cadillacs, supra.*

The Court of Appeals in the instant case determined that there was no issue of material fact regarding CCC's actual or constructive knowledge of the presence of ice on the stairway and that CCC did not have such knowledge. Derr did not seek further review of these determinations, so they are not at issue in this court, despite an apparent attempt by Derr's counsel to resuscitate his constructive notice claim during oral argument. The sole issue presented by CCC's petition for further review is the Court of Appeals' determination that there was evidence from which a fact finder could reasonably infer that CCC created a dangerous condition that led to Derr's accident.

In so determining, the Court of Appeals relied on this court's decision in *Chelberg v. Guitars & Cadillacs, supra*, also a slip-and-fall case. This court described the factual circumstances as follows:

> Guitars & Cadillacs sold beer out of a "beer trough." This trough was a steel tub filled with ice and bottles of beer, and was located in a recessed area of the club overlapping the tile walkway which circled the dance floor. A customer would tell the bartender what brand of beer the customer wanted, and the bartender would pull out the bottle, dry it off with a towel, open the top, and hand it to the customer. Some customers would pull out the bottles themselves. The beer trough closed at 12:45 a.m. At that time, the bartender loaded the remaining beer bottles into cardboard cases and placed them on a dolly. The loading of the dolly took place in the area where Chelberg fell. The beer was then wheeled to the beer cooler.

Chelberg v. Guitars & Cadillacs, 253 Neb. 830, 831-32, 572 N.W.2d 356, 358 (1998).

Chelberg contended that Guitars & Cadillacs, during the process described above, created a dangerous condition that led to his accident. This court stated:

> The manager of Guitars & Cadillacs testified that they trained employees involved in beer trough sales activity to grab the beer bottle with a towel, wipe off the bottle, and then hand it to the customer. He stated the reason for this procedure is "the bottles are sitting in a tub of ice and when you pull it out of the ice obviously there is water running off of it. So we wipe it down. It's still ice cold inside and it's still going to seep moisture out or the bottle will still sweat a little bit, but the major amount, the water moisture is wiped off." Giving all reasonable inferences to Chelberg, the fact finder could find that the bottles pulled out of the trough could drip on the floor and create a slippery, wet, and dangerous condition on the tile walkway used by the customers. Then, to allow some of the customers to remove bottles from the trough without wiping them off and, at 12:45 a.m., shortly before Chelberg's fall, take the rest of the bottles out of the trough, again without wiping them off, and load them onto a beer cart parked in the area where Chelberg fell, establishes a question of fact for the fact finder as to whether Guitars & Cadillacs created a dangerous condition.

Id. at 836-37, 572 N.W.2d at 361.

The facts of *Chelberg* are distinguishable from those presented in the instant case. In *Chelberg*, the dispositive factor was not the existence of beer trough sales, but the fact that employees of Guitars & Cadillacs had (1) allowed customers to remove their own bottles from the trough without having the bottles wiped and (2) removed the bottles from the trough themselves without wiping the bottles. *Id.* In *Chelberg*, then, the finder of fact could reasonably infer that Guitars & Cadillacs had created a dangerous condition through the active participation of its own employees.

No such evidence exists in the present case. There is no evidence to suggest, nor does Derr argue, that CCC employees were actively involved in spilling the ice on which Derr fell. Instead, the Court of Appeals found:

> In the case before us, giving the benefit of all reasonable inferences to Derr, the fact finder could find that the Convention Center's placement of an ice machine for use by its patrons at the foot of a stairway and the failure to frequently patrol the area for stray ice and melted ice created a dangerous condition.

Derr v. Columbus Convention Ctr., No. A-98-256, 1999 WL 4200064 at *4 (Neb. App. June 22, 1999) (not designated for permanent publication). In other words, the Court of Appeals found that the evidence could support the conclusion that CCC created a dangerous condition merely by placing an ice machine near the foot of the stairs and not establishing a regular schedule for inspecting the area.

However, in this case, the evidence shows that the ice was spilled on the stair, most likely from an ice bucket of another guest at the hotel. No evidence shows, and Derr does not allege, that any employee of the hotel created or was aware of the spill. Without such evidence, the finder of fact could not reasonably infer that CCC "created" the hazard which caused Derr's injury.

CCC presented evidence showing that its employees inspected the area where the accident occurred several times a day and that those employees were trained to recognize and respond to hazardous conditions. CCC's evidence also indicated that no previous similar accidents had occurred on its premises.

This evidence would, if uncontroverted at trial, entitle CCC to judgment in its favor, as it would show that Derr's accident was not reasonably foreseeable and that CCC took reasonable care to prevent such accidents.

In response, Derr presented no evidence supporting a reasonable inference to the contrary. Derr presented no evidence showing that CCC failed to take reasonable care or that CCC's lapses were the proximate cause of his injury. Most particularly, Derr failed to demonstrate how CCC's precautions failed to meet the requirements of reasonable care, what additional precautions would have been required by reasonable care, or how such additional precautions would have prevented his injury. Derr failed to present evidence sufficient to show a material issue of fact.

CONCLUSION

CCC met its prima facie burden for summary judgment by presenting evidence that its employees were not directly involved in the spill that caused Derr's injury and that CCC was not actually or constructively aware of the spilled ice. Based on the record presented, the finder of fact could not reasonably infer that the placement of the ice machine created a dangerous condition or that CCC failed to take reasonable care to prevent its invitees from being injured.

Consequently, CCC met its burden of proof and was entitled to summary judgment. The Court of Appeals erred in reversing the judgment of the district court. The judgment of the Court of Appeals is reversed, and the cause is remanded to that court with directions to affirm the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTIONS.

HENDRY, C.J., concurring.

I concur in the result reached in the majority opinion; however, I write separately because of a concern relating to the issue of whether CCC exercised reasonable care in patrolling the area around the ice machine.

The only issue on further review in this case is whether CCC created the condition which caused Derr's injury. The Court of Appeals held that there was no genuine issue of material fact regarding whether CCC had actual notice of the condition or would have discovered the condition through the exercise of rea-

sonable care, and neither party questioned this determination. Thus, the majority's discussion regarding the sufficiency of CCC's patrolling efforts is not necessary to resolve the issue presented in this case.

IN RE INTEREST OF MICHAEL B., JR., ET AL., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. MICHAEL B., APPELLANT, AND PATRICIA B., APPELLEE AND CROSS-APPELLANT.

604 N.W.2d 405

Filed January 14, 2000. No. S-98-516.

1. **Juvenile Courts: Parental Rights: Appeal and Error.** In an appeal from a juvenile court order terminating parental rights, the appellate court tries factual questions de novo on the record. Appellate review is independent of the juvenile court's findings; however, when the evidence is in conflict, the appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another.
2. **Parental Rights: Evidence: Proof.** In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-292 (Cum. Supp. 1996) exists and that termination is in the children's best interests.
3. **Evidence: Words and Phrases.** Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
4. **Parental Rights: Statutes: Words and Phrases.** Neb. Rev. Stat. § 43-292(5) (Cum. Supp. 1996), the statute authorizing termination of parental rights for mental illness or mental deficiency, means only those mental illnesses or mental deficiencies which render the parents unable to discharge their parental responsibilities.
5. **Parental Rights.** Mental deficiency, in and of itself, is not a ground for termination of parental rights, but it must be shown that the mental deficiency caused the failure in parenting which, in turn, would dictate termination in the best interests of the children.
6. **Parental Rights: Proof.** Only one ground for termination need be proved in order for parental rights to be terminated.
7. **Parental Rights.** Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the children require termination of the parental rights.
8. ___. Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.

Petition for further review from the Nebraska Court of Appeals, MUES, INBODY, and CARLSON, Judges, on appeal thereto from the County Court for Adams County, DANIEL BRYAN, JR., Judge. Judgment of Court of Appeals affirmed.

Stephen A. Scherr, of Whelan & Scherr, for appellant Michael B.

Brenda L. McCrady for appellee Patricia B.

S. Colin Palm, Deputy Adams County Attorney, for appellee State.

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

MCCORMACK, J.

NATURE OF CASE

The Adams County Court, sitting as a juvenile court, terminated the parental rights of Patricia B. to her three minor children pursuant to Neb. Rev. Stat. § 43-292(2), (4), (6), and (7) (Cum. Supp. 1996). The Nebraska Court of Appeals affirmed the juvenile court's order. See *In re Interest of Michael B. et al.*, 8 Neb. App. 411, 594 N.W.2d 674 (1999). Patricia now petitions this court for further review, contending that the termination of her parental rights was based on a finding that she had a mental deficiency but that the State did not allege such ground for termination and failed to appoint a guardian ad litem for her. We affirm.

BACKGROUND

Patricia is the natural mother of Michael B., Jr., born May 29, 1990; James B., born June 23, 1991; and Jeremiah B., born May 7, 1993. Patricia also has a daughter from a former marriage, born August 18, 1979, who is not part of the present action.

On March 8, 1996, the State filed a petition requesting that Michael, Jr.; James; and Jeremiah be adjudicated as juveniles within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993), and temporary care and custody of the children was placed with the then Nebraska Department of Social Services (DSS). On July 24, 1996, an amended petition was filed which alleged (1) that the children were homeless or destitute or with-

out proper support through no fault of their parents and (2) that the children lacked proper parental care by reason of the fault or habits of their parents or that the children's parents neglected or refused to provide proper or necessary subsistence or other care necessary for the health, morals, or well-being of the children. Specifically, the petition alleged, inter alia, that Patricia had hit the children in their head and facial areas with her knuckles; that an investigation revealed that the children had numerous abrasions and bruises on their heads and faces; that Michael, Jr., reported that his brothers got spanked with wooden spoons; and that there had been minimal compliance with the voluntary services offered by DSS over the past 5 years.

Patricia admitted or pled no contest to the allegations contained in the petition, and the children were adjudicated on September 18, 1996. Subsequently, at least two case plans were adopted, and DSS worked extensively with Patricia in regard to the goals of those case plans.

On December 8, 1997, the State filed a supplemental petition seeking termination of Patricia's parental rights to Michael, Jr.; James; and Jeremiah, pursuant to § 43-292(2), (4), (6), and (7). The State also alleged that such termination was in the best interests of the children.

At the termination hearing, the State presented many witnesses, two of whom were psychological expert witnesses who had evaluated Patricia. The first expert witness testified that Patricia has possible borderline intelligence and a mixed personality disorder with paranoid and antisocial behaviors. This witness further testified that Patricia does not possess the adequate parenting skills to provide a nurturing and safe environment for her children and is not capable of acquiring those skills. The second expert witness testified that Patricia has a poor prognosis for being able to parent her children. This witness testified that Patricia is intellectually limited and that this limitation, as well as her suspiciousness, distrust, and anger, hampers her ability to love and to be responsible. This witness further testified that Patricia's history indicates that she lacks the ability to care about her children's needs and feelings and to protect the children. Finally, this witness testified that Patricia is

functioning on a borderline retarded range of ability, and the witness gave his opinion that Patricia has a mental deficiency.

Following the termination hearing, the juvenile court found that Patricia had substantially and continuously or repeatedly neglected her children and had refused to give them the necessary parental care and protection. See § 43-292(2). The juvenile court found that Patricia was unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, which conduct is seriously detrimental to the health, morals, or well-being of the children. See § 43-292(4). The juvenile court also found that the children were adjudicated as juveniles within the meaning of § 43-247(3)(a) and that reasonable efforts had failed to correct the conditions leading to the adjudication. See § 43-292(6). Finally, the juvenile court found that the children had been in out-of-home placement for 18 or more consecutive months and that Patricia has failed to correct the conditions leading to the children's out-of-home placement in spite of reasonable efforts and services to Patricia. See § 43-292(7).

The juvenile court also found that the State had shown by clear and convincing evidence that Patricia had a mental deficiency which would continue for a duration preventing her from reuniting with and caring for her children.

The juvenile court found that Michael, Jr., had oppositional/defiant disorder and attention deficit hyperactivity disorder and that he had exhibited sexualized behavior. It found that James had been diagnosed with attention deficit hyperactivity disorder, major depression, and posttraumatic stress disorder; that he was on medications for seizure disorders; that he had been hospitalized on several occasions due to disruptive behavioral problems; that he had exhibited significant sexualized behavior; and that he had numerous scars reflective of abuse with no perpetrator being proved. The juvenile court found that Jeremiah was diagnosed with possible attention deficit hyperactivity disorder and developmental speech disorder; that he showed signs of disruptive behavior; that he had exhibited sexualized behavior; and that he had numerous scars on his body caused from physical abuse with no evidence of a perpetrator. The juvenile court further found that all three children exhibited

extensive learned use of vulgar and sexualized language; possessed special needs requiring strict and consistent limits; and required parents who could provide a stable, safe, and moral environment and a commitment of time to devote to the children's special needs.

With regard to Patricia, the juvenile court found that physical abuse to the children had occurred as a result of the discipline she exercised. It found that Patricia did not demonstrate an ability to parent her children and handle their behaviors without external intervention and did not comply with the case plans adopted by the juvenile court. However, the juvenile court found that Patricia's mental deficiency hindered her ability to follow and complete the juvenile court's case plans. It also found that her mental deficiency prevented her from profiting from services offered by DSS.

The juvenile court also found that Patricia had seriously perverted her children's well-being because of her extreme indulgence of sensual pleasures; had exhibited indecent, base, and unprincipled behavior in the presence of her children; and had excited her children's lustful desires by personal example and by allowing lustful movies and periodicals to be freely accessible to her children. It found that her history of personal abuse and mental deficiency is the proximate cause of her present attitudes, beliefs, and lifestyle.

The juvenile court found that Patricia used alcohol and drugs while she had the care and custody of her children; that after the children were removed from her care, she associated with and continues to associate with persons who are alcohol dependent and with persons who have been involved with abusive relationships with children; and that she allowed her minor daughter to also use alcohol and drugs.

The juvenile court further found that Patricia failed to place herself in a position to resume the care and custody of her children and would not be able to do so within a reasonable time because of her mental deficiency; that she substantially and repeatedly failed to provide a safe, clean, and moral environment for her children because of her mental deficiency; that she does not have the capacity to provide proper care, structure, nurturing, and protection for her children; and that she was not able

to provide a clean home for her children without external support.

The juvenile court found that it was in the children's best interests to terminate Patricia's parental rights. The parental rights of the children's father, Michael B., were also terminated.

Michael appealed the termination of his parental rights, and Patricia cross-appealed. The Court of Appeals affirmed the judgment of the juvenile court. See *In re Interest of Michael B. et al.*, 8 Neb. App. 411, 594 N.W.2d 674 (1999). The Court of Appeals found that the evidence was sufficient to terminate Patricia's parental rights under § 43-292(2) and (4), and because it so found, it did not discuss the other grounds for terminating Patricia's parental rights that were alleged in the petition. With regard to Patricia's mental deficiency, the Court of Appeals determined that the juvenile court did not terminate Patricia's parental rights based upon her mental deficiency. However, the Court of Appeals recognized that the juvenile court referenced Patricia's mental deficiency in addressing each of the grounds for termination and in finding the evidence sufficient under each of those grounds as charged. The Court of Appeals further concluded that *In re Interest of J.N.V.*, 224 Neb. 108, 395 N.W.2d 758 (1986), is controlling and holds that the presence of a mental deficiency in a parent does not preclude termination of parental rights under § 43-292(2) and that a logical extension of that holding is that such mental deficiency also does not preclude termination under § 43-292(4). Finally, the Court of Appeals determined that based on *In re Interest of J.N.V., supra*, and because § 43-292(5) was not alleged as a ground for termination, it could not find plain error in the failure to appoint a guardian ad litem for Patricia.

Patricia now petitions this court for further review. Michael did not challenge the decision of the Court of Appeals.

STANDARD OF REVIEW

[1] In an appeal from a juvenile court order terminating parental rights, the appellate court tries factual questions de novo on the record. Appellate review is independent of the juvenile court's findings; however, when the evidence is in conflict, the appellate court may give weight to the fact that the juvenile

court observed the witnesses and accepted one version of facts over another. *In re Interest of Joshua M. et al.*, 256 Neb. 596, 591 N.W.2d 557 (1999); *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998).

ASSIGNMENT OF ERROR

Patricia alleges that the Court of Appeals erred in affirming the order of the juvenile court terminating Patricia's parental rights based upon the juvenile court's finding that Patricia was unable to discharge parental responsibilities because of a mental deficiency, yet the State failed to allege such ground for termination of Patricia's parental rights and no guardian ad litem was appointed for Patricia.

ANALYSIS

Patricia argues that the termination order was based upon the finding that she was unable to discharge her parental responsibilities because of her mental deficiency, which would continue for a prolonged indeterminate period of time. See § 43-292(5). Thus, she argues that her parental rights were not properly terminated because the State did not allege mental deficiency as a ground for termination under § 43-292(5), and a guardian ad litem was thus not appointed to protect her interests as required when the State alleges mental deficiency as a ground for termination.

[2,3] In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the children's best interests. *In re Interest of Constance G., supra.* Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Interest of Joshua M. et al., supra.* In the instant case, the juvenile court found that termination was in the best interests of the children and that there was clear and convincing evidence establishing the grounds for terminations specified in § 43-292(2), (4), (6), and (7), which were the grounds alleged in the petition. Section 43-292(2) requires a finding that the parent has substantially and continuously or repeatedly neglected and refused to give the

juvenile or a sibling necessary parental care and protection. Section 43-292(4) requires a finding that the parent is unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, which conduct is seriously detrimental to the health, morals, or well-being of the children. Section 43-292(6) requires a finding that the parent has failed to correct the conditions leading to the determination that the child is one as described in § 43-247(3)(a). Section 43-292(7) requires a finding that the parent failed to correct the conditions leading to the out-of-home placement in spite of reasonable efforts and services and the juvenile has been in out-of-home placement for 18 or more consecutive months.

The State did not allege in its petition the separate termination ground based on mental deficiency, § 43-292(5), yet the State provided evidence that Patricia had a mental deficiency which would continue for a duration preventing her from reuniting with and caring for her children. Section 43-292(5) provides that a juvenile court may terminate parental rights when the parents are unable to discharge parental responsibilities because of mental illness or mental deficiency and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period. The statute further provides that when termination of parental rights is sought under subsection (5), the court shall appoint a guardian ad litem for the alleged incompetent parent. See *In re Interest of M.M., C.M., and D.M.*, 230 Neb. 388, 431 N.W.2d 611 (1988), citing § 43-292 (appointment of guardian ad litem for parents whose parental rights were sought to be terminated under § 43-292(5) was mandatory; failure to do so found to be plain error requiring reversal).

This court has previously addressed a similar situation to the one at hand, which the Court of Appeals found to be controlling. In the case *In re Interest of J.N.V.*, 224 Neb. 108, 395 N.W.2d 758 (1986) (Caporale, J., dissenting; Krivosha, C.J., and Shanahan, J., join), the State used § 43-292(2) as the operative section to terminate a mother's rights. The mother was diagnosed as paranoid schizophrenic and long-term hospitalization was recommended, as her condition was not expected to improve in the near future. The court upheld the termination of

the mother's rights under § 43-292(2). The majority of the court determined:

> It is true that the State might have elected to assert as a ground for terminating her rights the mother's inability to discharge her parental responsibilities because of her long-term mental illness or deficiency, § 43-292(5), or that more careful advocacy on the part of the State would have suggested that it amend its pleading by adding § 43-292(5) as a ground for the judgment it sought. . . .
>
> . . . .
>
> . . . While it might have been kinder in these sad and unfortunate circumstances for the State to have proceeded under § 43-292(5), it was not required to do so.

In re Interest of J.N.V., 224 Neb. at 111-12, 395 N.W.2d at 760-61.

Patricia urges us to adopt the three-justice dissent in *In re Interest of J.N.V., supra.* The dissent concluded that the State chose to ignore the fact that it was dealing with a mentally ill mother who, through no fault of her own, could not care for her child and that the State had treated her as if she were of sound mind and had consciously elected to neglect her parental responsibilities. The dissent further pointed out that the majority opinion makes no distinction between a mentally ill parent and one who is not, while § 43-292 does make such a distinction, and does so for good reason. *In re Interest of J.N.V., supra.* The dissent noted that "neglect contemplates the existence, among other things, of intelligence, judgment, and reason, rendering one capable of recognizing and adhering to a required standard of care." *Id.* at 113, 395 N.W.2d at 762. The dissent reasoned that the real question in the case was whether the mother had the capacity to neglect her child and concluded that the evidence established that the mother did not have such capacity and that she therefore did not come within the purview of § 43-292(2). *In re Interest of J.N.V., supra.* The dissent stated:

> The evidence establishes . . . that [the mother] may come within the purview of § 43-292(5). The difficulty is that the State did not give the mother notice, through a guardian ad litem, that it was her mental ability to be a parent which was at issue. . . .

> The majority opinion ignores a statutory requirement and deprives a mentally ill mother of the valuable right to have her interests protected by a guardian ad litem. Proper notice is more than a matter of form, it is a constitutional requirement which is met only when one is advised of the matters to be considered in a manner which is fair in view of the circumstances and conditions existent at the time. . . . It is fundamentally unfair to tell a mother it is the neglect of her son which is at issue and then try her for lacking the mental capacity to carry out her parental responsibilities.

(Citations omitted.) *In re Interest of J.N.V.*, 224 Neb. 108, 113-14, 395 N.W.2d 758, 762 (1986) (Caporale, J., dissenting; Krivosha, C.J., and Shanahan, J., join).

It is clear under § 43-292 that had subsection (5) been alleged in the petition, a guardian ad litem would have had to have been appointed for Patricia. However, subsection (5) was not alleged in the petition, but evidence of Patricia's mental deficiency was presented at the termination hearing. The question becomes whether a guardian ad litem was necessary under these circumstances. If a guardian ad litem had been appointed in this case, he or she would have done one of two things. The guardian ad litem either would have joined the State's attorney in his efforts or would have written his or her own report. By simply backing the State's attorney, the guardian ad litem would not have changed the termination proceedings in any way. If the guardian ad litem chose to write his or her own report and performed his or her job appropriately, the guardian ad litem's report would be adverse to Patricia. Therefore, Patricia would not have benefited by having a guardian ad litem appointed. The only action a guardian ad litem could have taken to benefit Patricia in this case would have been to retain expert witnesses to rebut the testimony of the State's expert witnesses as to Patricia's mental deficiencies. Because Patricia's mental deficiency is not a ground for the termination, the rebuttal testimony, if such testimony could have been procured at all, would not have changed the outcome of this case.

In this case, the State did not allege mental deficiency as that term is defined in § 43-292(5). Therefore, it was improper for

the State to put forth evidence of Patricia's mental deficiency, as this evidence was immaterial due to the State's failure to include mental deficiency as an allegation in drafting its petition. Whether this failure was an oversight or an attempt to save costs so that a guardian ad litem would not have to be appointed by reason of an allegation under § 43-292(5) does not make any difference.

[4,5] We have said that the statute authorizing termination of parental rights for mental illness or mental deficiency means only those mental illnesses or mental deficiencies which render the parents unable to discharge their parental responsibilities. *In re Interest of Holley*, 209 Neb. 437, 308 N.W.2d 341 (1981). In other words, mental deficiency, in and of itself, is not a ground for termination, but it must be shown that the mental deficiency caused the failure in parenting which, in turn, would dictate termination in the best interests of the children.

In *In re Interest of J.N.V.*, 224 Neb. 108, 395 N.W.2d 758 (1986) (Caporale, J., dissenting; Krivosha, C.J., and Shanahan, J., join), the mother gave birth to her baby on the floor of a kitchen; had no plans to care for the newborn baby; had no clothing, crib, or food for herself or the baby; and was diagnosed as a paranoid schizophrenic who, the day before the hearing, did not respond to efforts to communicate with her, exhibited extreme anger, was continually nervous and agitated, and threatened suicide. In that termination of parental rights case, mental deficiency under § 43-292(5) was not alleged as a ground for termination. The dissent in that case said that the State simply chose to ignore the fact that it was dealing with a mentally ill mother who, through no fault of her own, could not care for her son.

The facts of *In re Interest of J.N.V., supra*, are easily distinguishable from this case.

The evidence shows that Patricia allowed her children to have access to and did not stop them from looking at adult videos and magazines. Specifically, one witness testified that he saw the children look at adult magazines on a couple of occasions. Patricia's daughter also testified that she saw the children watching adult videos and that there were adult magazines in the house.

The record is also replete with evidence that the children have been exposed to repeated lewd and lascivious behavior. A number of witnesses testified to the foul language used by the children. At least one witness heard Patricia use foul language in the presence of the children. Witnesses who supervised visits between Patricia and the children after the children were removed from the home testified that Patricia would not react when the children used foul language and would have to be prompted to react to such language.

The children also exhibit sexualized behavior. The children's foster mother testified that the children would grab each other between the legs; that Jeremiah would talk about having sex; that James fondled the breasts of a mannequin; that she found Michael, Jr., and James in the same bed together and Michael, Jr., had his sweats and underwear down past his knees and James was lying on the bed with his head under the covers; and that she observed James rub his genitals up against objects. The children's foster mother also saw Patricia give James a lengthy kiss on the mouth, during which Patricia moaned and twisted her head back and forth.

Another witness observed James holding a pole between his legs and moving his body in a way that imitates a male during intercourse. The same witness also observed the children grabbing their own genitals and each other's.

Patricia's daughter testified that she saw the children in the bathtub together and in their beds playing with each other's genital areas and trying to "French kiss" each other. She also testified that she, Patricia, and Michael smoked marijuana and drank alcohol in the house and that she had had sexual intercourse in the house with Patricia's knowledge. Patricia's daughter was a minor during these times.

James and Jeremiah were observed to suck Patricia's fingers with an in-and-out motion, without reprimand from Patricia. One witness observed Jeremiah several times attempt to give Patricia a kiss with his mouth open and his tongue out, and Patricia simply laughed.

Patricia's daughter was sexually abused by Michael, and when her daughter told her about the abuse, Patricia failed to stop the abuse, and, in fact, blamed her daughter for the sexual

encounters between the two. Patricia even decided to marry Michael while he was incarcerated for sexually abusing her daughter and after she believed her daughter's version of what had happened between Michael and her daughter. At the time of the termination hearing, Patricia was living with another man whose parental rights to his own son had been terminated due in part to allegations of sexual abuse. Patricia also remained friends with yet another man after she found out he was a convicted child molester.

[6] In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998). Thus, only one ground for termination need be proved in order for Patricia's parental rights to be terminated.

In considering the above evidence, we conclude that there is clear and convincing evidence independent of any mental deficiency that Patricia is an unfit parent by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, which conduct is found to be seriously detrimental to the health, morals, or well-being of the juveniles. Therefore, Patricia's parental rights are terminated pursuant to § 43-292(4). Because we have concluded that the evidence is sufficient to terminate Patricia's parental rights under this ground, we need not discuss the other grounds for terminating Patricia's parental rights.

Having determined that the State has proved by clear and convincing evidence one of the grounds for termination under § 43-292, we must next examine whether the State has also shown, by the same quantum of proof, that termination of parental rights would be in the best interests of the children.

[7,8] Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the children require termination of the parental rights. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *Id.* At the time of the termination hearing, the children had been in foster

care for over 2 years. Intensive rehabilitation services were provided to Patricia, yet the care the children received from her had improved only slightly. Patricia's parenting skills had not improved to a point where she was allowed to have unsupervised visitation. A psychiatrist testified that all the children have mental problems to some extent and have been victimized by neglect, physical abuse, and possibly, sexual abuse. All of the children have special needs requiring extensive time from a parent who is willing and able to set strict guidelines and stringent boundaries. It is evident that Patricia has been either unable or unwilling to meet the physical and emotional needs of her children in the past and demonstrates no ability to do so in the future. The termination of Patricia's parental rights is in the best interests of her children.

CONCLUSION

Based upon our de novo review of the record, we conclude that the State has proved by clear and convincing evidence that the debauchery and lewd and lascivious conduct, together with the habitual use of illegal drugs, under § 43-292(4), exists independently of Patricia's mental deficiencies and that termination is in the children's best interests. Accordingly, we affirm the judgment of the Court of Appeals, affirming the county court's order terminating the parental rights of Patricia to Michael, Jr.; James; and Jeremiah.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V.
MARK D. KUEHN, APPELLEE.

604 N.W.2d 420

Filed January 14, 2000. Nos. S-99-229, S-99-230.

1. **Judgments: Appeal and Error.** To the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the courts below.
2. **Criminal Law: Prior Convictions: Habitual Criminals.** Prior convictions sought to be used for penalty enhancement under the habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 1995), cannot be attacked in a separate proceeding.

3. **Criminal Law: Prior Convictions: Habitual Criminals: Case Overruled.** To the extent that *State v. Johns*, 233 Neb. 477, 445 N.W.2d 914 (1989); *State v. Davis*, 224 Neb. 518, 398 N.W.2d 729 (1987), *overruled on other grounds, State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999); and *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985), concluded that a prior conviction sought to be used for penalty enhancement pursuant to the habitual criminal statute can be attacked in a separate proceeding, they are overruled.

Appeal from the District Court for Stanton County: ROBERT B. ENSZ, Judge. Reversed and remanded with directions to dismiss.

W. Bert Lammli, Stanton County Attorney, for appellant.

No appearance for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

In two consolidated appeals, the State appeals the order of the district court for Stanton County made in the combined separate proceedings filed by Mark D. Kuehn in which he challenged the validity of two prior felony convictions for purposes of penalty enhancement under the habitual criminal statute. The district court concluded that the two prior convictions were invalid for penalty enhancement purposes because there was no affirmative showing in the records of the prior cases that Kuehn had expressly waived his privilege against self-incrimination when he entered guilty pleas in the two prior felony cases. We reverse the order of the district court in both appeals and remand the cause with directions to dismiss.

STATEMENT OF FACTS

On June 11, 1998, Kuehn was charged with second-offense driving under the influence of alcoholic liquor (DUI), a Class W misdemeanor under Neb. Rev. Stat. § 60-6,196 (Reissue 1998), and with committing terroristic threats, a Class IV felony under Neb. Rev. Stat. § 28-311.01 (Reissue 1995). The State sought to charge Kuehn as being a habitual criminal for penalty enhancement purposes under Neb. Rev. Stat. § 29-2221 (Reissue 1995).

The habitual criminal charge was based on Kuehn's 1992 plea-based conviction for burglary, a Class III felony for which Kuehn was sentenced to imprisonment for a term of not less than 18 nor more than 30 months, and his 1996 plea-based conviction for delivery of a controlled substance, marijuana, a Class III felony for which Kuehn was sentenced to imprisonment for not less than 2 nor more than 5 years.

Kuehn filed two petitions for relief in two separate proceedings, each challenging the validity of his prior convictions for penalty enhancement purposes on the basis that the records failed to disclose that Kuehn understood and waived his constitutional rights on the record. Kuehn challenged his 1992 conviction for burglary and his 1996 conviction for possession of a controlled substance (case Nos. S-99-229 and S-99-230, respectively, on appeal to this court). The two separate proceedings were combined for hearing and disposition by the trial court.

At the combined hearing for the separate proceedings held January 4, 1999, the transcripts and bills of exceptions from the two prior convictions were entered into evidence. On January 13, the district court filed its written order, ruling on both proceedings. The district court found that in each of the prior convictions, there was no affirmative showing that Kuehn expressly waived his privilege against self-incrimination and that therefore his guilty pleas in each of those cases were "invalid for enhancement purposes and must be set aside." The State appealed the order of the district court in each case. Appeals from the two separate proceedings were consolidated by this court on appeal.

ASSIGNMENTS OF ERROR

The State asserts, restated, that the district court erred in allowing Kuehn in separate proceedings to attempt to set aside otherwise valid prior plea-based convictions from which no appeal was taken. The State argues, in the alternative, that should this court conclude that the separate proceedings were appropriate, the trial court erred in (1) applying the standards set forth in *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997), regarding challenging the voluntariness of pleas on direct appeal, to set aside otherwise valid prior convictions for

enhancement purposes and (2) concluding that Kuehn's constitutional rights were violated at the time he entered his prior guilty pleas and that as a result, the convictions were invalid for enhancement purposes.

STANDARD OF REVIEW

[1] The State's assignments of error present questions of law. To the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the courts below. *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999).

ANALYSIS

Section 29-2221 does not create a separate offense, but, rather, provides for enhanced punishment where a defendant is found to be a "habitual criminal." Under § 29-2221(1), a defendant convicted of a felony may be deemed a habitual criminal if the defendant has been (1) twice previously convicted of a crime, (2) sentenced, and (3) committed to prison for terms of not less than 1 year each. Where the defendant is convicted of a felony and the State has charged the defendant as a habitual criminal, a hearing shall be held prior to sentencing to determine whether the defendant has been convicted of two or more prior felonies and the sentences imposed therefor. § 29-2221(2). With certain exceptions not relevant here, one deemed to be a habitual criminal shall be punished by imprisonment for a mandatory minimum term of 10 years and a maximum term of not more than 60 years. § 29-2221(1).

Kuehn was charged with committing terroristic threats, a Class IV felony. In connection with that charge, the State sought to have Kuehn deemed a habitual criminal on the basis of his two prior felony convictions, one for burglary and the other for delivery of a controlled substance. It is undisputed that Kuehn was sentenced in each prior conviction to imprisonment for a term of not less than 1 year. See § 29-2221(1).

In an effort to avoid being deemed a habitual criminal and thereby avoid being subject to the enhanced penalty under § 29-2221(1), and in view of the fact that we have held that a defendant cannot in a habitual criminal proceeding collaterally

attack a prior plea-based conviction on a basis other than denial of the right to counsel, see *State v. Partee*, 240 Neb. 473, 482 N.W.2d 272 (1992), *grant of habeas corpus reversed on other grounds, Partee v. Hopkins*, 30 F.3d 1011 (8th Cir. 1994), Kuehn sought to have his two prior convictions declared invalid for enhancement purposes by filing two "separate" proceedings. The filing of separate proceedings was consistent with past cases of this court. In past cases, we have held that although a constitutional challenge to a prior conviction, other than a challenge based on denial of the right to counsel, may not be raised in the habitual criminal proceedings conducted pursuant to § 29-2221(2), such challenge may be raised either in a direct appeal after sentencing or in a separate proceeding commenced for the express purpose of setting aside the prior judgment alleged to be invalid. *State v. Johns*, 233 Neb. 477, 445 N.W.2d 914 (1989); *State v. Davis*, 224 Neb. 518, 398 N.W.2d 729 (1987), *overruled on other grounds, State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999); *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985).

Kuehn challenged his prior convictions in the two separate proceedings on the basis that the records of the two prior convictions failed to disclose that he understood and waived his constitutional right against self-incrimination on the record in connection with each of the prior convictions. Kuehn's challenges were based on *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). A "*Boykin* challenge" is a claim that the record of the prior conviction does not affirmatively show that the defendant entered the plea voluntarily and intelligently, with the knowledge that it constituted a waiver of the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront accusers. The State argues on appeal that separate proceedings, such as those brought by Kuehn, are not a valid means to attempt to set aside otherwise valid prior convictions from which no appeal was taken.

We recently held that a prior conviction sought to be used for penalty enhancement in a DUI prosecution cannot be collaterally attacked in a separate proceeding. *State v. Louthan, supra.* In *Louthan*, the defendant filed a separate proceeding to challenge the validity of her prior conviction for DUI which the

State sought to use for enhancement purposes in its prosecution of second-offense DUI charges against her. Nebraska's DUI law, § 60-6,196(2)(b), provides for greater penalties where a driver has been convicted of multiple convictions for DUI during a 12-year period.

In *Louthan*, we thoroughly examined the development of our case law regarding collateral attacks on prior plea-based convictions sought to be used for enhancement purposes. Prior to *Louthan*, the law regarding separate proceedings was set forth in cases such as *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992), *overruled, State v. Louthan, supra*. In *Wiltshire*, we distinguished between what we described as "first-tier" and "second-tier" challenges to prior convictions sought to be used for purposes of enhancement. "First-tier challenges" were those that could be asserted by general objection in the enhancement proceeding under consideration. A first-tier challenge was limited to a challenge based upon denial of the Sixth Amendment right to counsel. A *Boykin* challenge addressing any or all of a panoply of rights, such as that brought by Kuehn, was considered a "second-tier challenge" that could not be asserted in the enhancement proceeding. However, under *Wiltshire* and similar cases prior to *Louthan*, we held that a separate case initiated by a petition for a "separate proceeding" was a proper vehicle for asserting a second-tier challenge.

In 1995, the appellate courts of this state had the opportunity to revisit the issue of separate proceedings in light of the U.S. Supreme Court's decisions, subsequent to *Wiltshire*, in *Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994), and *Nichols v. United States*, 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994). In *LeGrand v. State*, 3 Neb. App. 300, 527 N.W.2d 203 (1995), *aff'd on other grounds, State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380, *overruled, State v. Louthan, supra*, the Nebraska Court of Appeals concluded that the "separate proceeding" was no longer necessary in order to comport with federal constitutional law. The Court of Appeals' decision was based, inter alia, on *Custis* and *Nichols*, which held that under the federal Constitution, the right to challenge a prior conviction offered for purposes of enhancement was required in

the pending proceeding only where the prior conviction resulted in imprisonment and the defendant had allegedly been denied the Sixth Amendment right to counsel.

On further review in *LeGrand*, this court determined that the Court of Appeals erred in concluding that *Custis* and *Nichols* invalidated the use of separate proceedings in Nebraska. *State v. LeGrand, supra*. This court stated that states are free to provide their citizens greater due process protections under state constitutions than those granted by the federal Constitution. This court in *LeGrand* therefore reaffirmed the holding in *Wiltshire* that collateral attacks in separate proceedings were a valid means in Nebraska for bringing a second-tier challenge to an allegedly constitutionally invalid plea-based prior conviction used for enhancement purposes.

In *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999), we overruled our holding in *LeGrand* to the extent the holding applied to enhancement in DUI prosecutions. We found our holding in *LeGrand* unsound for several reasons. In *Louthan*, we observed that "where a criminal procedure is not authorized by statute, it is unavailable to a defendant in a criminal proceeding." 257 Neb. at 186, 595 N.W.2d at 925. Because no statutory procedure existed for asserting second-tier challenges to prior plea-based DUI convictions, we concluded that such procedures were unavailable under Nebraska criminal procedure.

In *Louthan*, we further observed that "[a] person who is convicted on the basis of a guilty plea has a right to appeal on the ground that the plea was not knowing and voluntary." *Id.* However, if the defendant elects not to appeal, "when a separate proceeding is commenced years after a plea-based conviction from which there was no direct appeal, the record will likely not contain any colloquy between the court and the accused at the time of the acceptance of the plea." *Id.* at 187, 595 N.W.2d at 926. We stated that "[a]t some point, judgments of conviction must become final and the State should not be required to 'rummage through frequently nonexistent or difficult to obtain . . . transcripts or records' in order to defend them against collateral attack." *Id.*

Finally, we determined in *Louthan* that a separate proceeding "is inconsistent with limitations which our law places upon collateral attack of criminal convictions under other circumstances." *Id.* As examples of such limitations, we observed that a defendant may not utilize a separate proceeding to collaterally attack a prior conviction that is an element of a subsequent offense and that an incarcerated defendant is not permitted to utilize a motion for postconviction relief under Neb. Rev. Stat. § 29-3001 (Reissue 1995) in order to secure review of issues which could have been litigated on direct appeal.

[2] In *Louthan*, we overruled *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995), and other cases to the extent those cases held that a prior conviction sought to be used for enhancement in a DUI prosecution can be attacked in a separate proceeding. Our holding in *Louthan* applied specifically to enhancement in a DUI prosecution. In the instant case, we are faced with whether prior convictions sought to be used for penalty enhancement pursuant to the habitual criminal statute, as distinguished from an enhanced charge in the DUI context in *Louthan*, can be attacked in a separate proceeding. As more fully explained below, and consistent with our reasoning in *Louthan*, we find that they cannot. Thus, we hold that prior convictions sought to be used for penalty enhancement under the habitual criminal statute cannot be attacked in a separate proceeding.

In the instant case, the State sought to enhance Kuehn's punishment pursuant to the habitual criminal statute. Accordingly, we look to the habitual criminal statute in conjunction with constitutional principles in defining the parameters of a permissible attack on a prior conviction used as a basis for establishing habitual criminal status. As in *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999), where there was only one criminal statutory procedure for challenging a prior DUI conviction offered for purposes of enhancement, i.e., § 60-6,196(3), similarly, in the habitual criminal statute, there is only one criminal statutory procedure for challenging prior convictions which could otherwise be used to establish habitual criminal status. Specifically, § 29-2221(3) provides that if the defendant shows that "he or she was released from imprisonment upon either of [the prior] sentences upon a pardon granted for the reason that

he or she was innocent, such conviction and sentence shall not be considered as such" for purposes of enhancement under § 29-2221. Aside from the one explicit statutory procedure for challenging prior convictions, i.e., § 29-2221(3), which challenge can be presented in the enhancement hearing, we conclude on the basis of our reasoning in *Louthan* that there is no statutory authority for a separate proceeding to attack a prior conviction sought to be used for enhancement pursuant to the habitual criminal statute and that therefore such separate proceeding is unauthorized and unavailable under Nebraska criminal procedure.

As we further observed in *Louthan*, at some point, judgments must become final. The same interest in finality of prior convictions exists with regard to prior convictions used in the habitual criminal context as exists in the DUI context considered in *Louthan*. A separate proceeding in connection with habitual criminal enhancement is inconsistent with the other limitations our law places upon collateral attacks of criminal convictions. Subsequent to our decision in *Louthan*, an additional inconsistency would exist were we to allow such separate proceedings in connection with habitual criminal enhancement when they are not allowed in connection with DUI enhancement.

It is fundamental that a defendant is entitled to constitutional protections in connection with the entry of a guilty or nolo contendere plea in a criminal case. *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). In this regard, we observe that a defendant is further protected by the right of direct appeal from a plea-based conviction. *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997). Further, in a proceeding to establish habitual criminal status, we have held that § 29-2221 requires that in order to establish habitual criminal status for sentence enhancement purposes, the State must establish that at the time of the prior convictions which resulted in imprisonment for not less than 1 year, the defendant either had or waived counsel. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993), *postconviction relief granted* 249 Neb. 381, 543 N.W.2d 725 (1996), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998); *State v. Green*, 240 Neb. 639, 483 N.W.2d 748 (1992); *State v. Partee*, 240 Neb. 473, 482 N.W.2d 272 (1992), *grant of*

habeas corpus reversed on other grounds, Partee v. Hopkins, 30 F.3d 1011 (8th Cir. 1994); *State v. Johns*, 233 Neb. 477, 445 N.W.2d 914 (1989); *State v. Davis*, 224 Neb. 518, 398 N.W.2d 729 (1987), *overruled on other grounds, State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999); *State v. Huffman*, 222 Neb. 512, 385 N.W.2d 85 (1986). This requirement protects the defendant's Sixth Amendment right to counsel. *Nichols v. United States*, 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994); *Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994). Finally, it is unassailable that a defendant found to be a habitual criminal under § 29-2221 and sentenced accordingly has a right of direct appeal from that determination following entry of judgment. We believe these processes taken together afford the defendant the federal and state constitutional protections to which he or she is entitled.

[3] In view of the above analysis, we conclude that the requirements of both the state and federal Constitutions are satisfied by the right of direct appeal from the prior plea-based conviction used as a basis for habitual criminal status; the challenge afforded under § 29-2221(3); and the requirement that in order to establish habitual criminal status for sentence enhancement purposes under § 29-2221, the State must establish that at the time of the prior convictions, the defendant either had or waived counsel. Because we hold that separate proceedings to challenge prior felonies used to establish habitual criminal status are neither required nor authorized, to the extent that *State v. Johns, supra*; *State v. Davis, supra*; and *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985), concluded that a prior conviction sought to be used for penalty enhancement pursuant to the habitual criminal statute can be attacked in a separate proceeding, these cases are overruled.

Based on the reasons recited above, we conclude that the two prior felony convictions the State sought to use as a basis for establishing Kuehn's habitual criminal status were not subject to attack in the two separate proceedings filed by Kuehn and that the trial court was without authority to conclude that the two prior felony convictions were invalid for habitual criminal status purposes. In view of the above conclusions, we need not consider the State's other assignments of error.

CONCLUSION

We conclude that Kuehn's prior convictions used to establish habitual criminal status were not subject to attack in separate proceedings. We therefore reverse the order of the district court and remand the cause with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

LITA SHELDON-ZIMBELMAN, APPELLANT, V. BRYAN MEMORIAL HOSPITAL, APPELLEE.

604 N.W.2d 396

Filed January 14, 2000. No. S-99-314.

1. **Workers' Compensation: Appeal and Error.** Under the provisions of Neb. Rev. Stat. § 48-185 (Reissue 1998), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ___: ___. In determining whether to affirm, modify, reverse, or set aside the judgment of the Workers' Compensation Court review panel, the higher appellate court reviews the findings of the single judge who conducted the original hearing.
3. ___: ___. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation.** A modification to a workers' compensation award cannot be applied retroactively before the date the application for modification is filed.
5. ___. The only authority the Workers' Compensation Court possesses to modify orders or awards is that provided by Neb. Rev. Stat. §§ 48-141 and 48-180 (Reissue 1998).
6. ___. Because benefits received during vocational rehabilitation under Neb. Rev. Stat. § 48-121(5) (Reissue 1998) may be temporary total disability benefits, a species of total disability benefits, and where such benefits are followed by partial disability benefits pursuant to § 48-121(2), the 300-week period shall be reduced by the number of weeks during which compensation was paid for such total disability.
7. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** When judicial interpretation of a statute has not evoked a legislative amendment, it is presumed that the Legislature has acquiesced in the court's interpretation.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Laura A. Lowe, of Cobb & Hallinan, P.C., for appellant.

Walter E. Zink II and Darla S. Ideus, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Lita Sheldon-Zimbelman appeals from a decision by a three-judge review panel of the Nebraska Workers' Compensation Court, which affirmed in part, and in part reversed and remanded with directions the decision of a single Workers' Compensation Court judge. For the reasons stated below, we affirm the decision of the review panel.

STATEMENT OF FACTS

On January 27, 1992, while employed by Bryan Memorial Hospital (Bryan) as a micrographics sorter, Sheldon-Zimbelman suffered a work-related injury to her back, which injury arose out of and in the course of her employment. On June 22, 1993, Sheldon-Zimbelman filed a petition with the Workers' Compensation Court seeking workers' compensation benefits. On March 7, 1994, following the original hearing, a single judge entered an award in favor of Sheldon-Zimbelman (original award). Pursuant to the original award, the single judge therein found, inter alia, that Sheldon-Zimbelman had "suffered injuries to her back as a result of an accident arising out of and in the course of her employment." The single judge in the original award determined that Sheldon-Zimbelman had been either temporarily totally or temporarily partially disabled on various dates enumerated in the award. The single judge in the original award further found that as a result of the accident, Sheldon-Zimbelman had sustained permanent partial disability in the form of a 20-percent loss of earning capacity.

At the time of the accident, Sheldon-Zimbelman was receiving an average weekly wage of $358.53. Between the date of the accident and the date of the original award, Bryan had paid Sheldon-Zimbelman varying amounts of benefits. The single judge found Sheldon-Zimbelman was entitled to receive $239.02 per week for 34 6/7 weeks for temporary total disability

(TTD) benefits, and the single judge credited Bryan for having already paid this amount. The single judge also awarded Sheldon-Zimbelman temporary partial disability (TPD) benefits in the amount of $3,340.97, computed at varying rates for 17 weeks. Bryan received a credit for previously paying this amount. The award further ordered Bryan to pay Sheldon-Zimbelman $119.51 per week for 12 2/7 weeks for additional TPD benefits, and $47.80 per week for 236 6/7 weeks for permanent partial disability (PPD) loss of earning benefits.

Thus, consistent with Neb. Rev. Stat. § 48-121(2) (Reissue 1998), the single judge in the original award credited the weeks Sheldon-Zimbelman had received TTD and TPD against her statutory entitlement to 300 weeks for PPD loss of earning benefits. The single judge further ruled that Bryan was entitled to a credit for having already paid to Sheldon-Zimbelman all of the TTD benefits, as well as $3,340.97 of the TPD benefits awarded.

Finally, the single judge found that Sheldon-Zimbelman was entitled to vocational rehabilitation and ordered that she be provided vocational rehabilitation in the form of a combined 4-year bachelor's degree program in human services at Southeast Community College and the College of St. Mary. On the single judge's own motion, the original award was modified to order Bryan to pay Sheldon-Zimbelman "temporary disability" while she was participating in vocational rehabilitation.

Sheldon-Zimbelman completed her bachelor's degree program on or about May 11, 1996. While she was enrolled in the program, Bryan paid her temporary benefits in the amount of $239.02 per week for a total of 149 weeks. After she completed the vocational rehabilitation program, Bryan paid Sheldon-Zimbelman 59 2/7 weeks for PPD loss of earning benefits in the amount of $47.80 per week. On or about November 25, 1997, counsel for Bryan notified Sheldon-Zimbelman's counsel that Bryan was terminating the payment of Sheldon-Zimbelman's indemnity benefits. In a letter dated May 29, 1998, Bryan's counsel advised Sheldon-Zimbelman's counsel that it had ceased paying the benefits because Bryan had paid Sheldon-Zimbelman more than 300 weeks of benefits, apparently relying upon § 48-121(2).

On January 21, 1998, Sheldon-Zimbelman filed a petition (second petition) bearing the same case number as the original

petition. It is the outcome of the second petition which gives rise to this appeal. In her second petition, Sheldon-Zimbelman challenged Bryan's determination that it had paid her all of the indemnity benefits to which she was statutorily entitled. Specifically, Sheldon-Zimbelman challenged Bryan's claim that it was entitled to include in the 300-week calculation of total benefits the number of weeks it had paid her "temporary disability" benefits while she was participating in vocational rehabilitation. Sheldon-Zimbelman alleged that she was entitled to the entirety of the PPD loss of earning benefits awarded in the original award and that Bryan's "setoff" was contrary to Nebraska law and the workers' compensation statutes.

On August 25, 1998, Sheldon-Zimbelman's second petition came on for hearing before a single judge of the Workers' Compensation Court. The evidence presented at the hearing showed that Bryan had paid Sheldon-Zimbelman 308 weeks of indemnity benefits, including 149 weeks of benefits paid while Sheldon-Zimbelman was participating in her vocational rehabilitation program. Sheldon-Zimbelman presented uncontroverted evidence that as a result of her injury, she had been unable to work for various periods of time between October 22, 1996, and December 3, 1997. Evidence was admitted to show that during the majority of that time period, Bryan had paid Sheldon-Zimbelman PPD loss of earning benefits in accordance with the original award. Evidence was also admitted to show that as a result of her workers' compensation injury, Sheldon-Zimbelman was unable to work beginning on August 5, 1998, and continuing through the date of the hearing on August 25.

In a written order filed September 14, 1998, the single judge found, inter alia, that Sheldon-Zimbelman was totally disabled on various dates between October 22, 1996, and December 3, 1997, and ordered Bryan to pay TTD benefits instead of the PPD loss of earning capacity benefits Bryan had paid for those dates. The single judge also found that Sheldon-Zimbelman was entitled to receive TTD benefits beginning on August 5, 1998, and continuing on into the future "for so long thereafter as [Sheldon-Zimbelman] shall remain temporarily totally disabled." The single judge concluded that although this award of additional TTD benefits would result in Bryan's paying more than 300 weeks of

total benefits, there was no statutory limitation on the number of weeks TTD benefits could be paid. The single judge stated that in view of the resolution of the foregoing matters, the judge would "decline" to address Bryan's claim that it should be credited for benefits it had paid to Sheldon-Zimbelman while she was participating in vocational rehabilitation.

Both parties appealed the single judge's decision to the review panel. Their combined appeals came up for review hearing on February 23, 1999.

In an order dated March 10, 1999, the review panel affirmed the single judge's legal conclusion that there was no statutory prohibition against paying in excess of 300 weeks in indemnity benefits to a workers' compensation claimant when the claimant remained temporarily totally disabled. The review panel concluded, however, that the single judge's award of TTD benefits for the dates between October 1996 and December 1997 was an improper award of retroactive benefits and was in error as a matter of law, based on this court's ruling in *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998). In *Starks*, we held, inter alia, that a party is not entitled to the modification of a prior workers' compensation award to the extent the modification predates the date of filing the petition to modify. The review panel found that the various dates between October 1996 and December 1997 for which the single judge had ordered the retroactive payment of TTD benefits, as opposed to PPD benefits, preceded the January 21, 1998, filing of Sheldon-Zimbelman's second petition, and accordingly, it reversed the single judge's award of these retroactive TTD benefits.

The review panel further ruled that the single judge erred in failing to address the issue of Bryan's claimed credit for the "temporary disability" benefits paid to Sheldon-Zimbelman while she was participating in vocational rehabilitation. The review panel determined that this was a question of law involving the interpretation of a statute and that accordingly, it had the authority to resolve this issue on appeal independent of any decision by the single judge.

Treating the benefits Bryan had paid to Sheldon-Zimbelman while she was undergoing vocational rehabilitation as "temporary total disability," the review panel concluded that Bryan had

paid Sheldon-Zimbelman partial disability subsequent to paying total disability and that pursuant to § 48-121(2), Bryan was entitled to a credit against the 300-week statutory limitation on the payment of indemnity benefits for the weeks of TTD benefits which it had paid Sheldon-Zimbelman while she was participating in vocational rehabilitation. The review panel remanded the case to the single judge and ordered the single judge to make the necessary specific findings and calculations to reflect Bryan's credit for the 149 weeks it had paid Sheldon-Zimbelman TTD benefits while she was participating in vocational rehabilitation prior to receipt of the PPD loss of earning benefits. Sheldon-Zimbelman appeals from the decision of the review panel.

ASSIGNMENTS OF ERROR

On appeal, Sheldon-Zimbelman asserts two assignments of error: (1) The review panel erred in reversing the single judge's determination that she was entitled to a retroactive award of TTD benefits instead of the PPD loss of earning indemnity payments she had received for the majority of the time between October 22, 1996, and December 3, 1997, and (2) the review panel erred in determining that pursuant to § 48-121(2), Bryan was entitled to a credit against the 300-week maximum indemnity period for the 149 weeks that it had paid temporary benefits to Sheldon-Zimbelman while she was participating in vocational rehabilitation.

STANDARDS OF REVIEW

[1-3] Under the provisions of Neb. Rev. Stat. § 48-185 (Reissue 1998), 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. *Variano v. Dial Corp.*, 256 Neb. 318, 589 N.W.2d 845 (1999). In determining whether to affirm, modify, reverse, or set aside the judgment of the Workers' Compensation Court review panel, the higher appellate court reviews the findings of the sin-

gle judge who conducted the original hearing. *Ideen v. American Signature Graphics*, 257 Neb. 82, 595 N.W.2d 233 (1999). An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Anderson v. Omaha Pub. Sch. Dist.*, 254 Neb. 1007, 581 N.W.2d 424 (1998).

ANALYSIS

Retroactive Award of TTD.

Sheldon-Zimbelman claims that the review panel erred in reversing the single judge's award of retroactive TTD payments. In support of her claim, Sheldon-Zimbelman argues that the review panel erred because it reversed the findings of fact made by the single judge with regard to her total disability and that the review panel is without authority to reverse findings of fact. This assignment of error is without merit.

Sheldon-Zimbelman misperceives the review panel's decision pertaining to the single judge's award concerning retroactive TTD payments. The review panel did not reverse the single judge's factual findings, but, rather, the review panel determined that as a matter of law, Sheldon-Zimbelman was not entitled to the retroactive award she sought. The review panel may review a single-judge decision for errors of law. Neb. Rev. Stat. § 48-179 (Reissue 1998).

It is well settled that an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Anderson v. Omaha Pub. Sch. Dist., supra.* Accordingly, we review Sheldon-Zimbelman's assigned error regarding the retroactive award of TTD benefits independent of the lower courts' decisions. Based on applicable legal principles, we affirm the decision of the review panel that Sheldon-Zimbelman was not entitled to the retroactive award of TTD payments.

As recognized by the review panel, the case *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998), is dispositive of this issue on appeal. In *Starks*, the claimant, on original hearing, was found to be permanently and totally disabled. Sometime after this award was entered, the employer obtained information that the claimant was working at various odd jobs, in contravention of the determination at the original

hearing that he was totally disabled. Relying on this information, the employer, without a court order, terminated the claimant's workers' compensation benefits. One month later, the employer filed a petition with the Workers' Compensation Court seeking a modification of the original award. The single judge modified the award and the review panel affirmed.

[4] On appeal to this court, we affirmed the review panel's decision affirming the single judge's order to modify the original award, but we held in *Starks*, as a matter of law, that a modification to a workers' compensation award cannot be applied retroactively before the date the application for modification is filed and, accordingly, modified that portion of the review panel's decision affirming the retroactive portion of the award that predated the filing of the application to modify. We reached our decision, in part, based upon earlier decisions of this court that a workers' compensation award is "in full force and effect, as originally entered, until the award is modified pursuant to the procedure set forth in § 48-141." 254 Neb. at 38, 573 N.W.2d at 763 (citing *ITT Hartford v. Rodriguez*, 249 Neb. 445, 543 N.W.2d 740 (1996), and *Ludwickson v. Central States Electric Co.*, 142 Neb. 308, 6 N.W.2d 65 (1942)).

In the instant appeal, Sheldon-Zimbelman filed her second petition on January 21, 1998. The single judge awarded Sheldon-Zimbelman TTD benefits for the time period between October 22, 1996, to December 3, 1997. The award of these TTD benefits antedates the filing of her second petition, and the review panel was correct as a matter of law in reversing the single judge's award of retroactive TTD benefits.

To avoid the application of the principles enunciated in *Starks*, Sheldon-Zimbelman argues that her second petition did not seek a modification of the single judge's original award, but, rather, the single judge was merely clarifying her prior award to state that during those time periods that the evidence demonstrated Sheldon-Zimbelman had been disabled, she should have been paid TTD benefits instead of PPD loss of earning indemnity payments. Sheldon-Zimbelman relies in part on *Bennett v. J. C. Robinson Seed Co.*, 7 Neb. App. 525, 583 N.W.2d 370 (1998), in support of her claim. We reject Sheldon-Zimbelman's argument.

Initially, we note that the original award as modified in 1994 did not provide for the payment of TTD benefits to Sheldon-Zimbelman, except for those benefits which had already been paid to her, for which Bryan received a credit, and the award of "temporary disability" benefits which Sheldon-Zimbelman was to receive while she participated in vocational rehabilitation. As of the date of the original award, Sheldon-Zimbelman was found to be entitled to PPD loss of earning indemnity payments. Implicit in this award is a finding by the single judge that Sheldon-Zimbelman had reached maximum medical improvement and was no longer entitled to temporary benefits, except to the extent she participated in vocational rehabilitation. See *Gibson v. Kurt Mfg.*, 255 Neb. 255, 583 N.W.2d 767 (1998).

[5] We have long observed that the Nebraska Workers' Compensation Court is a tribunal of limited and special jurisdiction, and "it possesses only that authority which is conferred upon it by the Nebraska Workers' Compensation Act." *Ira v. Swift-Eckrich*, 251 Neb. 411, 414, 558 N.W.2d 40, 43 (1997). We have previously held that the only authority the Workers' Compensation Court possesses to modify orders or awards is that provided by Neb. Rev. Stat. §§ 48-141 and 48-180 (Reissue 1998). See, *Thach v. Quality Pork International*, 253 Neb. 544, 570 N.W.2d 830 (1997); *Ira v. Swift-Eckrich, supra*; *Dougherty v. Swift-Eckrich*, 251 Neb. 333, 557 N.W.2d 31 (1996).

Section 48-141(2) is the statutory authority for the Workers' Compensation Court to modify an award "on the ground of increase or decrease of incapacity due solely to the injury." On appeal to this court, Sheldon-Zimbelman denies that she filed a petition for modification under § 48-141 based on an increase or decrease of incapacity. Accordingly, the retroactive award of TTD benefits cannot be justified on the authority of § 48-141.

The Nebraska Workers' Compensation Act, in § 48-180, provides that the Workers' Compensation Court may "modify or change its findings, order, award, or judgment . . . within ten days from the date of such findings, order, award, or judgment for the purpose of correcting any ambiguity, clerical error, or patent or obvious error." The original award was entered in this case on March 7, 1994. The award on Sheldon-Zimbelman's second petition from which she is appealing was entered on

September 14, 1998. This latter award entered greater than 10 days after the original award is not a corrective award provided for in § 48-180.

Because Sheldon-Zimbelman did not seek a modification under § 48-141 due to a change in incapacity and because a modification of the 1994 award was unavailable to Sheldon-Zimbelman in 1998 under the 10-day provision of § 48-180, the single judge was without statutory authority to modify the original award and the review panel was correct in reversing the single judge's award of retroactive TTD benefits. With respect to *Bennett v. J. C. Robinson Seed Co.*, 7 Neb. App. 525, 583 N.W.2d 370 (1998), upon which Sheldon-Zimbelman relies, we note that the employer therein did not appeal to the review panel. To the extent that *Bennett, supra*, implies that a retroactive award is permissible, it is disapproved. Sheldon-Zimbelman's first assignment of error is without merit.

Statutory Maximum 300 Weeks of Benefits: § 48-121(2).

On appeal, Sheldon-Zimbelman challenges the review panel's determination that the indemnity payments she received while participating in vocational rehabilitation constituted TTD payments to be credited against the statutory maximum 300 weeks for which she was entitled to receive indemnity benefits. We find no merit to this assignment of error.

Section 48-121 controls this issue. Section 48-121 provides as follows:

> The following schedule of compensation is hereby established for injuries resulting in disability:
>
> (1) For total disability, the compensation during such disability shall be sixty-six and two-thirds percent of the wages received at the time of injury . . . .
>
> (2) For disability partial in character, except the particular cases mentioned in subdivision (3) of this section, 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 . . . . *This compensation shall be paid during the period of such partial disability but not beyond three hundred weeks. Should total disability be followed by partial*

> *disability, the period of three hundred weeks mentioned in this subdivision shall be reduced by the number of weeks during which compensation was paid for such total disability.*
>
> . . . .
>
> (5) The employee shall be entitled to compensation from his or her employer for temporary disability while undergoing rehabilitation whether the rehabilitation is voluntarily offered by the employer and accepted by the employee or is ordered by the Nebraska Workers' Compensation Court or any judge of the compensation court.

(Emphasis supplied.)

Based on § 48-121(1), total disability is compensated at two-thirds of the average weekly wage. Pursuant to § 48-121(2), partial disability is compensated at two-thirds of the difference between the claimant's earning power before and after the injury, but compensation under this subsection is limited to 300 weeks. Furthermore, § 48-121(2) provides that if payments for disability that is "partial" in character under subsection (2) *follow* payments for disability that is "total" in character under subsection (1), the employer is given credit against this 300-week total for the number of weeks that benefits for disability total in character were paid under subsection (1). Finally, under § 48-121(5), if a claimant is receiving vocational rehabilitation, he or she is to be provided temporary disability payments.

Sheldon-Zimbelman argues that because § 48-121(2) uses the word "partial" and § 48-121(5) uses the word "temporary," § 48-121(2) does not permit that "temporary" benefits paid pursuant to § 48-121(5) can be applied as a credit against the 300-week maximum provided for in § 48-121(2). Sheldon-Zimbelman does not challenge the review panel's determination that TTD payments in general are credited against the 300 weeks of partial disability payments provided for under § 48-121(2) where benefits for disability "total" in character are followed by benefits for disability "partial" in character. She merely challenges whether the disability benefits a claimant is paid while undergoing vocational rehabilitation are or can be

"temporary total disability" benefits. In resolving the issue raised by Sheldon-Zimbelman, we refer to the controlling statute and cases under it.

When construing statutes, "we are guided by the presumption that the Legislature intended a sensible, rather than an absurd, result in enacting the statute and its amendments." *Battle Creek State Bank v. Haake*, 255 Neb. 666, 680, 587 N.W.2d 83, 92 (1998). As a further aid to statutory interpretation, "we must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it." *Id.* Finally, we have stated that " '[w]hen considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.' " *In re Joshua M. et al.*, 256 Neb. 596, 605, 591 N.W.2d 557, 563 (1999) (quoting *Baker's Supermarkets v. State*, 248 Neb. 984, 540 N.W.2d 574 (1995)).

This court has previously considered the various terms used in § 48-121 and stated: "In relation to 'total disability' under § 48-121(1) and 'disability partial in character' under § 48-121(2), 'temporary' and 'permanent' refer to the duration of disability, while 'total' and 'partial' refer to the degree or extent of the diminished employability or impairment of earning power or earning capacity." *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 470, 461 N.W.2d 565, 573 (1990). In opining on claims under § 48-121, this court has used the phrases "temporary total disability," "temporary partial disability," and "permanent partial disability" to describe the nature of the workers' compensation benefits a claimant is receiving pursuant to various subsections of § 48-121, notwithstanding the fact that those phrases in their entirety do not appear in § 48-121. See, generally, *Anderson v. Omaha Pub. Sch. Dist.*, 254 Neb. 1007, 581 N.W.2d 424 (1998); *Foreman v. State*, 240 Neb. 716, 483 N.W.2d 752 (1992); *Boults v. Church*, 200 Neb. 319, 263 N.W.2d 478 (1978).

[6] Specifically, with respect to § 48-121, this court has on numerous occasions, where supported by the facts, described the benefits which a workers' compensation claimant was

receiving while undergoing vocational rehabilitation under § 48-121(5) as "temporary total disability" benefits, not merely as "temporary disability" benefits or "total disability" benefits. See, e.g., *Gibson v. Kurt Mfg.*, 255 Neb. 255, 583 N.W.2d 767 (1998); *Thach v. Quality Pork International*, 253 Neb. 544, 570 N.W.2d 830 (1997); *Bindrum v. Foote & Davies*, 235 Neb. 903, 457 N.W.2d 828 (1990); *Thom v. Lutheran Medical Center*, 226 Neb. 737, 414 N.W.2d 810 (1987). We so ruled because a claimant pursuing vocational rehabilitation may do so to the exclusion of employment and because under such circumstances, the disability is therefore "total," but such vocational rehabilitation is designed to result in future employability and, therefore, the disability is "temporary." See Neb. Rev. Stat. § 48-162.01(1) (Reissue 1998) (providing that "[o]ne of the primary purposes of the Nebraska Workers' Compensation Act shall be restoration of the injured employee to gainful employment"). Because benefits received during vocational rehabilitation under § 48-121(5) may be and in this case were "temporary total disability" benefits, a species of total disability benefits, and where such benefits are followed by "partial disability" benefits as in the instant case, pursuant to § 48-121(2), the 300-week period shall be reduced by the number of weeks during which compensation was paid for such total disability.

[7] Although we note that the Legislature has recently amended § 48-121, the amendment does not supersede this court's interpretation of § 48-121(5), in which on the specific facts of the cases, we have deemed the benefits received during vocational rehabilitation to be "temporary total disability" benefits. See § 48-121(5) (Supp. 1999). When judicial interpretation of a statute has not evoked a legislative amendment, it is presumed that the Legislature has acquiesced in the court's interpretation. *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999); *Miller v. Goodyear Tire & Rubber Co.*, 239 Neb. 1014, 480 N.W.2d 162 (1992).

Accordingly, we conclude that the temporary benefits Sheldon-Zimbelman received pursuant to § 48-121(5) while pursuing vocational rehabilitation were TTD benefits and were properly credited against the 300-week statutory limitation on workers' compensation indemnity benefits, to the extent such a

credit is permitted under § 48-121(2). The review panel was correct in ruling that as a matter of law under § 48-121(2), Bryan was entitled to a credit against the PPD payments it owed Sheldon-Zimbelman payable after completion of Sheldon-Zimbelman's vocational rehabilitation for the TTD benefits Bryan had previously paid Sheldon-Zimbelman while she was undergoing vocational rehabilitation. Sheldon-Zimbelman's assignment of error is without merit.

CONCLUSION

Having found no merit to Sheldon-Zimbelman's assigned errors, we affirm the decision of the Workers' Compensation Court review panel.

AFFIRMED.

STREEKS, INC., APPELLEE AND CROSS-APPELLANT, V. DIAMOND HILL FARMS, INC., A NEBRASKA CORPORATION, APPELLEE, AND JOHN D. NIELSEN, ALSO KNOWN AS JACK NIELSEN, APPELLANT AND CROSS-APPELLEE.

605 N.W.2d 110

Filed January 21, 2000. No. S-98-396.

1. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **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.
3. **Trial: Evidence: Appeal and Error.** In determining the admissibility of evidence, the exercise of judicial discretion is implicit in determinations of relevancy and admissibility, and the trial court's decision will not be reversed absent an abuse of discretion.
4. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
5. **Verdicts: Appeal and Error.** A civil jury verdict will not be disturbed on appeal unless clearly wrong.
6. **Damages: Appeal and Error.** The amount of damages to be awarded will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved.

7. **Directed Verdict: Evidence: Appeal and Error.** When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.
8. **Fraud: Proof.** To prove fraudulent concealment, a plaintiff must show that (1) the defendant had a duty to disclose a material fact; (2) the defendant, with knowledge of the material fact, concealed the fact; (3) the material fact was not within the plaintiff's reasonably diligent attention, observation, and judgment; (4) the defendant concealed the fact with the intention that the plaintiff act in response to the concealment or suppression; (5) the plaintiff, reasonably relying on the fact or facts as the plaintiff believed them to be as the result of the concealment, acted or withheld action; and (6) the plaintiff was damaged by the plaintiff's action or inaction in response to the concealment.
9. **Fraud.** Where one has a duty to speak, but deliberately remains silent, his or her silence is equivalent to a false representation.
10. ___. In nondisclosure cases, the law does not attempt to define occasions when the duty to speak arises, but, instead, has adopted the proposition that whether a duty to speak exists is determined by all the circumstances of the case.
11. ___. A party to a business transaction has a duty to disclose facts basic to the transaction when he or she knows another party is about to enter into the transaction under a mistake as to those facts and that the other party would reasonably expect a disclosure of those facts because of the relationship between the parties, the customs of the trade, or other objective circumstances.
12. **Fraud: Juries.** In fraudulent concealment cases, existence of a duty to disclose is a question of law, but the breach of that duty is a question of fact for the jury.
13. **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.
14. **Contracts: Fraud: Damages.** The benefit of the bargain rule is an appropriate measure of damages when the fraud induces a party to enter a contract for sale of property.
15. **Fraud: Damages.** In an action for fraud, a party may recover such damages as will compensate him or her for the loss or injury actually caused by the fraud and place the defrauded party in the same position as he or she would have been in had the fraud not occurred.
16. **Contracts: Fraud: Negligence.** A purchaser is not limited to the contract when bringing claims against a seller, but may also bring claims for fraudulent concealment, fraudulent misrepresentation, and negligence.
17. **Uniform Commercial Code: Fraud.** Nebraska's Uniform Commercial Code does not preclude an action for fraud.
18. **Uniform Commercial Code: Fraud: Contracts.** Fraud and deceit provide a ground for recovery that is independent of contract or the Uniform Commercial Code.
19. **Jury Instructions: Pleadings: Evidence.** A litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence.

20. **Jury Instructions: Evidence: New Trial.** Submission of an issue on which the evidence is insufficient to sustain an affirmative finding is generally prejudicial and results in a new trial.
21. **Damages: Proof.** The burden is on the defendant to prove that the plaintiff should have taken some action to mitigate damages.

Appeal from the District Court for Banner County: JOHN D. KNAPP, Judge. Affirmed.

Laurice M. Margheim, of Curtiss, Moravek, Curtiss & Margheim, for appellant.

Robert G. Pahlke and Maren Lynn Chaloupka, of The Van Steenberg Firm, for appellee Streeks, Inc.

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

HENDRY, C.J.

I. INTRODUCTION

Darrel Streeks, doing business as Streeks, Inc., brought an action against John D. Nielsen for fraudulent concealment based on Nielsen's failure to disclose certain information about potato seed. A jury rendered a verdict in favor of Streeks, Inc., in the amount of $25,000. Nielsen filed a notice of appeal and a petition to bypass. Streeks, Inc., cross-appealed. We granted Nielsen's petition to bypass, see Neb. Rev. Stat. § 24-1106(2) (Reissue 1995), and now affirm.

II. BACKGROUND

Streeks, Inc. (Streeks), is a family corporation composed of Darrel Streeks and his wife, LeAnn Streeks. Nielsen, doing business as Diamond Hill Farms, Inc., is in the business of raising seed potatoes for his own use and for sale to other farmers. For a number of years, Streeks has been engaged in growing certified seed potatoes. Potato growing in Nebraska is a specialized area of farming, with only 16 certified potato growers in the state.

Since 1994, Streeks has grown certified seed potatoes for Frenchman Valley Produce, which is owned and operated by Timothy May, Streeks' brother-in-law. May grows commercial potatoes and had agreements with Streeks in 1994 through 1996

to supply seed for this purpose. Pursuant to their agreement, during each of the 3 years, May would purchase potato seed and sell it to Streeks. Streeks would then raise the seedling potatoes at his expense and sell them back to May at a specified price. May then used the seedling potatoes to grow a commercial potato crop. This arrangement guaranteed May the required seedlings at a certain price.

May's operation requires a supply of seedling potatoes of a certain quality. The quality of certified potatoes is determined by classifying them into "generations." The generation of potato seed is determined by the standards set forth by the Potato Certification Association of Nebraska. One of the factors that determines a potato's generational level is the percentages of certain diseases it contains. Generation I potatoes have the lowest percentage of allowable diseases, and Generation V potatoes have the highest. Seed is evaluated by the "Florida winter test," which tests the seed for viruses. Seed can be reclassified at a lower generational level if the Florida tests detect a virus content that is above the acceptable level for that generation. Seed at one generational level produces a potato classified at the next lower generational level. May produced Generation III or IV potatoes, which required Generation II or III potato seed.

In early December 1995, Streeks contacted May and asked May to locate a supplier of Generation II seed for Streeks' use in raising the 1996 crop of Generation III seedlings for May. May located the supplier because May is a larger grower who could obtain a better price on the seed. May learned that Nielsen had some Generation II seed available for sale and contacted Nielsen about purchasing a supply. Before signing a written contract for the purchase of the seed, May informed Nielsen that Streeks would be raising the seedlings. Nielsen was aware that this was a three-party transaction in which May purchased the seed from Nielsen for Streeks' use in raising Generation III seedlings for May.

In January 1996, May entered into a contract with Nielsen for the purchase of Generation II certified seed. The contract contained a limitation-of-damages provision and an exclusion of warranties, including any warranties that the seed was free of latent potato diseases. After entering into the contract with

Nielsen, May and Nielsen had no further contact with one another regarding the seed. May told Streeks that Nielsen would be supplying the seed that Streeks would raise for May. All further communication regarding the seed was between Streeks and Nielsen.

In early February 1996, Nielsen learned that the results of the Florida tests, dated January 31, 1996, showed the seed had been downgraded from Generation II to the lowest generational level, Generation V, because it contained 3.2 percent leaf roll virus. The allowable percentage of leaf roll virus for Generation II seed is two-tenths of a percent. Nielsen did not inform May or Streeks that the seed had been downgraded.

In March 1996, May and Streeks reduced to writing their agreement regarding the seed May had purchased from Nielsen in January. Streeks purchased the Generation II seed from May for $25,300 and agreed to plant the seed to raise Generation III seedlings for May. May agreed to purchase the seedlings Streeks raised for $6.50 per hundredweight.

Nielsen was aware that Streeks was going to pick up the seed. Streeks and Nielsen spoke on the telephone on several occasions prior to Streeks' picking up the seed. Streeks and Nielsen discussed the fact that the seed was supposed to be classified as Generation II and would be used to raise certified seedlings for May. Streeks claimed that during these conversations, Nielsen never told him the seed had been downgraded to Generation V and never mentioned any problem with leaf roll. Nielsen claimed he told Streeks that the seed was "loused up with leaf roll" when he spoke with Streeks on the telephone in mid-April 1996. It is undisputed in the record that Nielsen never told Streeks that the seed had been downgraded. Only Nielsen knew that the seed had been downgraded.

On May 2, 1996, Streeks picked up the seed from Nielsen's storage Quonset and began planting later that same day, believing the seed to be classified as Generation II. After Streeks had planted the seed in early May, Nielsen informed Streeks that the seed was carrying leaf roll virus. According to Streeks, this was the first indication that the seed was not classified as Generation II. Both parties acknowledged that Streeks reacted with shock and surprise when Nielsen revealed this information.

Because the seed was classified as Generation V, instead of Generation II, Streeks could not meet the requirement under his contract with May to supply Generation III seedlings. Nielsen never requested payment from May for the seed.

Streeks was unable to sell much of his crop as seedlings because it was too early in the year to sell that type of seedling potatoes. Furthermore, a nationwide surplus of potatoes made it difficult to sell the crop as commercial potatoes. Streeks did sell some of the potatoes, but at much lower prices than originally provided for under the contract with May.

On April 8, 1997, Streeks filed an action in Banner County District Court against Nielsen based on negligence, fraudulent misrepresentation, and fraudulent concealment. The negligence and fraudulent misrepresentation claims were disposed of prior to trial. Streeks claimed approximately $152,322 in damages as the result of not being able to sell the seedlings to May at the specified price under their contract. Streeks claimed that Nielsen fraudulently concealed the fact that the seed Streeks received had been downgraded from Generation II to Generation V.

The fraudulent concealment claim was tried to a jury on January 26 through 30, 1998. At trial, Nielsen admitted that reclassification of seed is a material fact important to the grower of certified seedlings and that it is an accepted practice in the industry to disclose any reclassification. Nielsen admitted that there is an obligation to disclose a reclassification and that it would never be appropriate to fail to disclose such a fact.

Both parties moved for directed verdicts, and both motions were overruled. The jury found in favor of Streeks in the amount of $25,000. Streeks filed a motion for new trial or for judgment notwithstanding the verdict on the issue of damages only, claiming that the verdict was too small and was not supported by the evidence. The motion was denied. Nielsen thereafter appealed, and Streeks cross-appealed.

III. ASSIGNMENTS OF ERROR

Nielsen claims, rephrased, that the trial court erred in (1) denying his motion for summary judgment because Nielsen owed no duty to inform Streeks of the reclassification of the seed, (2) denying his motion for directed verdict because

Nielsen owed no duty to inform Streeks of the reclassification of the seed, (3) not deciding the issue of duty to disclose as a matter of law, (4) incorrectly instructing the jury on the issue of duty to disclose, (5) refusing to give his proposed "benefit of the bargain" instruction on damages, (6) incorrectly instructing the jury on the issue of damages, (7) not allowing the contract between Nielsen and May into evidence, and (8) ruling that his contract defenses were inapplicable.

In the cross-appeal, Streeks claims the trial court erred in (1) overruling Streeks' motion for new trial or for judgment notwithstanding the verdict because the amount of damages awarded was not supported by the evidence, (2) refusing to grant Streeks' motion for directed verdict on the issue of mitigation of damages, and (3) giving an instruction on the issue of mitigation.

IV. STANDARD OF REVIEW

[1] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999).

[2] 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. *Corcoran v. Lovercheck*, 256 Neb. 936, 594 N.W.2d 615 (1999).

[3] In determining the admissibility of evidence, the exercise of judicial discretion is implicit in determinations of relevancy and admissibility, and the trial court's decision will not be reversed absent an abuse of discretion. *Seeber v. Howlette*, 255 Neb. 561, 586 N.W.2d 445 (1998).

[4-6] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Nguyen v. Rezac*, 256 Neb. 458, 590 N.W.2d 375 (1999). "A civil jury verdict will not be disturbed on appeal unless clearly wrong." *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 182, 459 N.W.2d 718, 727 (1990). The amount of damages to be awarded will not be disturbed on appeal if it is supported by evidence and bears a reasonable rela-

tionship to the elements of the damages proved. *Jones v. Meyer*, 256 Neb. 947, 594 N.W.2d 610 (1999).

V. ANALYSIS

1. Fraudulent Concealment

(a) Summary Judgment

Nielsen claims that the trial court erred in not granting his motion for summary judgment. However, because the denial of Nielsen's motion for summary judgment is, under the circumstances presented, not reviewable on appeal, Nielsen's assignment of error on that ground is without merit. See *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999).

(b) Directed Verdict

[7] Nielsen contends the trial court incorrectly denied his motion for directed verdict. When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 555 N.W.2d 778 (1996). Nielsen claims his motion for directed verdict should have been granted because he had no duty to disclose to Streeks that the seed had been downgraded. He claims there was no contractual, fiduciary, or other special relationship between the parties that would create a duty to disclose. However, Streeks claims that Nielsen did have a duty to disclose because of the three-party transaction involving May, Nielsen, and Streeks. Thus, the issue presented is whether Nielsen owed Streeks a duty to disclose and the parameters of such a duty.

As an initial clarification, we note that the elements of fraudulent concealment include a showing by the plaintiff that the defendant had a duty to disclose. In several fraudulent concealment cases involving vendor-purchaser relationships, we have not mentioned duty to disclose as a specific element of a fraudulent concealment claim. See, *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994); *Kracl v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990); *Nelson v. Cheney*, 224 Neb.

756, 401 N.W.2d 472 (1987). However, in these "vendor-purchaser" cases, the contractual relationship between vendor and purchaser creates the duty to disclose. The duty to disclose was assumed as an element of a fraudulent concealment claim in that context.

[8,9] Because Streeks' claim falls outside the vendor-purchaser context, we must look to other cases where we have discussed fraudulent concealment. In *In re Estate of Stephenson*, 243 Neb. 890, 503 N.W.2d 540 (1993), a wife sought to rescind an antenuptial agreement based on her husband's failure to disclose material facts about his financial position. Regarding fraudulent concealment, we stated that

> to prove fraudulent concealment, a plaintiff must show that (1) the defendant had a duty to disclose a material fact; (2) the defendant, with knowledge of the material fact, concealed the fact; (3) the material fact was not within the plaintiff's reasonably diligent attention, observation, and judgment; (4) the defendant concealed the fact with the intention that the plaintiff act in response to the concealment or suppression; (5) the plaintiff, reasonably relying on the fact or facts as the plaintiff believed them to be as the result of the concealment, acted or withheld action; and (6) the plaintiff was damaged by the plaintiff's action or inaction in response to the concealment.

243 Neb. at 899, 503 N.W.2d at 547. In *In re Estate of Stephenson*, we specifically included duty to disclose as an element of fraudulent concealment. We further noted, " '[W]here one has a duty to speak, but deliberately remains silent, his silence is equivalent to a false representation.' " *Id.* at 898-99, 503 N.W.2d at 547, quoting *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987). But see *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993) (duty not stated as specific element of fraudulent concealment).

We determine that *In re Estate of Stephenson* properly sets out the elements of fraudulent concealment. In order to recover against Nielsen, Streeks must show that Nielsen owed him a duty to disclose the fact that the seed had been downgraded. However, the question remains as to what type of relationship will give rise to such a duty.

[10] In nondisclosure cases, the law does not attempt to define occasions when the duty to speak arises, but, instead, has adopted the proposition that whether a duty to speak exists is determined by all the circumstances of the case. 37 Am. Jur. 2d *Fraud and Deceit* § 146 (1968). Although the circumstances of each case typically determine whether a duty to disclose exists, there are several situations which have been consistently recognized as creating a duty to disclose. Such situations have been summarized in Restatement (Second) of Torts § 551 at 119 (1977) as follows:

> (1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.
>
> (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,
>
> (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust or confidence between them; and
>
> (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and
>
> (c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and
>
> (d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and
>
> (e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

The elements listed in § 551 on the creation of a duty to disclose have been widely used. See, e.g., *Chiarella v. United States*, 445 U.S. 222, 100 S. Ct. 1108, 63 L. Ed. 2d 348 (1980), citing the Restatement, *supra*, § 551(2)(a); *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3d Cir. 1993), citing the Restatement, *supra*, § 551; *Midwest Commerce Banking v. Elkhart City Centre*, 4 F.3d 521 (7th Cir. 1993), citing the Restatement, *supra*, § 551(2)(e); *Cent. States Stamping v. Terminal Equip. Co.*, 727 F.2d 1405 (6th Cir. 1984), citing the Restatement, *supra*, § 551(1) and (2); *Blon v. Bank One, Akron, N.A.*, 35 Ohio St. 3d 98, 519 N.E.2d 363 (1988), citing the Restatement, *supra*, § 551; *Saint Alphonsus Med. Center v. Krueger*, 124 Idaho 501, 861 P.2d 71 (Idaho App. 1992), citing the Restatement, *supra*, § 551(2); *In re Williams*, 314 Or. 530, 840 P.2d 1280 (1992); *Bernstein v. Portland Sav. and Loan*, 850 S.W.2d 694 (Tex. App. 1993), *disapproved on other grounds, Crown Life Ins. Co. v. Casteel*, No. 98-0218, 1999 WL 450773 (Tex. July 1, 1999). Furthermore, in *Bank of Valley v. Mattson*, 215 Neb. 596, 339 N.W.2d 923 (1983), we cited § 551 on the creation of a duty as helpful in resolving the issue in that case.

Nielsen correctly points out that in *Citizens Nat. Bank of Wisner v. Kennedy & Coe*, 232 Neb. 477, 441 N.W.2d 180 (1989), an accounting malpractice case, we refused to apply Restatement (Second) of Torts § 551 (1977). However, the issue in *Citizens Nat. Bank of Wisner* was the accountants' negligence, not fraudulent concealment. Because *Citizens Nat. Bank of Wisner* involved negligence, not fraud, § 551 was properly disregarded.

Contrary to Nielsen's contention, recognizing a duty to disclose in this case would not constitute an improper extension of the duty we have recognized in professional malpractice cases. The duty discussed in these malpractice cases is based on negligence, not fraud. See, *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997); *Lawyer's Title Ins. Corp. v. Hoffman*, 245 Neb. 507, 513 N.W.2d 521 (1994); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993); *Citizens Nat. Bank of Wisner v. Kennedy & Coe, supra*; *Landrigan v. Nelson*, 227 Neb. 835, 420 N.W.2d 313 (1988); *Lilyhorn v. Dier*, 214 Neb. 728, 335 N.W.2d 554

(1983); *Ames Bank v. Hahn*, 205 Neb. 353, 287 N.W.2d 687 (1980).

The duty involved in a case asserting negligence is different than the duty involved in a case asserting fraud. For example, in *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 371, 518 N.W.2d 910, 921 (1994), we noted the difference between fraudulent misrepresentation and negligent misrepresentation, stating:

> [T]he difference between fraudulent misrepresentation and negligent misrepresentation is the duty required in each claim. In fraudulent misrepresentation, one becomes liable for breaching the general duty of good faith or honesty. However, in a claim of negligent misrepresentation, one may become liable even though acting honestly and in good faith if one fails to exercise the level of care required under the circumstances.

In *Gibb*, we adopted Restatement (Second) of Torts § 552 (1977) to specifically enumerate the elements of *negligent misrepresentation*. In the present case, § 551 properly sets out when a duty to disclose may arise in a claim of *fraudulent concealment*.

Under the Restatement, *supra*, § 551, a duty to disclose may arise among parties to a business transaction. The term "business transaction" is not defined in § 551. Generally, a transaction consists of " 'an act or agreement, or several acts or agreements having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered. It is a broader term than "contract." ' " *Transamerica Commercial Finance v. Naef*, 842 P.2d 539, 542 (Wyo. 1992). See, also, *United States Hoffman Machinery Corp. v. Ebenstein*, 150 Kan. 790, 96 P.2d 661 (1939); *Sylvester v. Evans*, 109 Ohio App. 211, 160 N.E.2d 142 (1959); *Miles v. Starks*, 590 S.W.2d 223 (Tex. Civ. App. 1979). The term "transaction" has also been defined as "[a]ny activity involving **two or more persons**." (Emphasis supplied.) Black's Law Dictionary 1503 (7th ed. 1999).

In the present case, Streeks, May, and Nielsen were parties to a business transaction involving potato seed. May and Streeks agreed that May would procure the seed for Streeks' use in growing seedlings for May. May's contract with Nielsen for the

purchase of the seed would not have occurred had there been no agreement with Streeks to raise the seedlings. When May first contacted Nielsen, he informed Nielsen that Streeks would be raising the seedlings. Thereafter, Streeks and Nielsen communicated directly with one another regarding the seed. Although there was not a contract between Streeks and Nielsen; Streeks, May, and Nielsen were all parties to this specialized business transaction involving potato seed.

Existence of a contract between the plaintiff and the defendant is not necessary for a duty of disclosure to arise. In *R.A. Peck, Inc. v. Liberty Fed. Sav. Bk.*, 108 N.M. 84, 766 P.2d 928 (N.M. App. 1988), a bank entered into a loan agreement with a bank customer for construction of a ski lodge. The customer then entered into a contract with a contractor to build the ski lodge. Before beginning construction, the contractor received assurance from the bank that the loan for the project had been funded. The bank knew that the contractor was relying on the loan funds for payment of its construction services. The bank told the contractor to submit all its bills directly to the bank for payment and had numerous conversations with the contractor regarding payment for the contractor's services. Thereafter, the bank improperly disbursed all of the loan funds to other parties outside the purposes of the loan agreement, without disclosing this to the contractor. The contractor was left with $350,000 of unpaid work on the project. The court held that the bank had a duty to disclose to the contractor the premature disbursement of all the funds even though there was no contract between the bank and the contractor.

We have permitted an action for fraudulent concealment in a situation regarding a business transaction where there was no contract between the plaintiff and the defendant. In *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993), the defendant encouraged the plaintiffs to invest in an oil exploration venture. The plaintiffs thought the defendant had himself invested in the venture, when in fact he had not. The defendant later received a portion of the broker's commission as a result of convincing the plaintiffs to invest. We determined that the plaintiffs were entitled to a jury instruction on fraudulent concealment.

[11] Under Restatement (Second) of Torts § 551(2)(e) (1977), Nielsen had a duty to disclose the reclassification of the seed potatoes to Streeks. Section 551(2)(e) states that a party to a business transaction has a duty to disclose facts basic to the transaction when he or she knows another party is about to enter into the transaction under a mistake as to those facts and that the other party would reasonably expect a disclosure of those facts because of the relationship between the parties, the customs of the trade, or other objective circumstances.

Nielsen and Streeks were parties to the transaction involving the potato seed. Nielsen knew that it was basic to the transaction that the seed be classified as Generation II. Nielsen spoke to Streeks on several occasions after Nielsen knew that the seed had been downgraded, but before the seed was picked up. Nielsen did not disclose the fact that the seed had been downgraded to Generation V. Streeks planted the seed, mistakenly believing it was classified as Generation II. Streeks would not have picked up the seed and planted it had he known the seed was not classified as Generation II. Nielsen admitted that it is standard practice in the industry to disclose any reclassification of seed and that it would never be appropriate to fail to disclose such information. The transaction involving Streeks, May, and Nielsen; the customs of the potato trade; and the objective circumstances of the case make it reasonable for Streeks to expect Nielsen to disclose to him the fact that the seed had been downgraded. The trial court correctly denied Nielsen's motion for directed verdict because under the Restatement, *supra*, § 551(2)(e), Nielsen owed Streeks a duty to disclose the reclassification.

(c) Jury Instruction on Duty to Disclose

[12] Nielsen also claims that the trial court erred in not deciding the issue of duty as a matter of law. We have stated that the question of whether a legal duty exists is a question of law dependent on the facts in a particular situation. See *Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999). In fraudulent concealment cases, existence of a duty to disclose is a question of law, but the breach of that duty is a question of fact for the jury. See, *Berger v. Security Pacific Inf.*

Systems, 795 P.2d 1380 (Colo. App. 1990); *Maack v. Resource Design & Const., Inc.*, 875 P.2d 570 (Utah App. 1994); *DeBry v. Valley Mortg. Co.*, 835 P.2d 1000 (Utah App. 1992).

The record in this case shows that the court decided the issue of whether a duty to disclose existed as a matter of law. Prior to trial, Nielsen made a motion for summary judgment, which was denied as to the fraudulent concealment claim. Furthermore, Nielsen made a motion for directed verdict at the close of Streeks' evidence, and that motion was denied. The court, in ruling on the motion for summary judgment and motion for directed verdict, decided that Streeks had shown a duty to disclose. Had the court determined there was no duty to disclose, Nielsen would have prevailed. This assignment of error is without merit.

Nielsen also asserts that instruction No. 10 was an incorrect statement of the law. Instruction No. 10 paraphrases Restatement (Second) of Torts § 551(2)(e) (1977) as it relates to the element of duty in a fraudulent concealment claim. We have determined that § 551(2)(e) is a correct statement of the law. The jury needed to understand the duty Nielsen owed to Streeks in order to determine whether the facts demonstrated that Nielsen breached that duty by not disclosing to Streeks that the seed had been downgraded. The jury was properly instructed that a party to a business transaction has a duty to disclose facts basic to the transaction when the other party would reasonably expect a disclosure. Thus, this assignment of error is without merit.

All the jury instructions read together and taken as a whole correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence. Thus, there is no prejudicial error necessitating a reversal. See *Doe v. Gunny's Ltd. Partnership, supra.*

2. Damages Instruction

(a) Benefit of Bargain Measure of Damages

[13] Nielsen claims the trial court erred by failing to give Nielsen's proposed instruction on the measure of damages using the "benefit of the bargain" rule. 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. *Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999). Nielsen's proposed instruction stated the measure of damages as the difference between the value of the seed Streeks expected to receive and the value of the seed actually received at the time of delivery.

[14] The benefit of the bargain rule is an appropriate measure of damages when the fraud induces a party to enter a contract for sale of property. See, *Bibow v. Gerrard*, 209 Neb. 10, 306 N.W.2d 148 (1981); *Camfield v. Olsen*, 183 Neb. 739, 164 N.W.2d 431 (1969); *Beveridge v. Miller-Binder, Inc.*, 177 Neb. 734, 131 N.W.2d 155 (1964); *Rothery v. Pounds*, 150 Neb. 25, 33 N.W.2d 347 (1948); *Falkner v. Sacks Bros.*, 149 Neb. 121, 30 N.W.2d 572 (1948).

However, in the present case, we are not presented with a situation in which Streeks was fraudulently induced to enter into a contract with Nielsen. Because this action is not based on a fraudulently induced contract, the benefit of the bargain rule is not the appropriate measure of damages.

Nielsen has failed to show that his proposed benefit of the bargain instruction is a correct statement of the law warranted by the evidence in this case. Thus, failure to give this proposed instruction is not reversible error.

(b) Damages Instruction Given by Trial Court

Nielsen further claims that the trial court erred by giving instruction No. 11, which Nielsen claims allowed the jury to speculate on the issue of damages. Instruction No. 11 defined damages as the difference between the value to Streeks of the seed crop at maturity had the seed been suitable and the value of the actual crop received at harvest, less any savings, plus added expenses.

[15] The instruction given by the court was an appropriate measure of damages under the circumstances of this case. "In an action for fraud a party may recover such damages as will compensate him for the loss or injury actually caused by the fraud and place the defrauded party in the same position as he would

have been in had the fraud not occurred." *Forker Solar, Inc. v. Knoblauch*, 224 Neb. 143, 154, 396 N.W.2d 273, 281 (1986). See, also, *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986). Because of Nielsen's nondisclosure, Streeks could not perform the contract with May and was damaged as a result. Instruction No. 11 correctly states the law, was not misleading, and was supported by the pleadings and the evidence. Thus, there is no prejudicial error necessitating reversal. See *Doe v. Gunny's Ltd. Partnership, supra.*

3. MAY-NIELSEN CONTRACT

Nielsen also claims that the trial court erred in refusing to receive the January 1996 contract between May and Nielsen (May-Nielsen contract) into evidence, thus preventing Nielsen from asserting the contractual exclusions of warranty and limitation-of-damages provisions as defenses against Streeks' fraud claim. The court excluded the contract as irrelevant and did not allow Nielsen to assert his contract defenses.

The May-Nielsen contract included exclusion of warranty provisions and limited damages to the price of the seed. Nielsen claims that Streeks should have no better rights against him than May would have had under the contract. However, Nielsen overlooks the fact that had May sued Nielsen, the May-Nielsen contract would not have prohibited May from bringing a separate claim for fraudulent concealment.

[16] We have held that a purchaser is not limited to the contract when bringing claims against a seller, but may also bring claims for fraudulent concealment, fraudulent misrepresentation, and negligence. In *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994), the purchaser of a house brought an action against the seller for fraudulent concealment of termite damage. The selling agent showed the purchaser one area of termite damage, but failed to disclose the fact that other areas of the house contained termite damage. The purchaser sued the seller for fraudulent concealment, fraudulent misrepresentation, negligence, and breach of contract. The seller attempted to assert an "as is" clause contained in the sales contract as a defense against the purchaser's fraudulent concealment claim. We held that the "as is" clause contained in the con-

tract did not bar the purchaser's fraud-based claim and that thus, the purchaser was allowed to proceed on all four theories of recovery.

[17] Although *Gibb* involved a sale of realty rather than a sale of goods governed by the Nebraska Uniform Commercial Code, the reasoning applied in *Gibb* is applicable to the situation in the present case. Nebraska's U.C.C. does not preclude an action for fraud. Neb. U.C.C. § 1-103 (Reissue 1992) provides: "Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including . . . *fraud*, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." (Emphasis supplied.)

[18] A similar result was reached in *Murray v. D & J Motor Co., Inc.*, 958 P.2d 823, 831 (Okla. App. 1998), where the Oklahoma Court of Appeals stated, "Fraud and deceit provide a ground for recovery that is independent of contract or UCC." Furthermore, disclaimer of warranties is not material to a fraud action. *Id.* Thus, the May-Nielsen contract provisions do not insulate Nielsen from a claim of fraud.

Additionally, the disclaimer in the May-Nielsen contract provided that there were "no warranties which extend beyond the description on the face hereof." However, the face of the contract stated, and Nielsen expressly warranted, that the seed was classified as Generation II. Thus, had May sued Nielsen, the disclaimer of warranties would have had no effect and Nielsen would also be liable to May under the U.C.C. for supplying May with Generation V seed, which was not the seed for which May had contracted.

Streeks' cause of action is a tort claim based on fraud perpetrated by Nielsen. Streeks is not asserting any additional or better claim than that which would have been available to May. The trial court did not abuse its discretion in excluding the May-Nielsen contract as irrelevant. We find that based on the circumstances of this case, Nielsen's contract defenses were inapplicable against Streeks' fraud claim.

We find that Nielsen has asserted no error requiring reversal in this case. We now turn to Streeks' cross-appeal.

4. Cross-Appeal

(a) Insufficiency of Jury Verdict

Streeks' first assignment of error is that the amount of damages awarded was so low that the trial court erred in overruling Streeks' motion for new trial or for judgment notwithstanding the verdict.

"A civil jury verdict will not be disturbed on appeal unless clearly wrong." *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 182, 459 N.W.2d 718, 727 (1990). "The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved." *Jones v. Meyer*, 256 Neb. 947, 950, 594 N.W.2d 610, 612 (1999).

The jury verdict in this case was not clearly wrong. The jury awarded Streeks $25,000, which is approximately the amount Streeks paid May for the seed. The potatoes Streeks raised were still suitable for sale in other markets at a lower price. Streeks did not sell the potatoes immediately after harvest, but held them, hoping for an increase in price, which never materialized. A mitigation of damages instruction allowed the jury to reduce Streeks' damages by any amount that he could have received had he sold the potatoes sooner. Although the evidence could have supported a larger verdict, the amount awarded is not clearly wrong under all the evidence presented. Thus, the trial court did not abuse its discretion by denying Streeks' motion for new trial. See *Nguyen v. Rezac*, 256 Neb. 458, 590 N.W.2d 375 (1999).

(b) Mitigation of Damages

Finally, Streeks claims that the trial court erred in not granting a directed verdict on the issue of mitigation of damages and in instructing on mitigation. Streeks claims there was insufficient evidence to support such an instruction.

[19,20] A litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence. *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997). Submission of an issue on which the evidence is insufficient to

sustain an affirmative finding is generally prejudicial and results in a new trial. *Id.*

[21] The burden is on the defendant to prove that the plaintiff should have taken some action to mitigate damages. *Hurlbut v. Landgren*, 200 Neb. 413, 264 N.W.2d 174 (1978). An instruction on mitigation can be properly denied when the defendant produces no evidence on the issue of mitigation. *Id.*

Nielsen produced evidence that Streeks could have done more to mitigate his damages by selling his crop as commercial potatoes earlier in the season or by marketing them through a larger grower. Because Nielsen produced some evidence that Streeks failed to mitigate his damages, the motion for directed verdict on the issue of mitigation was properly denied and the instruction on mitigation was warranted by the evidence. See, *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 555 N.W.2d 778 (1996); *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997).

VI. CONCLUSION

Having considered all assignments of error of both parties and finding them to be without merit, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. GARY D. DENTON, RESPONDENT.

604 N.W.2d 832

Filed January 21, 2000. No. S-98-674.

1. **Appeal and Error.** Under existing case law, the Nebraska Supreme Court is limited in its review to examining only those items to which the parties have taken exception.
2. **Disciplinary Proceedings.** Under Neb. Ct. R. of Discipline 10(L) (rev. 1996), the Nebraska Supreme Court may, in its discretion, consider the referee's findings as final and conclusive.
3. ___. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.

4. ___. To determine what sanction is appropriate, each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances.
5. ___. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers a respondent's acts both underlying the events of the case and throughout the proceeding.

Original action. Judgment of disbarment.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Gary D. Denton, pro se.

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

PER CURIAM.

Formal charges were filed by the Nebraska State Bar Association (NSBA) against Gary D. Denton, a member of the NSBA. For the reasons set forth below, we conclude that Denton should be disbarred.

BACKGROUND

In January 1997, Denton's former client, K.J., filed a letter of complaint with the NSBA. K.J. alleged that she and Denton engaged in sexual relations during the time of their attorney-client relationship. In 1994 and 1995, Denton represented K.J. in a divorce proceeding involving a child custody dispute. Although K.J. was awarded temporary custody of the children, she lost permanent custody after Denton failed to call two potentially significant witnesses to testify about K.J.'s mental health and past behavior.

In June 1998, the NSBA filed formal charges against Denton for allegedly violating the attorney's oath of office and the following provisions of the Code of Professional Responsibility:

> DR 1-102 Misconduct.
> (A) A lawyer shall not:
> (1) Violate a Disciplinary Rule.
> . . . .
> (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.

. . . .

DR 2-110 Withdrawal from Employment.

. . . .

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

. . . .

(2) The lawyer knows or it is obvious that his or her continued employment will result in violation of a Disciplinary Rule.

. . . .

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair the Lawyer's Independent Professional Judgment.

(A) Except with the consent of his or her client after full disclosure, a lawyer shall not accept employment if the exercise of the lawyer's professional judgment on behalf of a client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests.

. . . .

DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

. . . .

(3) Prejudice or damage his or her client during the course of the professional relationship, except as required under DR 7-102(B).

Denton denied the allegations contained in the formal charges. Thereafter, a referee was appointed pursuant to Neb. Ct. R. of Discipline 10(J) (rev. 1996). In lieu of repeating testimony, the entire record made before the Committee on Inquiry of the Sixth Disciplinary District (Committee) was submitted to the referee. Sometime in early October, however, the NSBA dis-

covered new evidence that was not introduced to the Committee. This evidence directly contradicted the evidence that Denton presented to the Committee. The new evidence consisted of a statement by another of Denton's former clients, Jane Doe, that she, too, had engaged in sexual activity with Denton during his representation of her. This evidence was adduced to rebut Denton's claim that he was impotent. Jane Doe submitted an affidavit which stated that Denton was able to achieve an erection at the time of their sexual contact. The referee, therefore, held a hearing in February 1999 to take additional testimony. The referee heard testimony from K.J., the original complainant against Denton, and Jane Doe, the source of the NSBA's newly discovered evidence. The referee also heard additional testimony from Denton, Denton's wife, and one of Denton's friends.

In addition, the evidence presented by the NSBA consisted of a tape-recorded conversation between Denton and K.J. When K.J. confided in another attorney regarding her problems with Denton, she was encouraged to get corroborative evidence of the sexual relationship. She did so by secretly tape recording a conversation between her and Denton in September 1996. Although Denton made an implausible attempt to connect the taped conversation with K.J.'s divorce proceeding and tried to explain his responses by saying that he did not know what K.J. was talking about, the taped conversation convincingly shows that Denton and K.J. engaged in sexual relations.

Based on the record made before the Committee, the testimony before the referee, and the transcript of the recorded conversation, the referee found by clear and convincing evidence that Denton had violated several provisions of the Code of Professional Responsibility. Thereupon, the referee recommended that Denton be suspended from the practice of law for 2 years, during which time he be required to participate in gender sensitivity courses and to continue counseling for depression and anxiety.

STANDARD OF REVIEW

[1] Under existing case law, we are limited in our review to examining only those items to which the parties have taken exception. *State ex rel. NSBA v. Schmeling*, 247 Neb. 735, 529 N.W.2d 799 (1995).

[2] Under rule 10(L), this court may, in its discretion, consider the referee's findings as final and conclusive. See, *State ex rel. NSBA v. Schafer*, 227 Neb. 449, 418 N.W.2d 228 (1988); *State ex rel. Nebraska State Bar Assn. v. Blanchard*, 179 Neb. 452, 138 N.W.2d 804 (1965).

REFEREE'S FINDINGS

SEXUAL RELATIONSHIP WITH CLIENT

Based on the record made before the Committee, the testimony presented to the referee, and the transcript of the recorded conversation between Denton and K.J., the referee determined that "there was clearly some sort of sexual relationship engaged in between [K.J. and Denton] during the course of [Denton's] representation." Although Denton adamantly denied having any sexual contact whatsoever with K.J., the referee noted:

> This is more than a "he said/she said" confrontation. In addition to [K.J.'s] extensive and graphic testimony before both the Committee on Inquiry and the hearing before me, there is the tape recording. [Denton's] explanations for his statements on the tape recording are neither convincing nor plausible. . . . I saw and heard [K.J.] testify. I saw and heard [Jane Doe] testify. . . . I find that, despite any past problems either of them may have experienced, the testimony of [K.J. and Jane Doe] regarding [Denton] was credible.

Next, the referee determined whether Denton's solicitation of and engagement in a sexual relationship with a client constituted a violation of the Code of Professional Responsibility. In consideration of the facts that Denton represented K.J. in a contested custody proceeding and was well aware of K.J.'s psychological and psychiatric history, the referee found by clear and convincing evidence that Denton's conduct violated Canon 1, DR 1-102(A)(5) (conduct that is prejudicial to administration of justice); DR 1-102(A)(6) (conduct that adversely reflects on his or her fitness to practice law); and Canon 7, DR 7-101(A)(3) (lawyer shall not intentionally prejudice or damage client during course of professional relationship except as required under DR 7-102(B)).

FAILURE TO CALL WITNESSES AT TRIAL

The referee also found that Denton's conduct presented ethical violations beyond the sexual relationship with his client. The referee determined that Denton neglected to call two potentially significant witnesses on K.J.'s behalf *because of* their knowledge of the sexual relationship between K.J. and Denton. The referee concluded that by so doing, Denton put his own self-interest and protection above that of his client and thereby committed further violations of the Code of Professional Responsibility.

In preparation for the divorce proceeding, Denton asked K.J. about potential witnesses. She gave him several names, including Daniel L. Scharf, Ph.D., and Gary Cotton. Scharf, a licensed psychologist, counseled K.J. throughout the divorce proceedings. Cotton, a counselor at the Panhandle Mental Health Center, was a close friend and confidant of K.J.'s. At some point prior to trial, K.J. informed both Scharf and Cotton about her involvement with Denton. Although Scharf and Cotton had potentially significant testimony to offer, Denton neglected to contact either of them. Denton argues that he did not call them as witnesses because their testimony could have allowed K.J.'s husband to raise the question of her mental health at trial.

Although counsel for K.J.'s husband agreed at the pretrial conference not to raise the question of K.J.'s mental health as an issue at trial, opposing counsel did, in fact, bring up K.J.'s mental health during cross-examination. Counsel for K.J.'s husband testified before the Committee that he did not intend to raise the question of K.J.'s mental health, but, rather, he intended to impeach her. Nevertheless, opposing counsel's cross-examination of K.J. raised the issue of her mental health, and Denton failed to call either Scharf or Cotton to rehabilitate her status. Thereafter, the court awarded permanent custody of K.J.'s children to her husband.

The referee noted that in K.J.'s situation, which seemed to be a "typical" divorce trial where child custody was an issue, Denton should have contacted K.J.'s counselors. Although the referee acknowledged the difficulty of second-guessing an attorney's trial strategy after the fact, he found that there was more than an appearance of impropriety and that Denton's profes-

sional judgment was affected by his sexual relationship with K.J. The referee found by clear and convincing evidence that despite the potential significance of testimony by Scharf and Cotton, Denton did not contact or call either of them *because of* their knowledge of the sexual relationship between Denton and K.J. In addition to the obvious detrimental impact that the sexual relationship itself had on K.J., the referee noted Denton's failure to adequately represent his client. Due to the fact that Denton placed his own self-interest and protection above that of his client, which ultimately led or at least contributed to K.J.'s losing custody of her children, the referee found by clear and convincing evidence that Denton's conduct violated DR 1-102(A)(4) (conduct involving dishonesty, fraud, deceit, or misrepresentation); DR 1-102(A)(5) (conduct that is prejudicial to administration of justice); DR 1-102(A)(6) (conduct that adversely reflects on his or her fitness to practice law); Canon 2, DR 2-110(B)(2) (lawyer shall withdraw from employment if lawyer knows or it is obvious that continued employment will result in violation of disciplinary rules); and Canon 5, DR 5-101(A) (except with client's consent after full disclosure, lawyer shall not accept employment if professional judgment on behalf of client will be or reasonably may be affected by lawyer's own financial, business, property, or personal interests).

In the referee's recommendations to the court, he noted both a complete absence of mitigating circumstances and Denton's refusal to acknowledge any wrongdoing whatsoever. Nonetheless, the referee determined that the totality of the circumstances did not warrant disbarment and recommended that Denton be suspended from the practice of law for 2 years, during which time he be required to participate in gender sensitivity classes and continue his own counseling for depression and anxiety.

DETERMINATION OF SANCTION

The NSBA filed exceptions to the referee's recommended disciplinary sanction, but not to his findings of fact. Although Denton's brief disputes the referee's findings, Denton failed to file exceptions to the referee's report. Under existing case law, we are limited in our review to examining only those items to

which the parties have taken exception. See *State ex rel. NSBA v. Schmeling*, 247 Neb. 735, 742, 529 N.W.2d 799, 805 (1995) ("[i]n his brief, [respondent] raises other issues concerning the formal charges. However, we are limited in our review to examining only those items to which he has taken exception. Other issues discussed but not assigned as exceptions will not be considered"). Because Denton has not filed exceptions and the NSBA has filed exceptions only to the recommended sanction, we need not conduct a *de novo* review of the referee's findings of fact. Under the disciplinary rules, the court may, in its discretion, consider the referee's findings as final and conclusive. Rule 10(L) provides:

> Within ten days after the filing of the report of the referee, any party thereto may file written exceptions to such report. If no exceptions are filed, the Court, in its discretion, may consider the findings final and conclusive, and on motion shall enter such order as the evidence and law require.

See, *State ex rel. NSBA v. Schafer*, 227 Neb. 449, 454, 418 N.W.2d 228, 231 (1988) ("[p]ursuant to rule 10(L), the findings of the referee are accepted as final and conclusive"); *State ex rel. Nebraska State Bar Assn. v. Blanchard*, 179 Neb. 452, 454, 138 N.W.2d 804, 805 (1965) ("[t]he referee having found a violation of the cited canons, and no exceptions having been filed thereto, the findings are final and conclusive").

Since neither party filed exceptions to the referee's findings of fact, we consider them final and conclusive pursuant to rule 10(L). We therefore adopt the referee's findings and conclude that Denton violated DR 1-102(A)(5) (conduct that is prejudicial to administration of justice); DR 1-102(A)(6) (conduct that adversely reflects on his or her fitness to practice law); DR 2-110(B)(2) (lawyer shall withdraw from employment if lawyer knows or it is obvious that continued employment will result in violation of disciplinary rule); DR 5-101(A) (except with client's consent after full disclosure, lawyer shall not accept employment if professional judgment on behalf of client will be or reasonably may be affected by lawyer's own financial, business, property, or personal interests); and DR 7-101(A)(3) (lawyer shall not intentionally prejudice or damage client during

course of professional relationship, except as required under DR 7-102(B)).

[3] We must now determine the appropriate disciplinary measure to impose upon Denton. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. NSBA v. Miller, ante* p. 181, 602 N.W.2d 486 (1999); *State ex rel. NSBA v. Johnson*, 256 Neb. 495, 590 N.W.2d 849 (1999).

[4] To determine what sanction is appropriate, each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances. *State ex rel. NSBA v. McArthur*, 257 Neb. 618, 599 N.W.2d 592 (1999). In light of the particular facts and circumstances of this case, there are three main considerations requiring disbarment. First, Denton knowingly took advantage of K.J.'s vulnerability. Second, Denton placed his own self-interest and protection above that of his client's. Third, Denton misrepresented the truth throughout this proceeding, as demonstrated by his implausible theories of defense.

Taking Advantage of Client's Vulnerability

The record shows that K.J. was particularly vulnerable at the time Denton solicited a sexual relationship with her. K.J. was in the midst of a divorce which involved a custody battle for her children. Although K.J. was awarded temporary custody, she was ordered to move out of the marital home.

Denton was aware of K.J.'s psychological state. When questioned about her problems, Denton stated that there were "numerous problems, actually. I do believe that [her husband] was browbeating her, that he was trying to drive her nuts, and as distraught as she was getting, he was having a certain amount of success." Denton assessed K.J. as being "very, very nervous — or appeared to be very nervous. She's a very high strung person, from all I can tell." In fact, Denton stated that sometime during

the divorce proceedings, he recommended that K.J. seek professional help. Furthermore, Denton encouraged K.J. to confide in him, and she did so, relying on him for support during this time.

When Denton began making sexual advances, K.J. did not object. When asked why, she testified:

> I don't know what was going on in my mind. I was so confused by everything that was going on. For a long period of time it kind of felt like being in a fog.
>
> . . . .
>
> . . . I don't know that I really understood what I was getting myself into. What I felt is this man is here for me, he takes the time to listen to me and my problems with [my husband]. He's willing to give me hugs, he's a caring person.

It is obvious that Denton deliberately took advantage of K.J.'s vulnerability and abused the attorney-client relationship for his own personal gratification. By exploiting the professional relationship, Denton caused further psychological harm to a vulnerable client. At the time of K.J.'s testimony in front of the Committee, she was still seeing a psychologist because of her relationship with Denton, among other things. Denton's abuse of the attorney-client relationship in K.J.'s case demonstrated that he placed his interest in sexual gratification above that of his client's best interests. K.J. had the right to expect adequate legal representation when she hired Denton, not exploitation of the attorney-client relationship and a further violation of her trust.

Placing Denton's Own Interests Above Those of His Client

The referee found that the NSBA proved by clear and convincing evidence that Denton did not call certain witnesses *because of* their knowledge of his sexual relationship with K.J. By engaging in sexual relations with K.J., and then later refusing to contact potential witnesses who knew of the sexual relationship, Denton placed his own self-interest and protection above that of his client. In turn, this contributed to K.J.'s loss of custody of her children.

DENTON'S LACK OF CANDOR

[5] For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers a respondent's acts both underlying the events of the case and throughout the proceeding. *State ex rel. NSBA v. Miller, ante* p. 181, 602 N.W.2d 486 (1999); *State ex rel. NSBA v. Johnson*, 256 Neb. 495, 590 N.W.2d 849 (1999).

From the start, Denton adamantly denied the existence of any sexual relationship whatsoever with K.J. The evidence in the record, however, overwhelmingly indicates that a sexual relationship did in fact exist between Denton and K.J. Despite this evidence, Denton presented numerous implausible theories to show that he did not have a sexual relationship with K.J.

First, Denton claimed that he was impotent at the time of the encounters. He proffered medical evidence regarding his alleged impotency, and his wife testified about his professed condition. However, the affidavit and testimony of Jane Doe, another of Denton's former clients, convincingly shows that Denton misrepresented the truth by advancing the theory of his impotence. Jane Doe testified that on approximately four separate occasions, Denton held his pant leg up against his body to show her that he had an erection. She also testified that when she performed oral sex on Denton, it was quite obvious that he had an erection. From this testimony, it is clear that Denton misrepresented the truth when he presented evidence to the effect that he could not have engaged in sexual relations with K.J. because of his impotency.

Next, Denton offered unbelievable explanations regarding the taped conversation between himself and K.J. At the initial hearing before the Committee, Denton tried to explain the taped conversation by saying that he did not know what K.J. was talking about and that her questions were out of the blue. Denton made an implausible attempt to relate the conversation to the outcome of the divorce proceeding. Clearly, however, the taped conversation was not about K.J.'s divorce trial. Denton's explanations for his statements on the tape recording were neither convincing nor believable.

Moreover, Denton continues to deny the allegations of his sexual relationship with K.J., despite overwhelming evidence to

the contrary. In effect, Denton asks this court to deny the undeniable truth, which is that he engaged in sexual relations with K.J. and then refused to acknowledge any wrongdoing whatsoever. Denton has utterly failed to take any responsibility for his actions. This behavior demonstrates neither a present nor a future fitness to continue in the practice of law.

CONCLUSION

Denton has exploited his client's emotional vulnerability and placed his own self-interest and protection above that of his client. His abuse of the professional relationship, his continual refusal to accept responsibility for his conduct, and his disingenuous behavior throughout the disciplinary proceedings render Denton unfit to practice law. Since there are no mitigating factors to consider, we conclude that Denton should be disbarred.

JUDGMENT OF DISBARMENT.

MILLER-LERMAN, J., not participating.

DEBRA ZOUCHA, INDIVIDUALLY AND AS NEXT FRIEND OF D.H., A MINOR, APPELLANT, V. DANIEL S. HENN AND LAURIE KOUBA, APPELLEES.

604 N.W.2d 828

Filed January 21, 2000. No. S-98-1088.

1. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
2. **Judgments: Statutes: Appeal and Error.** In connection with questions of law and statutory interpretation, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Constitutional Law: Rules of the Supreme Court: Notice: Statutes: Appeal and Error.** Strict compliance with Neb. Ct. R. of Prac. 9E (rev. 1996) is required in order for an appellate court to consider a challenge to the constitutionality of a statute.
4. **Constitutional Law: Appeal and Error.** An appellate court will not consider a constitutional question unless it has been properly presented to the trial court for disposition.

5. **Statutes: Constitutional Law.** A litigant who invokes the provisions of a statute may not challenge its validity or seek the benefit of such statute and in the same action and at the same time question its constitutionality.
6. **Minors: Words and Phrases.** In the context of a paternity action, the Nebraska Supreme Court has defined "next friend" as one who, in the absence of a guardian, acts for the benefit of an infant.
7. **Parent and Child: Guardians and Conservators: Minors.** The father and mother are the natural guardians of their minor children.

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

Christopher A. Vacanti, of Cohen, Vacanti & Higgins, for appellant.

Stephanie Weber Milone for appellees.

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

STEPHAN, J.

Debra Zoucha brought this action in her individual capacity and as next friend of D.H., a minor child whom she alleges to be her paternal grandson born out of wedlock to her son Daniel S. Henn and Laurie Kouba. In the operative amended petition, Zoucha sought to establish Henn's paternity pursuant to Neb. Rev. Stat. § 43-1411 (Reissue 1998) and her right to grandparent visitation pursuant to Neb. Rev. Stat. § 43-1801 et seq. (Reissue 1998). The district court for Sarpy County sustained a demurrer jointly filed by named defendants Henn and Kouba and dismissed the action, based upon its determination that Zoucha did not allege a factual basis for grandparent visitation pursuant to § 43-1802(1) and could not maintain the paternity action as "next friend" of the minor child. Zoucha perfected this appeal, which we moved to our docket on our own motion. We conclude that the assignments of error are without merit and, therefore, affirm the judgment of the district court.

BACKGROUND

Zoucha alleges that Henn is her biological son and the father of D.H., a minor child born out of wedlock to Henn and Kouba on April 3, 1998. She alleges that D.H. resided with Henn and Kouba in Sarpy County throughout his lifetime. Zoucha alleges

that "temporary and permanent care, custody and control . . . should be established in the best interests of the minor child" and that those interests include the establishment of "specific visitation rights" with her as his paternal grandmother. She prays for an order determining paternity and awarding her visitation rights.

In its order sustaining the demurrer and dismissing the action, the district court determined that Zoucha had not alleged any of the statutory prerequisites for grandparent visitation under § 43-1802(1), which provides:

> A grandparent may seek visitation with his or her minor grandchild if:
>
> (a) The child's parent or parents are deceased;
>
> (b) The marriage of the child's parents has been dissolved or petition for the dissolution of such marriage has been filed, is still pending, but no decree has been entered; or
>
> (c) The parents of the minor child have never been married but paternity has been legally established.

With respect to the grounds set forth in § 43-1802(1)(c), the court held that no claim for grandparent visitation could accrue until after the legal establishment of paternity. In addition, the district court held that because the child was alleged to reside with a parent and natural guardian, Zoucha could not maintain a paternity action as the child's "next friend." The court further determined that these deficiencies could not be cured by amendment and that the action should therefore be dismissed.

ASSIGNMENTS OF ERROR

Zoucha contends, restated, that the district court erred: (1) in not finding that § 43-1802(1)(c) is unconstitutional because it requires that paternity be legally established before a claim for grandparent visitation may be filed; (2) in finding that she did not state facts sufficient to constitute a cause of action based on what she alleges to be "the unconstitutional provision" of § 43-1802(1)(c); and (3) in finding that she was not a proper party to bring an establishment of paternity action before the court.

STANDARD OF REVIEW

[1,2] In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as

alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999); *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998); *Giese v. Stice*, 252 Neb. 913, 567 N.W.2d 156 (1997); *Larson v. Demuth*, 252 Neb. 668, 564 N.W.2d 606 (1997). In connection with questions of law and statutory interpretation, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Cross v. Perreten, supra*; *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999); *Pier v. Bolles*, 257 Neb. 120, 596 N.W.2d 1 (1999).

ANALYSIS

In her brief, Zoucha advances the same argument in support of her first and second assignments of error, and we accordingly address them together. Both assignments of error arise from Zoucha's contention that § 43-1802(1)(c) is unconstitutional in that it

> impermissibly discriminates against children born out of wedlock by requiring those children to assume a heavier burden by requiring that paternity be established prior to the establishment of grandparent visitation whereas children born in wedlock may have an action for grandparent visitation instituted prior to the conclusion of a decree of dissolution.

Brief for appellant at 13.

[3] We dispose of these assignments of error without reaching any constitutional issue for several reasons. Zoucha failed to comply with Neb. Ct. R. of Prac. 9E (rev. 1996), which requires a party challenging the constitutionality of a statute to file and serve a separate written notice thereof at the time of filing an appellate brief, and to serve a copy of the brief on the Attorney General. Strict compliance with this rule is required in order for an appellate court to consider a challenge to the constitutionality of a statute. *State v. Feiling*, 255 Neb. 427, 585 N.W.2d 456

(1998); *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994).

[4,5] Even if Zoucha had complied with rule 9E, appellate consideration of her constitutional challenge would be precluded by her failure to assert it in the district court. An appellate court will not consider a constitutional question unless it has been properly presented to the trial court for disposition. *In re Interest of Rachael M. & Sherry M., ante* p. 250, 603 N.W.2d 10 (1999); *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993); *State ex rel. Sileven v. Spire*, 243 Neb. 451, 500 N.W.2d 179 (1993). Here, Zoucha actually invoked § 43-1802 as one of the statutory bases for her action. We have held that a litigant who invokes the provisions of a statute may not challenge its validity or seek the benefit of such statute and in the same action and at the same time question its constitutionality. *State ex rel. Bellino v. Moore*, 254 Neb. 385, 576 N.W.2d 793 (1998); *State ex rel. Sileven, supra*. Zoucha's first and second assignments of error are, therefore, without merit.

[6,7] In her third assignment of error, Zoucha contends that the district court erred in finding that she was not a proper party to bring a paternity action on behalf of D.H. In this regard, § 43-1411 provides:

> A civil proceeding to establish the paternity of a child may be instituted . . . by (1) the mother or the alleged father of such child, either during pregnancy or within four years after the child's birth . . . or (2) the guardian or next friend of such child or the state, either during pregnancy or within eighteen years after the child's birth.

In the context of a paternity action, we have defined "next friend" as "one who, in the absence of a guardian, acts for the benefit of an infant." *State on behalf of B.A.T. v. S.K.D.*, 246 Neb. 616, 618, 522 N.W.2d 393, 394 (1994). Zoucha alleges that Kouba is the biological mother of D.H. Neb. Rev. Stat. § 30-2608(a) (Cum. Supp. 1998) provides in pertinent part that "[t]he father and mother are the natural guardians of their minor children." Thus, the district court correctly determined that because D.H. is alleged to reside with his natural guardian, "there is no legal basis, reason, or cause for a 'next friend' to institute [a paternity] action on [his] behalf."

CONCLUSION

For the reasons stated above, we conclude that the constitutionality of § 43-1802(1)(c) has not been properly presented for appellate determination and that the district court did not err in determining that Zoucha could not maintain a paternity action in the capacity as "next friend" of D.H. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. MICHAEL L. MEFFERD, RESPONDENT.

604 N.W.2d 839

Filed January 21, 2000. No. S-98-1126.

1. **Disciplinary Proceedings: Proof: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. The charges against an attorney must be established by clear and convincing evidence.
2. **Disciplinary Proceedings: Appeal and Error.** When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, the Nebraska Supreme Court may, at its discretion, adopt the findings of the referee as final and conclusive.
3. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following facts: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
4. ___. A lawyer's restitution of a client's funds after being faced with legal accountability does not exonerate professional misconduct.
5. ___. Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is typically disbarment.
6. ___. For purposes of determining the proper discipline in a disciplinary proceeding, the Nebraska Supreme Court considers an attorney's acts both underlying the offenses and throughout the disciplinary proceeding.

7. **Attorney and Client.** A lawyer is responsible for adequately representing his or her client regardless of that client's behavior, and if that proves impossible, then the lawyer should withdraw from representation of that client.
8. **Disciplinary Proceedings.** Cumulative acts of attorney misconduct are distinguishable from isolated incidents of neglect, therefore justifying more serious sanctions.
9. ___. Responding to disciplinary complaints in an untimely manner and ignoring requests for information from the Counsel for Discipline of the Nebraska State Bar Association indicate a disrespect for the Nebraska Supreme Court's disciplinary jurisdiction and a lack of concern for the protection of the public, the profession, and the administration of justice.
10. ___. The propriety of a sanction must be considered with reference to the sanctions imposed by the Nebraska Supreme Court in prior cases presenting similar circumstances.

Original action. Judgment of suspension.

Stephen A. Scherr, of Whelan & Scherr, for relator.

Michael L. Mefferd, pro se.

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

PER CURIAM.

INTRODUCTION

Formal charges were filed by the Nebraska State Bar Association (NSBA), relator, against Michael L. Mefferd, respondent, a member of the NSBA since 1980. For the reasons set forth below, we order the respondent suspended from the practice of law for a period of 1 year.

FACTS OF CASE

In the summer of 1995, Kimberly Alderman, then the wife of Paul Alderman, contacted Mefferd. Kimberly Alderman was seeking legal representation for her husband, who had been charged with criminal offenses. Mefferd and Kimberly Alderman orally agreed that Mefferd would be paid $2,500 to represent Paul Alderman on these charges. Kimberly Alderman paid Mefferd $1,000 at the time of their agreement. Mefferd and the Aldermans understood that the remaining $1,500 would be paid from a refund of Paul Alderman's bail bond of $25,000. The Aldermans anticipated that $2,500 of the bond would be refunded, of which Mefferd would receive $1,500 and the Aldermans would receive the remainder.

Kimberly Alderman signed the bond over to Mefferd. The actual bond refund amount was $2,250, which was cashed by Mefferd on June 25, 1996. However, Mefferd did not refund the $750 overpayment to the Aldermans. Kimberly Alderman called Mefferd's office on numerous occasions, attempting to speak with Mefferd about the overpayment, but each time was told by Mefferd's secretary that Mefferd was out or busy. Kimberly Alderman left messages for Mefferd to call, but she got no response.

While incarcerated, Paul Alderman also attempted to reach Mefferd on several occasions about the overpayment, but his collect calls were refused. Paul Alderman wrote a letter to Mefferd about the overpayment. He mailed the letter to Kimberly Alderman, asking her to place her current return address on the envelope because he thought it was more likely that Mefferd would open the letter if it came from Kimberly Alderman. Kimberly Alderman mailed the letter to Mefferd, but Mefferd never responded.

On August 8, 1996, Dennis Carlson, Counsel for Discipline for the NSBA, received a letter from Paul Alderman regarding Mefferd's actions. Mefferd received notification of the complaint against him on August 12, personally signing the return receipt on that date. Mefferd was required to file a written response to the complaint with the Counsel for Discipline within 15 working days after receipt of the complaint, pursuant to Neb. Ct. R. of Discipline 9(E) (rev. 1996). Mefferd filed no response.

Carlson sent additional letters to Mefferd on September 4 and 18, 1996. Mefferd did not respond. On October 29, Carlson called Mefferd at his office and left a message for Mefferd to return the call. Mefferd did not respond. On November 5, Carlson called again and was told by Mefferd's secretary that Mefferd was with a client. Carlson said that he would expect a return call that afternoon, and Mefferd called back that day. Mefferd told Carlson that he had sent his written response to the Counsel for Discipline approximately 6 weeks earlier. Mefferd then told Carlson he would send another copy of his written response to Carlson by certified mail.

Carlson received nothing from Mefferd. On November 13, 1996, Carlson called and informed Mefferd he had still not

received his response and left a message for Mefferd to return his call. Mefferd did not respond. On November 14, Carlson called again, but no one answered the telephone. On November 15, Carlson wrote to Gerald Matzke, chair of the Committee on Inquiry of the Sixth Disciplinary District for the NSBA (hereinafter Committee), explaining that it was necessary to seek a temporary suspension of Mefferd's license due to Mefferd's failure to respond to the Alderman complaint. A copy of this letter was sent to Mefferd. Mefferd again did not respond. Matzke filed an application with the Nebraska Supreme Court requesting that Mefferd be temporarily suspended from the practice of law. The Supreme Court issued an order to show cause why Mefferd should not be temporarily suspended.

Mefferd filed a response to the show cause order. This response was received by the Counsel for Discipline on January 30, 1997. Mefferd's written response to the Alderman complaint was attached. His written response had a typed date on it of September 16, 1996.

Carlson continued investigating the Alderman complaint. Carlson wrote to Mefferd on April 14 and May 12, 1997, with some additional questions. Mefferd did not respond to the April 14 letter, but did respond to the May 12 letter. Carlson wrote Mefferd again on June 30 and July 15 with further questions, but Mefferd did not respond to either letter.

In June 1997, Carlson received another complaint against Mefferd from Robert G. Rose. Mefferd, while acting as a deputy public defender, had been appointed to handle Rose's appeal on a criminal matter. Rose's appeal was dismissed when Mefferd failed to file a brief.

On July 1, 1997, Mefferd received a certified letter from the Counsel for Discipline notifying Mefferd of the Rose complaint. Again, there was no response within the time period of 15 working days. Carlson wrote Mefferd regarding the Rose complaint on July 24 and again on August 5. Mefferd did not respond. On August 20, Carlson received a fax from Mefferd requesting until August 22 to respond. However, the Counsel for Discipline received no response from Mefferd on August 22. Carlson wrote again on September 2, with no response. On September 30, Carlson left a voice mail message at Mefferd's office. There was

no response. Carlson subsequently filed charges regarding the Rose complaint and the Alderman complaint with the Committee.

The Committee hearing, set for March 12, 1998, included charges of failing to return an overpayment to the Aldermans, failing to timely respond to the Alderman complaint, neglect of a legal matter regarding Rose's appeal, and failing to timely respond to the Rose complaint.

The Aldermans testified at the Committee hearing. Rose, who was still incarcerated, testified via affidavit that he met with Mefferd in February 1996 to discuss his appeal. Mefferd wrote Rose a letter in April saying that he was working on the appeal and would be in touch with Rose some time during the week of April 15. Rose never heard from Mefferd after that, although Rose tried to contact Mefferd at least three times via the public defender's office. At no time did Rose instruct Mefferd not to pursue his appeal. Rose initiated a complaint with the Counsel for Discipline in the spring of 1997, attempting to find out why his appeal had been dismissed and why he had heard nothing from Mefferd. The record reflects that Rose's appeal was dismissed because Mefferd failed to file a brief on Rose's behalf.

Mefferd testified that he failed to file a brief "[b]ecause Mr. Rose had — Mr. Rose had not directed me with regard to how he wanted his appeal — what he wanted to appeal." When asked, "Did Mr. Rose ever tell you, It's okay with me that you don't file a brief, that you can just drop the appeal?" Mefferd answered, "Not in those direct words, no. But he also didn't tell me what he wanted me to do with his appeal." When Mefferd was asked if he ever told Rose that he would not proceed with the appeal, Mefferd admitted, "I didn't tell him in one sentence that I will not proceed with your appeal, no."

At the Committee hearing, Mefferd submitted a "draft" he had discovered of his written response to the Rose complaint. Mefferd was unable to produce a copy of the actual letter. Mefferd testified that he mailed his response to the Rose complaint on August 22, 1997. However, Mefferd also testified that he received a letter from the Counsel for Discipline on September 2 indicating that his written response to the Rose complaint had not been received. Mefferd admitted he "did not

act" in response to the September 2 letter, offering no explanation for his behavior.

Mefferd was also asked why he had not previously refunded the $750 to the Aldermans, whose complaint had been pending for approximately 18 months. He testified that

> by the time this hearing was scheduled, we were so far into this that I wanted to wait and see what happened. . . .
>
> [T]he other thing is there have been a number of occasions where I wasn't sure if I owed Mr. Alderman the money. And the funds were not immediately available to give him the $750.
>
> And the other thing is I wasn't sure where Mr. Alderman was after he was released.

Mefferd agreed that he was overpaid in the amount of $750. During the hearing, Mefferd placed $750 on the table, which the Aldermans accepted as repayment.

After the Committee hearing, the Disciplinary Review Board determined that formal charges should be filed against Mefferd. These charges alleged that Mefferd violated the attorney's oath of office and the following provisions of the Code of Professional Responsibility:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (5) Engage in conduct that is prejudicial to the administration of justice. . . .
>
> (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.
>
> . . . .
>
> DR 6-101 Failing to Act Competently.
>
> . . . .
>
> (3) Neglect a legal matter entrusted to him or her.
>
> . . . .
>
> DR 9-102 Preserving Identity of Funds and Property of a Client.
>
> . . . .
>
> (B) A lawyer shall:
>
> . . . .

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

A formal hearing was held before a referee on April 14, 1999. The full transcript from the proceedings of the March 12, 1998, Committee hearing was admitted into evidence without objection. The Aldermans appeared and testified. Mefferd also appeared and testified that he was not aware the Aldermans were claiming an overpayment until he received the notice of complaint from Carlson in 1996. When asked if either of the Aldermans had ever tried to request the $750 from him prior to filing their complaint, he responded, "I don't recall."

Regarding the Rose complaint, Mefferd testified that because he was not sure upon what grounds Rose wished to appeal, Mefferd did not file a brief. Rose was living in Florida at the time of the hearing. Rose's testimony consisted of his affidavit previously offered to the Committee. This affidavit was received by the referee without objection.

Mefferd testified that he did not know whether his responses to the Alderman and Rose complaints were received by the Counsel for Discipline within the required 15 working days of receipt. In response to further questioning, Mefferd testified that he mailed his response to the Alderman complaint on September 16 or 17, 1996. He also testified that he believed he sent an additional copy of this response to Carlson at some point after that.

Regarding the Rose complaint, Mefferd testified that he prepared the letter on August 22, 1997, intending to mail it, and that "[his] assumption is that it was mailed." When asked if he responded to Carlson's correspondence and calls after August 22, indicating the Counsel for Discipline had not received Mefferd's response, Mefferd testified, "As to additional conversations with Mr. Carlson I don't know."

Mefferd offered a copy of his written response to the Rose complaint dated August 22, 1997. Mefferd requested that the record be left open for 10 days after the hearing to submit additional evidence. Mefferd's request was granted, but Mefferd provided nothing beyond what was offered at the hearing.

REFEREE'S FINDINGS

Based on the record made before the Committee and the testimony before the referee, the referee found by clear and convincing evidence that Mefferd had violated Canon 1, DR 1-102(A)(1); Canon 2, DR 2-106; and Canon 9, DR 9-102(B)(4), in that Mefferd failed to properly account for and promptly refund the $750 overpayment to the Aldermans; DR 1-102(A)(1) and Canon 6, DR 6-101(A)(3), in that Mefferd failed to file a brief in the Rose appeal without Rose's knowledge or permission; and DR 1-102(A)(1), (5), and (6), in that Mefferd failed to respond in a timely manner to the Counsel for Discipline regarding both complaints. From the evidence presented, the referee did not find any mitigating circumstances regarding these violations. The referee recommended that Mefferd be reprimanded for his actions.

SCOPE OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record, in which this court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. The charges against an attorney must be established by clear and convincing evidence. *State ex rel. NSBA v. McArthur*, 257 Neb. 618, 599 N.W.2d 592 (1999).

[2] When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, this court may, at its discretion, adopt the findings of the referee as final and conclusive. *State ex rel. NSBA v. Denton, ante* p. 600, 604 N.W.2d 832 (2000); Neb. Ct. R. of Discipline 10(L) (rev. 1996).

ASSIGNMENT OF ERROR

The relator assigned as error the referee's recommended sanction of reprimand, arguing that the gravity of Mefferd's violations requires a more severe sanction.

ANALYSIS

The only exception filed in this case relates to the recommended sanction. No exceptions were filed regarding the ref-

eree's factual findings. Under rule 10(L), we accept the findings of the referee as final and conclusive. See *Denton, supra*. Thus, the only issue left to consider is the appropriate sanction in this case.

[3] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following facts: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *McArthur, supra*. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case. *Id.*

Regarding Mefferd's failure to remit the $750 to the Aldermans, Mefferd argues that because he ultimately refunded the money to the Aldermans, reprimand is an appropriate sanction.

[4] Mefferd misunderstands the nature of his offense. Retaining $750 that belongs to a client is a misappropriation of the client's funds. Mefferd seems to think that because he repaid the funds in 1998, this justifies his behavior. However, "a lawyer's restitution of a client's funds after being faced with legal accountability does not exonerate professional misconduct." *State ex rel. NSBA v. Statmore*, 218 Neb. 138, 143, 352 N.W.2d 875, 878 (1984).

[5] As an attorney, Mefferd bears the responsibility to accurately account for his client's funds. See *Statmore, supra*. Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is typically disbarment. *State ex rel. NSBA v. Malcom*, 252 Neb. 263, 561 N.W.2d 237 (1997); *State ex rel. NSBA v. Gridley*, 249 Neb. 804, 545 N.W.2d 737 (1996).

In *Statmore*, a case also involving an overpayment, there was a dispute as to whether the $500 fee had been paid because of the client's insufficient fund check, which later cleared. Because of poor bookkeeping, the attorney did not realize that the insufficient fund check had actually cleared. When the client filed a complaint, the attorney properly responded to the Counsel for

Discipline and the overpayment was refunded within a few months. In contrast, Mefferd consistently failed to respond to the Counsel for Discipline and did not refund the overpayment for over 1½ years.

[6] Mefferd's attitude regarding the overpayment is reflected in his reasons for not refunding the $750 prior to the Committee hearing. Mefferd stated at the hearing that he "wanted to wait and see what happened." Mefferd chose to do nothing about the overpayment until he was actually before the Committee on Inquiry. For purposes of determining the proper discipline in a disciplinary proceeding, we consider an attorney's acts both underlying the offenses and throughout the disciplinary proceeding. *State ex rel. NSBA v. Johnson*, 256 Neb. 495, 590 N.W.2d 849 (1999).

[7] We next consider Mefferd's failure to file a brief in the Rose matter, which caused Rose's appeal to be dismissed. Mefferd's explanation for failing to file a brief was that Rose "never told him what he wanted to do." However, Mefferd also admitted that Rose never directed him to abandon the appeal and that Mefferd never told Rose directly that Mefferd was not filing a brief. Essentially, Mefferd's explanation is that Rose's behavior left Mefferd unable to file a brief. However, as we noted in *State ex rel. NSBA v. McArthur*, 257 Neb. 618, 599 N.W.2d 592 (1999), a lawyer is responsible for adequately representing his or her client regardless of that client's behavior, and if that proves impossible, then the lawyer should withdraw from representation of that client.

In the present case, if Rose's behavior left Mefferd unable to adequately represent Rose on his appeal, the proper course for Mefferd was to withdraw from the representation. By letting the time period to file the brief elapse without taking any further action, Mefferd neglected a legal matter entrusted to him.

We now turn to Mefferd's conduct in twice failing to respond to the Counsel for Discipline. Mefferd first received notice of the Alderman complaint on August 12, 1996. Mefferd chose to do nothing. Thereafter, Counsel for Discipline repeatedly contacted Mefferd, informing him that it had not received a response to the Alderman complaint. Finally, on January 30, 1997, almost 6 months later, Counsel for Discipline received Mefferd's reply.

In *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989), we considered a situation in which counsel failed to file two responses with the Counsel for Discipline, then after proceedings commenced, produced documents purporting to be the missing responses with a typed date of several months earlier. As we discussed in *Kirshen*, such documents do nothing to address the fact that the attorney failed to file a timely response with the Counsel for Discipline. Additionally, Mefferd failed to respond to Counsel for Discipline's requests for further information regarding the Alderman complaint on at least three occasions.

[8] Mefferd's pattern of conduct continued with the Rose complaint. We note that cumulative acts of attorney misconduct are distinguishable from isolated incidents of neglect, therefore justifying more serious sanctions. *Johnson, supra*. Mefferd received official notice of the Rose complaint on July 1, 1997. No response was received by the Counsel for Discipline until 8 months later. Counsel for Discipline attempted numerous times to contact Mefferd about his failure to respond. Mefferd received a letter from the Counsel for Discipline dated September 2, 1997, which stated that no response to the Rose complaint had been received. Mefferd admitted that he took no action in response to this letter.

[9] Mefferd asserts that since his responses to the complaints did arrive eventually, there was no harm done by their tardiness. Mefferd fails to recognize that responding to disciplinary complaints in an untimely manner and ignoring requests for information from the Counsel for Discipline make it impossible for the Counsel for Discipline to effectively do its work. As we noted in *Kirshen*, such behavior indicates a "disrespect for our disciplinary jurisdiction and [a] lack of concern for the protection of the public, the profession, and the administration of justice." 232 Neb. at 473, 441 N.W.2d at 178. The disciplinary process as a whole must function effectively in order for the public to have confidence in the integrity of the profession and to be protected from unscrupulous acts.

[10] In considering the appropriate sanction for Mefferd's actions, we note that the propriety of a sanction must be considered with reference to the sanctions we have imposed in prior

cases presenting similar circumstances. *State ex rel. NSBA v. McArthur*, 257 Neb. 618, 599 N.W.2d 592 (1999). Therefore, we look in part to *Kirshen,* where the attorney failed to timely respond to two disciplinary complaints. In *Kirshen*, we entered a judgment of disbarment. However, we note that there were additional factors in *Kirshen* regarding the mishandling of an estate which are not present here. We also look in part to *State ex rel. NSBA v. Statmore*, 218 Neb. 138, 352 N.W.2d 875 (1984), where the attorney was suspended for 6 months for retaining a $500 overpayment. However, in *Statmore*, the attorney timely responded to the Counsel for Discipline. *Kirshen* and *Statmore*, taken together, provide similar circumstances from which we may determine the appropriate sanction for Mefferd.

CONCLUSION

In light of the particular facts of this case and with no mitigating circumstances presented, we find that Mefferd should be suspended from the practice of law for a period of 1 year, effective immediately.

JUDGMENT OF SUSPENSION.

MILLER-LERMAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. CHRISTOPHER D. ANDERSON, APPELLANT.

605 N.W.2d 124

Filed January 21, 2000. No. S-99-259.

1. **Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to inferences drawn from those facts by the trial judge.
2. **Investigative Stops: Motor Vehicles: Probable Cause.** It is well established that a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
3. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** A reasonable investigation of a traffic stop may include asking for a driver's license and registration, requesting a driver to sit in the patrol car, and asking the driver about his or her destination and purpose. A law enforcement officer may also run a computer check to

establish whether the vehicle has been stolen and to ascertain whether there are outstanding arrest warrants for the occupants of the car.

4. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** If there is no detention or seizure within the meaning of the Fourth Amendment to the U.S. Constitution, then the Fourth Amendment safeguard against an unreasonable seizure is not implicated in an encounter between a private citizen and a police officer.
5. **Constitutional Law: Search and Seizure.** A seizure in the Fourth Amendment context occurs only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.
6. **Search and Seizure.** It is axiomatic that without a seizure, reasonable suspicion is not required.
7. **Police Officers and Sheriffs: Search and Seizure.** A seizure does not occur simply because a law enforcement officer approaches an individual and asks a few questions or requests permission to search an area, even if the officer has no reason to suspect the individual is involved in criminal activity, provided the officer does not indicate that compliance with his or her request is required.
8. ___: ___. Circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of a citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.
9. **Police Officers and Sheriffs: Investigative Stops: Probable Cause.** An officer must have a reasonable, articulable suspicion that a person is involved in criminal activity unrelated to the traffic violation before the officer may expand the scope of the traffic stop and continue to detain the person for additional investigation.
10. **Constitutional Law: Criminal Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** Police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the Fourth Amendment.
11. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause.
12. **Police Officers and Sheriffs: Investigative Stops: Probable Cause.** Whether a police officer has a reasonable suspicion based on sufficient articulable facts requires taking into account the totality of the circumstances.
13. **Criminal Law: Evidence: New Trial: Appeal and Error.** Upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial.
14. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.
15. **New Trial: Evidence: Appeal and Error.** When considering the sufficiency of the evidence in determining whether to remand for a new trial or to dismiss, an appellate court must consider all the evidence presented by the State and admitted by the trial court irrespective of the correctness of that admission.

Appeal from the District Court for Hamilton County: WILLIAM H. NORTON, District Judge, Retired, and MICHAEL OWENS, Judge. Reversed, sentence vacated, and cause remanded for a new trial.

Michael J. Hansen, of Berry, Kelley & Hansen, for appellant.

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

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

MCCORMACK, J.

NATURE OF CASE

Appellant Christopher D. Anderson was convicted of possession of a controlled substance, i.e., marijuana, with intent to distribute, pursuant to Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1995). Prior to trial, Anderson filed a motion to suppress the marijuana seized from his vehicle at the time of his arrest, alleging his rights were violated because he was unreasonably detained. The district court for Hamilton County, Nebraska, overruled Anderson's motion to suppress, from which he now appeals. On our own motion, we removed the matter to this court under our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. We reverse the judgment and remand the cause for a new trial.

BACKGROUND

On August 27, 1997, Anderson was driving a white Dodge Intrepid eastbound on Interstate 80, near the Giltner interchange in Hamilton County, Nebraska. Anderson was stopped by Trooper Christopher M. Kolb of the Nebraska State Patrol and issued a violation card for failing to display a front and rear license plate on the vehicle he was driving. Anderson was then asked if he had any drugs or guns in the vehicle, and he responded that he did not. Kolb then asked Anderson for consent to search the vehicle, and Anderson refused. Anderson was then detained, and his vehicle was reviewed by a canine unit of the State Patrol. Upon the canine's alerting to the presence of drugs, Anderson's vehicle was searched and 229½ pounds of marijuana were found in the trunk. Anderson was arrested.

Anderson was charged with possession of a controlled substance, i.e., marijuana, with intent to deliver, pursuant to § 28-416(1)(a), and possession of marijuana without a tax stamp, pursuant to Neb. Rev. Stat. § 77-4309 (Reissue 1996). Prior to trial, Anderson filed a motion seeking to suppress at the trial any and all items of evidence seized from his person and from his vehicle at the time of his arrest. Anderson's motion to suppress alleged that the stop, detention, seizure, and search of his vehicle, and the subsequent arrest of Anderson violated his right to be free from unreasonable searches and seizures as guaranteed to him by the 4th and 14th Amendments to the U.S. Constitution and by article I, § 7, of the Nebraska Constitution.

On June 11, 1998, a suppression hearing was held. The State first called Kolb. Kolb testified that he is employed as a sergeant assigned to road operations with the State Patrol, has been employed with the State Patrol for over 15 years, and has been a sergeant since November 1992. On the date Anderson was stopped, Kolb was working traffic patrol on Interstate 80.

Kolb testified that just before stopping Anderson, Kolb's vehicle was east of the Giltner interchange on Interstate 80, sitting on the median as Kolb observed traffic. Kolb saw a white car traveling eastbound on the Interstate and noticed that the car did not have a front license plate. When the car went by Kolb's location, Kolb thought he saw an Ohio license plate on the rear of the car. Kolb pulled into traffic and proceeded east on the Interstate to catch up with the car and confirm that the car had an Ohio license plate. Once Kolb confirmed that the car did have an Ohio license plate, he stopped the car for failing to display two license plates. Kolb testified he was familiar with the fact that Ohio requires two license plates to be displayed, one on the front and one on the rear of the car.

Once the car pulled over, Kolb contacted the driver, who was Anderson, and asked him for his driver's license and vehicle registration. Kolb testified that he initially noted that he could see Anderson's carotid artery pulse beating through the skin of his neck. Kolb testified that he could not recall ever before seeing someone's pulse beating in their neck to the degree Anderson's was. In response to Kolb's request for Anderson's driver's license and registration, Anderson first produced a

driver's license from Ohio. As Anderson searched for the vehicle registration, Kolb testified that Anderson's hands were visibly shaking and that initially an insurance card was produced by Anderson and handed to Kolb. Kolb testified that he had seen Anderson thumb past the registration initially while Anderson was looking through several papers. Kolb gave the insurance card back to Anderson and again requested the vehicle registration. Anderson went through the papers that he had in his hands again. Anderson again passed over the registration while looking through the papers. Kolb testified that Anderson's hands were still visibly shaking and that eventually Kolb pointed out the registration to Anderson.

Kolb noted that both the license and registration had the name "Christopher Anderson" on them, and Kolb then began to tell Anderson why he had been stopped. During this conversation, Kolb asked Anderson where he was coming from. Kolb testified that Anderson hesitated for several seconds and then said that he had stayed all night in North Platte. Kolb then asked Anderson where he had initiated his trip, not where he had stayed the night before. Anderson responded that he had initiated his trip in Albuquerque, New Mexico. Anderson went on to indicate that he had visited a sister there and had stayed about 2 days. Kolb testified that based on his experience, he found it odd that Anderson hesitated before answering the initial question and found it unusual that Anderson answered the initial question with where he had spent the previous night rather than from where his trip had initiated.

Kolb testified that he next told Anderson to remain seated in his car. Kolb then went back to his patrol car and filled out a violation card and also ran a driver's license status check and a criminal history check. Kolb testified that these were normal activities performed during a traffic stop. The check revealed that the driver's license was valid and that Anderson had no criminal history. Kolb then returned to Anderson's vehicle, gave Anderson back his driver's license and registration, and explained the violation card to him and had him sign it.

Kolb testified that when he returned to Anderson's car, he could still see the pulsing in Anderson's neck. He also observed Anderson's hands continue to shake, and Anderson continued to

be nervous, even after it was explained to him that he was being given only a violation card. A violation card carries no penalty, but requires the driver of the vehicle to correct the defect that the trooper has marked on the card. Kolb testified that in his experience, normally when a driver receives a violation card instead of a citation, it usually has a "calming effect" on the driver once the driver understands it is not a citation.

After Anderson signed the violation card, Kolb gave him a copy and told Anderson that he was not under arrest or in custody. Kolb then asked Anderson if he was carrying any illegal drugs or guns, specifically naming off marijuana, cocaine, and methamphetamine. Anderson indicated "no" to each drug that was named by Kolb. Kolb testified that at this point, Anderson would not look at him and stared straight ahead, not making eye contact with Kolb. Before Kolb had mentioned narcotics, Anderson had maintained eye contact with Kolb.

Kolb testified that he next asked Anderson for permission to search his person, his vehicle, and the vehicle's contents. Anderson initially asked whether the search would be limited to the backseat area of the car, and Kolb clarified that he was asking permission to search Anderson's person, as well as the entire vehicle and its contents. Anderson then refused to consent to a search of his vehicle. Kolb testified that during this exchange, Anderson exhibited the same nervous tendencies that Kolb had initially observed.

Kolb informed Anderson that based upon his observations and the conversation the two had had, Kolb was going to call a canine unit to walk around the exterior of Anderson's vehicle. Kolb also told Anderson to remain in his car while Kolb called the canine unit. Anderson remained in his vehicle while waiting for the canine unit to arrive. Trooper Greg Goltz arrived at the location with the narcotics canine within a few minutes of being called. Just before Goltz arrived, Trooper George Scott also arrived at the location.

Goltz also testified at the suppression hearing on behalf of the State. Goltz testified that when he arrived at the location where Kolb had stopped Anderson, he first spoke with Kolb about the situation. Goltz then asked Anderson, who was still seated in his

vehicle, to roll up the windows and step out of the vehicle. Goltz testified that he walked the canine around Anderson's vehicle, starting at the front of the vehicle and proceeding around to the driver's side. When Goltz and the canine reached the driver's side back door, the canine started to alert to the odor of a controlled substance, and when the canine got to the trunk of the vehicle, the canine aggressively alerted. Goltz then asked Anderson if he was responsible for everything in the vehicle, and Anderson responded that he was. Goltz then obtained the key to the trunk from Anderson and opened it, finding four duffelbags containing large cellophane-wrapped bundles of marijuana. Goltz testified that Anderson was then placed under arrest.

The trial court overruled Anderson's motion to suppress, finding that in consideration of all the circumstances that had occurred, Kolb had a reasonable and articulable suspicion that Anderson was engaged in criminal behavior.

Anderson waived a jury trial, and the case was tried as a stipulated bench trial that preserved Anderson's objections to the seized evidence for purposes of appeal. Anderson was convicted of possession of a controlled substance with intent to distribute. The other charge, possession of marijuana without a tax stamp, was dismissed by the State. Anderson was subsequently sentenced to a term of imprisonment of not less than 18 months nor more than 3 years. Anderson timely appealed.

STANDARD OF REVIEW

[1] When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to inferences drawn from those facts by the trial judge. *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996).

ASSIGNMENT OF ERROR

Anderson assigns that the trial court erred when it overruled his motion to suppress, finding that his detention was based on a reasonable suspicion of criminal activity.

ANALYSIS

[2] Anderson does not challenge the validity of the initial traffic stop. "It is well established that a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle." *State v. Bartholomew, ante* p. 174, 179, 602 N.W.2d 510, 514 (1999). Accord, *U.S. v. Beck*, 140 F.3d 1129 (8th Cir. 1998); *U.S. v. Barry*, 98 F.3d 373 (8th Cir. 1996), *cert. denied* 519 U.S. 1140, 117 S. Ct. 1014, 136 L. Ed. 2d 891 (1997); and *U.S. v. Barahona*, 990 F.2d 412 (8th Cir. 1993). Kolb's observation of Anderson's vehicle having only one Ohio license plate, rather than two, provided probable cause for Kolb to stop Anderson's vehicle. There is no dispute that the initial stop of Anderson's vehicle was lawful.

Anderson argues that the troopers were not justified in continuing to detain him after the initial traffic stop was complete. Anderson alleges that detaining him after he had received the violation card and had refused to consent to a search of his vehicle constituted an unreasonable detention because Kolb did not have reasonable suspicion that Anderson was engaged in criminal activity.

[3] When Kolb stopped Anderson, he was entitled to conduct an investigation " 'reasonably related in scope to the circumstances that justified the interference in the first place.' " *U.S. v. Bloomfield*, 40 F.3d 910, 915 (8th Cir. 1994) (quoting *U.S. v. Cummins*, 920 F.2d 498 (8th Cir. 1990)). A reasonable investigation of a traffic stop may include asking for a driver's license and registration, requesting a driver to sit in the patrol car, and asking the driver about his or her destination and purpose. *U.S. v. White*, 81 F.3d 775 (8th Cir. 1996); *U.S. v. Ramos*, 42 F.3d 1160 (8th Cir. 1994); *U.S. v. Bloomfield, supra.* A law enforcement officer may also run a computer check to establish whether the vehicle has been stolen and to ascertain whether there are outstanding arrest warrants for the occupants of the car. *U.S. v. White, supra.* See, also, *State v. Holman*, 221 Neb. 730, 380 N.W.2d 304 (1986).

After Kolb stopped Anderson, he asked Anderson for his driver's license and vehicle registration and also asked where Anderson was coming from. He also conducted a check on Anderson's driver's license as well as a criminal history check.

After running the checks, Kolb gave Anderson his driver's license and registration back and gave him the violation card. These actions were reasonable for a traffic stop. At this point, the purpose of the initial traffic stop was complete. There was no unreasonable detention prior to Kolb's issuance of the violation card to Anderson.

The reasonable scope of the initial traffic stop ended when Anderson refused to consent to a search of his vehicle. Anderson contends that after this point in time, he was unreasonably detained.

We must initially determine whether detaining Anderson after the completion of a valid stop for a traffic violation, in order to await a drug dog sniff of his vehicle, constitutes a seizure under the Fourth Amendment. If such actions do give rise to a seizure within the Fourth Amendment, we must also determine whether Kolb possessed a reasonable suspicion to further detain Anderson after the completion of the traffic stop.

[4-6] If there is no detention or seizure within the meaning of the Fourth Amendment to the U.S. Constitution, then the Fourth Amendment safeguard against an unreasonable seizure is not implicated in an encounter between a private citizen and a police officer. *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997); *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991). A seizure in the Fourth Amendment context occurs " 'only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' " *State v. Twohig*, 238 Neb. at 102, 469 N.W.2d at 351 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 108 S. Ct. 1975, 100 L. Ed. 2d 565 (1988)). It is axiomatic that without a seizure, reasonable suspicion is not required. *State v. Soukharith, supra.*

[7,8] A seizure does not occur simply because a law enforcement officer approaches an individual and asks a few questions or requests permission to search an area, even if the officer has no reason to suspect the individual is involved in criminal activity, provided the officer does not indicate that compliance with his or her request is required. *U.S. v. Beck*, 140 F.3d 1129 (8th Cir. 1998); *U.S. v. White, supra.* Circumstances indicative of a seizure may include " 'the threatening presence of several officers, the display of a weapon by an officer, some physical touch-

ing of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.' " *U.S. v. Galvan-Muro*, 141 F.3d 904, 906 (8th Cir. 1998) (quoting *U.S. v. White*, 81 F.3d 775 (8th Cir. 1996), and *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980), *rehearing denied* 448 U.S. 908, 100 S. Ct. 3051, 65 L. Ed. 2d 1138)).

Once Kolb gave Anderson the violation card and returned Anderson's driver's license and registration, Anderson had everything in his possession that he needed to continue his trip. The question becomes whether a reasonable person who is initially stopped for a traffic violation and is then asked by a State Patrol trooper for consent to search his or her vehicle and refuses to consent to the search would have felt free to leave. We do not believe that a reasonable person in Anderson's situation would have felt free to leave.

In addition, Kolb admitted at the suppression hearing that Anderson was not free to leave. The following exchange occurred at the suppression hearing between Anderson's counsel and Kolb:

> Q Was it then — I'm going to go back to the traffic stop — then was it then [after Kolb had explained the violation ticket] that you told him that he wasn't under arrest or in custody?
>
> A Yeah, after I gave him the card and explained it to him, then I told him that he wasn't under arrest or in custody.
>
> Q Was he free to leave at that point?
>
> A I would have asked him to remain, based upon my observations, but I had a conversation with him after that, after I told him that he wasn't under arrest or in custody. So he knew, you know, where he stood, that he wasn't under arrest or in custody.
>
> Q My question was, was he free to leave at that point?
>
> A I would have detained him at that point.
>
> Q So the answer is, no, he wasn't free to leave?
>
> THE COURT: Isn't that what you're saying, Sergeant?
>
> A Yeah, I would have detained him based upon what I knew at that point.
>
> THE COURT: Answer is no.

Therefore, Anderson was seized within the Fourth Amendment after the traffic stop was complete. The search that followed was permissible only if Kolb had a reasonable suspicion that Anderson was involved in criminal activity unrelated to the traffic violation.

[9-12] An officer must have a reasonable, articulable suspicion that a person is involved in criminal activity unrelated to the traffic violation before the officer may expand the scope of the traffic stop and continue to detain the person for additional investigation. *U.S. v. Carrate*, 122 F.3d 666 (8th Cir. 1997). Therefore, unless Kolb had a reasonable, articulable suspicion for believing that criminal activity was afoot, continued detention of Anderson became unreasonable after Kolb had finished processing Anderson's traffic violation. See *U.S. v. Beck*, 140 F.3d 1129 (8th Cir. 1998).

> " ' "[P]olice can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the fourth amendment." ' ". . . " ' "Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause.". . . ' "

(Citations omitted.) *State v. Soukharith*, 253 Neb. 310, 321, 570 N.W.2d 344, 354 (1997) (quoting *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996), and *State v. Childs*, 242 Neb. 426, 495 N.W.2d 475 (1993)). Whether a police officer has a reasonable suspicion based on sufficient articulable facts requires taking into account the totality of the circumstances. *State v. Soukharith, supra*; *State v. Ellington*, 242 Neb. 554, 495 N.W.2d 915 (1993).

In *U.S. v. Beck, supra*, an Arkansas police officer observed Beck in a green Buick with California license plates following another vehicle too closely. The officer pulled the vehicle over and asked Beck for his driver's license and rental car agreement. While talking to Beck, the officer noticed that Beck's hands were shaking and he was looking around. The officer also

observed fast-food trash on the front passenger floor and also noted that there was not any luggage in the vehicle's passenger compartment. Following a check of the driver's license and rental car agreement, both of which checked out, the officer gave Beck a verbal warning for following too closely and then told Beck he was free to go. The officer then asked Beck if he had any guns, drugs, or knives in his vehicle. Beck stared out the window and said no. The officer then asked if he could conduct a quick search. The officer indicated that at this point, Beck became more nervous and asked for the reason for the search. Beck refused the request to search. A K-9 officer was radioed, and when the officer and his drug dog arrived, the dog alerted at the rear door. Beck was then asked if he had anything illegal in the car, and he said yes and indicated a briefcase, a search of which revealed methamphetamines. The trial court denied Beck's motion to suppress. The U.S. Court of Appeals for the Eighth Circuit held that the fact that the Buick was coming from California, a purported " 'source state' " for drugs, *id.* at 1137, was an extremely weak factor to suspect criminal activity, given that out-of-state license plates are consistent with innocent behavior and not probative of reasonable suspicion. The court of appeals noted that innumerable other Americans travel to and from California for pleasure or lawful business. The court of appeals also held that mere presence of fast-food wrappers is entirely consistent with innocent travel such that in the absence of contradictory information, that factor cannot reasonably be said to give rise to suspicion of criminal activity. The court of appeals held that the lack of luggage in the passenger compartment fails to generate any suspicion of criminal activity because law enforcement agencies, as a crime prevention tip, advise not to leave luggage in view. The court of appeals also held that subjective assessment of nervousness cannot be deemed unusual for a motorist to exhibit when confronted by a law enforcement officer and concluded that the suspicion associated with Beck's nervous demeanor was, at best, minimal. The court of appeals noted that nervousness, as a basis for reasonable suspicion, must be treated with caution. The court of appeals also held that the fact that Beck, a truckdriver, would travel across the United States to obtain employment is not suspicious behavior.

In *U.S. v. Kirkpatrick*, 5 F. Supp. 2d 1045 (D. Neb. 1998), a Nebraska state trooper observed Kirkpatrick in a vehicle on Interstate 80 going 72 miles per hour in a 65-mile-per-hour zone. The trooper pulled the vehicle over and asked Kirkpatrick for his driver's license and rental car agreement. The rental car agreement showed that the vehicle had been rented in Las Vegas, Nevada, on November 9, 1997, and was due in Minneapolis on November 12. The trooper explained the reason for the stop, and then asked Kirkpatrick where he was coming from. Kirkpatrick replied that he was coming from Las Vegas and going to Minneapolis. Kirkpatrick explained that he had flown to Las Vegas to pick up his niece, as her mother did not want her to fly, and drove his niece from Las Vegas to Denver. A check of Kirkpatrick's license showed no problems. The trooper then asked if Kirkpatrick had any guns or drugs in the car, and Kirkpatrick said no. One of the trooper's suspicions was based on the fact that Kirkpatrick kept touching his nose. The trooper radioed for a drug dog and while waiting for the dog and his handler to arrive, he asked Kirkpatrick for permission to search the vehicle, which was refused. The opinion is silent as to whether when the dog arrived it alerted. The two troopers searched Kirkpatrick's vehicle and found a handgun, police scanner, and a duffelbag of $20 bills. The government contended the trooper involved in the initial stop had an "articulable suspicion" based on "'particularized facts.'" *Id.* at 1050. The U.S. District Court found:

> Even a cursory comparison of the facts of this case and the facts of *Beck* show that the facts of this case are even weaker than the facts found insufficient in *Beck*. The "source" and "destination" facts are too inclusive to raise an objective suspicion; that is, many perfectly law-abiding citizens drive from the Southwest to Minneapolis. The fact that the defendant was driving a rental car is also perfectly consistent with law-abiding activity. In fact, the name match between the driver's license and the rental car agreement and the match between the rental agreement (the place of rental and return) and the defendant's story dispels, rather than creates, suspicion. Still further, and contrary to the officer's suggestion, there was nothing odd

> about the defendant's explanation of his trip. Uncles very frequently help their nieces just like (as in *Beck*) some truck drivers from California rent cars to look for work in North Carolina. Also, the duration of the trip—four days—in relationship to the reason for the trip was not suspicious. Finally, the act of touching one's nose, and the like, hardly suggests criminal behavior.

Id. at 1050.

The Eighth Circuit Court of Appeals has summarized the standards used to consider whether reasonable suspicion exists as follows:

> "The standard of articulable justification required by the fourth amendment for an investigative, *Terry*-type seizure is whether the police officers were aware of 'particularized, objective facts which, taken together with rational inferences from those facts, reasonably warrant[ed] suspicion that a crime [was] being committed.' . . . In assessing whether the requisite degree of suspicion exists, we must determine whether the facts collectively establish reasonable suspicion, not whether each particular fact establishes reasonable suspicion. '[T]he totality of the circumstances—the whole picture—must be taken into account.' . . . We may consider any added meaning certain conduct might suggest to experienced officers trained in the arts of observation and crime detection and acquainted with operating modes of criminals. . . . It is not necessary that the behavior on which reasonable suspicion is grounded be susceptible only to an interpretation of guilt; . . . however, the officers must be acting on facts directly relating to the suspect or the suspect's conduct and not just on a 'hunch' or on circumstances which 'describe a very broad category of predominately innocent travelers.' "

(Citations omitted.) *U.S. v. Beck*, 140 F.3d 1129, 1136 (8th Cir. 1998).

In this case, prior to the request by Kolb to search the vehicle and the refusal by Anderson, Kolb noticed that Anderson's carotid artery was pulsing, his hands were visibly shaking, and he had difficulty locating his registration. Kolb found that Anderson's initial response to the question "[w]here are you

coming from?" was evasive. The only action of Anderson that was different after the request for a search and the refusal of such request was that Anderson no longer maintained eye contact with Kolb as he had prior to the request for a search.

Trembling hands, a pulsing carotid artery, difficulty locating a vehicle registration among documents in a glove box, and hesitancy to make eye contact are signs of nervousness which may be displayed by innocent travelers who are stopped and confronted by an officer. Standing alone, these observations did not afford Kolb a basis for believing that Anderson was involved in criminal activity. See, *U.S. v. Beck, supra*; *U.S. v. Kirkpatrick*, 5 F. Supp. 2d 1045 (D. Neb. 1998). Likewise, Anderson's hesitation before responding to Kolb's inquiry as to where he was coming from cannot be viewed as indicative of criminal behavior, in that the question is not specific as to whether Kolb was inquiring about the starting point of the trip or about the place from which Anderson had departed that day. Anderson's actions during the stop, as described by Kolb, did not afford a basis for a reasonable suspicion of criminal activity, but, rather, supported nothing more than a "hunch." The fact that the hunch proved to be correct does not legitimize the seizure and subsequent search. Based on the evidence in this record, we determine that Kolb did not have a reasonable suspicion of criminal activity to justify detaining Anderson after the traffic stop was complete and that Anderson's motion to suppress should therefore have been sustained.

[13,14] Upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial. In *Lockhart v. Nelson*, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988), the Court held that the Double Jeopardy Clause does not forbid a retrial so long as the sum of the evidence offered by a state and admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. See, also, *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999).

[15] Pursuant to *Lockhart v. Nelson, supra*, when considering the sufficiency of the evidence in determining whether to remand for a new trial or to dismiss, an appellate court must

consider all the evidence presented by the State and admitted by the trial court irrespective of the correctness of that admission. To the extent that *State v. Christner*, 251 Neb. 549, 557 N.W.2d 707 (1997); *State v. Emrich*, 251 Neb. 540, 557 N.W.2d 674 (1997); *State v. Janssen*, 7 Neb. App. 384, 584 N.W.2d 27 (1998); *State v. Mays*, 6 Neb. App. 855, 578 N.W.2d 453 (1998); *State v. Konfrst*, 4 Neb. App. 517, 546 N.W.2d 67 (1996), *reversed on other grounds* 251 Neb. 214, 556 N.W.2d 250; *State v. Jimenez*, 3 Neb. App. 421, 530 N.W.2d 257 (1995), *modified* 248 Neb. 255, 533 N.W.2d 913; *State v. Noll*, 3 Neb. App. 410, 527 N.W.2d 644 (1995); and *State v. Poppe*, No. A-96-402, 1997 WL 52896 (Neb. App. Feb. 4, 1997) (not designated for permanent publication), are inconsistent with this opinion, they are overruled.

In the present case, the evidence against Anderson was the marijuana found in Anderson's vehicle. Although we have concluded that the marijuana was erroneously admitted, we include such evidence in our determination of the sufficiency of the evidence. See *Lockhart v. Nelson, supra*. We conclude the marijuana was sufficient evidence to sustain Anderson's conviction for possession of a controlled substance with intent to distribute. Thus, Anderson is not entitled to dismissal of the charges against him. We reverse Anderson's conviction, vacate the sentence, and remand the cause for a new trial.

CONCLUSION

The officer who stopped Anderson for failing to display two Ohio license plates did not have reasonable suspicion to detain Anderson after the traffic stop was complete. Therefore, the continued detention and seizure of Anderson violated his rights under the 4th and 14th Amendments to the U.S. Constitution and article I, § 7, of the Nebraska Constitution. Anderson's motion to suppress should have been sustained.

REVERSED, SENTENCE VACATED, AND CAUSE REMANDED FOR A NEW TRIAL.

SHELLEY M. SNYDER, GUARDIAN AND NEXT FRIEND OF BRIANNA D. SNYDER, A CHILD UNDER 18 YEARS OF AGE, APPELLEE, CROSS-APPELLANT, AND CROSS-APPELLEE, V. CONTEMPORARY OBSTETRICS & GYNECOLOGY, P.C., AND DAVID H. WEIR, M.D., APPELLANTS AND CROSS-APPELLEES, LAWRENCE R. JONES, M.D., APPELLEE, CROSS-APPELLANT, AND CROSS-APPELLEE, AND JOHN H. SCHULTE, M.D., APPELLEE AND CROSS-APPELLEE.

605 N.W.2d 782

Filed January 28, 2000. No. S-98-483.

1. **Judgments: Verdicts.** On a motion for judgment non obstante verdicto, or notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.
2. ___: ___. In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
3. **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.
4. **Jury Instructions: Appeal and Error.** In reviewing a claim of prejudice from instructions given or refused, the instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error.
5. **Judgments: Directed Verdict: Appeal and Error.** On appeal from an order of a trial court dismissing an action at the close of the plaintiff's evidence, an appellate court must accept the plaintiff's evidence as true, together with reasonable conclusions deducible from that 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. **Judgments: Verdicts: Appeal and Error.** Neb. Rev. Stat. § 25-1315.02 (Reissue 1995) authorizes an appeal from the denial of a judgment notwithstanding the verdict after the jury has been discharged as the result of an inability to reach a verdict.
8. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.
9. **Malpractice: Physician and Patient: Proof: Proximate Cause.** In a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was the proximate cause of the plaintiff's alleged injuries. The plaintiff must prove each essential element of the claim asserted by a preponderance of the evidence.

10. **Negligence: Proximate Cause.** A defendant's negligence is not actionable unless it is a proximate cause of the plaintiff's injuries or is a cause that proximately contributed to them.
11. **Malpractice: Physician and Patient: Proof: Proximate Cause.** Proximate causation requires proof necessary to establish that the physician's deviation from the standard of care caused or contributed to the injury or damage to the plaintiff.
12. **Trial: Evidence: Proof.** The burden of proving a cause of action is not sustained by evidence from which a jury can arrive at its conclusions only by guess, speculation, conjecture, or choice of possibilities; there must be something more which would lead a reasoning mind to one conclusion rather than to another.
13. **Expert Witnesses.** Lack of certainty in an expert's opinion is a problem of relevance.
14. **Rules of Evidence: Appeal and Error.** Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. § 27-401 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion.
15. **Rules of Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
16. **Rules of Evidence: Proof.** For evidence to be relevant under Neb. Rev. Stat. § 27-401 (Reissue 1995), all that must be established is a rational, probative connection, however slight, between the offered evidence and a fact of consequence.
17. **Damages: Proof.** Generally, while damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural.
18. **Courts: Damages: Evidence.** It is the duty of the district court to refrain from submitting to the jury the issue of damages where the evidence is such that it cannot determine that issue without indulging in speculation and conjecture.
19. **Jury Instructions: Appeal and Error.** A jury instruction is not error if, taken as a whole, it correctly states the law, is not misleading, and adequately covers the issues.
20. **Jury Instructions.** The instructions contained in the second edition of the Nebraska Jury Instructions are designed to be used when they reflect the law, and the pleadings and the evidence call for such an instruction.
21. **Judgments: Verdicts.** Where the verdict is special, or where there has been a special finding on particular questions of fact, or where the court has ordered the case to be reserved, it shall order what judgment shall be entered.
22. **Juries: Verdicts: Words and Phrases.** A special verdict is that by which the jury finds the facts only. It must present the facts as established by the evidence, and not the evidence to prove them; and they must be so presented that nothing remains to the court but to draw from them conclusions of law.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

William M. Lamson, Jr., James W. Ambrose II, and William R. Settles, of Lamson, Dugan & Murray, for appellants

Contemporary Obstetrics & Gynecology, P.C., and David H. Weir.

Denzel R. Busick, of Luebs, Leininger, Smith, Busick, Johnson, Baack, Placzek & Steele, for appellee Shelley M. Snyder.

Fredric H. Kauffman and Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, for appellee Lawrence R. Jones.

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

MCCORMACK, J.

I. FACTUAL BACKGROUND

Shelley M. Snyder, mother of the plaintiff, Brianna D. Snyder, became pregnant with Brianna in 1992. Shelley's obstetrician was defendant David H. Weir, M.D., an employee of defendant Contemporary Obstetrics & Gynecology, P.C. (hereinafter referred to as "COG"). Defendants Lawrence R. Jones, M.D., and John H. Schulte, M.D., were also employees of COG.

Shelley was pregnant for the second time and had suffered from preeclampsia during her first pregnancy. Preeclampsia is a condition in pregnant women which is generally evidenced by elevated blood pressure, protein in the urine, and edema in the face, hands, and feet. Preeclampsia can harm the fetus by causing placental insufficiency and, if left untreated, can progress to eclampsia, which is characterized by coma and convulsive seizures in the pregnant woman.

On December 15, 1992, Shelley saw Weir for a regular office visit. Shelley was experiencing edema in her extremities and had an elevated protein level of 2+ in her urine. Weir ordered that a urine culture be performed to test for a bladder infection.

On December 16, 1992, Shelley went to her job at a local hospital. Shelley had the laboratory technicians at the hospital recheck her urine, and an elevated protein level of 3+ was found. Shelley called COG to check on the results of her tests from the previous day, but was told that the results were not yet available.

On December 17, 1992, a nurse at COG called Shelley and told her that the results of the urine culture had been lost and

that Shelley should have the test redone at a facility closer to her home. COG made an appointment for Shelley at a local clinic to have a urine culture performed. However, when Shelley arrived for the appointment, she was told that the clinic was not equipped to perform a urine culture. Shelley told clinic personnel to call COG and inform them that the test could not be performed.

While at the clinic, Shelley was told that Jones wanted the urinalysis results from the hospital on the previous day faxed to him at COG. Shelley was also told that she should have a urine culture done at the hospital, and she had the culture performed at the hospital on December 17, 1992. On December 19, she was informed that the culture was, at that point, negative.

Shelley awoke on the morning of December 21, 1992, with a severe headache. At about 4 a.m., she began vomiting, and her husband, Michael Snyder, telephoned Schulte, who was on call for COG. Schulte said that Shelley should take Tylenol, elevate her feet, and call Weir the following day. At about 6 a.m., Michael found that Shelley was breathing abnormally and that her tongue was extended and bloody; he was unable to wake her. Shelley was taken by ambulance to the hospital, where she suffered a seizure. An emergency cesarean section was performed to deliver a premature, 1⅓-pound baby girl, Brianna.

Brianna survived, but is severely disabled. Although Brianna may have at least average intelligence, she is visually impaired; has cerebral palsy; and is unable to walk, speak, or eat normally. Brianna requires constant care and may require constant care for the rest of her life.

II. PROCEDURAL BACKGROUND

Brianna's action against the defendants went to trial in 1997. At the close of Brianna's case, the trial court granted a directed verdict for Schulte, but overruled motions for directed verdict as to the other defendants. Brianna filed a timely motion for new trial to preserve the issue of Schulte's dismissal for appellate review. The defendants again moved for directed verdict at the close of the defense case, and the motions were overruled.

The case was submitted to the jury, but the jury was unable to reach a verdict. In the process of questioning the jurors on the deadlock, it was revealed that the jury agreed for Brianna on the

element of negligence, but was unable to agree on proximate cause. A mistrial was declared.

The defendants filed posttrial motions for judgment notwithstanding the verdict, pursuant to Neb. Rev. Stat. § 25-1315.02 (Reissue 1995). Brianna filed a motion for entry of a partial judgment pursuant to Neb. Rev. Stat. § 25-1314 (Reissue 1995), arguing that the jury's consensus regarding negligence was a "special verdict" on the issue of negligence entitling her to judgment thereon. These motions, and Brianna's motion for new trial, were overruled.

III. ASSIGNMENTS OF ERROR

Defendants-appellants Weir and COG assign, consolidated and restated, that the trial court erred in (1) admitting the causation testimony of Brianna's expert, Andrew Robertson, M.D.; (2) failing to direct a verdict for COG and Weir due to Brianna's failure to establish causation with the requisite degree of certainty; and (3) failing to direct a verdict for COG and Weir based on Brianna's failure to establish what damages were proximately caused by the defendants' alleged negligence.

Defendant-cross-appellant Jones assigns, consolidated and restated, that the trial court erred in (1) failing to direct a verdict for Jones and (2) giving instruction No. 14, relating to the allocation of damages where a preexisting condition is partially responsible for Brianna's injuries.

Plaintiff-cross-appellant Brianna assigns, consolidated and restated, that the trial court erred in (1) sustaining Schulte's motion for directed verdict and overruling Brianna's motion for new trial therefrom and (2) overruling Brianna's motion for judgment pursuant to § 25-1314.

IV. STANDARD OF REVIEW

[1,2] On a motion for judgment non obstante verdicto, or notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Hulett v. Ranch Bowl of Omaha*, 251 Neb. 189, 556 N.W.2d 23 (1996), *overruled on other grounds, Knoll v.*

Board of Regents, 258 Neb. 1, 601 N.W.2d 757 (1999); *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996). In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Id.*

[3] 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. *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998); *Mahoney v. Nebraska Methodist Hosp.*, 251 Neb. 841, 560 N.W.2d 451 (1997).

[4] In reviewing a claim of prejudice from instructions given or refused, the instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error. *Cobb v. Sure Crop Chem. Co.*, 255 Neb. 625, 587 N.W.2d 355 (1998).

[5] On appeal from an order of a trial court dismissing an action at the close of the plaintiff's evidence, an appellate court must accept the plaintiff's evidence as true, together with reasonable conclusions deducible from that evidence. *Alexander v. Warehouse*, 253 Neb. 153, 568 N.W.2d 892 (1997); *Cloonan v. Food-4-Less*, 247 Neb. 677, 529 N.W.2d 759 (1995).

[6] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *In re Estate of Myers*, 256 Neb. 817, 594 N.W.2d 563 (1999); *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999).

V. ANALYSIS

[7] We first note that although the jury in this case was not able to agree on a verdict, the defendants have properly appealed from a posttrial motion for judgment notwithstanding the verdict. Section 25-1315.02 authorizes an appeal from the denial of a judgment notwithstanding the verdict after the jury has been discharged as the result of an inability to reach a verdict. See, *Critchfield v. McNamara*, 248 Neb. 39, 532 N.W.2d 287 (1995); *Ditloff v. Otto*, 239 Neb. 377, 476 N.W.2d 675 (1991).

[8] We also note that although our disposition of this case requires that it be remanded for a new trial and that we need not reach all of the issues argued by the parties, we nonetheless consider those issues that are likely to recur on retrial. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. See, e.g., *Floyd v. Worobec*, 248 Neb. 605, 537 N.W.2d 512 (1995); *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991); *State v. Harney*, 237 Neb. 512, 466 N.W.2d 540 (1991); *Denesia v. St. Elizabeth Comm. Health Ctr.*, 235 Neb. 151, 454 N.W.2d 294 (1990).

1. Weir and COG's Appeal

Weir and COG's assignments of error relate to the sufficiency of testimony presented by Brianna's expert witness, Robertson. Specifically, Weir and COG argue that Robertson's testimony was not sufficiently definitive on the issue of causation. Regarding the degree to which Weir's alleged negligence caused Brianna's injuries, Robertson testified on direct examination in relevant part as follows:

> Q If we look at Dr. Weir's contact with the patient in the chart from December 15, 1992, until the child was born, do you have an opinion based upon a reasonable degree of medical certainty as to whether his failure to meet the appropriate standard of care as you've described it would have been a proximately contributing cause to the premature birth of Brianna Snyder? Do you have such an opinion?
>
> A Yes.
>
> . . . .
>
> Q What is your opinion?
>
> A My opinion is that since the diagnosis was not made, the appropriate treatment was not undertaken, so we don't know how much longer the pregnancy could have gone on. I think there's reasonable probability that had the diagnosis been made and treatment undertaken, that the pregnancy would have gone on longer and the two most critical things is how old it is and how big it is when its [sic] born. I don't know how long, but statistically somewhere in the range of two to six weeks.

Q And you can state that with a reasonable degree of medical probability?

A Yes.

. . . .

Q And do you have an opinion based upon a reasonable degree of medical probability as to approximately how much longer the pregnancy could have been extended if she had received proper treatment as of December 15, 1992?

. . . .

[A] Yes.

Q And what is your opinion?

. . . .

[A] The range could have been as little as two or three days and probably not over six weeks with the vast majority being between — somewhere between two and six weeks. Without the benefit of any therapy, I can't tell you exactly how long the pregnancy would have been.

. . . .

Q Do you have an opinion as to whether this child would have been born disabled if the pregnancy had been prolonged as long as six weeks?

. . . .

[A] I have an opinion, yes.

[Q] What is your opinion?

. . . .

[A] Well, given the gestational age that Brianna was delivered at which was 25 weeks, the outside probably would have gotten six weeks. I would have expected her to still have some disabilities because she would have been born at less than 32 weeks and that's — and certainly in 1992, that was kind of the cut off where you see problems with prematurity. I would expect those disabilities to be less but she may very well have had some disabilities.

. . . .

Q Do you have an opinion based upon a reasonable degree of medical probability as to whether the child would have been less disabled if the appropriate measures had been instituted on December 15, 1992; do you have such an opinion?

A Yes.

Q And what is that opinion?

A They would have been more likely to work because she was not as sick at that time and the likelihood of prolonging the pregnancy would have been greater. The sicker she is at the time you start your treatment, the less likely you are to gain that extra time that you need.

(a) Directed Verdict Motions

[9,10] In a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was the proximate cause of the plaintiff's alleged injuries. *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999). The plaintiff must prove each essential element of the claim asserted by a preponderance of the evidence. *Id.* A defendant's negligence is, therefore, not actionable unless it is a proximate cause of the plaintiff's injuries or is a cause that proximately contributed to them. *Id.*

[11,12] In other words, proximate causation requires proof necessary to establish that the physician's deviation from the standard of care caused or contributed to the injury or damage to the plaintiff. *Id.* The burden of proving a cause of action is not sustained by evidence from which a jury can arrive at its conclusions only by guess, speculation, conjecture, or choice of possibilities; there must be something more which would lead a reasoning mind to one conclusion rather than to another. *Id.*

Taken in the light most favorable to Brianna, Robertson's testimony supports a finding that Weir's negligence caused at least some of Brianna's injuries. Robertson's testimony, so construed, supports the conclusion that Weir was negligent in failing to diagnose and treat Shelley for preeclampsia; that because of this failure, Shelley's premature delivery of Brianna was sooner than would otherwise have occurred; and that consequently, Brianna's disabilities were greater than they otherwise would have been. In short, this evidence supports the conclusion that Weir's negligence contributed to the injuries suffered by Brianna. This conclusion would satisfy Brianna's burden of

proof. See *id.* Consequently, Weir and COG's assignment of error is without merit.

To the extent that there is uncertainty in Robertson's testimony, it relates not to causation, but, instead, to the degree to which Brianna's injuries were enhanced by the defendants' conduct. In other words, Robertson did not state, with any degree of specificity, exactly how much of Brianna's ultimate disability was directly caused by the defendants. This fact, however, relates not to causation, but to damages, and will be analyzed in the context of another assignment of error.

(b) Admissibility of Robertson's Testimony

The issue with respect to Robertson's testimony is whether his opinion regarding causation is sufficiently certain. This does not entail an analysis of the methods used by Robertson in reaching his conclusions; rather, it is simply a question of whether Robertson's conclusions regarding causation were definitive enough to be relevant evidence on that point. Consequently, this question does not implicate the issues raised in *Phillips v. Industrial Machine*, 257 Neb. 256, 597 N.W.2d 377 (1999) (Gerrard, J., concurring).

[13,14] Lack of certainty in an expert's opinion is a problem of relevance. *Menkens v. Finley*, 251 Neb. 84, 555 N.W.2d 47 (1996). Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. § 27-401 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion. See *Seeber v. Howlette*, 255 Neb. 561, 586 N.W.2d 445 (1998).

[15,16] Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. § 27-401. Thus, for evidence to be relevant under § 27-401, all that must be established is a rational, probative connection, however slight, between the offered evidence and a fact of consequence. *State v. McManus*, 257 Neb. 1, 594 N.W.2d 623 (1999). In the instant case, the issues were the standard of care, the defendants' deviation from that standard of care, and the relationship between that deviation and Brianna's injuries. See *Doe v. Zedek*, 255

Neb. 963, 587 N.W.2d 885 (1999). As Robertson's testimony was rationally and probatively connected to those issues, as noted above, we cannot conclude that the trial court abused its discretion in allowing the testimony. Weir and COG's assignment of error is without merit.

(c) Proof of Damages

Weir and COG's assignment of error regarding Brianna's proof of damages presents the same issues that are raised by Jones' second assignment of error relating to allocation of damages. We will resolve both assignments of error in our analysis of Jones' cross-appeal.

2. JONES' CROSS-APPEAL

(a) Directed Verdict Motion

Jones' first assignment of error is that the trial court erred in not directing a verdict in his favor. First, Jones argues that Brianna failed to present evidence sufficient to show that Jones violated an existing standard of care. In that regard, the following testimony of Robertson was adduced without objection:

> Q Do you have any opinions based upon a reasonable degree of medical certainty as to whether Dr. Jones on December 17, 1992, fell below the appropriate standard of care in his care and treatment regarding Mrs. Snyder?
>
> A Yes.
>
> Q And what is your opinion, sir?
>
> A That he[,] once again very similar to Dr. Weir[,] now had a patient who had not just two plus protein but three plus protein in her urine, had no symptoms of urinary tract infection and felt like she had a bladder infection and had no other diagnosis at that time. I think that's inadequate.
>
> Q Could you ascertain from the chart or from Dr. Jones' deposition whether he actually looked at Mrs. Snyder's chart when he was consulted on December 17, 1992?
>
> A I can't tell that he did.
>
> Q If all that occurred on that date was that he was given the three plus protein result and the prior two plus protein result in the urine do you have an opinion based upon a reasonable degree of medical certainty as to whether his

ordering another urinalysis, doing only that on that date would have met the appropriate standard of care? Do you have an opinion?

A Yes.

Q What is your opinion?

A I think it was inadequate, insufficient. It did not meet the standard.

This testimony, taken in the light most favorable to Brianna, is sufficient to establish that Jones' treatment of Shelley failed to meet the appropriate standard of medical care.

Second, Jones claims that Brianna failed to establish causation with respect to his treatment of Shelley on December 17, 1992. In that regard, Robertson testified as follows:

Q . . . In regards to December 17, 1992, what measures — do you have an opinion based upon a reasonable degree of medical certainty as to what measures should have been instituted as of December 17, 1992?

A Yes.

Q And what is that opinion?

A The diagnosis of preeclampsia should have been made. An evaluation of Mrs. Snyder to how bad the preeclampsia should have been made [sic]. She should have been put — at that point with three plus protein should have been put at bed rest; probably in the hospital. And consideration for other therapy.

Q What other therapy?

A I think at that particular time with three plus protein, you have to consider the risk of her having a seizure is pretty high. Some type of antenatal therapy, magnesium sulfate or phenobarbital would have been instituted. And at that point she's that sick, that's when I would have given steroids.

Q Do you have an opinion then, Doctor, based upon a reasonable degree of medical certainty if that treatment had been rendered as of that date whether this pregnancy would have been prolonged?

A Yes.

Q And what is your opinion?

. . . .

[A] Once again given the fact that she now had three plus protein, she was sicker, I still think there was the potential to prolong the pregnancy but that potential was less.

. . . .

Q Do you have an opinion as to the amount of time that the pregnancy could have been prolonged as of that time if the proper therapy had been executed?

. . . .

Q I would ask do you have such an opinion based upon a reasonable degree of medical certainty?

. . . .

[A] Yes.

. . . .

Q What is the opinion?

. . . .

[A] I think you're going to get something less than six weeks. Once again, it's an opinion, it's — you're probably in the two-to-four week range when you get into that potent.

. . . .

Q Do you have an opinion as to based upon medical certainty if the proper therapy had been instituted on that date, the disabilities of the child would have been less?

A Yes.

Q And what is your opinion?

. . . .

[A] It's the same thing. The longer the pregnancy goes on, in most instances the less likely the baby is to have long-term problems when it's born. Now you have to take into account how the baby is, mom is doing and the therapy is going to work. She never had the benefit of therapy to know if it was going to work.

Robertson's testimony regarding Jones is effectively the same as his testimony regarding Weir, as analyzed above. Taken in the light most favorable to Brianna, this testimony establishes that Jones' failure to diagnose and treat Shelley's condition on December 17, 1992, proximately caused at least some of the injuries suffered by Brianna. Consequently, the trial court did not err in failing to direct a verdict for Jones.

(b) Allocation of Damages

Both Jones' second assignment of error and Weir and COG's third assignment of error deal with the ability of the jury, based upon the evidence presented, to allocate how much of Brianna's damages were caused by the defendants' alleged negligence. Weir and COG argue that a directed verdict should have been granted, and Jones argues that the trial court should not have given instruction No. 14, which dealt with the allocation of damages. We first turn to Weir and COG's assignment of error.

[17,18] Generally, while damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural. *Union Ins. Co. v. Land and Sky, Inc.*, 253 Neb. 184, 568 N.W.2d 908 (1997); *World Radio Labs. v. Coopers & Lybrand*, 251 Neb. 261, 557 N.W.2d 1 (1996). It is the duty of the district court to refrain from submitting to the jury the issue of damages where the evidence is such that it cannot determine that issue without indulging in speculation and conjecture. *Evergreen Farms v. First Nat. Bank & Trust*, 250 Neb. 860, 553 N.W.2d 728 (1996).

Weir and COG argue that Brianna's evidence on damages would allow only speculation and conjecture, such that the trial court should have directed a verdict instead of submitting the case to the jury. See *id.* We disagree.

In fact, Brianna presented a great deal of expert testimony establishing the medical expenses associated with Brianna's birth and pediatric care, the expenses associated with her continuing need for care, the expenses of her several corrective surgeries, and the projected expenses of her care for the remainder of her life. Additionally, the jury was presented with evidence of Brianna's lifestyle and daily activities, such that the jurors were able to discern some of the effects of Brianna's injuries. This evidence was certainly sufficient to allow the jury to determine the amount of damages warranted by Brianna's condition.

The complaint raised by Weir and COG, then, does not relate to speculation regarding the total amount of Brianna's damages. Instead, they are concerned with the jury's ability to establish to what degree those damages were caused by the negligence of the defendants. In other words, Weir and COG are not complaining about the sufficiency of the evidence of damages per se, but with

the lack of evidence supporting a reasoned allocation of damages. This is precisely the issue raised by Jones' assignment of error.

Jones claims that the trial court should not have given instruction No. 14, which provided:

> There is evidence that had Shelley Snyder's pregnancy continued to the optimum delivery date the plaintiff would still have been born with disabilities. The defendants are liable only for damages that you find to be proximately caused by their medical negligence. If you find that a defendant's medical negligence caused additional damages, injuries or disabilities, and you cannot separate these damages from the disabilities she nevertheless would have had, then the defendant is liable for all of the damages.

[19,20] A jury instruction is not error if, taken as a whole, it correctly states the law, is not misleading, and adequately covers the issues. *Dukat v. Leiserv, Inc.*, 255 Neb. 750, 587 N.W.2d 96 (1998). There is no question that the given instruction was a correct statement of the law, as we have, in several cases, approved functionally identical instructions. See, *Wasiak v. Omaha Pub. Power Dist.*, 253 Neb. 46, 568 N.W.2d 229 (1997); *Ketteler v. Daniel*, 251 Neb. 287, 556 N.W.2d 623 (1996); *Kirchner v. Wilson*, 251 Neb. 56, 554 N.W.2d 782 (1996); *David v. DeLeon*, 250 Neb. 109, 547 N.W.2d 726 (1996). Additionally, we note that the given instruction uses the language of NJI2d Civ. 4.09. The instructions contained in the second edition of the Nebraska Jury Instructions are designed to be used when they reflect the law, and the pleadings and the evidence call for such an instruction. See *Nguyen v. Rezac*, 256 Neb. 458, 590 N.W.2d 375 (1999).

The argument raised by Jones is that the instruction was not warranted by the evidence presented in the case. Jones initially argues that the instruction was not warranted because Brianna failed to establish causation. Our analysis of the motions for directed verdict, set forth above, disposes of this claim.

To the extent that Jones, Weir, and COG all claim that the evidence was insufficient to allow the jury to properly allocate damages, their claims are meritless. The evidence was sufficient to support a jury's finding that Brianna was injured and that at least some of those injuries were caused by the defendants' negligence. At that point, under the authority cited above, the bur-

den of producing evidence regarding the proper allocation of damages shifted to the defendants.

In *David v. DeLeon*, 250 Neb. at 116, 547 N.W.2d at 730, an automobile accident case, we said that

> without the admonition that the defendant is liable for all damages if the jury cannot apportion, the instruction would have failed to address the event in which a jury finds that damages were proximately caused by a collision, but is unable to determine precisely what quantum of those damages was not preexisting. This instruction prevents the result of a jury finding that damages were proximately caused by the tortious act, but failing to award damages because it cannot demarcate preexisting illnesses from new losses.

Similarly, in the instant case, a failure to give instruction No. 14 would have failed to address the event in which the jury found that Brianna's damages were caused by the defendants' failure to diagnose and treat preeclampsia, but were unable to determine what quantum of those damages was unavoidable due to the preexisting disease process. Instruction No. 14 would prevent the result of a jury's finding that damages were proximately caused by the defendants' negligence, but would fail to award damages because it cannot demarcate the unavoidable effects of preeclampsia from the effects caused by negligent medical care.

These principles were applied to a factual situation similar to that of the instant case in *Ehlinger v. Sipes*, 155 Wis. 2d 1, 454 N.W.2d 754 (1990). In that case, the defendant doctors failed to properly diagnose the mother's multiple pregnancy, and the mother gave birth prematurely to disabled twins. *Id.* The plaintiff parents alleged that this missed diagnosis was negligent, that it precluded the use of treatments that might have prolonged the pregnancy, and that prolonging the pregnancy might have prevented or reduced the injuries suffered by the twins. *Id.*

After trial, the circuit court granted the defendants' motion to dismiss on the basis that the plaintiffs failed to produce sufficient evidence from which the trier of fact could determine that the defendants' alleged negligence caused the twins' injuries. *Id.* The Supreme Court of Wisconsin reversed this determination, stating:

> We disagree that to establish causation the [plaintiffs] must show that proper diagnosis and treatment *would* have been

> successful. We conclude that in a case of this nature, where the causal relationship between the defendant's alleged negligence and the plaintiff's harm can only be inferred by surmising as to what the plaintiff's condition would have been had the defendant exercised ordinary care, to satisfy his or her burden of production on causation, the plaintiff need only show that the omitted treatment was intended to prevent the very type of harm which resulted, that the plaintiff would have submitted to the treatment, and that it is more probable than not the treatment *could* have lessened or avoided the plaintiff's injury had it been rendered. It then is for the trier of fact to determine whether the defendant's negligence was a substantial factor in causing the plaintiff's harm.

(Emphasis in original.) *Id.* at 13-14, 454 N.W.2d at 759.

The court concluded:

> In a case such as presented here, where given the natures of the malady and omitted treatment the success of the treatment if instituted is not a matter of reasonable certainty, we refuse to place upon an injured plaintiff the burden of proving what more probably than not *would* have happened had the defendant not been negligent.

(Emphasis in original.) *Id.* at 18, 454 N.W.2d at 761. See, also, *Colburn v. U.S.*, 45 F. Supp. 2d 787 (S.D. Cal. 1998); *Freeman v. Petroff*, 288 Ill. App. 3d 145, 680 N.E.2d 453, 223 Ill. Dec. 720 (1997), *appeal denied* 174 Ill. 2d 559, 686 N.E.2d 1160, 227 Ill. Dec. 4.

The defendants are incorrect in claiming that application of the above-cited authority would require the jury in the instant case to engage in speculation and conjecture. In fact, this is precisely what *David v. DeLeon*, 250 Neb. 109, 547 N.W.2d 726 (1996), and its progeny had intended to avoid. If Brianna's evidence is credited by the jury, as we are required to assume, then the jury need not speculate in order to determine that the defendants proximately caused at least some of the injuries sustained by her. Neither is the jury required to speculate in order to determine the degree to which those injuries are attributable to the defendants as, under *DeLeon*, all of those injuries are attributed to the defendants unless the defendants present evidence contradicting such an assumption. The uncertain interaction between

negligence and preexisting condition does not require speculation on the part of the jury, because *DeLeon* resolves uncertainty against the defendants.

Jones also claims that the instruction on Shelley's preexisting condition was incorrect because that instruction applies only to situations where the preexisting condition and the injury are suffered by the same person and that, in this case, Brianna is arguing that Shelley's preexisting condition exacerbated her injuries. Under the circumstances, we find this distinction to be unpersuasive.

The evidence established that preeclampsia is a condition present only in pregnant women that can profoundly harm both the pregnant woman and her fetus. It can result not only in a myriad of possible injuries to the pregnant woman, but in a reduced blood flow to, and consequent undernourishment of, the fetus. Given the nature of the disease process, we cannot agree that preeclampsia is a preexisting condition that is strictly confined to the pregnant woman. See *Scafidi v. Seiler*, 119 N.J. 93, 574 A.2d 398 (1990) (approving similar jury instruction in context of failure to treat condition that led to premature birth and death of infant).

The evidence presented at trial established that preeclampsia was a preexisting condition suffered by both Shelley and Brianna. Given that evidence, the trial court did not err in giving instruction No. 14. Jones' second assignment of error and Weir and COG's third assignment of error are without merit.

3. Brianna's Cross-Appeal

(a) Directed Verdict for Schulte

Brianna's first assignment of error is that the trial court erred in directing a verdict for Schulte at the close of her case. A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *McLaughlin v. Hellbusch*, 256 Neb. 615, 591 N.W.2d 569 (1999); *Cobb v. Sure Crop Chem. Co.*, 255 Neb. 625, 587 N.W.2d 355 (1998).

Brianna contends that the evidence was sufficient to support the conclusion that Schulte's negligence, during the telephone call on December 21, 1992, proximately caused some of her injuries. The testimony offered at trial, however, indicates otherwise. On direct examination, when Robertson was asked if, in

his opinion, Schulte had met Robertson's understanding of the standard of care, Robertson testified:

> [A] I think it's more likely than not, [the pregnancy] would not have prolonged for any length of time. I think the difference there is Mrs. Snyder might not have had to have undergone an emergency Cesarean and fetal distress because that was strictly related to her seizure activity. Had she been treated for seizures, the baby may not have to be delivered at that exact moment.
>
> . . . .
>
> Q Do you have an opinion based upon a reasonable degree of probability as to what length of time it could have been prolonged as of that time?
>
> . . . .
>
> Q What is your opinion?
>
> A I think it would have been — you'd be looking at best 24 to 48 hours to get steroid therapy in at that point.
>
> Q Do you have an opinion based upon a reasonable degree of probability as to whether the degree of disability of the child would have been lessened if the pregnancy had been prolonged as of that date?
>
> . . . .
>
> [A] Without knowing whether or not you could have gotten the time for the steroid, if you couldn't have gotten the time for steroid therapy, it would have been no different. If you've gotten time for steroid therapy, there's no question it would improve the outcome.

On cross-examination, Robertson was asked, "[A]ssuming that what the information you've been given is accurate . . . more likely than not that [December 21] phone conversation was irrelevant to the outcome of this delivery?" He conceded, "Yes."

On redirect examination, Robertson testified:

> Q . . . [D]o you have an opinion based upon a reasonable degree of medical probability as to whether the delay which occurred between 4:30 a.m. and the time of the actual delivery of the infant on the 21st of December, 1992, caused some injury to Brianna Snyder; do you have an opinion?
>
> A Yes.

> Q What's your opinion?
>
> . . . .
>
> [A] It's my opinion that Dr. Schulte had the least opportunity to make a difference in what happened in the sense that Mrs. Snyder had gotten real sick from no treatment and that given the timeframe, there's likelihood that she probably would have seized once before getting treatment. And with that, that's going to change it. Whether she would have had a second seizure or needed an emergency Cesarean section such that the baby needed to be delivered at that particular time, that's where I would have — I would say more likely than not. There are [sic] little time to be bought but certainly not any significant amount of time.
>
> . . . .
>
> Q Any time that could be bought, would that be beneficial to the infant?
>
> . . . .
>
> [A] Once again, I think if you look at the literature, the minimum time in '92 would have thought probably was 48 hours and 72 hours was the maximum. In reality it's probably about 12 hours. Whether there could have been 12 hours bought, that's difficult to say. I would think at best would be a toss up and it's more likely than not that it would not have been that length of time.

Even taken in the light most favorable to Brianna, this testimony is insufficient to establish to a reasonable degree of medical certainty that Schulte's conduct was the proximate cause of any of Brianna's injuries. In fact, even in the light most favorable to Brianna, this testimony from Brianna's expert witness appears to establish precisely the opposite.

The trial court did not err in directing a verdict in favor of Schulte, as Brianna presented no evidence that Schulte's negligence proximately caused any of her injuries.

(b) Judgment on Special Verdict

[21] Brianna claims that she was entitled to judgment on a special verdict pursuant to § 25-1314, which provides that "[w]here the verdict is special, or where there has been a special finding on particular questions of fact, or where the court has

ordered the case to be reserved, it shall order what judgment shall be entered."

Brianna claims that the jury returned a special verdict on the issue of negligence, as contained in the following colloquy, which occurred while the trial court was questioning the jury foreperson on the reported deadlock:

> THE COURT: The bailiff advises me that in your opinion that the jury is deadlocked and is not going to be able to come to a decision in this case?
>
> [Foreperson]: Right.
>
> THE COURT: Is it your opinion that if the Court requested that you continue to deliberate as a jury, that there would be no further movement and a decision would not be entered?
>
> [Foreperson]: My opinion, yeah.
>
> . . . .
>
> THE COURT: . . . I would like the record to reflect that the jurors have deliberated for in excess of two full days at this point. The Court's going to accept the opinions of the jurors and find that a mistrial in this matter shall be and should be and is declared at this time.
>
> . . . as far as the jury's deliberations are concerned, I assume that you never got past the issue of liability as to whether or not the doctors were liable in this matter; is that correct?
>
> [Foreperson]: Right.
>
> THE COURT: Can you tell me without — well, first of all, can you tell me, have you actually conducted a vote on that issue?
>
> [Foreperson]: Yes, we have.
>
> THE COURT: And what was the last result numbers wise?
>
> [Foreperson]: 8/4.
>
> THE COURT: And as far as the concept of finding the doctors negligent and that they caused the injuries, did you get a vote as to that as to whether or not — first of all, may I ask, did you take a vote as for whether or not they found that there was negligence on the part of the doctors?
>
> [Foreperson]: Yes, we did.
>
> THE COURT: And what was the result of that?
>
> [Foreperson]: It was 12.

> THE COURT: All of you agree?
>
> [Foreperson]: All of us agreed that there was negligence.
>
> THE COURT: As far as the negligence being the cause of the birth, did you have a vote on that?
>
> [Foreperson]: Yes, we did.
>
> THE COURT: Or the prematurity of the birth, and how did that come out?
>
> [Foreperson]: It was 8 to 4.
>
> . . . .
>
> THE COURT: Can you tell me which?
>
> [Foreperson]: It went — said that he wasn't — that it wasn't a proximate cause.
>
> THE COURT: And four believed?
>
> [Foreperson]: Four said it was the proximate cause.

Brianna contends that this colloquy was a "special verdict" within the meaning of § 25-1314, entitling her to judgment on the issue of negligence. It is evident, however, that this colloquy satisfies none of the statutory prerequisites for a special finding or verdict.

[22] A special verdict is that by which the jury finds the facts only. Neb. Rev. Stat. § 25-1122 (Reissue 1995). It must present the facts as established by the evidence, and not the evidence to prove them; and they must be so presented that nothing remains to the court but to draw from them conclusions of law. *Id.*

Neb. Rev. Stat. § 25-1121 (Reissue 1995) states:

> In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict, in writing, upon all or any of the issues and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered on the journal.

Neb. Rev. Stat. § 25-1123 (Reissue 1995) provides, in relevant part:

> The verdict shall be written, signed by the foreman, and read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, the jury must be sent out again; but if no disagreement be expressed, and

neither party requires the jury to be polled, the verdict is complete, and the jury discharged from the case.

In the instant case, no written verdict was ever issued, nor was any inquiry made of the jury as a whole regarding the validity of such a verdict, nor was such a verdict filed with the clerk and entered on the journal of the court. See §§ 25-1121 and 25-1123. The "verdict" of the jury foreperson obviously left issues of fact unresolved, such that the trial court was presented with questions beyond conclusions of law. See § 25-1122. Consequently, it is evident that the colloquy between the foreperson and the trial court was not a special verdict, and Brianna was not entitled to any judgment pursuant to § 25-1314. Brianna's assignment of error is without merit.

VI. CONCLUSION

Finding no merit in the appellants' or cross-appellants' assignments of error, the judgment of the trial court is in all respects affirmed.

AFFIRMED.

WRIGHT, J., not participating.

STEPHAN, J., concurring in part, and in part dissenting.

I concur with the majority's disposition of the issues raised by Brianna's cross-appeal. While I also agree with the majority that there was an issue of fact with respect to the negligence of Weir and Jones, it is my view that their motions for directed verdict should have been granted because there was insufficient evidence to establish a prima facie showing on the issues of proximate cause and damages. I therefore respectfully dissent from that portion of the majority opinion concluding otherwise.

After determining that the evidence as to proximate cause was sufficient to withstand the motions for directed verdict made on behalf of Weir, COG, and Jones, the majority reasons that there is a separate issue as to damages, namely, whether there was sufficient evidence upon which a jury could determine to what degree the alleged damages sustained by Brianna "were caused by the negligence of the defendants." To resolve this issue, the majority relies upon *Ehlinger v. Sipes*, 155 Wis. 2d 1, 454 N.W.2d 754 (1990), a case in which the plaintiffs alleged that the defendant physicians had negligently failed to diagnose

a multiple pregnancy and take appropriate measures to avoid injuries subsequently suffered by the Ehlingers' twins as a result of their premature birth. The critical issue in *Ehlinger* was causation, to which the court stated:

> We conclude that the evidence in this case was sufficient under current Wisconsin law to present the causation question to the trier of fact. To establish causation in Wisconsin, the plaintiff bears the burden of proving that the defendant's negligence was a substantial factor in causing the plaintiff's harm. . . . "The phrase 'substantial factor' denotes that the defendant's conduct has such an effect in producing the harm as to lead the trier of fact, as a reasonable person, to regard it as a cause, using that word in the popular sense."

(Citation omitted.) *Id.* at 12, 454 N.W.2d at 758. It was upon this framework that the Wisconsin Supreme Court fashioned the test upon which the majority in this case relies for determining the nature and sufficiency of evidence which the plaintiff was required to present in order to have the issue of causation submitted to the jury.

The problem with grafting the holding in *Ehlinger* into our law is that unlike Wisconsin, Nebraska generally utilizes a "but for" test for determining proximate cause in a personal injury case. We have held that there are three basic requirements that must be met to establish causation: (1) that "but for" the defendant's negligence, the injury would not have occurred; (2) that the injury is the natural and probable result of the negligence; and (3) that there is no efficient intervening cause. *Johnson v. School Dist. of Millard*, 253 Neb. 634, 573 N.W.2d 116 (1998); *World Radio Labs. v. Coopers & Lybrand*, 251 Neb. 261, 557 N.W.2d 1 (1996); *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995). As recently noted in *Reimer v. Surgical Servs. of the Great Plains, P.C., post* p. 671, 605 N.W.2d 777 (2000), we have utilized the "substantial factor" test for proximate cause primarily in cases where the acts of negligence of two or more persons combine to produce a single injury, although one of them alone could not have caused the result. See, e.g., *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 509 N.W.2d 603 (1994) (holding that substantial factor test could be

used in determining whether vehicle manufacturer's failure to design crashworthy vehicle was proximate cause of passenger's injuries notwithstanding evidence that driver was negligent); *Miles v. Box Butte County*, 241 Neb. 588, 489 N.W.2d 829 (1992) (holding that where record established that nurse's negligence was substantial factor in bringing about harm to patient notwithstanding evidence that treating physician was also negligent, evidence was sufficient to present question of fact as to whether nurse's actions were proximate cause of injury). Our use of the "substantial factor" test for establishing proximate cause is consistent with the fact that the rule " 'was developed primarily for cases in which application of the but-for rule would allow each defendant to escape responsibility because the conduct of one or more others would have been sufficient to produce the same result.' " *Reimer v. Surgical Servs. of the Great Plains, post* at 677, 605 N.W.2d at 781, quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 41 (5th ed. 1984).

In this case, it is alleged that Brianna sustained specific injuries and damages "[a]s a result of the undiagnosed toxemia, preeclampsia, and seizures which [Shelley] suffered, and the premature delivery of her baby." The jury was initially instructed that "[a] proximate cause is a cause that produces a result in a natural and continuous sequence, and without which the result would not have occurred." Supplemental jury instruction No. 1 given by the trial court further instructed the jury:

> Negligence is a proximate cause if the negligence occurs and produces in a natural and continuous sequence a result, and the result would not have occurred without the negligence. A proximate cause must be a cause from which the damage or injury sued for naturally flows and without which that damage or injury would not have been sustained. It need not, however, be the immediate cause: it is enough that the act complained of set in motion a series of events through which it produced the damage or injury.

Supplemental jury instruction No. 5 contained a further statement regarding proximate cause:

> Supplemental Jury Instruction No. 1 as well as the original jury instruction concerning proximate cause attempt to define proximate cause for the jury. As noted in the state-

> ment of the case, before a verdict can be entered in favor of the plaintiff a finding must be made by the jury that the negligence was a proximate cause of certain results.
>
> To be a proximate cause the negligence which occurs must produce a result. Stated another way the result would not have occurred but for the negligence. In that regard the negligence need not be the immediate cause of the result. The negligence must be part of a natural and continuous sequence of events and if the negligence was removed from that sequence of events the result would not have occurred.

Generally, an appellate court will dispose of a case on the theories which were presented to the trial court. *Schindler v. Walker*, 256 Neb. 767, 592 N.W.2d 912 (1999); *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996). It is clear that the case was pled and tried upon the "but for" causation test, and in my view, this court is obligated to determine whether a question of fact as to causation was presented under this test. Thus, with respect to the issue of proximate cause, the pertinent question is whether there is any evidence from which a jury could infer with reasonable medical certainty that Brianna sustained an identifiable injury compensable in damages which would not have occurred but for the negligence of Weir and Jones.

Expert testimony established that a term pregnancy is considered to be between 38 and 42 weeks' gestation. Brianna was born at a gestational age of between 25 to 26 weeks, which is considered "extreme prematurity." Following her birth, she was diagnosed as suffering from numerous medical conditions related to her level of prematurity, which included apnea, bradycardia, retinopathy, bronchopulmonary dysplasia, moderate cerebral palsy, and spastic diplegia. Robertson's testimony, viewed in a light most favorable to the plaintiff, establishes that but for the negligence of Weir and Jones, Brianna's birth could have been delayed for a period of 2 to 6 weeks. When asked his opinion as to whether Brianna would have been "born disabled if the pregnancy had been prolonged as long as six weeks," Robertson responded:

> Well, given the gestational age that Brianna was delivered at which was 25 weeks, the outside probably would have

> gotten six weeks. I would have expected her to still have some disabilities because she would have been born at less than 32 weeks and that's — and certainly in 1992, that was kind of the cut off of where you see problems with prematurity. I would expect those disabilities to be less but she may very well have had some disabilities.

Robertson also testified that Brianna would have been less disabled if the appropriate medical measures had been instituted on December 15, 1992.

The sequence of events leading to Brianna's injuries was placed in motion not by any act or omission by the physicians but by Shelley's preeclampsia which, according to Robertson, was going on "long before" she was seen by Weir on December 15, 1992. Robertson's testimony also establishes that Brianna would have been born prematurely with some disabilities in the absence of any negligence on the part of Weir or Jones. However, neither Robertson nor any other witness identified the nature of such disabilities compared to those actually sustained by Brianna, nor was there any testimony as to morbidity expectations for an infant born at 26 weeks' gestation compared to one born at 32 weeks' gestation, other than general statements that prolonging a pregnancy is advantageous unless there is an indication of fetal distress. In the absence of any evidence differentiating the injuries which Brianna actually sustained from those she would have sustained in the absence of medical negligence, I do not see how a finder of fact could ever identify any specific injury or damage caused by any negligence on the part of the physicians without engaging in speculation and conjecture.

In this regard, I disagree with the majority's application of *David v. DeLeon*, 250 Neb. 109, 547 N.W.2d 726 (1996), to the facts of this case. In *DeLeon*, a person with a preexisting arthritic condition suffered traumatic injuries in a motor vehicle accident. Following *McCall v. Weeks*, 183 Neb. 743, 164 N.W.2d 206 (1969), in which we adopted the theory of the "eggshell-skull" plaintiff whom the negligent defendant must take as he or she finds, we held that the plaintiff was not "required to provide a precise line between the damages directly related to the accident and any preexisting physical or mental condition . . . as a precondition for recovering any damages at all" and that where

there is evidence that damages were proximately caused by a negligent act, the burden of apportioning damages between the tortious injury and the preexisting condition fell upon the defendant. *David v. DeLeon*, 250 Neb. at 115, 547 N.W.2d at 730.

The present case does not involve the infliction of a new traumatic injury upon a preexisting physical condition, as in *DeLeon*, but, rather, the alleged failure of physicians to properly diagnose and treat a progressive prenatal disease process which ultimately led to Brianna's premature birth and associated injuries. The critical question is whether the injuries were caused by the disease itself or by the fact that it was not diagnosed and treated by Shelley's physicians. In my opinion, this must be determined under traditional professional liability concepts, including "but for" causation. Generally, the law does not impose liability upon a physician simply because of a patient's adverse medical outcome. Rather, the party seeking recovery bears the burden of proving, usually through expert testimony, that the physician departed from a generally recognized standard of care and that the deviation was the proximate cause of the injuries alleged. See, *McLaughlin v. Hellbusch*, 256 Neb. 615, 591 N.W.2d 569 (1999); *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999). That being so, it follows that a prima facie showing in a medical negligence action must include evidence distinguishing harm to a patient caused by medical negligence from that which would have occurred in the absence of such negligence in order to establish "but for" causation. In my opinion, the record does not contain sufficient evidence upon which a finder of fact could make this distinction.

I note that some jurisdictions, recognizing the inherent difficulty in proving what would have occurred in the absence of medical negligence, have departed from traditional causation rules to recognize recovery for "loss of a chance" of survival or a better medical outcome. See Robert S. Bruer, Note, *Loss of a Chance as a Cause of Action in Medical Malpractice Cases*, 59 Mo. L. Rev. 969 (1994). For example, some courts have utilized a "relaxed causation" approach by adopting the Restatement (Second) of Torts § 323 at 135 (1965), which provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as

> necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm . . . .

See, *Thompson v. Sun City Community Hosp., Inc.*, 141 Ariz. 597, 688 P.2d 605 (1984); *Herskovits v. Group Health*, 99 Wash. 2d 609, 664 P.2d 474 (1983); *Hamil v. Bashline*, 481 Pa. 256, 392 A.2d 1280 (1978). Other courts treat loss of a chance as a distinct compensable injury, a theory derived from Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 Yale L.J. 1353 (1981). See, e.g., *Perez v. Las Vegas Medical Center*, 107 Nev. 1, 805 P.2d 589 (1991); *DeBurkarte v. Louvar*, 393 N.W.2d 131 (Iowa 1986). This court has not adopted either of these positions and cannot reach the issue of whether to do so in this case because it was pled and tried under the "but for" theory of causation.

For these reasons, I would reverse, and remand with directions to dismiss.

CONNOLLY, J., joins in this concurrence and dissent.

JAMES V. REIMER AND BARBARA JENSEN, PERSONAL REPRESENTATIVES OF THE ESTATE OF LOUIS W. REIMER, JR., DECEASED, APPELLANTS, V. SURGICAL SERVICES OF THE GREAT PLAINS, P.C., AND THOMAS C. HOWARD, M.D., APPELLEES.

605 N.W.2d 777

Filed January 28, 2000. No. S-98-511.

1. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.
2. **Judges: Words and Phrases.** An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that

(1) the appellant was prejudiced by the court's refusal to give the tendered instruction, (2) the tendered instruction is a correct statement of the law, and (3) the tendered instruction is warranted by the evidence.

4. **Trial: Insurance.** Any reference to insurance where its presence or absence is tangential to the facts at issue should be carefully scrutinized.
5. **Trial: Witnesses: Insurance.** The remote potential for bias of a witness on the basis of sharing the same insurance carrier as the defendant must be balanced against the prejudicial effect of its admission.
6. **Trial: Expert Witnesses: Proof: Insurance.** A plaintiff must establish that an expert has more connection to a defendant's insurer than that of the policyholder or member in order for the evidence to be admissible.
7. **Trial: Witnesses: Evidence: Insurance.** Absent evidence that a witness has a direct interest in the outcome of the litigation, such as an agent, owner, or employee of the defendant's insurer, the potential for bias of evidence of a common insurance carrier is too remote and is outweighed by the prejudice its admission would cause.
8. **Negligence: Proximate Cause: Liability.** A defendant's negligence is not actionable unless it is the proximate cause of the plaintiff's injuries or is a cause which proximately contributed to them.
9. ___: ___: ___. The substantial factor test harmonizes with Nebraska law regarding proximate cause when multiple causes act to produce a single injury or when the active negligence of a third person is also a substantial factor in bringing about the harm.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Denzel R. Busick, of Luebs, Leininger, Smith, Busick, Johnson, Baack, Placzek & Steele, for appellants

Thomas J. Shomaker and Gerald L. Kratochvil, of Sodoro, Daly & Sodoro, for appellees.

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

CONNOLLY, J.

The appellants, James V. Reimer and Barbara Jensen, the personal representatives of the estate of Louis W. Reimer, Jr. (Reimer), filed this medical malpractice action against the appellees, Thomas C. Howard, M.D., and his employer, Surgical Services of the Great Plains, P.C. During trial, the district court refused to allow the appellants to question one of Howard's expert witnesses regarding whether the expert and Howard carried professional liability insurance issued by the same com-

pany. The trial court also refused to give a causation instruction that utilized the term "substantial factor" instead of instructing on proximate cause. We affirm.

BACKGROUND

Reimer was treated by Howard in 1992 after a cancerous mass was discovered in Reimer's esophagus. Howard recommended that surgery be performed and subsequently removed the mass on April 7, 1992. Following the surgery, it was discovered that Reimer had an infection due to a leaking anastomosis just below two clips that had been used in surgery for suturing. Because the tissue in the area appeared healthy, Howard performed a "patch up" of the leak rather than pursuing other forms of surgery. According to the appellants' experts, such actions did not meet the minimum standard of medical care and ensured that the problem would continue.

Approximately 1 week later, the anastomosis began to leak again. At this time, there was a disagreement between physicians caring for Reimer regarding what the course of treatment should be. The record indicates that several physicians believed that without additional surgery, Reimer would die. However, Howard disagreed. In late May 1992, a physician again expressed the opinion that without additional surgery, Reimer would die. Howard did not perform surgery at that time, because in his opinion, Reimer was too weak to survive the operation. Reimer died on May 31.

The appellants brought a wrongful death action against the hospital where Reimer underwent the surgery, Howard, four other physicians, and Howard's employer and the other physicians' employer on the basis of respondeat superior. Prior to trial, a judge's entry shows the hospital was dismissed from the action. Following trial, a court order was entered dismissing the other physicians. Although this dismissal occurred after trial, it appears from the record that the trial was conducted on only the issue of whether Howard or his employer was negligent and that the verdict forms listed only Howard and his employer as defendants. Before trial, the court sustained Howard's motion in limine seeking to prevent the appellants from inquiring about whether Howard and one of his expert witnesses were covered

by the same insurance company. During trial, the appellants provided an offer of proof in which it was indicated that Howard and the expert witness were both covered by the same insurance company. The appellants sought to present this evidence to the jury on the basis that it went to the question of bias. Other than the possibility that Howard and the expert witness shared the same insurance carrier, no other facts indicating bias were introduced as part of the offer of proof. Howard objected, contending that any bias shown by the evidence was outweighed by unfair prejudice. The trial court sustained the objection.

When the case was submitted to the jury, the court instructed the jury that "[a] proximate cause is a cause that produces a result in a natural and continuous sequence, and without which the result would not have occurred. A proximate cause need not be the sole cause." See NJI2d Civ. 3.41. The appellants objected to the instruction on the basis that it did not instruct the jury utilizing language that would allow them to find liability if Howard's actions were a "substantial factor" in bringing about the harm. The objection was overruled. The jury returned a verdict in favor of Howard and this appeal followed.

ASSIGNMENTS OF ERROR

The appellants assign that the trial court erred in (1) refusing to allow them to question Howard's expert witness about his professional liability insurance carrier for the purpose of showing potential bias and (2) giving a proximate cause instruction that did not tell the jury that it could find Howard liable if his actions were "substantial factors" in contributing to Reimer's death.

STANDARD OF REVIEW

[1,2] The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *Stumpf v. Nintendo of America*, 257 Neb. 920, 601 N.W.2d 735 (1999). An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id.*

[3] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the appellant was prejudiced by the court's refusal to give the tendered instruction, (2) the tendered instruction is a correct statement of the law, and (3) the tendered instruction is warranted by the evidence. *Hausman v. Cowen*, 257 Neb. 852, 601 N.W.2d 547 (1999); *Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999).

ANALYSIS

Evidence of Insurance

The appellants contend that the trial court should have allowed them to cross-examine one of Howard's expert witnesses about the fact that the expert and Howard had the same professional liability insurance carrier. According to the appellants, they should have been able to cross-examine the expert on the issue because Neb. Rev. Stat. § 27-411 (Reissue 1995) allows evidence that a person is insured when that evidence is offered for the purpose of showing bias on the part of a witness. The appellants further contend that even if the admission of evidence of insurance would have been prejudicial, the probative value of the evidence was not outweighed by any unfair prejudice. In particular, the appellants argue that with the evidence excluded, they had no alternate way to present evidence of the potential bias to the jury.

Section 27-411 provides:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

However, Neb. Rev. Stat. § 27-403 (Reissue 1995) provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[4-7] Any reference to insurance where its presence or absence is tangential to the facts at issue should be carefully scrutinized. *Stumpf v. Nintendo of America, supra.* Other jurisdictions that have considered the issue overwhelmingly hold that the remote potential for bias of a witness on the basis of sharing the same insurance carrier as the defendant must be balanced against the prejudicial effect of its admission. See, e.g., *Mills v. Grotheer*, 957 P.2d 540 (Okla. 1998) (citing cases); *Wallace v. Leedhanachoke*, 949 S.W.2d 624 (Ky. App. 1997) (citing cases); *Warren v. Jackson*, 125 N.C. App. 96, 479 S.E.2d 278 (1997) (citing cases). Thus, it is held that a plaintiff must establish that an expert has more connection to a defendant's insurer than that of the policyholder or member in order for the evidence to be admissible. See, *Mills v. Grotheer, supra*; *Warren v. Jackson, supra*; *Otwell v. Bryant*, 497 So. 2d 111 (Ala. 1986); *Mendoza v. Varon*, 563 S.W.2d 646 (Tex. Civ. App. 1978). As one court has noted, absent evidence that a witness has a direct interest in the outcome of the litigation, such as an agent, owner, or employee of the defendant's insurer, the potential for bias is too remote and is outweighed by the prejudice its admission would cause. *Mendoza v. Varon, supra.*

In the instant case, the potential for unfair prejudice by admission of evidence of insurance is high because the jury might wrongfully consider the presence of insurance when considering the issue of negligence or damages. At the same time, the fact that Howard and his expert shared the same insurance carrier had little or no probative value on the issue of bias in the instant case. The appellants presented no evidence of bias other than the mere fact that Howard and his expert were policyholders of insurance issued by the same carrier. Absent other facts to indicate bias, the facts of the instant case indicate only a remote possibility of bias. Under these circumstances, the probative value is substantially outweighed by the danger of unfair prejudice. Accordingly, the trial court did not abuse its discretion in refusing to allow the appellants to present evidence regarding the common insurance carrier.

Jury Instruction on Proximate Cause

The appellants contend that the trial court erred in giving the proximate cause instruction that "a proximate cause is a cause

that produces a result in a natural and continuous sequence and without which the result would not have occurred." The appellants argue that because all people die regardless of another's negligence, this instruction foreclosed the jury from ever determining that Reimer died as a result of Howard's negligence. Instead, the appellants requested an instruction that the jury could find liability if Howard's actions were a substantial factor in bringing about Reimer's death.

[8,9] A defendant's negligence is not actionable unless it is the proximate cause of the plaintiff's injuries or is a cause which proximately contributed to them. *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 509 N.W.2d 603 (1994). We have stated that the substantial factor test harmonizes with Nebraska law regarding proximate cause when multiple causes act to produce a single injury or when the active negligence of a third person is also a substantial factor in bringing about the harm. See *id.* This is the case because when there are multiple causes to an injury, liability could never be established under the standard proximate cause instruction. See W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 41 (5th ed. 1984 & Supp. 1988). Under such circumstances, an instruction that a defendant's conduct is a cause of an event if it was a substantial factor in bringing it about is appropriate. *Id.* Thus, "[t]he substantial-factor rule was developed primarily for cases in which application of the but-for rule would allow each defendant to escape responsibility because the conduct of one or more others would have been sufficient to produce the same result." *Id.* at 268.

In the instant case, the jury was concerned only with the action of one person, Howard. The trial did not involve allegations of multiple causes of injury. Under these circumstances, there was no need to give a causation instruction that included the substantial factor test. Further, the fact that everyone dies has no bearing on the instruction regarding proximate cause, rather, the issue is whether Howard's actions hastened Reimer's death. We find this assignment of error to be without merit.

CONCLUSION

We conclude that the trial court did not abuse its discretion in refusing to allow evidence that Howard and one of his expert

witnesses shared the same insurance carrier. We also conclude that the jury was properly instructed regarding proximate cause. Finding no error, the decision of the trial court is affirmed.

AFFIRMED.

STEPHAN, J., not participating.

DONALD E. NELSON, APPELLEE, V. LUSTERSTONE SURFACING COMPANY, A NEBRASKA CORPORATION, AND STEPHEN J. MYERS, APPELLANTS.

605 N.W.2d 136

Filed January 28, 2000. No. S-98-576.

1. **Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **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.
3. ___: ___. Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
4. **Appeal and Error.** In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
5. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the appellant was prejudiced by the court's refusal to give the tendered instruction, (2) the tendered instruction is a correct statement of the law, and (3) the tendered instruction is warranted by the evidence.
6. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
7. **Consumer Protection: Appeal and Error.** Neb. Rev. Stat. § 59-1602 (Reissue 1998) of the Consumer Protection Act defines trade and commerce as the sale of assets or services and any commerce directly or indirectly affecting the people of the State of Nebraska. The Nebraska Supreme Court reads this definition to limit the disputes that fall within the ambit of § 59-1602 to unfair or deceptive acts or practices that affect the public interest.
8. **Consumer Protection.** To be actionable under the Consumer Protection Act, the unfair or deceptive act or practice must have an impact upon the public interest. The act is not available to redress a private wrong where the public interest is unaffected.
9. **Statutes.** In construing a statute, effect must be given, if possible, to all of its several parts; no word, clause, or sentence should be rejected as meaningless or superfluous if it can be avoided.

10. **Jury Instructions: Appeal and Error.** On appellate review, jury instructions must be read together; they must be read conjunctively, rather than separately in isolation.
11. ___: ___. It is an instruction's meaning, not its phraseology, that is the crucial consideration, and a claim of prejudice will not lie when the instruction's meaning is reasonably clear.
12. **Trial: Jury Instructions: Appeal and Error.** In order to appeal a jury instruction, an objection to the proposed instruction must be made at the trial level.
13. **Corporations: Liability: Debtors and Creditors.** Generally, a corporation is viewed as a complete and separate entity from its shareholders and officers, who are not, as a rule, liable for the debts and obligations of the corporation.
14. **Corporations: Fraud: Liability.** Where fraud is committed by a corporation, it is time to disregard the corporate fiction and hold the persons responsible for the fraud liable in their individual capacities.
15. **Fraud.** What constitutes fraud is a question of fact in each case.

Appeal from the District Court for Douglas County: MICHAEL McGILL, Judge. Affirmed.

S. Caporale for appellants.

Joseph A. Jordano, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., for appellee.

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

CONNOLLY, J.

Donald E. Nelson, appellee, brought suit against Lusterstone Surfacing Company (Lusterstone) and Stephen J. Myers, appellants, for fraudulent representation, fraudulent concealment, and violation of Nebraska's Consumer Protection Act (CPA). A jury found for appellee on all three theories of recovery and awarded him damages in the amount of $14,000. On appeal, appellants contend that the trial court erred in various respects. The primary issue is whether the CPA applies to transactions that do not affect the public interest. We hold that the CPA does not apply to transactions that do not affect the public interest. However, we affirm the jury verdict because we find no reversible error in submitting the fraudulent misrepresentation and fraudulent concealment theories to the jury.

FACTS

In March 1995, appellee bought a 1993 Jeep Grand Cherokee from appellant Lusterstone. Appellant Myers, the president and

co-owner of appellant Lusterstone, a Nebraska corporation engaged in the business of resurfacing driveways and patios, negotiated the sale with appellee.

Appellant Myers testified that in December 1994, he bought the Jeep from A.J. Motors in Denison, Iowa. Before appellant Myers purchased the Jeep, he learned that it had been involved in an accident and that the Iowa certificate of title carried a prior salvage designation. Appellant Myers purchased the Jeep for $17,800 and registered it in appellant Lusterstone's name with the Nebraska Department of Motor Vehicles. On the certificate of title that appellant Myers received from the State of Nebraska, the Jeep was erroneously classified as carrying an original title. Therefore, the prior salvage designation was not obvious on the face of the title that appellee subsequently received from the appellants.

Appellant Myers testified that it was his belief that once he received the Nebraska certificate of title, the Jeep no longer carried a prior salvage designation. In order to register the Jeep in Nebraska, he presented the required paperwork to the state and had the Jeep inspected. In return, he received an original Nebraska certificate of title. It was his belief that the prior salvage designation had been expunged once he had gone through the proper channels for registering the Jeep in Nebraska. When appellant Myers sold appellee the Jeep, he did not volunteer the fact that the Jeep had been classified as a prior salvage in Iowa because he did not feel that it was necessary to do so.

Before appellee agreed to purchase the Jeep from appellant Lusterstone, he asked appellant Myers if it had ever been in an accident. Although the evidence is in conflict, appellee testified, and the jury must have believed, that appellant Myers essentially stated that the Jeep had been involved in a "fender-bender." Appellant Meyers did not point out any specific items of damage and did not disclose that it had been titled in Iowa as a prior salvage.

Almost immediately after he purchased the vehicle, appellee noticed problems with its performance. The day after he purchased the Jeep, he called appellant Myers and asked whether there was anything else he should know about the vehicle. Appellant Myers responded in the negative. The Jeep continued

to have problems, and appellee called appellant Myers a second time and asked for his money back. Appellant Myers refused. On the third trip to the automobile repair shop, appellee learned that all warranties on the Jeep, including the manufacturer's warranty, had been released. Upon investigation, he learned that the Jeep's Iowa title carried a prior salvage designation. He then called appellant Myers for the third time and demanded his money back. According to appellee, when asked why he had not disclosed the prior salvage designation, appellant Myers responded, "Well Don [appellee], I got screwed and now you're screwed."

Appellee continued to use the Jeep because he could not sell it with a salvage title without losing money. However, he continued to have problems with it. Eventually, he filed this action against appellants for fraudulent concealment, fraudulent misrepresentation, and violation of the CPA, specifically, Neb. Rev. Stat. § 59-1602 (Reissue 1998).

The jury found for appellee on all three theories of recovery and awarded damages in the amount of $14,000.

ASSIGNMENTS OF ERROR

Appellants make the following assignments of error, as restated and renumbered by this court. The trial court erred when it (1) applied the CPA to the transaction between appellee and appellants, (2) submitted the CPA claim to the jury for damages, (3) gave certain jury instructions over appellants' objections, (4) refused to give certain jury instructions requested by appellants, and (5) overruled appellants' motion for a directed verdict as to appellant Myers.

STANDARD OF REVIEW

[1] When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *In re Estate of Poach*, 257 Neb. 663, 600 N.W.2d 172 (1999).

[2] 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. *Corcoran v. Lovercheck*, 256 Neb. 936, 594 N.W.2d 615 (1999); *Cobb v. Sure Crop Chem. Co.*, 255 Neb. 625, 587 N.W.2d 355 (1998).

[3] Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error. *State on behalf of Joseph F. v. Rial*, 251 Neb. 1, 554 N.W.2d 769 (1996); *Evergreen Farms v. First Nat. Bank & Trust*, 250 Neb. 860, 553 N.W.2d 728 (1996).

[4] In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Schindler v. Walker*, 256 Neb. 767, 592 N.W.2d 912 (1999).

[5] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the appellant was prejudiced by the court's refusal to give the tendered instruction, (2) the tendered instruction is a correct statement of the law, and (3) the tendered instruction is warranted by the evidence. *Hausman v. Cowen*, 257 Neb. 852, 601 N.W.2d 547 (1999).

[6] A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Alexander v. Warehouse*, 253 Neb. 153, 568 N.W.2d 892 (1997).

CONSUMER PROTECTION ACT

The main issue on appeal is whether the trial court correctly applied the CPA to the private transaction between the parties. Whether a transaction of this type falls within the ambit of the CPA is an issue of first impression. Essentially, appellants argue that because the isolated sale of the Jeep was strictly private and affected no one but the parties, it does not fall within the purview of the CPA. In reply, appellee argues that the CPA is not limited to transactions occurring in business settings, nor is it limited to merchants. Appellee argues that the very absence of such limiting language provides evidence that the Legislature intended the CPA to cover private transactions between individuals.

The CPA is found at Neb. Rev. Stat. § 59-1601 et seq. (Reissue 1998). Under § 59-1602, "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of

any trade or commerce shall be unlawful." The terms "trade" and "commerce" are defined by § 59-1601(2) as "the sale of assets or services and any commerce directly or indirectly affecting the people of the State of Nebraska."

Section 59-1609 creates a private right of action to persons injured by certain violations of the CPA, including violations of § 59-1602. Any person so injured "may bring a civil action in the district court to enjoin further violations, to recover the actual damages sustained by him, or both, together with the costs of the suit, including a reasonable attorney's fee." § 59-1609.

We note that several other states have similar consumer protection acts that have been interpreted in various ways. The determination of the issue here, however, depends on how we interpret the language of this state's CPA. When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *In re Estate of Poach*, 257 Neb. 663, 600 N.W.2d 172 (1999).

[7,8] The CPA contains limiting language that cannot be ignored. While it is true that the CPA does not limit its reach to conduct in the course of business, vocation, or occupation, as does the Uniform Deceptive Trade Practices Act found at Neb. Rev. Stat. § 87-301 et seq. (Reissue 1999), see § 87-302(a), the Legislature's intent to limit the application of the CPA is clear. The CPA defines "trade and commerce" as "the sale of assets or services and any commerce *directly or indirectly affecting the people of the State of Nebraska*." (Emphasis supplied.) § 59-1601(2). We read this definition to limit the disputes that fall within the ambit of § 59-1602 to unfair or deceptive acts or practices that affect the public interest. See, *LaMotte v. The Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988) (public impact requirement recognized by South Carolina Supreme Court); *Noack Enterprises, Inc. v. Country Corner Interiors*, 290 S.C. 475, 477, 351 S.E.2d 347, 348 (S.C. App. 1986) (holding that language "'directly or indirectly affecting the people of this State'" prevented act's application to unfair or deceptive act or practice that affected only parties to transaction). Compare *Pennington v. Singleton*, 606 S.W.2d 682 (Tex. 1980) (holding that Texas consumer protection statute

applies to strictly private transactions). To be actionable under the CPA, therefore, we conclude that the unfair or deceptive act or practice must have an impact upon the public interest. The act is not available to redress a private wrong where the public interest is unaffected. See *Noack Enterprises, Inc. v. Country Corner Interiors, supra.*

[9] Furthermore, if the Legislature had intended the CPA to cover all private causes of action, then the limiting language found in § 59-1601(2) would not have been included. In construing a statute, effect must be given, if possible, to all of its several parts; no word, clause, or sentence should be rejected as meaningless or superfluous if it can be avoided. *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995). The Legislature could have defined "trade and commerce" as "the sale of assets or services and any commerce." The Legislature chose, however, to add the limiting language "directly or indirectly affecting the people of the State of Nebraska." See § 59-1601(2). We cannot ignore this language and apply the CPA to isolated transactions between individuals that do not have an impact on consumers at large. To do so would be a misconstruction of the statute.

Were we to hold otherwise, where would the line be drawn? Theoretically, the CPA would apply to every single transaction in which there was an alleged unfair or deceptive act or practice. It would even apply to transactions in the context of flea markets or garage sales. We conclude that the Legislature did not intend such a result when it adopted 1974 Neb. Laws, L.B. 1028, as an antitrust measure to protect Nebraska consumers from monopolies and price-fixing conspiracies.

Under the facts of this case, the transfer of the Jeep from appellants to appellee affected no one other than the parties to the transaction, and appellee has not shown a sufficient impact indirectly or directly on the public to qualify the transaction as an act or practice which is prohibited under § 59-1602. We therefore conclude that the trial court erred when it found that the CPA applied to appellants' fraudulent acts.

Having determined that the CPA should not have been applied in this case, we must now determine whether its erroneous application requires reversal. This case was submitted to

the jury on three separate theories of recovery: (1) fraudulent misrepresentation, (2) fraudulent concealment, and (3) violation of the CPA. The jury found in appellee's favor, and against appellants, on all three theories. As a result of their findings, the jury awarded appellee $14,000 in damages. The trial court instructed the jury in instruction No. 27 that "[a]lthough the Plaintiff seeks recovery of damages on three theories, you may assess only one recovery. If you find for the Plaintiff on one or more of the theories, any verdict for the Plaintiff must be in a single amount and there can be no duplication of damages therein." This instruction makes clear that the jury was to award appellee damages based on the fraudulent misrepresentation theory, the fraudulent concealment theory, or violation of the CPA theory. It is clear from the instruction that the jury was not to duplicate damages if it found for the appellee on more than one of the proffered theories. Thus, if the instructions on damages were such that the jury would have arrived at the same award regardless of the theory on which it chose to assign damages, then the erroneous application of the CPA does not require reversal. In other words, if any one of the three theories of recovery is valid, and the assigned damages would be the same on each of them, then the verdict as to appellee's single cause of action stands.

[10] The law is well established that on appellate review, jury instructions must be read together; they must be read conjunctively, rather than separately in isolation. See *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998). In this case, the jury was given two instructions on how to award damages if it found in favor of appellee. The first of these two, instruction No. 22, instructed the jury on the measure of damages if it found in favor of appellee on the CPA theory. The instruction states, "If you find in favor of Plaintiff on his claim that one or both of Defendants violated the Nebraska Consumer Protection Act, you may award Plaintiff damages in the amount of the Plaintiff's actual damages." The jury was not given any specific definition of "actual damages." Instruction No. 23, the second of the two instructions on damages, however, provided the following:

> If you find in favor of the Plaintiff on his claim for misrepresentation or fraudulent concealment, or violation of

the Nebraska Consumer Protection Act, then you must determine the amount of Plaintiff's damages.

In an action for fraud, a party may recover such damages as will compensate him for the loss actually caused by the fraud and place the party in the same position as he would have been in had the fraud not occurred.

In arriving at such damages, you may consider:

1. Whether the Plaintiff would have purchased the vehicle if he knew it was prior salvage;

2. The amount the Plaintiff paid for the vehicle and the fair market value of the vehicle (as a prior salvage vehicle) as of March 13, 1995;

3. The fair and reasonable expenses incurred by the Plaintiff while the vehicle was in Plaintiff's possession; and

4. The fair and reasonable value of the use of the vehicle while it was in Plaintiff's possession.

Whether any of the above elements of damage have been proved by a greater weight of the evidence is for you to determine. You are not permitted to allow any damages by way of punishment or through sympathy. Your verdict must be based upon evidence and not upon speculation or conjecture.

[11] Reading these instructions together, it is reasonably clear that the "actual damages" referred to in instruction No. 22 are the same as "the loss actually caused" referred to in instruction No. 23. It is an instruction's meaning, not its phraseology, that is the crucial consideration, and a claim of prejudice will not lie when the instruction's meaning is reasonably clear. *Scharmann v. Dayton Hudson Corp.*, 247 Neb. 304, 526 N.W.2d 436 (1995). As such, the jury instructions on damages were the same for each of the three theories of recovery. Whether the jury assigned damages based on fraudulent misrepresentation, fraudulent concealment, or violation of the CPA, the measure of damages would be determined according to instruction No. 23. Therefore, in terms of appellee's recovery, it makes no difference whether the CPA was erroneously applied. Even without the CPA, the same result would have been reached on the fraudulent misrepresentation or the fraudulent concealment claim. Thus, we find that the erroneous application of the CPA to appellee's case was harmless error by the trial court.

Next, appellants argue that the district court erred when it submitted the CPA theory to the jury for damages. Appellants' argument on this particular assignment, however, consists of one sentence. Appellants argue that under *State ex rel. Douglas v. Schroeder*, 222 Neb. 473, 384 N.W.2d 626 (1986), the CPA is equitable in nature and that therefore, trial is to the court, not to the jury. Since we have already decided that the erroneous application of the CPA was harmless, it makes no difference whether the theory was submitted to the jury.

JURY INSTRUCTIONS GIVEN AT TRIAL

[12] Under the third assignment of error, appellants argue that the trial court erred when it gave certain jury instructions over their objections. Specifically, they assign as error the giving of the following jury instructions: Nos. 2C, 2D, 2F, 2G, 6, 11, 12, 13, 21, and 22. In order to appeal a jury instruction, an objection to the proposed instruction must be made at the trial level. Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error. *State on behalf of Joseph F. v. Rial*, 251 Neb. 1, 554 N.W.2d 769 (1996). Furthermore, in order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Schindler v. Walker*, 256 Neb. 767, 592 N.W.2d 912 (1999).

Of the 10 instructions that appellants assign as error, only 2 of them have been properly objected, assigned, and argued. We will therefore not consider the other eight instructions assigned as error. The two instructions properly before the court, Nos. 21 and 22, both deal with the CPA. Since we have already determined that application of the CPA in this case was error, albeit harmless error, we need not determine whether these two instructions resulted in prejudicial error. Obviously, the instructions should not have been given because the CPA did not apply to the transaction between the parties. The point is moot, however, in light of our finding that it was harmless error for the trial court to apply the CPA in this case.

Under the fourth assignment of error, appellants contend that the trial court erred when it refused to give proposed jury

instructions Nos. 4, 7, 8, and 13. We decline to address this contention, however, because appellants have failed to provide any meaningful argument on the fourth assignment of error. To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the appellant was prejudiced by the court's refusal to give the tendered instruction, (2) the tendered instruction is a correct statement of the law, and (3) the tendered instruction is warranted by the evidence. *Hausman v. Cowen*, 257 Neb. 852, 601 N.W.2d 547 (1999).

Appellants' "argument" on the fourth assignment of error consists of the unsupported statement that the proffered instructions were promulgated by the Supreme Court and should have been followed by the trial court. Appellants do not attempt to explain, however, why they should have been followed. Appellants assert that the instructions were clear and concise and not suggestive to the jury. We cannot discern from this argument why the proposed instructions should have been given. Appellants have essentially failed to make any of the showings that are required to establish reversible error from a court's refusal to give a requested instruction. We find that appellants have failed to meet their burden of proof. Therefore, we cannot say that the trial court erred in its refusal to give the proposed instructions.

Finally, we reach the fifth assignment of error, in which appellants argue that the trial court erred by overruling their motion for a directed verdict. A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Alexander v. Warehouse*, 253 Neb. 153, 568 N.W.2d 892 (1997).

At the close of appellee's case and again at the close of all the evidence, appellants moved for a directed verdict as to appellant Myers. Appellants' motion was based on their contention that appellant Lusterstone, as owner of the Jeep, was the only proper defendant. Appellants argued that appellee had not produced sufficient evidence to pierce appellant Lusterstone's corporate veil or to treat appellant Myers as an alter ego of the corporation. In other words, appellants argued that appellant Myers

could not be held personally liable for his actions on behalf of the corporation. On appeal, appellants argue that to hold appellant Myers liable, the corporate veil must be pierced. We find appellants' argument to be without merit.

[13-15] Generally, a corporation is viewed as a complete and separate entity from its shareholders and officers, who are not, as a rule, liable for the debts and obligations of the corporation. *Huffman v. Poore*, 6 Neb. App. 43, 569 N.W.2d 549 (1997). However, it has long been held in Nebraska that where fraud is committed by a corporation, it is time to disregard the corporate fiction and hold the persons responsible for the fraud liable in their individual capacities. *Id.* See, also, *ServiceMaster Indus. v. J.R.L. Enterprises*, 223 Neb. 39, 388 N.W.2d 83 (1986). What constitutes fraud is a question of fact in each case. *ServiceMaster Indus. v. J.R.L. Enterprises, supra.*

At the close of appellee's case, there was ample evidence to support a finding that appellant Lusterstone committed fraud through the actions of its president, appellant Myers. Therefore, this was an appropriate case in which to disregard the corporate fiction and hold appellant Myers responsible in his individual capacity. We therefore find that the trial court did not err by overruling appellants' motion for a directed verdict.

CONCLUSION

The trial court erred in applying § 59-1602 of the CPA to appellee's case. The error was harmless, however, because the jury instructions on damages were the same for all three theories of recovery. Having found no reversible error, we affirm the judgment entered by the trial court.

AFFIRMED.

NEBRASKANS AGAINST EXPANDED GAMBLING, INC., AND BRIAN FONTANA, APPELLANTS, V. NEBRASKA HORSEMEN'S BENEVOLENT & PROTECTIVE ASSOCIATION ET AL., APPELLEES.

605 N.W.2d 803

Filed January 28, 2000. No. S-98-828.

1. **Standing: Proof.** In order for a party to establish standing to bring suit, it is necessary to show that the party is in danger of sustaining direct injury as a result of anticipated action, and it is not sufficient that one has merely a general interest common to all members of the public.
2. **Public Officers and Employees: Actions.** A person seeking to restrain the act of a public board or officer must show special injury peculiar to himself or herself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation.
3. **Standing: Statutes.** An exception allowing standing exists where matters of great public concern are involved and a legislative enactment may go unchallenged unless the plaintiff has the right to bring the action.

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

Todd E. Frazier and C.G. Jolly, Jr., of Frazier, Wieland, Bataillon & Katz, for appellants.

Don Stenberg, Attorney General, and L. Jay Bartel for appellees Janell Beveridge, Allan Eurek, and Dennis Lee.

Michael J. Lehan and Jeffery R. Kirkpatrick, of Kelley, Lehan & Hall, P.C., for appellee Nebraska Horsemen's Benevolent & Protective Association.

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

CONNOLLY, J.

The appellants, Nebraskans Against Expanded Gambling, Inc. (NAEG), and Brian Fontana, brought the instant action against the Nebraska Horsemen's Benevolent & Protective Association (NHBPA) and the commissioners of the Nebraska State Racing Commission (collectively the appellees). The NHBPA had received licenses from the commission to conduct simulcast horseracing. The appellants sought a declaratory judgment that any simulcast racing events conducted by NHBPA

were contrary to Neb. Rev. Stat. § 2-1204 (Reissue 1991), Neb. Rev. Stat. §§ 2-1207 and 2-1228 (Reissue 1997), and Neb. Const. art. III, § 24; that the commissioners exceeded their statutory authority in approving the license applications of NHBPA; and that the licenses were null and void. The appellants further sought injunctive relief. The district court sustained the appellees' demurrers on the basis that the appellants lacked standing to assert claims based on § 2-1207, § 2-1228, and article III, § 24, of the Nebraska Constitution and that the petition failed to show the existence of an actual case or controversy based on § 2-1204. We conclude that the appellants lack standing to sue on all causes of action and dismiss the appeal.

BACKGROUND

NAEG is a nonprofit corporation licensed and organized under the laws of the State of Nebraska. Its corporate purpose is to protect the families and the citizens of the state and Douglas County from the proliferation of gambling. The members of NAEG are residents and taxpayers of the state and have expressly authorized NAEG to bring the instant action on their behalf. Appellant Fontana is also a citizen and taxpayer of Nebraska.

The commissioners are charged with the duty to regulate and supervise the horseracing industry in Nebraska and to enforce all state laws relating to horseracing, and they have the authority to issue, revoke, or suspend licenses to entities engaged in simulcast horseracing in Nebraska. NHBPA is a nonprofit organization composed of members engaged in the horseracing industry in Nebraska.

On December 17, 1997, the commissioners voted to approve NHBPA's applications for interstate simulcast licenses. During 1997, NHBPA did not conduct live horseracing events, but on approximately January 3, 1998, NHBPA commenced the simulcasting of horseraces at Horsemen's Park in Omaha, Nebraska, pursuant to the licenses. For their first cause of action, the appellants allege that the commissioners' act of granting the licenses was in violation of § 2-1228 and was an abuse of power because pursuant to § 2-1228, licenses cannot be granted unless the organization seeking the license conducted at least 70 percent of the live races it was authorized to conduct in the prior year.

For their second cause of action, the appellants allege that NHBPA did not have a "racetrack" facility. Based on this, the appellants allege that the commissioners exceeded their statutory authority under § 2-1207 and article III, § 24, of the Nebraska Constitution because these provisions only permit wagering within the enclosure of a "racetrack."

For their third cause of action, the appellants allege that one or more members of NHBPA received personal profits from the activities at Horsemen's Park. Based on this, the appellants allege that NHBPA was not eligible for simulcast licenses under § 2-1204 because § 2-1204 allows only organizations whose members do not derive personal profits from its activities to apply for licenses. The appellants further allege that unless restrained, the appellees will continue to act pursuant to the licenses and engage in illegal gambling. The appellants then pray for a declaratory judgment and injunctive relief.

The appellees each demurred to the petition. Each demurrer listed failure to state facts sufficient to state a cause of action as a reason for the demurrer. On the first two causes of action, the district court sustained the demurrers on the basis that the appellants lacked standing. Specifically, the district court determined that NAEG and its members could not show that they had any legally protected interest at stake in the controversy that rose above the general public's desire to have state officials act within their authority. The district court further determined that NAEG and Fontana did not have taxpayer standing because the action was not brought to enjoin the expenditure of public funds raised for a governmental purpose.

On the third cause of action, the district court sustained the demurrer on the bases of a lack of standing and a lack of an actual case or controversy. The district court then determined that the defects could not be corrected by amendment and dismissed the action.

ASSIGNMENT OF ERROR

The appellants assign that the district court erred in sustaining the appellees' demurrers on the bases that the appellants lacked standing to bring the action and that the third cause of action failed to state a claim.

STANDARD OF REVIEW

In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999); *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998).

If, upon the sustainment of a demurrer, it is clear that no reasonable possibility exists that an amendment will correct a pleading defect, leave to amend need not be granted. *Billups v. Scott*, 253 Neb. 287, 571 N.W.2d 603 (1997).

ANALYSIS

The appellants contend that as taxpayers, they have standing in the instant action because the alleged illegality of the government action is of great public concern. We disagree.

[1-3] We have repeatedly held that in order for a party to establish standing to bring suit, it is necessary to show that the party is in danger of sustaining direct injury as a result of anticipated action, and it is not sufficient that one has merely a general interest common to all members of the public. *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999). A person seeking to restrain the act of a public board or officer must show special injury peculiar to himself or herself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation. See, *id.*; *Rexroad, Inc. v. S.I.D. No. 66*, 222 Neb. 618, 386 N.W.2d 433 (1986); *Niklaus v. Miller*, 159 Neb. 301, 66 N.W.2d 824 (1954). An exception to this general rule exists where matters of great public concern are involved and a legislative enactment may go unchallenged unless the plaintiff has the right to bring the action. *Cunningham v. Exon*, 202 Neb. 563, 276 N.W.2d 213 (1979). See, also, *Ritchhart v. Daub, supra* (threshold question is whether there exists another party whose interests are more at issue in action).

In *Cunningham*, we determined that a taxpayer's interest in the form of government under which he or she was required to

live, or any proposed change thereof, was an interest of great public concern. Thus, where a taxpayer was challenging the validity of the publication of a constitutional amendment, we concluded that the taxpayer had standing. In contrast, in *Green v. Cox Cable of Omaha, Inc.*, 212 Neb. 915, 327 N.W.2d 603 (1982), we concluded that taxpayers did not have standing to challenge a municipality's award of a cable franchise. Distinguishing the circumstances in *Green* from those in *Cunningham*, we noted that *Cunningham* dealt with the question of whether a portion of the Nebraska Constitution had been properly published while the issue of television service in *Green* did not present a constitutional issue.

In the instant case, the appellants have asserted only a general interest common to all members of the public. In all three causes of action, the injury alleged is not an injury peculiar to the interests of the appellants and the allegations do not involve the illegal expenditure of public funds or an increase in the burden of taxation. Although the appellants contend that their interests in preventing the proliferation of gambling and having public officials act within their statutory boundaries are matters of great public concern, these interests do not rise to the level of the issue presented in *Cunningham*. Further, to the extent that a cause of action might exist, the parties capable of asserting such an action would be participants in the horseracing industry who faced direct harm due to a violation of the statutory sections at issue. See, generally, Neb. Rev. Stat. § 2-1246 (Reissue 1997). Thus, our decisions in *Ritchhart* and *Green* are controlling in all three of the appellants' alleged causes of action. Further, we agree with the conclusion of the district court that the standing defect cannot be cured by amending the petition. Accordingly, the district court was correct in dismissing the action.

CONCLUSION

The district court was correct in sustaining the demurrers of the appellees and dismissing the first two causes of action on the basis that the appellants lacked standing to sue. To the extent the district court sustained the demurrers of the appellees and dismissed the third cause of action on the basis of standing, the district court was also correct.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. JAMES E. JONES, APPELLANT.

605 N.W.2d 434

Filed January 28, 2000. No. S-99-579.

1. **Courts: Trial: Mental Competency.** The question of competency to stand trial is one of fact to be determined by the trial court and the means employed in resolving the question are discretionary with the court.
2. **Mental Competency: Appeal and Error.** If there is sufficient evidence in the record to support factual findings relating to competency, such factual findings will not be disturbed on appeal.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Trial: Mental Competency.** A proceeding to determine the competency of an accused to stand trial is a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995), and an order finding the accused incompetent to stand trial and ordering the accused confined until such time as he or she is competent is a final order from which an appeal may be taken under Neb. Rev. Stat. § 25-1911 (Reissue 1995).
5. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. ___: ___. If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
7. **Courts: Trial: Mental Competency: Appeal and Error.** If the district court determines that an accused is incompetent to stand trial, then the court must make a determination whether there is a substantial probability that the accused will become competent within the foreseeable future, Neb. Rev. Stat. § 29-1823 (Cum. Supp. 1998); absent such a factual determination, there is no order to be meaningfully reviewed on appeal.
8. **Courts: Mental Competency.** The means to be employed to determine competency or the substantial probability of competency within the foreseeable future are discretionary with the district court, and the court may cause such medical, psychiatric, or psychological examination of the accused to be made as he or she deems necessary in order to make such a determination under Neb. Rev. Stat. § 29-1823(1) (Cum. Supp. 1998).

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Order vacated, and cause remanded with direction.

Thomas C. Riley, Douglas County Public Defender, and Leslie E. Kendrick for appellant.

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

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

GERRARD, J.

NATURE OF CASE

James E. Jones appeals from an order of the Douglas County District Court finding him incompetent to stand trial and committing him to a state hospital for the mentally ill. The question presented is whether the district court's ruling that "there is a question as to whether or not there is a substantial probability that [Jones] will become competent within the foreseeable future" and its subsequent order of commitment comply with the requirements of Neb. Rev. Stat. § 29-1823 (Cum. Supp. 1998). Because we conclude that the district court did not make the requisite finding mandated by § 29-1823, we vacate its order and remand this cause with direction that the district court make the necessary finding in compliance with § 29-1823.

FACTUAL AND PROCEDURAL BACKGROUND

Jones was charged with an unauthorized use of a financial transaction device on October 22, 1998. On January 17, 1999, Jones was hospitalized at Alegent Health, Immanuel Medical Center (Alegent Health), under a Douglas County Board of Mental Health petition as filed by his family. His family had noticed that Jones was exhibiting bizarre behavior. Additionally, Jones had threatened his grandmother and his uncle. Dr. Hudson Hsieh of Alegent Health diagnosed Jones with a schizophrenic disorder and marijuana dependence and stated that Jones was a danger to himself and was unable to meet his basic human needs. Hsieh recommended that the least restrictive treatment alternative for Jones would be continued inpatient psychiatric treatment. The Douglas County Board of Mental Health accepted this recommendation and on January 29, 1999, ordered Jones to full-time inpatient hospitalization at Alegent Health for a period of observation not to exceed 60 days.

On February 10, 1999, Jones' counsel made a motion, pursuant to § 29-1823, to determine whether Jones was mentally competent to stand trial on the unauthorized use of a financial device charge. On February 16, a competency hearing was con-

ducted. Jones' counsel offered the January commitment order of the Douglas County Board of Mental Health, which was received into evidence. The district court ordered Jones to undergo a "psychological evaluation," performed by Dr. Bruce D. Gutnik, a duly licensed psychiatrist.

On April 21, 1999, the competency hearing continued. Gutnik's written psychiatric diagnostic evaluation was received into evidence. Gutnik's evaluation stated that Jones was psychotic, was quite paranoid, experienced auditory hallucinations, did not understand the roles of the judge and jury, and did not trust his attorney. Gutnik concluded:

> Jones is at this time not competent to stand trial and not competent to participate in his own defense. If he is to remain on his present medications and if his condition does not improve, then one could assume that he will remain incompetent for the foreseeable future. If his treatment plan is to change, then [sic] level of competence may also change.

On May 7, the district court found that Jones was not competent to stand trial at the present time and that "there is a question as to whether or not there is a substantial probability that [Jones] will become competent within the foreseeable future." The district court ordered that Jones be committed to the Norfolk Regional Center in Norfolk, Nebraska, or to another state hospital for the mentally ill until such time as the disability may be removed and that a review hearing of this matter shall take place 6 months from the date of the order or as soon thereafter as the matter can be scheduled. It is from this order that Jones appeals.

ASSIGNMENTS OF ERROR

Jones alleges, restated, that (1) the district court's order does not comply with § 29-1823 because Jones can be ordered to be committed only until such time as he shall become competent, with a review in 6 months, if there is a finding that there is a substantial probability that Jones will become competent within the foreseeable future and (2) there is no factual basis for a finding that there is a substantial probability that Jones will become competent within the foreseeable future and, therefore, no factual basis supports the portion of the district court's order com-

mitting Jones until such time as his disability may be removed, with 6-month reviews.

STANDARD OF REVIEW

[1,2] The question of competency to stand trial is one of fact to be determined by the trial court and the means employed in resolving the question are discretionary with the court. *State v. Bolton*, 210 Neb. 694, 316 N.W.2d 619 (1982). If there is sufficient evidence in the record to support factual findings relating to competency, such factual findings will not be disturbed on appeal. See *State v. Johnson*, 4 Neb. App. 776, 551 N.W.2d 742 (1996). See, also, *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538 (1980).

ANALYSIS

FINAL ORDER

The State argues that the district court's order is not a final, appealable order and, therefore, maintains that Jones' appeal is not properly before this court. The State's argument is essentially that because the district court found that there was a question as to whether there is a substantial probability that Jones will become competent within the foreseeable future and provided for another hearing in 6 months, a final order has not been entered.

[3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Interest of Alycia P., ante* p. 258, 603 N.W.2d 7 (1999); *US Ecology v. State, ante* p. 10, 601 N.W.2d 775 (1999).

[4] Neb. Rev. Stat. § 25-1902 (Reissue 1995) defines a final order:

> An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter.

A proceeding to determine the competency of an accused to stand trial is a special proceeding within the meaning of

§ 25-1902, and an order finding the accused incompetent to stand trial and ordering the accused confined until such time as he or she is competent is a final order from which an appeal may be taken under Neb. Rev. Stat. § 25-1911 (Reissue 1995). *Guatney, supra.*

In *Guatney*, an argument similar to the State's argument was rejected. *Guatney* involved a prior version of § 29-1823 (Reissue 1979). This version did not require a determination regarding whether there is a substantial probability that the accused will become competent within the foreseeable future and did not provide for 6-month reviews. However, the reasoning of *Guatney* reveals that the final order analysis remains the same. We held in *Guatney* that a competency hearing was a special proceeding and that an order finding the accused incompetent to stand trial and committing the accused until he or she is competent is a final order. In so holding, we stated:

> We, therefore, find little reason or sense in suggesting that one may be deprived of his liberty under a court order finding him incompetent . . . and have no recourse from that order. In the instant case, the court has done more than declare that the accused need not answer the charges against him. The court, by virtue of its order, has . . . denied the appellant his liberty for an undetermined time. It is difficult, if not impossible, to see how that order, therefore, does not affect a substantial right or is not an order from which the appellant should be entitled to appeal pursuant to the provisions of § 25-1911.

State v. Guatney, 207 Neb. 501, 507-08, 299 N.W.2d 538, 543 (1980).

The district court in this case found that Jones was not competent to stand trial and ordered him to be committed to a state mental hospital, with a review after 6 months. Similar to *Guatney, supra*, Jones has been denied his liberty for an unascertainable and significant amount of time. This denial clearly affects a substantial right. Additionally, because *Guatney* determined that a proceeding to determine the competency of an accused to stand trial is a special proceeding within the meaning of § 25-1902, the district court's order is an order affecting a substantial right made in a special proceeding. Thus, the district

court's order in the instant case is a final order, and we have jurisdiction to consider Jones' appeal.

§ 29-1823

Section 29-1823 was substantially amended in 1997, and the amended portion of § 29-1823 relevant to this appeal provides:

> (1) If at any time prior to trial it appears that the accused has become mentally incompetent to stand trial, such disability may be called to the attention of the district court by the county attorney, by the accused, or by any person for the accused. The judge of the district court of the county where the accused is to be tried shall have the authority to determine whether or not the accused is competent to stand trial. . . . Should the district judge *determine* after a hearing that the accused is mentally incompetent to stand trial and that *there is a substantial probability that the accused will become competent within the foreseeable future*, the district judge shall order the accused to be committed to a state hospital for the mentally ill or some other appropriate state-owned or state-operated facility for appropriate treatment until such time as the disability may be removed.
>
> (2) Within six months after the commencement of the treatment ordered by the district court, and every six months thereafter until either the disability is removed or other disposition of the accused has been made, the court shall hold a hearing to determine (a) whether the accused is competent to stand trial or (b) whether or not there is a substantial probability that the accused will become competent within the foreseeable future.
>
> (3) *If it is determined that there is not a substantial probability that the accused will become competent within the foreseeable future,* then the state shall either (a) commence the applicable civil commitment proceeding that would be required to commit any other person for an indefinite period of time or (b) release the accused.

(Emphasis supplied.)

[5,6] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of

statutory words which are plain, direct, and unambiguous. *State ex rel. Stenberg v. Moore, ante* p. 199, 602 N.W.2d 465 (1999); *Parnell v. Madonna Rehab. Hosp., ante* p. 125, 602 N.W.2d 461 (1999). If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Ameritas Life Ins. v. Balka*, 257 Neb. 878, 601 N.W.2d 508 (1999).

The language of § 29-1823 is clear. The statute sets forth a decision tree that the district courts are obligated to follow. The district court must first determine whether or not the accused is mentally competent to stand trial. In making that determination, the district court may cause such medical, psychiatric, or psychological examination of the accused to be made as he or she deems warranted, and the court may hold such hearing as he or she deems necessary. If the district court determines that the accused is incompetent to stand trial, then the court must make a determination whether there is a substantial probability that the accused will become competent within the foreseeable future. If the district court determines that there *is* a substantial probability that the accused will become competent within the foreseeable future, then § 29-1823(1) mandates that the court order the accused committed to a state mental hospital or to some other appropriate state-owned or state-operated facility for appropriate treatment until such time as the disability may be removed. Section 29-1823(2) provides for 6-month reviews of the competency determination made by the district court. If, however, the district court determines that there *is not* a substantial probability that the accused will become competent within the foreseeable future, § 29-1823(3) specifies the appropriate procedure: the State shall either commence civil commitment proceedings or release the accused.

In the present case, the district court made no dispositive determination; rather, the court found that "there is a question as to whether or not there is a substantial probability that [Jones] will become competent within the foreseeable future." Jones' counsel argues that the record compels the conclusion that there is not a substantial probability that Jones will become competent within the foreseeable future. Therefore, Jones requests that we reverse the order of the district court and remand this matter

with direction to the district court to enter an order mandating the State to either commence civil commitment proceedings or release the accused pursuant to § 29-1823(3). This we cannot do. We are not convinced that this record compels only one conclusion; on the contrary, Gutnik's evaluation, as a whole, could reasonably lead to more than one conclusion.

[7] The obvious problem in the instant case is that the district court did not comply with the statutory mandates of § 29-1823. The court neither determined that there *was* a substantial probability that Jones would become competent within the foreseeable future, as provided in § 29-1823(1), nor did the court determine that there *was not* a substantial probability that Jones would become competent within the foreseeable future, as provided in § 29-1823(3). In the absence of such a factual determination, there is no order that we can meaningfully review on appeal.

For this reason, we vacate the May 7, 1999, order of the district court and remand the cause to the district court with direction that the court enter an order complying with the requirements of § 29-1823.

[8] We do note that the means to be employed to determine competency or the substantial probability of competency within the foreseeable future are discretionary with the district court, see *State v. Bolton*, 210 Neb. 694, 316 N.W.2d 619 (1982), and that the district court may cause such further medical, psychiatric, or psychological examination of the accused to be made as the court deems necessary in order to make such a determination, see § 29-1823(1).

CONCLUSION

Because we conclude that the district court did not make the requisite finding mandated by § 29-1823, we vacate its May 7, 1999, order and remand this cause with direction that the district court make the necessary finding in compliance with § 29-1823.

ORDER VACATED, AND CAUSE
REMANDED WITH DIRECTION.

MELODY M. FOSSETT, APPELLANT, V. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, DOING BUSINESS AS UNIVERSITY OF NEBRASKA MEDICAL CENTER, ET AL., APPELLEES.

605 N.W.2d 465

Filed February 4, 2000. No. S-98-442.

1. **Summary Judgment: Appeal and Error.** In reviewing an order of summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment was 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: Appeal and Error.** On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
4. **Summary Judgment.** As a procedural equivalent to a trial, a summary judgment is an extreme remedy because a summary judgment may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion for summary judgment is directed.
5. **Malpractice: Physicians and Surgeons: Expert Witnesses: Proof.** Ordinarily, in a medical malpractice case, the plaintiff must prove the physician's negligence by expert testimony.

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

William B. Woodruff for appellant.

Gregory M. Thomas, of Sodoro, Daly & Sodoro, for appellees.

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

PER CURIAM.

Melody M. Fossett filed suit against the Board of Regents of the University of Nebraska, doing business as University of Nebraska Medical Center; Randall E. Brand, M.D.; Kenric Murayama, M.D.; Timothy McCashland, M.D.; Suzanne Sasse, M.D.; and Boston Scientific Corporation for medical malprac-

tice. Brand, Murayama, and McCashland (appellees) filed motions for summary judgment. The district court found that Fossett's evidence failed to present a genuine issue of material fact and granted summary judgment for appellees. Fossett conceded at oral argument that summary judgment was proper as to McCashland. We address whether statements made by Brand and Murayama created a genuine issue of fact as to whether they breached the standard of care. We conclude that Brand's statements to Fossett and her husband created a reasonable inference that Brand did not meet the applicable standard of care in his treatment of Fossett. We therefore reverse summary judgment in favor of Brand and affirm as to Murayama and McCashland.

BACKGROUND

On August 7, 1994, Fossett was admitted to the University of Nebraska Medical Center for severe pain on her right side and back, around the area of her ribs. Murayama performed an ultrasound on her abdomen. Murayama's answers to requests for admissions indicate that the ultrasound proved normal; there were no free fluid collections in Fossett's abdomen at that time. On August 8, Brand performed an endoscopic retrograde cholangiopancreatography (ERCP) on Fossett. During the ERCP, a false passage was created which constituted a perforation of the duodenum. On August 9, Fossett underwent another procedure for removal of her gallbladder, at which time a large amount of bilious fluid was found in her peritoneal cavity.

Fossett contends that the false passage created during the ERCP introduced enterococcus faecalis into her abdominal cavity, which developed into at least three intra-abdominal abscesses. As a result, Fossett brought this action against appellees for medical malpractice. In her second amended petition, Fossett alleged liability under the theories of negligence and res ipsa loquitur.

In response, appellees filed motions for summary judgment. At the hearing, appellees presented evidence which consisted of their curricula vitae, as well as their affidavits stating they had committed no negligence and had complied with the applicable standard of care. At that time, Fossett was given 60 days to find an expert to testify on the requisite standard of care and evalu-

ate appellees' professional conduct. When Fossett presented her evidence at the second hearing, it consisted of affidavits by Fossett, Fossett's husband, Fossett's mother, and Fossett's counsel, which included portions of appellees' answers to interrogatories and requests for admissions. Fossett offered no expert opinion to establish any professional negligence by appellees. Finding that the evidence and theories proffered by Fossett failed to present a genuine issue of material fact, the court sustained the motions for summary judgment and dismissed Fossett's amended petition as to appellees.

As mentioned, Fossett's second amended petition claimed that appellees were liable in negligence and under the doctrine of res ipsa loquitur. The theory of res ipsa loquitur was again proffered by Fossett's counsel at the summary judgment hearing on December 5, 1997. In her brief to this court, however, Fossett has abandoned her theory of Brand's and Murayama's liability under the doctrine of res ipsa loquitur.

In Fossett's appeal filed May 4, 1998, her argument focuses on the legal effect of alleged statements of admission by Brand and Murayama. According to the affidavits introduced by Fossett, when Fossett's mother asked Murayama why he had not removed the fluid from Fossett's abdomen, he replied, "I don't know why I left it there, I just left it there." When Fossett asked Murayama why he had not removed the fluid, he replied that he thought it would absorb into her body. When Fossett discussed with Brand the fluid left in her abdominal cavity by Murayama, Brand told her that "leaving it in there was a mistake."

Regarding statements made by Brand, Fossett introduced affidavits that after Brand performed the ERCP, he told her husband that "I have punctured her . . . duodenum. I made a false passage, I made a terrible mistake, I'm very very sorry." Brand told Fossett's husband that there might be fluid leaking into Fossett's abdominal cavity. When Fossett's husband told Brand that it was okay, Brand responded, "No, it isn't. This shouldn't have happened." In addition, when Fossett later asked Brand what went wrong with the ERCP, he told her that the puncture caused by the tube going down her throat was not supposed to have happened.

Since Fossett did not assign and argue res ipsa loquitur, we will not consider Brand's and Murayama's liability under that

theory. We address, therefore, whether admissions by Brand and Murayama eliminated the requirement of medical experts for the purpose of summary judgment.

ASSIGNMENTS OF ERROR

Fossett claims that the district court erred in finding there was no genuine issue of material fact and in sustaining the motions for summary judgment.

STANDARD OF REVIEW

[1] In reviewing an order of summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999).

[2] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *NECO, Inc. v. Larry Price & Assocs.*, 257 Neb. 323, 597 N.W.2d 602 (1999); *Fackler v. Genetzky*, 257 Neb. 130, 595 N.W.2d 884 (1999).

[3] On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *NECO, Inc. v. Larry Price & Assocs., supra*; *Dvorak v. Bunge Corp.*, 256 Neb. 341, 590 N.W.2d 682 (1999).

[4] As a procedural equivalent to a trial, a summary judgment is an extreme remedy because a summary judgment may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion for summary judgment is directed. *Bruning v. Law Offices of Ronald J. Palagi*, 250 Neb. 677, 551 N.W.2d 266 (1996); *Oliver v. Clark*, 248 Neb. 631, 537 N.W.2d 635 (1995).

ANALYSIS

We first note Fossett's concession at oral argument that summary judgment was proper as to McCashland. We therefore affirm the district court's order with respect to McCashland and

proceed to Fossett's assignments of error regarding Brand and Murayama.

EXPERT TESTIMONY AND COMMON KNOWLEDGE EXCEPTION

[5] Ordinarily, in a medical malpractice case, the plaintiff must prove the physician's negligence by expert testimony. The rule is expressed in *Halligan v. Cotton*, 193 Neb. 331, 335, 227 N.W.2d 10, 12-13 (1975), that "whether a specific manner of treatment or exercise of skill by a physician or surgeon demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter that must usually be proved by expert testimony."

There is a recognized exception to this rule, however, known as the "common knowledge exception." The exception is stated in *Halligan v. Cotton*, 193 Neb. at 335-36, 227 N.W.2d at 13, that "[o]ne of the exceptions to the requirement of expert testimony is the situation where the evidence and the circumstances are such that the recognition of the alleged negligence may be presumed to be within the comprehension of laymen." Generally, this exception is applicable in cases where the physician fails to remove a foreign object from a patient's body or where a patient enters the hospital for treatment on one part of the body and sustains injury to another part of the body. See, *Boyd v. Chakraborty*, 250 Neb. 575, 583, 550 N.W.2d 44, 49 (1996) ("[i]n sum, this case involves the leaving of a foreign object, namely, a tube fragment, in a patient's body, which fragment should have been removed by an act understandable by the jury without technical evidence. . . . This is within the realm of knowledge of laypersons"); *Swierczek v. Lynch*, 237 Neb. 469, 478, 466 N.W.2d 512, 518 (1991) ("[i]t is within the common knowledge and experience of a layperson to determine that an individual does not enter the hospital for extraction of her teeth and come out with an injury to nerves in her arms and hands, without some type of negligence occurring"). In contrast, the common knowledge exception has been held not to apply where the defendant physician's negligence is not obvious from the facts and circumstances of the case. See, *Hanzlik v. Paustian*, 211 Neb. 322, 318 N.W.2d 712 (1982) (holding that negligence could not be presumed to be within comprehension of layper-

sons where patient's esophagus was perforated during dilation), *disapproved on other grounds, Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992); *Reifschneider v. Nebraska Methodist Hosp.*, 222 Neb. 782, 387 N.W.2d 486 (1986) (declining to apply common knowledge exception where to do so would be assuming that ordinary trier of fact, judge or jury, is capable of assessing status of emergency room patient and determining whether or not restraints were needed).

Fossett has raised the common knowledge exception in relation to Brand, but does not explain how the creation of a false passage or perforation of the duodenum during an ERCP constitutes negligence within the common knowledge of a layperson. Brand and Murayama argue that an ERCP is a very technical and specialized medical procedure that involves surgical expertise. We agree that the creation of a false passage during this procedure is not the type of injury that falls within the common knowledge exception. We therefore conclude that there is no issue of fact as to Brand's negligence under the common knowledge exception.

Fossett has also raised the common knowledge exception in relation to Murayama. Murayama operated on Fossett the day after Brand performed the ERCP. When Murayama entered Fossett's peritoneal cavity, he found a large amount of bilious peritoneal fluid. Rather than remove the fluid, he left it in Fossett's abdominal cavity. Murayama told Fossett that he did not remove the fluid because he thought it would absorb into her body. Fossett was released from the hospital 5 days after Murayama performed the operation, but returned just 2 days later suffering from extreme pain in her abdomen, chest, right leg, and operative incision. Fossett argues that these facts, taken together with Brand's statement to her that leaving the fluid in her abdominal cavity was a mistake, establish negligence under the common knowledge exception. This argument assumes that the trier of fact is capable of determining whether it is accepted medical practice for a surgeon to leave bodily fluid where it is found in a patient during an operation. This court has indicated a hesitancy in placing such a burden on the trier of fact. See, *Reifschneider v. Nebraska Methodist Hosp., supra*; *Halligan v. Cotton*, 193 Neb. 331, 227 N.W.2d 10 (1975). We believe that

expert testimony was required to establish whether Murayama was negligent in failing to remove the fluid from Fossett's abdomen. We therefore conclude that there was no issue of fact as to Murayama's negligence under the common knowledge exception.

Statements Made by Brand and Murayama

Fossett next argues that certain statements made by Brand and Murayama to her and her family raise genuine issues of fact and thereby eliminate the requirement for expert testimony. Affidavits introduced by Fossett contain statements of fact allegedly made by Brand and Murayama to Fossett, Fossett's husband, and Fossett's mother. We accept these statements as true because on appellate review of summary judgment, the court views the evidence in the light most favorable to the party against whom summary judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. See *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999).

In this case, Brand and Murayama each filed an affidavit in support of the motion for summary judgment. Each affidavit stated that the care rendered to Fossett complied with the applicable standard of care for a similar physician under similar circumstances in a similar community. This is sufficient for summary judgment purposes to present a prima facie showing that appellees were not negligent in their treatment of Fossett. See *Boyd v. Chakraborty*, 250 Neb. 575, 550 N.W.2d 44 (1996) (holding that affidavit of defendant physician in malpractice case which states that defendant did not breach appropriate standard of care presents prima facie case of lack of negligence for purposes of summary judgment). The burden then shifted to Fossett to rebut this evidence and to establish the existence of a genuine issue of material fact. Since Fossett presented no medical expert opinion to contradict Brand's and Murayama's affidavits, we must determine whether statements made by Brand and Murayama create a reasonable inference of negligence on their part.

Fossett argues that under *Healy v. Langdon*, 245 Neb. 1, 511 N.W.2d 498 (1994), Brand's and Murayama's statements create

a genuine issue of material fact. In *Healy*, the plaintiff introduced the defendant doctor's deposition in opposition to the defendant doctor's motion for summary judgment. In one portion of the deposition, the defendant doctor stated that "he would have deviated from the standard of care if he had failed to inform Sherry Healy that death was a potential side effect of the chemotherapy." *Id.* at 8, 511 N.W.2d at 503. To establish a breach of that standard, the plaintiff offered his own affidavit, which stated that " 'at no time prior to or during the course of the chemotherapy treatment' did [the defendant doctor] inform Sherry Healy that death was a potential side effect of the chemotherapy." *Id.* at 9, 511 N.W.2d at 503. The court found that the plaintiff's affidavit directly conflicted with evidence presented by the defendant doctor and therefore created a factual issue. The court held that because there was a genuine issue of material fact, summary judgment was improper.

We recognize that *Healy* implicitly stands for the proposition that a defendant physician's own statements can be used to create a factual issue in a medical malpractice case. *Healy* is factually distinguishable, however, from the case at hand because in *Healy*, the plaintiff introduced a direct statement by the defendant doctor on the applicable standard of care. The plaintiff then offered his own affidavit which stated that the defendant doctor had not acted in conformity with that standard. In *Healy*, the defendant doctor stated that it would have been a deviation from the applicable standard of care if he had failed to inform the patient that death was a potential side effect of the treatment. In this case, neither party has set out the applicable standard of care. As a result, the record contains no indication of the standard by which to evaluate Brand's and Murayama's professional conduct. Therefore, *Healy* does not control the outcome of Fossett's appeal.

However, this is not a typical case in which the plaintiff has failed to produce any evidence from a qualified medical expert. Fossett has introduced statements by Brand and Murayama that constitute evaluations of their own performances. According to the affidavits introduced by Fossett, when Fossett's mother asked Murayama why he had not removed the fluid from Fossett's abdomen, he replied, "I don't know why I left it there,

I just left it there." When Fossett asked Murayama why he had not removed the fluid, he replied that he thought it would absorb into her body. When Fossett discussed with Brand the fluid left in her abdominal cavity by Murayama, Brand told her that "leaving it in there was a mistake."

We agree with the district court that these statements are not sufficient to create an issue of fact as to Murayama. These statements provide no insight into the requisite standard of care for treating Fossett, who had infectious fluid in her abdomen. The mere statement by Brand that "leaving it in there was a mistake," does not create a reasonable inference of negligence. A mistake is not synonymous with negligence. We therefore conclude that the district court was correct in granting summary judgment in favor of Murayama.

In reference to Brand, however, there is more evidence of the requisite standard of care and his failure to meet that standard. According to the affidavits introduced by Fossett, Brand approached Fossett's husband after he performed the ERCP and said, "I have punctured her duodenum. I made a false passage, I made a terrible mistake, I'm very very sorry." Brand told Fossett's husband that there might be fluid leaking into Fossett's abdominal cavity. When Fossett's husband told Brand that it was okay, Brand responded, "No, it isn't. This shouldn't have happened." In addition, when Fossett later asked Brand what went wrong with the ERCP, he told her that the puncture caused by the tube going down her throat was not supposed to have happened.

Brand's statements to the effect that the puncture should not have happened constitute an evaluation of his own performance. Viewing these statements in a light most favorable to Fossett and giving her the benefit of all reasonable inferences, we determine that Brand's statements imply that he did not meet the requisite standard of care. Therefore, the district court erred in granting summary judgment in favor of Brand. We reverse.

CONCLUSION

The district court correctly entered summary judgment in favor of McCashland and Murayama. We therefore affirm with respect to McCashland and Murayama. The district court erred

in granting Brand summary judgment because his statements create a genuine issue of fact. We therefore reverse with respect to Brand.

AFFIRMED IN PART, AND IN PART REVERSED.

CONNOLLY, J., dissenting.

I respectfully dissent. I cannot reconcile the majority's result with our firmly established precedent. In my opinion, the district court correctly determined that Brand's statements to Fossett and her family created no genuine issue of material fact.

The majority bases its decision on the fact that Brand made certain "statements" or "admissions" to Fossett and her family that constituted an evaluation of his own performance. Fossett introduced affidavits which showed that Brand made the following statements: "I have punctured her . . . duodenum. I made a false passage, I made a terrible mistake, I'm very very sorry. . . . No, it isn't [okay]. This shouldn't have happened." In addition, according to Fossett, he told her that she had been "punctured" and that "the injury caused by the tube going down into [her] throat during the E.R.C.P. was not supposed to happen." It is clear, however, that when all of Brand's comments are read together, they give no indication of the requisite standard of care or whether his actions complied with that standard.

I fail to see how these comments are sufficient to satisfy the requirement that professional negligence be proved by expert testimony. There is no indication in Brand's comments on whether his manner of treatment and exercise of skill demonstrated a lack of skill or knowledge or a failure to exercise reasonable care. Although his admissions are certainly sufficient to prove a prima facie case on the issue of causation, they are not sufficient to obviate the usual necessity for expert testimony on the standard of care and skill and its exercise. In short, statements or admissions characterized as "mistakes" do not necessarily mean that a standard of care has been violated.

We have long held that a physician's negligence, unless brought under the res ipsa loquitur doctrine, must be proved by expert testimony or must fall within the common knowledge exception. See *Halligan v. Cotton*, 193 Neb. 331, 227 N.W.2d 10 (1975). We have even held that despite a physician's admissions

on causation, expert testimony is still required on the standard of care and skill and its exercise. See *Halligan, supra.*

In *Halligan*, we carefully distinguished the plaintiff's case from other cases in which defendant doctors had admitted *negligence*. The court stated, "In the present case we have no admission by Dr. Cotton that his conduct was negligent. Such an admission does not follow from his testimony even by inference." *Id.* at 339, 227 N.W.2d at 14.

I believe that *Halligan* requires this court to affirm the district court's decision to grant summary judgment in favor of Brand. The record demonstrates a complete absence of expert testimony on the applicable standard of care and whether Brand complied with that standard in his treatment of Fossett. Since the majority correctly finds that the facts do not satisfy the common knowledge exception, expert opinion testimony is required to raise an issue of fact as to Brand's negligence.

Brand's affidavit stated that his treatment of Fossett complied with the applicable standard of care for a similar physician under similar circumstances in a similar community. This was sufficient for summary judgment purposes to present a prima facie showing that he was not negligent in his treatment of Fossett. See *Boyd v. Chakraborty*, 250 Neb. 575, 550 N.W.2d 44 (1996). The burden then shifted to Fossett to rebut this evidence and to establish the existence of a genuine issue of material fact. Brand's comments to Fossett and her family simply do not create an issue of fact because they do not establish the applicable standard of care. How can a defendant be found liable for breach of an undefined duty?

In my opinion, Fossett failed to rebut Brand's prima facie showing that he met the standard of care. Therefore, I would affirm the decision of the district court.

STEPHAN, J., joins in this dissent.

GREATER OMAHA REALTY COMPANY, A NEBRASKA CORPORATION, APPELLANT, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
DAVID L. DAVIS, APPELLANT, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

605 N.W.2d 472

Filed February 4, 2000. Nos. S-98-545, S-98-546.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Courts: Jurisdiction.** While it is not a constitutional prerequisite for jurisdiction, the existence of an actual case or controversy is necessary for the exercise of judicial power.
4. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.
5. ___. As a general rule, a moot case is subject to summary dismissal.
6. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
7. **Declaratory Judgments: Moot Question.** A declaratory judgment action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action.
8. **Declaratory Judgments.** At the time that a declaratory judgment is sought, there must be an actual justiciable issue.
9. **Justiciable Issues.** A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.
10. **Declaratory Judgments.** Declaratory relief cannot be used to obtain a judgment which is merely advisory.
11. **Moot Question: Appeal and Error.** The public interest exception to the rule precluding consideration of issues on appeal due to mootness requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.
12. ___: ___. It is generally inappropriate for an appellate court to review a moot case that does not evade review as a result of a transitory setting, even if the problem is likely to recur.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Appeals dismissed.

Tyler B. Gaines, of Gaines, Mullen, Pansing & Hogan, for appellants Greater Omaha Realty Company and David L. Davis.

Michael J. Mills and Jill A. Vinjamuri, of Kutak Rock, for appellee First National Bank of Omaha.

John E. Hubbard and Trenten P. Bausch, of Blackwell Sanders Peper Martin, for appellee Jayhawk, L.L.C.

Paul Kratz, Omaha City Attorney, Bernard J. in den Bosch, and Charles K. Bunger for appellee City of Omaha.

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

GERRARD, J.

INTRODUCTION

The appellees, City of Omaha, Nebraska (City), First National Bank of Omaha, and Jayhawk, L.L.C., were parties to an agreement concerning the redevelopment of certain downtown Omaha properties. The appellants, Greater Omaha Realty Company (Greater Omaha) and David L. Davis, owned property subject to this proposed plan. Using its power of eminent domain, the City filed a petition to condemn the property. The appellants then filed separate lawsuits against the appellees seeking declaratory relief, alleging that the takings were unconstitutional. The trial court granted the appellees' motion for summary judgment and overruled the appellants' motion for a new trial in each case. The appellants timely appealed. For the reasons that follow, we dismiss the consolidated appeals as moot.

FACTUAL AND PROCEDURAL BACKGROUND

Davis owned property located at 1514 Davenport Street in Omaha, Nebraska. Greater Omaha owned two parcels of land: one tract located at 1501 Davenport Street and another tract located at 213 North 16th Street and 1516 Capitol Avenue, also in Omaha. Collectively, these parcels will be referred to as "property." This property was designated "blighted and substandard" pursuant to Nebraska's Community Development Law (CDL), codified at Neb. Rev. Stat. §§ 18-2101 through 18-2144 (Reissue 1991 & Cum. Supp. 1992), on June 2, 1992. In an

effort to redevelop the downtown area, the City publicized a plan under the CDL in November 1996. The plan called for the construction of an operations-data processing facility and an office tower in downtown Omaha, affecting the appellants' property. In November and December 1996, the City's planning department and the city council approved of this redevelopment plan. The city council also passed an ordinance on February 4, 1997, declaring the necessity of appropriating these properties for the plan.

On February 4 and 10, 1997, a redevelopment agreement was signed to implement this plan by and among the City, Jayhawk, and First National Bank. This redevelopment agreement required Jayhawk to acquire the appellants' property (and others) and build the facility and the tower, which, as the agreement recited, First National Bank intended to use and occupy. Further, the agreement required the City to use its power of eminent domain to obtain the properties in the event that Jayhawk was unable to acquire them through a business transaction.

Negotiations between Jayhawk and the appellants failed. Therefore, on June 13, 1997, the City filed a petition to condemn the appellants' property. On June 27, the City filed its notice of intention to acquire the property.

On July 22, 1997, the appellants filed separate lawsuits against the appellees, seeking declaratory relief. The petitions were identical except for the named plaintiff and the affected real estate. The appellants claimed that the acquisition of the property was unlawful in that (1) the City's exercise of its power of eminent domain was not for a public use or purpose; (2) the City's action violated the 5th and 14th Amendments to the U.S. Constitution and article I, § 21, of the Nebraska Constitution; and (3) the City's ordinance No. 34106 and the CDL which authorized the taking were unconstitutional. The appellants asked the district court to enter an order declaring the acquisition of the appellants' property to be unconstitutional, the redevelopment agreement entered into by the appellees as null and void, and such further relief as the court deemed just and equitable. The appellants did not seek injunctive relief.

The appellees separately answered the petitions and then moved to consolidate the proceedings, and the motion was

granted on September 16, 1997. In late September, the appellees filed motions for summary judgment. In support of their motions, the appellees offered the affidavits of Buster Brown, acting city clerk, and Steven Jensen, assistant director of the planning department's urban planning division for the City. In addition, the appellees asserted the acquisition of the property pursuant to the power of eminent domain is for a public purpose or use as set forth in the CDL, and as recognized by this court in *Monarch Chemical Works, Inc. v. City of Omaha*, 203 Neb. 33, 277 N.W.2d 423 (1979). The appellants offered the affidavit of their attorney with six newspaper articles attached. The trial court sustained the appellees' motions for summary judgment and dismissed the case on February 2, 1998. In relevant part, the summary judgment order stated:

> The City of Omaha has complied with Neb. Rev. Stat. Sections 18-2101, 2102 (Reissue 1991), the Community Development Law and pursuant to Monarch Chemical Works, Inc. v. City of Omaha, 203 Neb. 33, 277 N.W.2d 423 (1979) and Thornton Development Authority v. Upah, 640 F. Supp. 1071 (D. Colo. 1986), [Appellees'] Motions for Summary Judgment are sustained in their entirety and this case is dismissed.

The appellants moved for a new trial on February 11, 1998. This motion was denied on May 6. The appellants then filed separate notices of appeal on May 28. These actions have been consolidated for all purposes on appeal.

At the time the appeals were filed, construction on the appellants' property had commenced. The appellants did not move for a stay of the condemnation proceedings or the construction pending the outcome of the instant appeals, nor did they seek a temporary injunction. In the interim between the district court's rulings and the oral argument on the instant appeal, condemnation proceedings were completed, the City took possession of the property, and a three-story building on the property was substantially completed. Consequently, on October 5, 1999, the appellees filed a suggestion of mootness and joint motion to dismiss, to which the appellants objected. The appellants and the appellees argued both the mootness issue and the merits of the appeal at oral argument, as ordered by this court.

ASSIGNMENTS OF ERROR

The appellants claim that the district court erred in (1) granting summary judgment because there was insufficient evidence in the bill of exceptions for the trial court to sustain such motion; (2) determining the separate appellees are entitled to judgment as a matter of law and erred in overruling the appellants' motions for a new trial; (3) failing to consider and determine the issue of whether the taking under the CDL was for a public or private purpose or use; (4) granting summary judgment to the appellees because there were genuine fact questions relating to whether the taking was for a public purpose or use; (5) granting summary judgment because the City failed to comply with the CDL in §§ 18-2101 through 18-2144; and (6) granting summary judgment because article XIII, § 2, of the Nebraska Constitution prohibits the use of condemnation to acquire property in blighted areas.

STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision. *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999).

ANALYSIS

MOOTNESS

[2,3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Interest of Alycia P., ante* p. 258, 603 N.W.2d 7 (1999); *US Ecology v. State, ante* p. 10, 601 N.W.2d 775 (1999). While it is not a constitutional prerequisite for jurisdiction, the existence of an actual case or controversy is necessary for the exercise of judicial power. *US Ecology v. State, supra*; *Galyen v. Balka*, 253 Neb. 270, 570 N.W.2d 519 (1997). Thus, the threshold issue that must be addressed is whether the taking and substantial completion of construction on the appellants' property render the instant appeals moot.

[4-6] A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally

cognizable interest in the outcome of litigation. *Elstun v. Elstun*, 257 Neb. 820, 600 N.W.2d 835 (1999); *Putnam v. Fortenberry, supra*; *State ex rel. Shepherd v. Neb. Equal Opp. Comm.*, 251 Neb. 517, 557 N.W.2d 684 (1997). As a general rule, a moot case is subject to summary dismissal. *Elstun v. Elstun, supra*; *Putnam v. Fortenberry, supra*. A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Putnam v. Fortenberry, supra*.

[7-9] Given the nature of the relief sought, we conclude that the appeals in the instant case are moot. Our analysis is guided by the recent case *Putnam v. Fortenberry, supra*. In *Putnam*, appellant sought to enjoin the proposed sale of Lincoln General Hospital to Bryan Memorial Hospital. Appellant also sought declaratory relief. The district court denied appellant's injunction and her action for declaratory judgment, and she appealed. The record revealed no stay or supersedeas bond, and by the time the appeal reached this court, the sale had already been completed. Appellees argued that the appeal was now moot, and we agreed. In addressing her claim for declaratory relief, we stated:

> A declaratory judgment action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action. . . . At the time that the declaration is sought, there must be an actual justiciable issue. . . . A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.

Id. at 272-73, 589 N.W.2d at 844. We concluded that the declaratory judgment action was moot because "[d]eclaratory relief would not undo what has already been completed." *Id.* at 273, 589 N.W.2d at 844.

[10] Similarly, the instant appeal is moot. The takings that the appellants claim are unconstitutional and unlawful have already occurred; equitable relief is not available, for equity will not seek to declare unlawful an action that has already been completed. See *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999). As noted in *Putnam*, "A declaratory judgment in this

case would be nothing more than advisory, and 'declaratory relief cannot be used to obtain a judgment which is merely advisory.' " 256 Neb. at 273, 589 N.W.2d at 844 (quoting *Galyen v. Balka*, 253 Neb. 270, 570 N.W.2d 519 (1997)).

PUBLIC INTEREST EXCEPTION

[11] The appellants assert that even if their appeals are moot, they should be considered under the public interest exception. We disagree. The public interest exception to the rule precluding consideration of issues on appeal due to mootness requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem. *Elstun v. Elstun*, 257 Neb. 820, 600 N.W.2d 835 (1999); *Putnam v. Fortenberry, supra.*

This same argument was raised in *Putnam*, and was also rejected. In *Putnam v. Fortenberry*, 256 Neb. at 273-74, 589 N.W.2d at 844, this court determined that the exception did not apply:

> We find in the instant case that while the issues presented involve public questions, there is little need for authoritative adjudication of these issues, because of the remote likelihood of another case presenting the same or similar circumstances. The issues presented in this case rest on the terms of this particular sale, the particular deeds and bequests made for Lincoln General's benefit, and the particular procedures that were used to approve the sale in this case. It is highly unlikely that another case could present a similar factual situation.
>
> Moreover, the posture of this case is due to the terms of this particular contract, the relief sought by Putnam, and the strategic choice of Putnam in not attempting to prevent the sale from closing during the pendency of appellate review. The nature of this case would not inherently preclude appellate review.

[12] In the instant case, the appellants' action arguably does have a public nature because the power of eminent domain is involved. However, as in *Putnam*, this particular set of circumstances is unlikely to recur, because the purported unlawfulness of the taking is essentially predicated on the contract between

the appellees relating to provisions of the CDL. Moreover, like the *Putnam* case, the posture of the instant case is due in part to the declaratory relief sought by the appellants and the strategic choice of the appellants in not seeking injunctive relief or taking some other legal action to prevent the construction of the three-story building during the pendency of appellate review. It is generally inappropriate for an appellate court to review a moot case that does not evade review as a result of a transitory setting, even if the problem is likely to recur. *Putnam v. Fortenberry, supra.* There is nothing in the nature of this case that would inherently preclude appellate review.

As a result, we conclude that the public interest exception to the mootness doctrine does not apply in this case.

CONCLUSION

Because we have concluded that these appeals are moot and that the public interest exception does not apply, these consolidated appeals are dismissed.

APPEALS DISMISSED.

MILLER-LERMAN, J., not participating.

MICKEY L. RHOADES, APPELLEE, V.
MARY JO RHOADES, APPELLANT.

605 N.W.2d 454

Filed February 4, 2000. No. S-98-567.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of the amount of child support payments is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
2. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change in circumstances which has occurred subsequent to the entry of the original decree or a previous modification and was not contemplated when the decree was entered. Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent.
3. **Child Support: Rules of the Supreme Court: Words and Phrases.** In general, child support payments should be set according to the Nebraska Child Support

Guidelines established pursuant to Neb. Rev. Stat. § 42-364.16 (Reissue 1998). The guidelines provide that in calculating child support, the court must consider the total monthly income, defined as the income of both parties derived from all sources except all means-tested public assistance benefits and payments received for children of prior marriages.

4. **Child Support: Taxation.** As a general rule, the income of a self-employed person can be determined from his or her income tax return. However, income for the purpose of child support is not necessarily synonymous with taxable income.
5. **Child Support: Rules of the Supreme Court: Presumptions.** The Nebraska Child Support Guidelines are applied as a rebuttable presumption, and all orders for child support shall be established in accordance with the provisions of the guidelines unless the court finds that one or both of the parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied.
6. **Child Support: Rules of the Supreme Court.** The Nebraska Child Support Guidelines permit deviations under specified circumstances, including whenever the application of the guidelines in an individual case would be unjust or inappropriate.
7. ___: ___. If a child support order deviates from the Nebraska Child Support Guidelines, the trial court must state the reasons for the deviation in the decree or order, or alternatively, it must complete worksheet 5 and file it in the court file. In addition, paragraph C of the guidelines requires that the decree or order state the amount of support that would have been required under the guidelines absent the deviation.
8. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded for further proceedings.

Michael B. Lustgarten, of Lustgarten & Roberts, P.C., for appellant.

Thomas C. Green II and Rodney G. Gnuse, of Gnuse Law Offices, P.C., for appellee.

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

STEPHAN, J.

Mary Jo Rhoades appeals from the dismissal of her application to modify the child support obligation of Mickey L. Rhoades, her former spouse. The principal issue is whether the district court erred in permitting Mickey, a self-employed truck-

driver, to deduct a portion of the cost of a truck-tractor unit which he purchased in 1996 from the income from self-employment shown on his income tax return in order to arrive at the net income upon which his child support obligation should be calculated under the Nebraska Child Support Guidelines. We conclude that the district court abused its discretion in permitting the deduction and therefore reverse, and remand for further proceedings.

FACTS

Mickey and Mary Jo were married May 7, 1977, in Valley, Nebraska. They are the parents of two children, a son born April 17, 1978, and a daughter born January 13, 1982. The marriage was dissolved by the district court for Douglas County on May 17, 1993. Pursuant to the terms of the decree, custody of the minor children was awarded to Mary Jo, and Mickey was ordered to pay child support in the amount of $600 per month while both children were minors and $400 a month thereafter until the younger child reached the age of majority.

Mary Jo filed an application to modify this child support obligation on December 22, 1997. At that time, one of the children had reached majority. In her application for modification, Mary Jo alleged that there had been a material change in circumstances because of a significant increase in Mickey's income and because of the implementation of the new Nebraska Child Support Guidelines on January 1, 1996.

A hearing was held on the application on May 18, 1998. The evidence established that Mary Jo had been a self-employed hairdresser for 15 years and that Mickey had been a self-employed truckdriver for 25 to 30 years. Mickey testified that he currently contracts with BTI Special Commodities to haul loads using his personally owned tractor. It is necessary for him to have a reliable tractor because he frequently transports time-sensitive materials, and he therefore tries to purchase a new tractor every 5 to 6 years.

Mickey purchased a new tractor in 1996. On February 23, 1996, he executed a promissory note in the amount of $76,215.58, payable over 60 months, to finance a portion of the purchase price, obligating him to make monthly payments of

$1,661.70. He deducts the interest on this loan as a business expense in calculating his net profit from self-employment on his federal income tax return. His returns reflected an interest expense deduction of $6,603 in 1996 and $6,859 in 1997. In addition, he claimed depreciation on the tractor in the amount of $22,700 in 1996 and $12,791 in 1997.

Each party offered child support calculations and supporting evidence which was received by the court without objection. Mary Jo's calculation was based upon average net income for both parties for 1996 and 1997. She arrived at a combined monthly net income of $3,674.42, resulting in total monthly support for one child in the amount of $857 as determined by table 1 of the Nebraska Child Support Guidelines. She calculated Mickey's share of this obligation to be $693.38, representing 80.91 percent of the total.

Mickey's calculations were based upon his average income for the years 1995 through 1997. He added his claimed depreciation back into net income for purposes of determining support income, as required by paragraph D of the Nebraska Child Support Guidelines. However, he then deducted one-sixth of the actual cost of the tractor purchased in 1996 less an anticipated trade-in allowance of $20,000 from his income for each of the years 1995 through 1997 in order to arrive at the income upon which he calculated the child support obligation. Using this method, he calculated the total monthly income of both parents to be $2,343.71, resulting in total monthly support for one child in the amount of $558. He further calculated his share of this obligation to be $349.98, representing 62.72 percent of the total.

The district court issued the following ruling from the bench at the close of the hearing:

> The decree in this matter was 5 years ago. The decree itself doesn't show what was taken into account for the determination of the child support which was calculated at that time. . . . While petitioner's expense for his truck doesn't fall neatly within the child support guidelines mandated by the Nebraska Supreme Court, the cost of purchase of the vehicle — the principal cost of it and the life of that truck is an actual expense to the petitioner and one that is ongoing. It is every bit an actual cost as those other costs that

> are allowed to be deducted by the Nebraska Supreme Court. The interest is not a part of this request, the interest deduction. The other paper deductions are back — fed back into the cost determination and calculations.
>
> Since the cost is actual, since it is necessary and since it is ongoing, the court finds that the petitioner's request to allow it to be played in and deducted from his net income is appropriate. The court will allow it.
>
> The court therefore finds that the net income of the respondent has not appreciably or substantially changed over the years. The application, therefore, to modify the decree has not been met, And [sic] the application to modify is overruled and dismissed. Each party shall be responsible for their own attorney fees. That will be the judgment of the court.

The court then made the following journal entry: "Application to modify decree came on for hearing. Parties appear. Evidence adduced. Respondent fails to show material and substantial change in circumstances. Application to modify dismissed."

Mary Jo perfected a timely appeal, which we moved to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts.

ASSIGNMENT OF ERROR

Mary Jo assigns that the district court abused its discretion in calculating Mickey's income for child support purposes.

STANDARD OF REVIEW

[1] Modification of the amount of child support payments is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Truman v. Truman*, 256 Neb. 628, 591 N.W.2d 81 (1999); *Faaborg v. Faaborg*, 254 Neb. 501, 576 N.W.2d 826 (1998).

ANALYSIS

[2] A party seeking to modify a child support order must show a material change in circumstances which has occurred subsequent to the entry of the original decree or a previous modification and was not contemplated when the decree was

entered. *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999). Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent. *Id.*

In her application for modification, Mary Jo alleged as material changes in circumstances (1) a significant increase in Mickey's earnings and (2) the implementation of the new Nebraska Child Support Guidelines on January 1, 1996. While the record contains Mickey's incomes for the years 1995 through 1997, it is silent as to his income at the time of the 1993 decree. Thus, Mary Jo did not meet her burden of proving a material change in circumstances based upon a change in Mickey's income between 1993 and 1997.

However, Mary Jo also alleged that the 1996 amendments to the Nebraska Child Support Guidelines constituted a material change in circumstances warranting an upward modification of Mickey's child support obligation. Paragraph Q of the guidelines, as amended, states:

> **Modification.** Application of the child support guidelines which would result in a variation by 10 percent or more, upward or downward, of the current child support obligation, due to financial circumstances which have lasted 3 months and can reasonably be expected to last for an additional 6 months, establishes a rebuttable presumption of a material change of circumstances.

See *Dueling v. Dueling*, 257 Neb. 862, 601 N.W.2d 516 (1999). Based upon Mary Jo's calculations which were received in evidence, Mickey's child support obligation for one child under the current guidelines would be $693.38, an increase of approximately 73 percent over the amount set forth in the decree, which would establish a rebuttable presumption of a material change of circumstances under paragraph Q. Under Mickey's calculations, his obligation would be $349.98, which is 12.5 percent less than the original award.

Our task in determining whether the trial court erred in calculating Mickey's current wages, as asserted by Mary Jo, is

complicated somewhat by the fact that the record contains no wage calculation by the trial court. However, it is clear from the court's oral ruling that it accepted Mickey's contention that a portion of the cost of his tractor should be deducted from his income in order to arrive at his child support obligation. On oral argument before this court, the parties agreed that this issue is dispositive. We therefore address the question of whether the tractor cost was properly deducted in calculating Mickey's net income for purposes of child support modification.

[3,4] In general, child support payments should be set according to the Nebraska Child Support Guidelines established pursuant to Neb. Rev. Stat. § 42-364.16 (Reissue 1998). *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W.2d 528 (1999); *Knippelmier v. Knippelmier*, 238 Neb. 428, 470 N.W.2d 798 (1991). The guidelines provide that in calculating child support, the court must consider the total monthly income, defined as the income of both parties derived from all sources except all means-tested public assistance benefits and payments received for children of prior marriages. *Dueling v. Dueling, supra*; *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999); Nebraska Child Support Guidelines, paragraph D. As a general rule, the income of a self-employed person can be determined from his or her income tax return. See, *Marr v. Marr*, 245 Neb. 655, 515 N.W.2d 118 (1994) (income of self-employed paving contractor derived from income tax returns); Nebraska Child Support Guidelines, paragraph D (requiring submission of tax returns to court in advance of hearing regarding child support). However, we have also held that income for the purpose of child support is not necessarily synonymous with taxable income. *Rauch v. Rauch, supra*; *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998). Mickey's tax returns do not reflect a deduction for the actual cost of his tractor.

[5,6] The Nebraska Child Support Guidelines are applied as a rebuttable presumption, and all orders for child support shall be established in accordance with the provisions of the guidelines unless the court finds that one or both of the parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied. *Dueling v. Dueling, supra*; *State on behalf of Hopkins v. Batt, supra*. The guidelines permit devi-

ations under specified circumstances, including "whenever the application of the guidelines in an individual case would be unjust or inappropriate." Nebraska Child Support Guidelines, paragraph C(5).

In *Rauch v. Rauch, supra*, we held that although a father was entitled to take a loss from his taxable income due to his part-time farming losses, the trial court did not abuse its discretion when it deviated from the guidelines by not considering the farming losses in calculating the father's monthly income for child support purposes. We noted that the father had generated the losses by investing considerable sums of money in his farm, and reasoned that "[i]t would be unfair for [the father] to benefit from his choice to incur debt and build equity in his farm at the expense of his children." *Id.* at 264, 590 N.W.2d at 175. We concluded that under the circumstances of that case, the consideration of farming losses in arriving at the father's net income "might create a false impression of [the father's] financial situation and lead to an unjust award of child support." *Id.*

[7] As in *Rauch*, the appropriate analytical framework in this case is whether the trial court erred in permitting a deviation from the child support guidelines with respect to the manner in which the father's income was computed. This case presents the converse of *Rauch*, i.e., whether the trial court abused its discretion in permitting a parent to compute his income by deducting an expense which is *not* deductible for income tax purposes. We recently restated in *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W.2d 528 (1999), that if a child support order deviates from the guidelines, the trial court must state the reasons for the deviation in the decree or order, or alternatively, it must complete worksheet 5 and file it in the court file. In addition, paragraph C of the guidelines requires that the decree or order state the amount of support that would have been required under the guidelines absent the deviation. Although the trial judge's ruling from the bench in this case can fairly be interpreted as allowing a deviation from the guidelines by permitting Mickey to deduct a portion of the cost of the tractor he purchased in 1996 in order to arrive at his net income, there is no statement of the amount of support which would be required under the guidelines absent the deviation. The only evidence in this regard is Mary Jo's

calculation of Mickey's support obligation in the amount of $693.38.

The tractor is a capital asset used by Mickey to generate income. In *Woods v. Woods*, 95 Ohio App. 3d 222, 223, 642 N.E.2d 45, 46 (1994), a self-employed truckdriver was permitted to deduct the monthly loan payments on his tractor-trailer rig in arriving at his net income for child support purposes under a guideline which defined "self-generated income" as "'gross receipts received by a parent from self-employment . . . minus ordinary and necessary expenses incurred by the parent in generating the gross receipts.'" Our child support guidelines contain no similar language. Therefore, a deduction of the cost of the tractor from Mickey's income would be permissible only as a deviation from the guidelines where its disallowance would result in an "unjust or inappropriate" child support order. See Nebraska Child Support Guidelines, paragraph C(5).

The trial court found that allowing the deduction for the tractor cost was "appropriate," but did not specifically find that disallowance would be "unjust or inappropriate" so as to justify a deviation from the guidelines. As the trial court noted in its oral ruling, there was no showing that the tractor cost was deducted from Mickey's income in arriving at the child support obligation specified in the 1993 decree. Indeed, an inference can be drawn that it was not, because Mickey's 1998 calculations, which include the deduction, result in lower child support than ordered in the decree. Absent a showing that the tractor cost was deducted in determining Mickey's income for purposes of child support under the guidelines in effect at the time of the decree, we perceive no good reason why it should be deducted in calculating his child support obligation for purposes of making the comparison specified in paragraph Q of the guidelines. Unless the deduction was applied in both instances, the comparison is not meaningful or accurate. Thus, there was no basis for allowing the deduction of the tractor cost from Mickey's income as a deviation from the child support guidelines at the time of the modification proceeding because there was no evidence that such costs had been deducted in computing the original child support obligation which Mary Jo sought to modify, and therefore no showing that the deviation was necessary to avoid an unjust or inappropriate result.

Moreover, although Mickey argues on appeal that the tractor cost deduction is the equivalent of lease payments which would be deductible from his gross receipts for income tax purposes, he offered no evidence regarding the fair rental value of the tractor or the net effect which deducting lease payments would have on his taxable income from self-employment. Likewise, Mickey offered no evidence that increasing his child support obligation from $400 to the amount of $693.38 would subject him to economic hardship or otherwise achieve an unjust result. We note that he was paying a total of $600 per month before his older child reached majority in April 1997 and that the younger child for whom increased support is sought will reach majority in January 2001.

[8] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Hoshor v. Hoshor*, 254 Neb. 743, 580 N.W.2d 516 (1998). In this case, we conclude that the district court abused its discretion in allowing a deviation from the current child support guidelines by permitting Mickey to deduct the cost of his tractor in computing his income for child support purposes in the modification proceeding in the absence of a showing that this deduction was utilized at the time of the original child support determination and that application of the deduction was necessary in order to avoid an unjust or inappropriate result. The allowance of the deduction deprived Mary Jo of a substantial right because without the deduction, the evidence established a rebuttable presumption that upward modification of child support was warranted under paragraph Q of the guidelines.

Accordingly, we reverse, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MILLER-LERMAN, J., not participating.

KATHERINE M. RANEY, APPELLANT AND CROSS-APPELLEE, V. JOEY L. BLECHA, APPELLEE AND CROSS-APPELLANT.

605 N.W.2d 449

Filed February 4, 2000. No. S-98-920.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
3. **Visitation: Parental Rights: Adoption.** Grandparents' existing visitation rights are not automatically terminated by an adoption, but can be modified upon a showing of cause with the child's best interests at issue.
4. **Visitation: Parental Rights.** The court may modify an order granting or denying grandparent visitation upon a showing that there has been a material change in circumstances which justifies such modification and that the modification would serve the best interests of the child.
5. **Final Orders: Appeal and Error.** A party may appeal from a court's order only if the decision is a final, appealable order.
6. ___: ___. The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action, when such order in effect determines the action and prevents a judgment; (2) an order affecting a substantial right made during a special proceeding; and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
7. **Visitation: Appeal and Error.** Factual determinations concerning grandparent visitation are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of abuse of the trial judge's discretion.
8. **Judges: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed.

Charles J. Bentjen, of Witte and Bentjen, P.C., for appellant.

John F. Thomas, Leo A. Knowles, and Amy E. Wallace, of McGrath, North, Mullin & Kratz, P.C., for appellee.

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

WRIGHT, J.

NATURE OF CASE

Katherine M. Raney appeals the decision of the district court which terminated her temporary visitation with Shelby Leigh Blecha.

SCOPE OF REVIEW

[1] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Ferguson v. Union Pacific RR. Co., ante* p. 78, 601 N.W.2d 907 (1999).

[2] In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Pier v. Bolles*, 257 Neb. 120, 596 N.W.2d 1 (1999).

FACTS

Shelby was born to Katherine's daughter Leigh Ann Jarrett and Joey L. Blecha in 1992. Leigh Ann and Joey never married, but Joey has executed a written acknowledgment of paternity. Joey lived with Shelby and Leigh Ann for approximately 2 months during Shelby's first year. Thereafter, Joey moved out, and Shelby lived with Leigh Ann and Katherine until Leigh Ann's death in 1997.

Following Leigh Ann's death, Katherine attempted to be named personal representative of the estate, but she was unsuccessful. In addition, she applied for a writ of habeas corpus to obtain custody of Shelby, but the petition was voluntarily dismissed. Katherine then filed suit as Shelby's next friend, seeking to have paternity established, custody of Shelby awarded to her, and an order of support and visitation entered against Joey. See *Blecha v. Blecha*, 257 Neb. 543, 599 N.W.2d 829 (1999). Katherine's claim for custody was based on allegations that Shelby and Leigh Ann had lived with either Katherine or Shelby's aunt for nearly all of Shelby's life and that Katherine was a fit and proper legal custodian of Shelby. *Id.*

On February 12, 1998, Katherine and Joey stipulated to a temporary visitation schedule which was subsequently approved by the district court. The schedule included visitation on alter-

nating Sundays from 9 a.m. until 7 p.m. On February 18, Joey filed a motion to terminate the visitation. Joey claimed that Katherine had used the visitation to interfere with the natural father-son relationship by taking Shelby to be interviewed by an attorney for purposes of Katherine's seeking custody. The district court overruled this motion, and no further action was taken on this matter.

On July 28, 1998, a decree of adoption was entered by the Sarpy County Court in which Joey's wife, Jessica Blecha, adopted Shelby. The following day, Joey filed in the district court for Douglas County a second motion to terminate visitation for the reason that Shelby had been adopted by Jessica. In his motion, Joey alleged that Katherine was no longer Shelby's grandmother and therefore did not have a right to visitation.

On August 7, 1998, the district court terminated the visitation, finding that although Katherine had filed a petition seeking grandparent visitation, Shelby had subsequently been adopted by Jessica. Relying on Neb. Rev. Stat. § 43-111 (Reissue 1998), the district court concluded that the adoption of Shelby by Jessica terminated the rights of Leigh Ann and that, therefore, Katherine no longer met the definition of a grandparent set forth in the grandparent visitation statutes. On this basis, the district court sustained Joey's motion to terminate visitation. Katherine appeals from this order.

ASSIGNMENTS OF ERROR

Katherine asserts the district court erred (1) in finding that the adoption of a child by a stepparent terminates the parental rights of the deceased parent, (2) in finding that Katherine no longer fits the definition of a grandparent under the grandparent visitation statutes, and (3) in sustaining the motion to terminate temporary visitation.

On cross-appeal, Joey asserts that the district court erred in overruling his first motion to terminate visitation.

ANALYSIS

The issue is whether a maternal grandparent's right to visitation is terminated by the subsequent adoption of the child by the stepmother. The district court concluded that under § 43-111, Neb. Rev. Stat. § 43-1801 (Reissue 1998), and *Rust v. Buckler*,

247 Neb. 852, 530 N.W.2d 630 (1995), the adoption of Shelby by Jessica terminated any rights that Leigh Ann had in Shelby and that, therefore, Katherine was no longer a "grandparent" and had no further right to visitation with Shelby.

In *Rust v. Buckler, supra*, the biological parents of Jason Dwayne Buckler died on or about September 19, 1993. Jerry and Marti Buckler, the maternal grandparents, who had been raising Jason since he was approximately 6 weeks old, took custody of Jason. Paul and Anita Rust, Jason's paternal grandparents, thereupon filed suit to establish visitation. Pursuant to the parties' agreement, the trial court entered a temporary order granting the Rusts specified visitation rights. The Bucklers thereafter adopted Jason and challenged the order of the trial court which granted the Rusts temporary visitation. The Bucklers' petition to set aside the temporary visitation order was denied, and the trial court then granted the Rusts permanent visitation.

On appeal, we did not decide whether an adoption serves to terminate the rights of a deceased biological parent such as to remove the grandparent from the ambit of the visitation statutes. We concluded that such determination was unnecessary because the language of Neb. Rev. Stat. § 43-110 (Reissue 1998) made it clear that because of the adoption, the Bucklers had become the boy's parents and the condition under which the visitation statutes would permit grandparent visitation no longer existed.

Pier v. Bolles, 257 Neb. 120, 596 N.W.2d 1 (1999), was released after the filing of the district court's order herein. In *Pier*, we considered whether under Nebraska law, paternal grandparent visitation which had been granted following a divorce proceeding was automatically terminated by the father's voluntary relinquishment of parental rights and the subsequent adoption of the child by the stepfather.

In *Pier*, the parents divorced, and custody of the child was granted to the mother. Paternal grandparent visitation was granted, but the decree provided that such visitation could be unilaterally terminated by the mother if the father violated his criminal probation order or was charged with a criminal offense within 2 years after entry of the decree. In September 1994, the grandparents' visitation was terminated, evidently due to the

occurrence of one of those events. On October 20, the paternal grandparents initiated a new action and were granted temporary visitation. On May 26, 1995, the trial court awarded the grandparents visitation.

The mother had remarried in August 1993, and the biological father subsequently voluntarily relinquished his parental rights to the child and consented to the child's adoption by the stepfather. The adoption was entered April 11, 1996. On June 6, 1997, the mother moved to terminate the grandparents' visitation because the child had been adopted by the stepfather. The trial court denied the motion, concluding that the prior order of the court granting grandparent visitation was not automatically terminated by the adoption of the child by the stepfather and that it was in the best interests of the child to maintain grandparent visitation rights.

On appeal, we concluded that visitation granted under the grandparent visitation statutes was not intended to be interrupted by the adoption statutes. We stated:

> [T]he grandparent visitation statutes provide a two-step analysis by which the court, upon application, can determine on a case-by-case basis whether an order previously granting or denying grandparent visitation should be modified. Thus, following the adoption of the child, if the evidence shows that there has been a material change in circumstances justifying a change and the best interests of the child would be served, previously granted grandparent visitation can be modified, up to and including termination of grandparent visitation.

Pier, 257 Neb. at 128, 596 N.W.2d at 7. We affirmed the trial court's determination that grandparent visitation is not automatically terminated by the adoption of a minor child by a stepparent.

We noted that in contrast to § 43-110, § 43-111 makes no reference to the kindred of the natural parent as being affected by or relieved of the duties of their natural relationship to the child. We concluded that the effect of §§ 43-110 and 43-111 was to provide that the adoptive parent and his or her kindred enjoy a new relationship to the child but that only the natural parents of the adopted child were relieved of their duties to the child. Therefore, although § 43-110 relieves the natural parents of

their duties, § 43-111 does not affect the rights of the biological grandparents. We pointed out that if parental rights are terminated and the child is adopted prior to the time that grandparents seek visitation, then the grandparents have no standing to seek visitation.

The case at bar is controlled by our decision in *Pier v. Bolles*, 257 Neb. 120, 596 N.W.2d 1 (1999). To the extent that *Rust v. Buckler*, 247 Neb. 852, 530 N.W.2d 630 (1995), conflicts with *Pier*, it is overruled. Here, Katherine obtained an order of visitation prior to Shelby's adoption by Jessica, and therefore, Katherine's visitation rights were not terminated by the adoption.

[3,4] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Ferguson v. Union Pacific RR. Co.*, *ante* p. 78, 601 N.W.2d 907 (1999). Grandparents' existing visitation rights are not automatically terminated by an adoption, but can be modified upon a showing of cause with the child's best interests at issue. "The court may modify an order granting or denying such visitation upon a showing that there has been a material change in circumstances which justifies such modification and that the modification would serve the best interests of the child." Neb. Rev. Stat. § 43-1802(3) (Reissue 1998).

[5,6] On cross-appeal, Joey contends that the district court erred in overruling his first motion to terminate visitation. A party may appeal from a court's order only if the decision is a final, appealable order. *Hernandez v. Blankenship*, 257 Neb. 235, 596 N.W.2d 292 (1999). The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action, when such order in effect determines the action and prevents a judgment; (2) an order affecting a substantial right made during a special proceeding; and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. See *id.*

The district court's order which overruled Joey's first motion to terminate visitation was not a final order such that Joey had to appeal within 30 days of the order. Therefore, we can consider the matter during this appeal.

Joey argues that the district court erred by not terminating visitation when Katherine took Shelby to see a lawyer without Joey's knowledge, filed a petition for habeas corpus, and objected to Joey's appointment as Shelby's conservator. Joey asserts that grandparent visitation is contingent upon several factors, one of which is that "such visitation will not adversely interfere with the parent-child relationship." See § 43-1802(2). Joey claims that Katherine's actions interfered with the parent-child relationship and were grounds for terminating grandparent visitation.

[7,8] Factual determinations concerning grandparent visitation are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of abuse of the trial judge's discretion. *Pier v. Bolles*, 257 Neb. 120, 596 N.W.2d 1 (1999). A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999).

Upon our de novo review of the record, we conclude that the trial judge did not abuse his discretion in overruling Joey's first motion for termination of grandparent visitation. Therefore, Joey's cross-appeal is without merit.

CONCLUSION

For the reasons set forth herein, the judgment of the district court is reversed.

REVERSED.

STEPHAN, J., not participating.

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

605 N.W.2d 440

Filed February 4, 2000. No. S-98-974.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **Constitutional Law.** The guarantee of freedom of speech is the same under both the Nebraska and the U.S. Constitutions.
3. **Constitutional Law: Statutes.** In order to determine whether a campaign financing law violates the constitutional guarantee of freedom of speech, a court must ascertain whether the statute burdens the exercise of political speech and, if it does, whether it is narrowly tailored to serve a compelling state interest.

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

David M. Pedersen and John W. McMullen, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellant.

Don Stenberg, Attorney General, L. Steven Grasz, and Lynn A. Melson for appellee.

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

STEPHAN, J.

This is an appeal from a judgment of the district court for Lancaster County determining that 1997 Neb. Laws, L.B. 420, now codified at Neb. Rev. Stat. § 32-1614 (Reissue 1998), is unconstitutional and invalid. Based upon our de novo review, we reach the same conclusion and therefore affirm the judgment of the district court.

BACKGROUND

The Campaign Finance Limitation Act (Act), Neb. Rev. Stat. §§ 32-1601 to 32-1614 (Reissue 1998 & Supp. 1999), was enacted by the Legislature in 1992 and became operative on January 1, 1993. See § 32-1601 (Cum. Supp. 1992). In general, the Act allows candidates for certain state offices to elect to limit their campaign

spending in order to become eligible for public campaign funding. *Id.* Under the Act in its original form, a candidate's agreement to abide by the spending limits was irrevocable. See §§ 32-1601 to 32-1610 (Cum. Supp. 1992). Originally, the Act did not impose any restrictions or requirements with respect to independent expenditures made by groups or committees supporting or opposing a candidate.

In 1997, the Act was amended to permit a candidate to revoke a prior decision to abide by the spending limitations under certain circumstances. The record reflects that the 1997 amendments were in response to events that took place during the 1996 state elections in Nebraska, when an independent political committee made substantial independent expenditures in support of two candidates within 8 days of the election. The most significant amendment, and the only one challenged in this action, was contained in § 14 of L.B. 420, now codified at § 32-1614, which we hereinafter refer to as "§ 14." The pertinent portions of § 14, as found in § 32-1614, provide:

> (1) If a person as defined in section 49-1438, including an independent committee or a political party committee, determines more than forty-five days prior to a primary election or general election that it intends to make independent expenditures of two thousand dollars or more during the primary election period or the general election period for or against a candidate seeking nomination or election to a covered elective office, the person shall file a statement of intent to expend with the Nebraska Accountability and Disclosure Commission. The statement of intent to expend shall be filed no later than forty-five days prior to the date of the election at which the candidate is seeking nomination or election. The statement of intent to expend shall include:
>
> . . . .
>
> (e) The maximum amount of independent expenditures the person intends to spend in support of or in opposition to the candidate for the primary election period and the general election period.
>
> (2) No person who has filed a statement of intent to expend shall make independent expenditures exceeding

> twenty percent more than the amount stated in subdivision (1)(e) of this section or less than twenty percent less than such amount. No person shall make independent expenditures for a covered elective office without filing a statement of intent to expend under this section.
>
> . . . .
>
> (4) If a statement of intent to expend is filed pursuant to this section, (a) the candidate named in the statement if the expenditures are to be made in opposition to such candidate or (b) a candidate for the same office as the candidate named in the statement and on whose behalf the expenditures are to be made shall be allowed to withdraw an affidavit of intent to abide by the spending limitations of section 32-1604 if the candidate has not received public funds under the Campaign Finance Limitation Act. The withdrawal shall be accomplished by filing a written statement withdrawing his or her affidavit to abide and simultaneously filing an affidavit not to abide under subdivision (5)(a) of section 32-1604 at least thirty days prior to the election.
>
> . . . .
>
> (6) This section shall not apply to an individual making independent expenditures with his or her own funds. An individual making independent expenditures shall be required to file an independent expenditure report as required by section 49-1467.

An independent expenditure is defined as an expenditure which "is not made at the direction of, under the control of, or with the cooperation of another person and if the expenditure is not a contribution to a committee." Neb. Rev. Stat. § 49-1428 (Reissue 1998). See, also, § 32-1603.

On August 5, 1997, the Attorney General issued Att'y Gen. Op. No. 97038 at the request of Frank J. Daley, Jr., then acting executive director of the Nebraska Accountability and Disclosure Commission. The Attorney General concluded that enforcement of § 14 would unconstitutionally infringe on the First Amendment rights of the groups which are required to file a statement of intent to expend. In reliance upon this opinion, the Nebraska Accountability and Disclosure Commission notified the Attorney General that it would not enforce § 14.

Pursuant to Neb. Rev. Stat. § 84-215 (Reissue 1999), the Attorney General, as relator for the State of Nebraska, filed a petition for declaratory judgment in the district court for Lancaster County, requesting the court to find that § 14 violated the free speech clauses of both the Nebraska and the U.S. Constitutions. The petition named as respondent Scott Moore, the Secretary of State of the State of Nebraska, who is charged by § 84-215 with defending an action brought by the Attorney General to determine the validity of a statute.

On July 22, 1998, the district court granted summary judgment in favor of the Attorney General based upon its determination that § 14 is unconstitutional. The district court further determined that § 14 was severable from other provisions of L.B. 420, which were therefore unaffected by its judgment. The Secretary of State filed this timely appeal.

ASSIGNMENTS OF ERROR

The Secretary of State assigns, restated, that the district court erred (1) in finding that § 14 imposes a substantial burden on the First Amendment rights of Nebraska citizens to engage in political expression and (2) in not finding that § 14 was narrowly tailored to serve a compelling state interest.

STANDARD OF REVIEW

[1] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *State ex rel. Stenberg v. Moore, ante* p. 199, 602 N.W.2d 465 (1999); *Bauers v. City of Lincoln*, 255 Neb. 572, 586 N.W.2d 452 (1998).

ANALYSIS

INTRODUCTION

The Attorney General contends that § 14 is in violation of the free speech provision of article I, § 5, of the Constitution of the State of Nebraska and the Free Speech Clause of the First Amendment to the U.S. Constitution in that it abridges the freedom of speech of those persons required to file a statement of intent to expend. The Secretary of State argues that the statute is a legitimate exercise of legislative authority intended to ensure

that candidates who agree to abide by the spending limits set forth in the Act receive notice of independent expenditures in sufficient time to permit them to make an educated decision whether to withdraw their agreement in order to effectively respond to such expenditures. The parties have not directed us to any state or federal statute containing provisions substantially similar to § 14, and our research has disclosed none. The issue before us is thus one of first impression.

ANALYTICAL FRAMEWORK

[2] This court has never articulated a specific test to be applied in determining whether provisions of the Act violate the constitutional guarantee of freedom of speech. We have stated, however, that the guarantee of freedom of speech is the same under both the Nebraska and the U.S. Constitutions. *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995). In *Pick*, we adopted the reasoning and analytical framework utilized by the U.S. Supreme Court in reviewing various state election statutes. We therefore look to the analysis utilized by federal courts in addressing constitutional challenges to various state and federal statutory restrictions upon independent campaign expenditures.

[3] In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657, 110 S. Ct. 1391, 108 L. Ed. 2d 652 (1990), the Supreme Court held that in order to determine whether a Michigan statute imposing restrictions on corporate political expenditures could be applied to a state chamber of commerce, it was required to "ascertain whether [the statutory restriction] burdens the exercise of political speech and, if it does, whether it is narrowly tailored to serve a compelling state interest." This two-part test was applied by the Eighth Circuit Court of Appeals in *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996), involving a First Amendment challenge to provisions of a Minnesota campaign financing statute, and *Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422 (8th Cir. 1995), involving a challenge to a Missouri statute imposing limits on certain political campaign contributions and expenditures. We conclude that the test articulated in *Austin, supra*, is the appropriate analytical framework for our evaluation of the constitutionality of § 14.

DOES § 14 BURDEN EXERCISE OF POLITICAL SPEECH?

The statute in question deals with the subject of "independent expenditures . . . for or against a candidate seeking nomination or election to a covered elective office." § 32-1614(1). The U.S. Supreme Court has characterized this subject as "an area of the most fundamental First Amendment activities." *Buckley v. Valeo*, 424 U.S. 1, 14, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). As the Court observed:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Although First Amendment protections are not confined to "the exposition of ideas," *Winters v. New York*, 333 U.S. 507, 510 (1948), "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates . . . ." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971), "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

Buckley, 424 U.S. at 14-15.

Section 14 contains two interrelated provisions which apply to independent political campaign expenditures. First, it provides that a political group or committee may not make inde-

pendent expenditures exceeding $2,000 unless it files a statement of intent to expend a specific amount in excess thereof at least 45 days prior to an election. See § 32-1614(1). Second, it prohibits the group or committee filing such a statement from spending more than 120 percent or less than 80 percent of the amount designated, which we will refer to as the "20/20 provision." See § 32-1614(2). The Secretary of State contends that the statute establishes "time, place, and manner regulations" similar to those which have been upheld against First Amendment challenges. Brief for appellant at 22. He relies on *Rosario v. Rockefeller*, 410 U.S. 752, 93 S. Ct. 1245, 36 L. Ed. 2d 1 (1973), in which the Supreme Court upheld the constitutionality of a New York election law which required a person wishing to vote in a primary election to enroll in a political party at least 30 days prior to the general election held in the preceding year. The Court reasoned that the statute did not absolutely disenfranchise potential voters, but merely imposed a time deadline upon voter registration. The Secretary of State argues that requiring a statement of intent to make independent expenditures exceeding $2,000 is a similar deadline and that the 20/20 provision is a necessary enforcement mechanism without which the statement of intent would serve no purpose.

In *Buckley v. Valeo*, 424 U.S. 1, 18, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), the Court held that a statutory $1,000 limit on independent political expenditures could not be upheld as a time, place, and manner regulation because it imposed "direct quantity restrictions" upon political speech. The Court reasoned:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

424 U.S. at 19. The court further noted that "[t]he electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech." *Id.* The Attorney General argues that, as in

Buckley, the statute under consideration in the present case results in a direct quantity restriction on political speech.

It is true that *Buckley* involved a fixed dollar limitation imposed by the government upon independent political expenditures, whereas § 14 permits a group wishing to spend more than $2,000 on a campaign to place whatever limitation it chooses upon itself, so long as it does so more than 45 days prior to the election and then complies with the 20/20 provision. In our view, however, this distinction is not material to our analysis because of the inescapable fact that § 14 restricts the previously unrestricted right of groups to make independent expenditures in support of or in opposition to political candidates. If a group does not file a statement of intent to expend pursuant to § 32-1614(1), it is subject to a $2,000 statutory cap on independent expenditures. On the other hand, if the statement of intent to expend is filed at least 45 days prior to the election as required by the statute, the filer is restricted to spending not more than 120 percent of the amount designated in the statement and becomes obligated to spend at least 80 percent of that amount, regardless of circumstances arising in the last 45 days of the campaign, which may prompt a desire to spend more or less than the amount set forth in the filer's statement. Thus, § 14 replaced the previously unfettered discretion of a group or committee to engage in political speech by making independent political expenditures subject to two options, both of which involve a quantitative regulation of that right.

"[R]estrictions on independent expenditures significantly impair the ability of individuals and groups to engage in direct political advocacy and 'represent substantial . . . restraints on the quantity and diversity of political speech.'" *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 615, 116 S. Ct. 2309, 135 L. Ed. 2d 795 (1996), quoting *Buckley, supra.* The First Amendment protects both the right to speak and the right not to speak. *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985); *Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977). Operation of § 14 would necessarily result in either a restriction upon the right to engage in political speech through independent political expenditures in

excess of $2,000 for groups which elect not to file a statement of intent to expend within the prescribed time period or a restriction to a greater amount, coupled with an obligation to spend a specific minimum amount, in circumstances where a timely filing is made and the 20/20 provision is triggered. We therefore conclude that § 14 is not simply a time, place, and manner regulation, but, rather, imposes direct quantity restrictions which burden the exercise of political speech. We must therefore proceed to the second step of our analytical framework in order to determine its constitutionality.

Is § 14 Narrowly Tailored to Achieve Compelling State Interest?

The Supreme Court has stated that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *FEC v. National Conservative PAC*, 470 U.S. 480, 496-97, 105 S. Ct. 1459, 84 L. Ed. 2d 455 (1985). The Secretary of State essentially argues that the compelling interest served by § 14 is the encouragement of participation in the Nebraska public funding scheme, which is designed to prevent corruption or the appearance of corruption.

The Act contains the following Legislative findings:

> (1) The Legislature finds that the cost of running for statewide offices and legislative seats has risen greatly and that many qualified candidates are excluded from the democratic system as a result of such rising cost. The Legislature further finds that the United States Supreme Court has indicated that any limitation on campaign expenditures must be entered into voluntarily and that the utilization of public financing of campaigns is a constitutionally permissible way in which to encourage candidates to adopt voluntary campaign spending limitations. The Legislature further finds that using public funds to assist in the financing of campaigns for certain statewide offices and legislative seats, in conjunction with voluntary campaign spending limitations, will increase the number of qualified candidates able to run for office.
>
> (2) The Legislature finds that there is a compelling state interest in preserving the integrity of the electoral process

> in state elections by ensuring that these elections are free from corruption and the appearance of corruption and that this end can only be achieved if (a) reasonable limits are placed on the amount of campaign contributions from certain sources and (b) the sources of funding and the use of that funding in campaigns are fully disclosed.

§ 32-1602. The Secretary of State argues that without § 14, the possibility of significant independent expenditures by political groups in the days just before an election is an "enormous disincentive" to participation in a public funding scheme. Brief for appellant at 29.

With respect to public campaign financing at the federal level, the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 57 n.65, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), recognized:

> Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.

The legitimacy of public campaign financing schemes was later affirmed in *Republican Nat. Committee v. Fed. Elec. Com'n*, 487 F. Supp. 280 (S.D.N.Y. 1980). Relying on these decisions, several lower courts have found that a state has a compelling interest in stimulating candidate participation in its public financing scheme, because such schemes promote political dialog among the candidates and combat corruption by reducing the candidates' reliance on fundraising efforts. See, *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993); *Wilkinson v. Jones*, 876 F. Supp. 916 (W.D. Ky. 1995). The Secretary of State relies upon these cases to support his assertion that § 14 is narrowly tailored to achieve a compelling government interest.

However, none of these cases involved restrictions upon the amount or timing of independent expenditures by groups supporting or opposing political candidates. In *Rosenstiel*, a Minnesota statute provided that a publicly funded candidate was released from the expenditure limit when his privately funded opponent received contributions or made expenditures equaling

20 percent of the applicable limit prior to 10 days before the primary election, and contributions or expenditures equaling 50 percent of the applicable limit thereafter. A privately funded candidate argued this statute burdened his First Amendment rights because he was coerced into accepting the public funding scheme. The Eighth Circuit Court of Appeals found that such statute was not a burden on a privately funded candidate because the scheme remained voluntary. The court then noted, in dicta, that the statutory scheme was narrowly tailored to achieve a compelling governmental interest because it was designed to promote a reduction in the possibility of corruption by encouraging participation in the public financing scheme. Specifically, it found that the expenditure limitation waiver by which the publicly financed candidate could retain the public subsidy while exceeding the statutory spending limitations was narrowly tailored to remove the disincentive a candidate may have to participate in the public funding scheme because of concern over "being grossly outspent by a privately financed *opponent* with no expenditure limit." (Emphasis supplied.) *Id.* at 1551.

In *Vote Choice, Inc., supra*, a Rhode Island campaign finance act doubled the amount of contributions a publicly funded candidate could receive from a person or political action committee in order to encourage participation in the public funding program. A privately funded candidate challenged the statute as a burden on her First Amendment rights. The court found the "cap gap" portion of the statute was narrowly tailored to promote a compelling state interest, noting:

> The state need not be completely neutral on the matter of public financing of elections. When, as now, the legislature has adopted a public funding alternative, the state possesses a valid interest in having candidates accept public financing because such programs "facilitate communication by candidates with the electorate," . . . free candidates from the pressures of fundraising, . . . and, relatedly, tend to combat corruption.

(Citations omitted.) *Id.* at 39. The court reasoned that the "cap gap" on *contributions* made it "less likely that a given contribution will tend to corrupt a candidate." (Emphasis supplied.) *Id.*

In *Wilkinson v. Jones*, 876 F. Supp. 916 (W.D. Ky. 1995), a Kentucky statute operated to release a publicly financed candidate from the spending limit of $1.8 million when the opposing, privately financed candidate exceeded that amount, either in contributions or expenditures. A privately financed candidate contended this statute was coercive on his First Amendment rights. The court first found that his free speech right was not chilled in any manner by the statute. It then noted, once again in dicta, that Kentucky had a compelling interest in encouraging candidates to accept public financing and that the "trigger" provision was narrowly tailored to achieve this goal. *Id.* at 928. Without such a trigger, the court reasoned, the publicly financed candidate would be faced with the possibility of being grossly outspent.

We deem it significant that other states have sought to eliminate disincentives to participation in publicly financed campaign schemes without placing any limitation or restriction upon those wishing to exercise political speech through independent campaign expenditures. The jurisprudence recognizes a distinction between such expenditures and contributions made directly to a candidate's campaign. The Court in *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 412 L. Ed. 2d 659 (1976), struck down the Federal Election Campaign Act's limitation on independent expenditures by individuals and political action committees because it found that such expenditures, being uncoordinated with the candidate or his campaign, had no tendency to corrupt or to give the appearance of corruption. Distinguishing independent political expenditures from campaign contributions as a potential source of electoral corruption, the Court stated:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

Buckley, 424 U.S. at 47. See, also, *Nixon v. Shrink Missouri Government PAC*, No. 98-963, 2000 WL 48424 (U.S. Jan. 24, 2000).

In subsequent campaign financing cases, the Court has continued to recognize this " 'fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign.' " *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 614-615, 116 S. Ct. 2309, 135 L. Ed. 2d 795 (1996), quoting *FEC v. National Conservative PAC*, 470 U.S. 480, 105 S. Ct. 1459, 84 L. Ed. 2d 455 (1985). In *National Conservative PAC*, the Court struck down a federal law which prohibited independent political committees from expending more than $1,000 to further the campaign of a candidate who elected to accept public financing. The Court rejected a contention that the limitation was necessary to prevent corruption, noting that "[t]he hallmark of corruption is the financial *quid pro quo*: dollars for political favors," whereas the conduct proscribed by the statute under consideration was "not contributions to the candidate, but independent expenditures in support of the candidate." 470 U.S. at 497. For these reasons, the Court concluded that the effort to link independent expenditures to corruption or the appearance of corruption in order to show a relationship to a compelling government interest did not pass its " 'rigorous' " First Amendment standard of review. 470 U.S. at 501.

We reach the same conclusion in the present case. The record does not reflect any direct correlation between the statutory restrictions on independent political expenditures and the legitimate governmental interest in preventing corruption in the electoral process. Nor are we persuaded that the right of political groups and committees to spend as much or as little as they choose in expressing their views concerning a candidate for elective office, and to decide the timing of such expenditures, constitutes a disincentive to a candidate's participation in a public financing scheme which the state must regulate in order to prevent or minimize corruption. Were that the case, we can discern no legitimate reason why such expenditures by an individual using his or her own funds would not also be subject to regulation, yet § 14 specifically exempts such expenditures from its scope. Moreover, the record reflects that participation by candidates in Nebraska's public funding scheme, enacted in 1992,

was already high before the adoption of § 14 in that 57 of 59 candidates for the Legislature and 22 of 25 candidates for other elective state offices to which the Act was applicable elected to abide by the Act's spending limitations in 1996, thus qualifying for public funds. In the two 1996 legislative races identified as involving independent expenditures by a political committee a few days prior to the election, all four candidates had elected to abide by the spending limitations imposed by the Act, and one of the candidates supported by the committee was elected while another was defeated. In *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), the court found it unnecessary to even consider whether an amendment to Minnesota's public campaign financing scheme was narrowly tailored to a goal of encouraging participation in that scheme, where candidate participation in public campaign financing was nearly 100 percent before enactment of the amendment. Under these circumstances, the court determined that the state's interest, "no matter how compelling in the abstract, is not legitimate." *Id.* at 1361.

We conclude that § 14 is not narrowly tailored to any compelling state interest so as to justify the burden it imposes on the First Amendment rights of those wishing to engage in political speech supporting or opposing a candidate through independent expenditures which are neither coordinated with nor controlled by a candidate's campaign.

CONCLUSION

Based upon our independent review, we determine that § 14, as codified at § 32-1614, unconstitutionally infringes upon the right of groups and committees to engage in political speech through the making of independent expenditures as defined by Nebraska law. We agree with the district court that § 14 is severable from the remaining provisions of L.B. 420, which are not affected by our holding. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT S. HANSEN, APPELLANT.

605 N.W.2d 461

Filed February 4, 2000. No. S-99-347.

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: Drunk Driving: Prior Convictions: Sentences.** Neb. Rev. Stat. § 60-6,196 (Reissue 1998), which allows a trial court to consider prior driving under the influence convictions of a defendant within the 12 years prior to the offense for which a defendant currently stands trial, is not ex post facto as to a conviction prior to its passage, since an offender subject to enhancement of punishment under this statute is not receiving additional punishment for his or her previous convictions but is being penalized for an offense committed after its passage.
3. ___: ___: ___: ___: ___. Neb. Rev. Stat. § 60-6,196 (Reissue 1998) deals with offenses committed after its passage, permits an inquiry into a defendant's previous convictions, and in fixing the penalty, does not punish the defendant for previous offenses but for persistence in violating the statute.

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

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

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

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

GERRARD, J.

BACKGROUND

Prior to passage of 1998 Neb. Laws, L.B. 309, trial courts in Nebraska could look back only 8 years, for purposes of sentence enhancement, to determine if a person convicted of driving under the influence (DUI) in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1993) had previous DUI convictions. However, L.B. 309 amended § 60-6,196(2) such that courts may now look back 12 years to prior DUI convictions for enhancement purposes. That amendment went into effect on April 19, 1998.

Nearly 4 months later, on August 12, 1998, Robert S. Hansen was arrested for DUI. An information was filed in the district court for Sarpy County in which Hansen was charged with

fourth-offense DUI, a Class IV felony. On January 27, 1999, Hansen pled guilty to the charge of DUI.

After the district court accepted Hansen's guilty plea on January 27, 1999, an enhancement hearing was held during which the State offered three exhibits into evidence. Exhibit 1 was a certified copy of Hansen's conviction for DUI dated May 7, 1998. Exhibit 2 was a certified copy of a DUI conviction of Hansen, dated July 20, 1988, and exhibit 3 was a certified copy of a DUI conviction of Hansen, dated December 9, 1988. Hansen objected to exhibits 2 and 3, claiming that because the convictions were from 1988, more than 8 years had passed, and consideration of those convictions would be unconstitutional. Hansen argued that for the court to apply the 12-year look-back provision in newly enacted § 60-6,196 (Reissue 1998) would be an unconstitutional ex post facto application of the statute, since Hansen's previous convictions were already in existence when the statute was amended and would not have been considered under § 60-6,196 as it existed prior to amendment in 1998. Exhibits 2 and 3 were received over Hansen's objection, and he was convicted of fourth-offense DUI.

On March 12, 1999, a sentencing hearing was held, and Hansen was sentenced to 18 months of intensive supervised probation. Hansen timely appealed.

ASSIGNMENT OF ERROR

Hansen's sole assignment of error is that the district court erred in finding Hansen guilty of fourth-offense DUI because Hansen's prior convictions were time barred from being used for enhancement purposes.

STANDARD OF REVIEW

[1] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Torres*, 254 Neb. 91, 574 N.W.2d 153 (1998).

ANALYSIS

Section 60-6,196 (Reissue 1998) provides, in pertinent part:

> (2) Any person who operates or is in the actual physical control of any motor vehicle while [intoxicated] shall be guilty of a crime and upon conviction punished as follows:

. . . .

(d) If such person (i) has had three or more convictions under this section in the twelve years prior to the date of the current conviction . . . such person shall be guilty of a Class IV felony . . . .

Hansen argues, citing *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994), that because his two 1988 convictions were in existence when § 60-6,196 was amended and would not have been considered under § 60-6,196 as it existed prior to amendment, allowing consideration of those convictions under the new statute unconstitutionally expands the timeframe from which prior convictions can be considered and has the effect of giving the statute an ex post facto application. Hansen claims that once an offense becomes time barred, a later statute extending the period of limitations cannot revive the offense.

While the principle cited by Hansen is correct, it has no application because the use of the two 1988 DUI convictions is not time barred in the instant case, as the amended enhancement provisions of § 60-6,196 (Reissue 1998) had become effective nearly 4 months prior to Hansen's arrest on August 12, 1998. We considered a nearly identical contention in *State v. Steemer*, 175 Neb. 342, 121 N.W.2d 813 (1963), and our reasoning from that case is controlling. Elwood Steemer had been convicted in 1957 of driving on a suspended license in violation of Neb. Rev. Stat. § 60-418 (Reissue 1952). At that time, the penalty statute, Neb. Rev. Stat. § 60-430 (Reissue 1952), did not provide for an enhanced sentence for second offenses. Thereafter, the Legislature enacted Neb. Rev. Stat. § 60-430.01 (Reissue 1960), which provided for increased penalties against those who are convicted a second time for driving on a suspended license. See *State v. Steemer, supra.*

On October 9, 1962, Steemer was convicted for the second time of driving on a suspended license, and the trial court enhanced Steemer's penalty accordingly under § 60-430.01. On direct appeal, Steemer claimed that the consideration of his prior conviction via § 60-430.01 was unconstitutionally ex post facto. This court disagreed, explaining that "[t]he penalty for a second conviction was in existence when [Steemer] committed the second offense; it was not increased after his offense was

committed." *State v. Steemer*, 175 Neb. at 344, 121 N.W.2d at 815.

[2] Likewise, the 12-year look-back provision was in existence in the instant case when Hansen committed his fourth-offense DUI, and the penalty therefore was not increased subsequent to his commission of the offense. Section 60-6,196, in effect at the time of Hansen's arrest in August 1998, provides a sentencing scheme under which an offender's punishment for DUI shall be increased in the event that same offender has been convicted of DUI in the 12 years prior to an instant conviction. See § 60-6,196 (Reissue 1998). The penalty provided in § 60-6,196 for a fourth-offense DUI was not increased *after* Hansen committed his fourth-offense DUI. Hansen was arrested for DUI 4 months after the amendments to § 60-6,196 became effective; therefore, the statute has not been applied in such a manner as to render it an ex post facto law. See *State v. Steemer, supra*. See, also, *Berry v. Wolff*, 193 Neb. 717, 228 N.W.2d 885 (1975).

[3] As we said in *State v. Steemer*, 175 Neb. at 344, 121 N.W.2d at 815, § 60-6,196 is a "'statute [which] deals with offenses committed after its passage, permits an inquiry whether [Hansen] has previously [been convicted], and in fixing the penalty does not punish him for his previous offences (sic) but for his persistence in crime.'" (Quoting *Taylor v. State*, 114 Neb. 257, 207 N.W. 207 (1926).) In the instant case, Hansen is not receiving additional punishment for his previous convictions, but he is being penalized under the newly amended statutory scheme for persisting in committing the offense of DUI. Hansen's assignment of error is therefore without merit.

CONCLUSION

We conclude that because § 60-6,196(2) (Reissue 1998) was in existence at the time Hansen committed the current offense, the district court's consideration of Hansen's DUI convictions from 1988 in no way results in an ex post facto application of the statute. We, therefore, affirm the judgment of the district court.

AFFIRMED.

BEN PFEIFER, JR., AND DONNA PFEIFER, HUSBAND AND WIFE, APPELLANTS, V. E.I. DU PONT DE NEMOURS AND COMPANY, A DELAWARE CORPORATION, APPELLEE.

606 N.W.2d 773

Filed February 11, 2000. No. S-98-270.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Federal Acts: Claims.** Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq. (1994), common-law failure to warn and labeling-based claims brought against manufacturers of pesticides are preempted by federal law.
4. ____: ____. Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq. (1994), warranty or other claims based solely on a registered product's label are preempted by federal law.
5. ____: ____. If an action is label based, it is preempted by the Federal Insecticide, Fungicide, and Rodenticide Act.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Affirmed.

George H. Moyer, Jr., of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellants.

Thomas M. Maul, of Grant, Rogers, Maul & Grant, and Ann Marie Hanrahan, of Faegre & Benson LLP, and Raymond Michael Ripple and Donna L. Goodman, of E.I. Du Pont de Nemours and Company, for appellee.

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

MCCORMACK, J.

This is a suit brought by appellants Ben Pfeifer, Jr. (Pfeifer), and Donna Pfeifer for breach of express and implied warranties in the sale of Extrazine II DF, a herbicide manufactured by appellee E.I. Du Pont de Nemours and Company (Du Pont). The trial court granted summary judgment to Du Pont on the sole ground that the Pfeifers' claims were preempted by the Federal

Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 et seq. (1994). We affirm.

BACKGROUND

The Pfeifers appeal from the granting of summary judgment in favor of Du Pont. The Pfeifers had sued Du Pont for breach of express and implied warranties regarding its herbicide Extrazine. Pfeifer is a third-generation farmer and is certified to apply restricted use pesticides such as Extrazine. Extrazine is a herbicide registered with the Environmental Protection Agency (EPA), as required by FIFRA.

The Extrazine label in this case stated:

> When applied as a postemergence herbicide, Extrazine . . . is also active through foliage as well as through the roots. Yellowing and/or stunting of the crop may result from this treatment, particularly if cold, adverse growing conditions occur after application. Extended or extreme cold and wet conditions may reduce stands. Do not apply Extrazine . . . postemergence to a crop that is damaged or growing under stress.
>
> . . . .
>
> Do not apply this treatment under cold, wet, weather conditions or to corn growing under stress caused by weather, insects, disease, etc. Yellowing of the corn may result from this treatment, particularly if cold, adverse growing conditions occur after application. Extended or extreme cold and wet conditions may reduce stand.
>
> . . . .
>
> NOTICE OF WARRANTY
>
> Du Pont warrants that this product conforms to the chemical description on the label thereof and is reasonably fit for the purposes stated on such label only when used in accordance with the directions under normal use conditions. It is impossible to eliminate all risks inherently associated with the use of this product. Crop injury, ineffectiveness or other unintended consequences may result because of such factors as weather conditions, presence of other materials, or the manner of use or application, all of which are beyond the control of

> Du Pont. In no case shall Du Pont be liable for consequential, special or indirect damages resulting from the use or handling of this product. All such risks shall be assumed by the buyer. DU PONT MAKES NO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE NOR ANY OTHER EXPRESS OR IMPLIED WARRANTY EXCEPT AS STATED ABOVE.

The Pfeifers allege in their amended petition that Pfeifer purchased the Extrazine from the Farmers Co-op Association in Lindsay, Nebraska. The petition alleges that the co-op employee from whom Pfeifer purchased the Extrazine, Gary Jarecki, consulted literature published by Du Pont that described Extrazine as, among other things, suitable for controlling weeds in corn. The petition alleges that this literature was separate and distinct from the labels on the Extrazine bags and that Pfeifer did not receive the actual labels attached to the Extrazine until he took delivery of the product.

Jarecki states in an affidavit that he had been informed at sales meetings sponsored by Du Pont representatives that Extrazine was suitable for controlling weeds in corn crops and that he checked his recollection of this information against the Du Pont catalog before making his recommendation to Pfeifer. Jarecki admits in a separate affidavit that the catalog was essentially a collection of product labels, and that both the information received at the sales meetings and that obtained from the catalog were entirely consistent with the information contained in the product label.

The Pfeifers allege that Pfeifer purchased Extrazine in reliance on Jarecki's statements and applied Extrazine to 152 acres of his 1992 corn crop as a postemergence treatment. The Pfeifers claim that the product reduced their corn stand from a population of 28,000 plants per acre to 13,000 plants per acre, resulting in lost profits of $22,502.68. The Pfeifers allege that Pfeifer applied the herbicide as directed by the label on the container in which it came.

The EPA-approved label of the Extrazine contained directions for use, as well as various warnings and environmental information required by FIFRA. The label also generally

described the product as "a selective herbicide for the control of annual grasses and broadleaf weeds in field corn, popcorn, and sweet corn."

Du Pont moved for summary judgment on the ground of FIFRA preemption. The trial court granted Du Pont's motion, finding that the Pfeifers' warranty claims were based on the herbicide's labeling and were therefore preempted by FIFRA under *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997), *cert. denied* 522 U.S. 928, 118 S. Ct. 329, 139 L. Ed. 2d 255.

ASSIGNMENT OF ERROR

The Pfeifers assign that the trial court erred in granting Du Pont's motion for summary judgment.

STANDARD OF REVIEW

[1] 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. *Ferguson v. Union Pacific RR. Co., ante* p. 78, 601 N.W.2d 907 (1999); *Nebraska Popcorn, Inc. v. Wing, ante* p. 60, 602 N.W.2d 18 (1999).

[2] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State ex rel. City of Alma v. Furnas Cty. Farms*, 257 Neb. 189, 595 N.W.2d 551 (1999); *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999).

ANALYSIS

FIFRA'S PREEMPTIVE EFFECT ON STATE BREACH OF WARRANTY CLAIMS

[3] Analysis of FIFRA preemption in Nebraska begins with *Ackles v. Luttrell, supra*. In *Ackles*, this court held that failure to warn and labeling-based claims brought under common-law causes of action against manufacturers of pesticides are preempted by FIFRA. This is so because FIFRA mandates that certain information be placed on the labels of pesticides and herbicides. Courts have uniformly found that allowing state causes of

action to be based upon language mandated by the federal government would amount to a state law requirement regarding such language. See, e.g., *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69 (8th Cir. 1995); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993), *cert. denied* 510 U.S. 913, 114 S. Ct. 300, 126 L. Ed. 2d 248. FIFRA expressly prohibits states from making such requirements. "Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA]." 7 U.S.C. § 136v(b).

Ackles v. Luttrell, supra, did not specifically address warranty claims. The holding in *Ackles* was addressed solely to a claim of insufficient labeling. Nevertheless, the logic behind the holding applies equally to warranty claims if such claims are solely based on federally mandated label statements:

> If Ackles' labeling-based cause of action against Pennwalt were allowed to proceed and be successful, Pennwalt would be stuck between the proverbial rock and hard place in that it would be required to use the label approved by the EPA, yet pay damages because a jury determined that such label was not sufficient. This result would obviously run contrary to the intentions of Congress in passing FIFRA, namely, that labeling information will be regulated solely by the federal government.
>
> We therefore hold, in accordance with virtually all courts that have ruled on this issue both before and after the U.S. Supreme Court's decision in *Medtronic, Inc.* [*v. Lohr*, 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)], that Ackles' labeling-based cause of action against Pennwalt is preempted by FIFRA . . . .

Ackles v. Lutrell, 252 Neb. 273, 283, 561 N.W.2d 573, 579 (1997).

[4] Applying FIFRA to warranties, we find that manufacturers would be equally between a rock and a hard place if they were forced by the federal government to make statements regarding the use of the manufacturers' products, and the state then treated such statements as warranties and allowed juries to

award damages based upon them. Thus, to the extent that the Pfeifers are alleging that the Extrazine label constituted an express or implied warranty, such a cause of action must be preempted by FIFRA. Otherwise, success on such claims would subject Du Pont to warranty liability for statements that it was forced to make in order to legally sell its product.

Pfeifer testified that Jarecki told him that Extrazine was suitable for controlling weeds in corn crops. Jarecki's affidavit stated, "I suggested to him that Extrazine II DF would be an appropriate application for his problem." Jarecki testified that the statement he made to Pfeifer was based on the agricultural herbicide labels. Jarecki also testified that he referred to a Du Pont product catalog, which is generally composed of the Du Pont product labels. What Jarecki said to Pfeifer is nothing more than a recitation of what is on the label, and as such, the Pfeifers' claim for a warranty based on what Jarecki said to Pfeifer is preempted under FIFRA. The granting of the motion for summary judgment to Du Pont on this issue was correct and is affirmed.

Breach of Implied Warranty Claim

The Pfeifers also allege that Du Pont breached an implied warranty that "the product was suitable and fit for the purposes for which it was sold and intended to be used." The product in this case was a herbicide suitable for controlling weeds in corn. Therefore, the ordinary purpose was the control of weeds in corn. Neb. U.C.C. § 2-315 (Reissue 1992) states:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

In this case, Pfeifer testified as follows:

> [Defendant's attorney] Q. Is there something that DuPont should have told you, as you sit here today, that they didn't tell you, that would have made a difference in how you applied the product or what you did with the product or —

A. I guess I don't understand what they mean by — for one thing, on their postemergence says "do not apply under cold and wet weather conditions." Well, I didn't, it was warm and dry. Later on it did turn cold and wet, they don't say how much later on if it turns cold and wet, and they don't define cold or wet. You know, they could — cold or wet to them might mean a month, or might mean a month to me or, you know, who knows, you know. You define cold and wet and define how long and, like I say, it says there, don't put it on corn under these conditions. Well, it was in the mid 80s and that's pretty warm for — for May, and it was dry, too.

Q. Okay. And that's your recollection, although you didn't take notes of the weather conditions at the time?

A. Yes.

Q. Okay. Fair enough. So, if I understand — and I appreciate the fact that your attorney may present some other legal theory or may offer expert testimony, but, so I understand, your complaint with the product is you don't feel as though the label instructions were clear enough or definite enough for your use of the product?

[Plaintiffs' attorney]: I don't know that it's the instructions exactly. I mean —

[Defendant's attorney] Q. Well, the information contained within this pamphlet that accompanies purchase of the product; is that your gripe?

A. Yes.

. . . .

[Defendant's attorney] Q. In paragraph 7 of your [original] petition, you state that the defendant failed to warn plaintiffs that such change in the weather would adversely affect the growth of plaintiffs' crop; is that your complaint with the product in this case?

A. My complaint is that the corn was damaged, the yield was down, and, as far as I'm concerned, their label doesn't say — doesn't — you know, it says if it turns cold. Well, what's cold, and, you know, how long after is cold. You put it on when it's 80 degrees, that's not cold.

Q. Okay. My question is: Is that what you're complaining about, what the label said, or what it didn't say?

A. Basically.

[Plaintiffs' attorney]: Maybe he has other complaints, too, counsel, which have to do with certain expert witnesses, and we may decide to amend his petition. I'm just giving you fair warning.

[Defendant's attorney] Q. As you sit here today, Mr. Pfeifer, can you think of anything else wrong with the product, that you're aware of, that you would complain about?

A. Well, no.

[5] The above testimony of Pfeifer shows that his complaints were label based. If the action is label based, it is preempted by FIFRA. See, e.g., *Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559 (1st Cir. 1996) (favorably cited by this court in *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997), that because negligence and warranty actions dealt specifically with labeling-based claims, they were preempted by FIFRA); *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69 (8th Cir. 1995) (express warranty claim based on label's statement with regard to herbicide's carryover effect is preempted by FIFRA); *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993), *cert. denied* 114 S. Ct. 300, 126 L. Ed. 2d 248 (1993) (to extent implied warranty claim depends upon inadequacies in labeling or packaging, § 136v of FIFRA preempts claim). Therefore, we determine that the Pfeifers' implied warranty is preempted.

CONCLUSION

The Pfeifers' claim for breach of express warranty was preempted by FIFRA. Therefore, the trial court properly granted the motion for summary judgment to Du Pont on this issue.

As to the Pfeifers' claim of breach of implied warranty of fitness for a particular purpose, we determine that this claim is also preempted by FIFRA for the reason that Pfeifer's testimony indicates that the claim is label based.

AFFIRMED.

GERRARD, J., not participating.

PETER M. HORNIG AND DIDI HORNIG, HUSBAND AND WIFE, APPELLEES, V. MARTEL LIFT SYSTEMS, INC., AND CROWN EQUIPMENT CORPORATION, APPELLANTS, AND MANPOWER, INC., OF LINCOLN, APPELLEE.

606 N.W.2d 764

Filed February 11, 2000. No. S-98-445.

1. **Equity: Appeal and Error.** On appeal from an equity action, the appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court.
2. **Judgments: Records: Words and Phrases.** A trial docket entry which purports to automatically dismiss a case at some time in the future based on the failure of some condition is a "conditional order" and is wholly void as it does not perform in praesenti.
3. **Judgments: Records: Public Officers and Employees.** Entry of a dismissal on the trial docket by the clerk of the district court is not a valid order because the court clerk does not have the authority to enter a judgment of dismissal.
4. **Judgments: Records.** A trial docket entry alone, unaccompanied by an oral pronouncement in open court, does not amount to a rendition of judgment. On the other hand, a rendition of judgment can occur in more than one manner.
5. **Judgments: Records: Words and Phrases.** A rendition of judgment occurs when the court makes an oral pronouncement in open court and accompanies that pronouncement with a notation on the trial docket or, in the alternative, when some written notation of the judgment is filed in the records of the court.
6. **Equity: Jurisdiction: Appeal and Error.** The correct standard of review for a trial court's exercise of equity jurisdiction is de novo on the record, with independent conclusions of law and fact.
7. **Equity.** It is a well-established maxim that equity aids the vigilant and the diligent, not those who sleep on their rights. A party seeking to take advantage of this maxim must be free from fault, and the party must have done nothing to lull his or her adversary into repose, thereby obstructing and preventing vigilance on the part of the latter.
8. **Equity: Proof.** To proceed in equity, the litigant must show that he or she is without a legal remedy; more specifically, that Neb. Rev. Stat. § 25-2001 (Cum. Supp. 1998) could not provide adequate relief.
9. **Actions: Equity: Jurisdiction.** An action in equity must be founded on some recognized source of equity jurisdiction.
10. **Equity: Jurisdiction.** The test of equity jurisdiction is generally the absence of an adequate remedy at law.
11. **Equity.** Whether a case is one of equitable cognizance depends upon the peculiar facts disclosed by the record.
12. **Equity: Words and Phrases.** The term "adequate remedy at law" refers to a remedy which is plain and complete, and as practical and efficient to the ends of justice as is the equitable remedy.

13. **Judgments: Appeal and Error.** A proper result will not be reversed merely because it was reached for the wrong reasons.
14. ___: ___. Where the record demonstrates that the decision of a trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the appellate court will affirm.

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Affirmed.

Lyman L. Larsen and Neil B. Danberg, Jr., of Stinson, Mag & Fizzell, for appellants.

Ronald H. Stave for appellees the Hornigs.

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

CONNOLLY, J.

Martel Lift Systems, Inc., and Crown Equipment Corporation (appellants) appeal the district court's order vacating a dismissal and reinstating this case in a subsequent court term. Appellees Peter M. Hornig and Didi Hornig sought reinstatement pursuant to the district court's equity jurisdiction. The issue to be decided is whether the district court was correct in reinstating the instant case, pursuant to its equity power, after adjournment of the term. We conclude that the facts warrant equitable relief and that therefore, the judgment of the district court is affirmed.

I. BACKGROUND

On August 30, 1994, the Hornigs filed suit against appellants and Manpower, Inc., of Lincoln, which had a subrogation interest. Pursuant to a stipulation of the parties, the court extended the time within which to file a certificate of readiness to October 2, 1995. The case was subsequently dismissed on October 3 for failure to prosecute. On October 27, pursuant to a stipulation by the parties, the court entered an order which set aside the October 3 dismissal and reinstated the case. The court extended the time within which to file a certificate of readiness to April 1, 1996. On March 1, the Hornigs filed a motion to extend the time for filing a certificate of readiness from April 1 to September 15. Pursuant to the Hornigs' motion, the court again extended the time within which to file a certificate of readiness to September 15. When no certificate of readiness was filed, the court dis-

missed the case on September 17 for the second time. Pursuant to a stipulation by the parties, the court entered an order which set aside the September 17 dismissal and reinstated the case. The court extended the time within which to file a certificate of readiness to December 1.

The Hornigs filed a certificate of readiness for trial on December 2, 1996. Appellants then filed a motion to strike the certificate of readiness. Pursuant to the parties' agreement, the court sustained appellants' motion to strike and extended the deadline for the certificate of readiness to March 31, 1997. On April 1, when no certificate of readiness was filed, the court dismissed the case for the third time.

On December 29, 1997, counsel for the Hornigs forwarded a stipulation to appellants' local counsel to set aside the dismissal and reinstate the case. Although appellants' counsel received the stipulation on or about December 30, it was not reviewed until January 5, 1998. On January 12, appellants' counsel notified the Hornigs' counsel that appellants would not enter into the stipulation. Thereafter, on February 4, the Hornigs filed a motion to vacate the dismissal and reinstate the case. The motion was sustained, and the case was reinstated to the court's docket.

II. ASSIGNMENTS OF ERROR

Appellants assign, renumbered and restated, that the district court erred in granting equitable relief when the Hornigs (1) failed to exercise due diligence in reinstating the case, (2) had an adequate remedy at law which they elected not to invoke, and (3) neither pled nor proved the doctrines of waiver and estoppel.

III. STANDARD OF REVIEW

[1] On appeal from an equity action, the appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court. *Marten v. Staab*, 249 Neb. 299, 543 N.W.2d 436 (1996).

IV. ANALYSIS

1. Motion to Dismiss Appeal

This is an appeal from an April 6, 1998, order of the district court for Douglas County, which vacated its previous April 1,

1997, order of dismissal and granted the Hornigs' motion for reinstatement of the case. Prior to oral arguments, the Hornigs filed a motion to dismiss this appeal, pursuant to Neb. Ct. R. of Prac. 7B(1) (rev. 1996), alleging that this court "is without jurisdiction" because "the matter was never properly dismissed by the District Court."

The Hornigs argue that it was correct to reinstate their case because there was never a *valid* order of dismissal. If the dismissal was never valid, they argue, then there could be no error in the district court's reinstatement of the case. In support of their motion, the Hornigs rely on *Building Systems, Inc. v. Medical Center, Ltd.*, 228 Neb. 168, 421 N.W.2d 773 (1988), and *Harvey Oaks Dental v. Peter Letterese & Assocs.*, 7 Neb. App. 403, 583 N.W.2d 72 (1998). At issue in *Building Systems, Inc.* and *Harvey Oaks Dental* was the validity of an order purporting to automatically dismiss a case in which the certificate of readiness was not timely filed.

[2,3] In *Building Systems, Inc.*, we held that a trial docket entry which purports to automatically dismiss a case at some time in the future based on the failure of some condition is a "conditional order" and is wholly void as it does not perform in praesenti. *Id.* at 170, 421 N.W.2d at 775. In addition, we held that entry of a dismissal on the trial docket by the clerk of the district court is not a valid order. A court clerk does not, we held, have the authority to enter a judgment of dismissal. *Id.*

The facts of this case, however, are distinguishable from those in *Building Systems, Inc.* In *Building Systems, Inc.*, the March 20, 1986, trial docket entry of dismissal was merely a standardized "rubber" stamp, stating "Case Dismissed—Progression Letter." As noted in the opinion, the March 20 entry *standing alone* was a purported order of dismissal entered by the clerk, with no indication of the district court's action on that date.

Here, we are not concerned with a "conditional order" purporting to automatically dismiss a case. Nor do we have a standardized rubber-stamped entry on the trial docket sheet with no evidence of judicial involvement. In this case, it is clear from the evidence in the record that the presiding judge initialed the stamped entry, which states, "Case Dismissed W/O Prejudice -

Progression Letter." An affidavit of the clerk of the district court for Douglas County clearly identifies the procedure used and identifies the person whose initials follow that entry as the presiding judge who considered the matter and adopted the standardized order as his own. The trial docket entry of April 1, 1997, was the "judgment" of the court as defined by Neb. Rev. Stat. § 25-1301(1) (Reissue 1995) in that it stated the "final determination of the rights of the parties in [the] action."

[4,5] The trial docket entry standing alone, however, does not constitute a "rendition of judgment." This court has said many times that a trial docket entry alone, unaccompanied by an "oral pronouncement in open court," does not amount to a "rendition of judgment." On the other hand, we have also said that a "rendition of judgment" can occur in more than one manner. We most recently reiterated in *Dvorak v. Bunge Corp.*, 256 Neb. 341, 347-48, 590 N.W.2d 682, 686-87 (1999), the following rules of law:

> [I]n *Reutzel v. Reutzel*, 252 Neb. 354, 562 N.W.2d 351 (1997), we explained that a rendition of judgment occurs when the court makes an oral pronouncement in open court and accompanies that pronouncement with a notation on the trial docket *or, in the alternative, when some written notation of the judgment is filed in the records of the court.*
>
> As pointed out in the statement of facts, *there is no record of an oral pronouncement by the trial court* overruling either Dvorak's or Bunge's motion for new trial. Therefore, in this case, *if there is a final order disposing of either motion, it must be found in the entry of a judgment, which is the act of the clerk of the court spreading on the court's journal both the proceedings had and the relief granted or denied.* See, *Tri-County Landfill v. Board of Cty. Comrs.*[, 247 Neb. 350, 526 N.W.2d 668 (1995)]; § 25-1301. *In other words, there must be some written notation of the judgment filed in the official records of the court.* See, *Reutzel v. Reutzel, supra.*

(Emphasis supplied.)

Here, as in *Dvorak*, the final order dismissing this case is found in the "entry of a judgment, which is the act of the clerk

of the court spreading on the court's journal both the proceedings had and the relief granted or denied." See 256 Neb. at 347, 590 N.W.2d at 686. In this case, the clerk's notice to the parties, which was file stamped on April 3, 1997, is a "written notation of the judgment filed in the official records of the court." See *id.* at 348, 590 N.W.2d at 687. Thus, based on our case law, judgment was rendered in this case when the clerk spread on the court's journal the district court's "judgment" dated April 1, 1997. Unlike *Building Systems, Inc. v. Medical Center, Ltd.*, 228 Neb. 168, 421 N.W.2d 773 (1988), in this case, the clerk did not dismiss the case; the court did so. On April 3, the clerk, as he is required to do, entered that judgment on the court's journal and filed it in the official records of the court.

Thus, as of April 3, 1997, this case stood dismissed without prejudice, and we must address whether the district court had the authority to vacate its order of dismissal and reinstate the case outside the term.

To the extent the Hornigs rely on *Harvey Oaks Dental v. Peter Letterese & Assocs.*, 7 Neb. App. 403, 583 N.W.2d 72 (1998), we simply note there was no affidavit in the record of that case to explain or identify the handwritten initials following the stamped trial docket entry. Therefore, *Harvey Oaks Dental* is distinguishable and does not support the Hornigs' argument.

We also take this opportunity to add a word of caution to the lower courts and practicing bar. In *Dvorak v. Bunge Corp.*, 256 Neb. at 348, 590 N.W.2d at 687, we noted as to the law of final orders that "these requirements have been a source of confusion for trial courts and have presented numerous difficulties to appellate courts. However, until the situation is addressed by legislative enactment, we must continue to determine jurisdiction in accordance with § 25-1301." We now note that the Legislature did act during its last legislative session by passing 1999 Neb. Laws, L.B. 43, and amending, in part, § 25-1301 and Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1998), effective August 28, 1999. See §§ 25-1301 and 25-1912 (Supp. 1999). That law will alter the landscape of "final orders" and will likely render issues such as that presented here as issues of last impression. We take this opportunity to urge both the trial courts and the practicing bar to familiarize themselves with this new legislation as it will have a substantial impact on future appeals.

2. TRIAL COURT'S EXERCISE OF EQUITY JURISDICTION

We now address the trial court's decision to vacate its previous order of dismissal and reinstate this case outside the court term. We first note that the proper standard of review in this case is de novo on the record because the Hornigs sought reinstatement pursuant to the district court's independent equity jurisdiction. On appeal, equity actions are reviewed de novo on the record and questions of law and fact are determined independently from the trial court's conclusions. *Marten v. Staab*, 249 Neb. 299, 543 N.W.2d 436 (1996).

[6] Apparently, there is some confusion as to the applicable standard of review because this court has previously stated, "[a]n appellate court will reverse a decision on a motion to vacate or modify a judgment only if the litigant shows that the district court abused its discretion." *Thrift Mart v. State Farm Fire & Cas. Co.*, 251 Neb. 448, 451, 558 N.W.2d 531, 535 (1997). In *Thrift Mart*, however, the plaintiffs sought reinstatement of their dismissed case under both the trial court's statutory authority and under its independent equity jurisdiction. To the extent that *Thrift Mart* reviewed the trial court's refusal to exercise its independent equity powers for abuse of discretion, that decision is overruled. The correct standard of review for a trial court's exercise of equity jurisdiction is de novo on the record, with independent conclusions of law and fact.

(a) Failure to Exercise Due Diligence

Appellants first argue that the district court erred when it granted equitable relief because the Hornigs failed to exercise due diligence in having the case reinstated after the April 1, 1997, dismissal. Appellants argue that because the Hornigs did not exercise due diligence in reinstating their case, they are not entitled to equitable relief.

[7] It is a well-established maxim that equity aids the vigilant and the diligent, not those who sleep on their rights. See, 27A Am. Jur. 2d *Equity* § 120 (1996); 30A C.J.S. *Equity* § 115 (1992). This maxim is qualified, however, by another principle of equity which states that a party seeking to take advantage of the maxim must be free from fault, and the party must have done nothing to lull his or her adversary into repose, thereby obstruct-

ing and preventing vigilance on the part of the latter. See 30A C.J.S., *supra*. The Hornigs argue that due to appellants' past conduct in stipulating to reinstatement and in continuing with discovery after the April 1, 1997, dismissal, it was reasonable for them to believe that appellants would stipulate to reinstatement after the term of court ended. In other words, the Hornigs argue that appellants lulled them into inactivity. Appellants, therefore, should be prevented from taking advantage of the maxim that equity aids the vigilant and the diligent, not those who sleep on their rights.

We agree with the Hornigs that appellants' conduct prevents them from benefiting under the maxim that equity aids the diligent, not those who sleep on their rights. From our de novo review of the record, we conclude that appellants lulled the Hornigs into repose, thereby obstructing and preventing them from acting with vigilance. In this case, the dismissal occurred on April 1, 1997. After this date, appellants participated in the deposition of Dan Hartung on May 29. Appellants also participated in the Hornigs' efforts to depose appellants' expert, Paul Packman. The deposition of Packman was originally scheduled for June 18, but was continued to August 4 because of a conflict with appellants' schedule, and then was rescheduled to January 1998 because of conflicts with appellants' counsel's schedule. In addition, appellants' counsel served the Hornigs with new materials on September 5, 1997, including videotapes which were prepared by appellant Crown Equipment after appellants' initial response to the Hornigs' production requests. Obviously, appellants' counsel received a generous amount of leeway from the Hornigs in scheduling the deposition of appellants' expert witness, Packman. Then, in January 1998, appellants' counsel took advantage of the situation which he helped create by refusing to stipulate to reinstatement. Although one could argue that the Hornigs' counsel should have been more zealous, we cannot condone appellants' apparent strategy of "I gottcha."

We conclude that appellants' conduct prevents their use of the maxim that equity aids the vigilant, not the negligent. In light of the numerous dismissals and reinstatements in this case, coupled with appellants' continued participation in discovery after April 1, 1997, it was reasonable for the Hornigs to believe that

appellants would stipulate to reinstatement. Appellants are not without fault and shall not be permitted to take advantage of a situation which they helped create.

(b) Adequate Remedy at Law

[8] Next, appellants argue that the district court erred when it granted equitable relief because the Hornigs had an adequate remedy at law, which they elected not to invoke. To proceed in equity, the litigant must show that he or she is without a legal remedy; more specifically, that Neb. Rev. Stat. § 25-2001 (Cum. Supp. 1998) could not provide adequate relief. See *Emry v. American Honda Motor Co.*, 214 Neb. 435, 334 N.W.2d 786 (1983). This issue was addressed in *Emry*, where the court stated, "It is true that § 25-2001 is not the exclusive remedy for vacating a judgment after the term has expired. That statute is concurrent with an independent equity jurisdiction." 214 Neb. at 447, 334 N.W.2d at 794.

[9-11] An action in equity must be founded on some recognized source of equity jurisdiction. See *Kulhanek v. Kulhanek*, 106 Neb. 595, 184 N.W. 139 (1921). The test of equity jurisdiction is generally the absence of an adequate remedy at law. *Adams v. Adams*, 156 Neb. 778, 58 N.W.2d 172 (1953). Whether a case is one of equitable cognizance depends upon the peculiar facts disclosed by the record. *Id.*

Appellants' argument focuses on the Hornigs' failure to plead and prove that § 25-2001 could not serve them. Appellants argue that because the Hornigs did not show that § 25-2001 could not serve them, they are not entitled to equitable relief. However, *Emry v. American Honda Motor Co.*, 214 Neb. at 447, 334 N.W.2d at 794, clearly states that the "statute is *concurrent* with an independent equity jurisdiction." Likewise, in *Roemer v. Maly*, 248 Neb. 741, 745, 539 N.W.2d 40, 44 (1995), the court noted that § 25-2001 is not a litigant's "exclusive remedy for vacating a judgment after the term has expired, because that statute is concurrent with an independent equity jurisdiction and with a court's inherent powers of equity."

This is not a situation in which the party seeking equity failed to institute proceedings under § 25-2001 within the applicable statute of limitations. See *Lindstrom v. Nilsson*, 133 Neb. 184,

274 N.W. 485 (1937). Nor is this a situation in which the party seeking equity could have proceeded under the statute and did not do so because of fault or laches on its part. See *Shipley v. McNeel*, 149 Neb. 793, 32 N.W.2d 636 (1948). Rather, this is a case in which the party seeking equity did not proceed under § 25-2001 because the statute did not apply.

Section 25-2001 provides nine different instances in which the district court has statutory power to vacate or modify its own judgment or order after adjournment of the term. The statute specifically provides:

> A district court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made (1) by granting a new trial of the cause within the time and in the manner prescribed in sections 25-1143 and 25-1145; (2) by a new trial granted in proceedings against defendants served by publication; (3) for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order; (4) for fraud practiced by the successful party in obtaining the judgment or order; (5) for erroneous proceedings against an infant or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings; (6) for the death of one of the parties before the judgment in the action; (7) for unavoidable casualty or misfortune, preventing the party from prosecuting or defending; (8) for errors in a judgment shown by an infant in twelve months after arriving at full age, as prescribed in section 25-1317; and (9) for taking judgments upon warrants of attorney for more than was due to the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment.

It is clear from the record that none of these provisions could have served the Hornigs in their attempt to reinstate the case. None of the nine enumerated categories in § 25-2001 contemplate a scenario like the one in which the Hornigs found themselves on February 4, 1998, when they filed their motion to reinstate the case. Therefore, the Hornigs' only option was to proceed under the court's independent equity jurisdiction. Since

the record contains facts sufficient to show that § 25-2001 could not serve the Hornigs, they were entitled to proceed in equity.

[12] Appellants also argue that the Hornigs had an adequate remedy at law because they could have sought reinstatement of the case during the term in which the dismissal was made. While it is true that a district court has inherent authority to vacate or modify a decision within the same term that the initial decision was rendered, appellants' argument on this point is without merit. See *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993). The term "adequate remedy at law" refers to a remedy which is plain and complete, and as practical and efficient to the ends of justice as is the equitable remedy. See *Adams v. Adams*, 156 Neb. 778, 788, 58 N.W.2d 172, 178 (1953). Thus, in order to be an adequate remedy at law, the remedy must presently exist. See 30A C.J.S. *Equity* § 24 (1992).

The Hornigs' delay in seeking reinstatement after dismissal was a factor to consider in the granting of equitable relief; not a bar to proceeding in equity. Indeed, the whole point of the line of cases following *Emry v. American Honda Motor Co.*, 214 Neb. 435, 334 N.W.2d 786 (1983), is that a litigant is entitled to seek vacation or modification of a judgment at a subsequent term, notwithstanding the fact that reinstatement could theoretically have been sought during the same term in which the judgment was rendered. We therefore conclude that the Hornigs were entitled to seek equitable relief because they did not have an adequate remedy at law.

(c) Waiver and Estoppel

Finally, appellants assert that the district court erred when it granted equitable relief to the Hornigs because they neither pled nor proved the doctrines of waiver and estoppel. Appellants argue that because the district court purportedly based its decision on the doctrines of waiver and estoppel, the Hornigs were required to plead and produce evidence in support of these doctrines. We disagree.

[13,14] Although the order of the district court could be interpreted as relying upon the doctrines of waiver and estoppel, there is no legal requirement that a trial court must find estoppel or waiver in order to grant equitable relief. We have determined

that the district court properly exercised its independent equity jurisdiction in this case. Based on our de novo review of the record, we agree that the Hornigs were entitled to equitable relief. The district court's reference to waiver and estoppel have no effect on the outcome of this appeal. A proper result will not be reversed merely because it was reached for the wrong reasons. *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999). Where the record demonstrates that the decision of a trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the appellate court will affirm. *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998). When the equities are balanced in this case, it is clear that appellants' "I gottcha" tactic entitled the Hornigs to equitable relief. To conclude otherwise would be to reward appellants for taking advantage of a situation which they helped create.

V. CONCLUSION

We therefore conclude that the district court was correct in exercising its independent equity jurisdiction in vacating its order of dismissal and reinstating this case to its trial docket. Therefore, the judgment is affirmed.

AFFIRMED.

KEITH H. PREISTER AND JANICE M. PREISTER, HUSBAND AND WIFE, APPELLANTS AND CROSS-APPELLEES, V. MADISON COUNTY, NEBRASKA, A BODY POLITIC, ET AL., APPELLEES AND CROSS-APPELLANTS.

606 N.W.2d 756

Filed February 11, 2000. No. S-98-471.

1. **Equity: Appeal and Error.** In an appeal from an equitable action, the reviewing court reviews the action de novo on the record and reaches a conclusion independent of the factual findings of the lower court; however, where credible evidence is in conflict on a material issue of fact, the reviewing court considers and may give weight to the circumstance that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Constitutional Law: States.** Under the Supremacy Clause of the U.S. Constitution, state courts have a concurrent duty to enforce federal law.

3. **Actions: Eminent Domain.** When the character of a governmental action is a permanent physical occupation of property, there is a taking to the extent of that occupation.
4. **Constitutional Law: Eminent Domain: Damages.** Under the Fifth Amendment to the U.S. Constitution, when the government has worked a complete physical taking of the land, the landowner need only show the fair market value of the land taken to recover damages.
5. **Equity: Appeal and Error.** When the trial court has viewed the land in question, an appellate court is required to consider and may give weight to any findings made by the trial court, provided that the record contains competent evidence to support the findings.
6. **Constitutional Law: Words and Phrases.** A plaintiff is considered a prevailing party under 42 U.S.C. § 1988 (1994 & Supp. III 1997) when he or she obtains actual relief on the merits of any of the asserted claims, but need not prevail on all claims.

Petition for further review from the Nebraska Court of Appeals, MUES, INBODY, and CARLSON, Judges, on appeal thereto from the District Court for Madison County, ROBERT B. ENSZ, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Stephen D. Mossman, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellants.

Charles W. Campbell, of Angle, Murphy, Valentino & Campbell, P.C., for appellees.

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

HENDRY, C.J.

INTRODUCTION

Keith H. Preister and Janice M. Preister brought a claim against Madison County, Nebraska, and the County Commissioners of Madison County (collectively the county) asserting, inter alia, that road work done by the county in 1993 worked a taking of their land in violation of 42 U.S.C. § 1983 (Supp. III 1997), the Fifth Amendment to the U.S. Constitution, and art. I, § 21, of the Nebraska Constitution.

FACTUAL BACKGROUND

The Preisters have lived and farmed in Madison, Nebraska, since the late 1960's. The Preisters own a section of land, com-

monly known as the Haschke quarter (the Quarter), which is the focus of this litigation. Abutting the south side of the Quarter is a county road, known as Five Mile Road, that runs east to west.

The Quarter is a flat, low-lying area. Union Creek cuts through the northwest portion of the Quarter, flowing to the northeast. The Quarter as a whole drains to the northeast and eventually into Union Creek. The Quarter is in a flood plain, which means that in the event of a 100-year flood, the land would be under water.

Five Mile Road has a history of becoming overtopped with water and impassable during heavy rains. Prior to 1993, at the east end of the Quarter, Five Mile Road had a slight dip, and water tended to collect in the dip after heavy rains.

In 1993, after a 100-year flood event, the county decided to raise the level of Five Mile Road as a solution to the recurring flooding. The county raised Five Mile Road and installed culverts. The culverts acted to remove water from the property south of Five Mile Road and empty the water onto the Quarter.

In 1996, the Preisters brought suit against the county. The Preisters sought permanent damages for land taken by the county's actions and temporary crop damages for the years from 1994 through 1996. The Preisters also sought injunctive relief, asking that the county be ordered to remove two of the culverts and conduct a hydrological study of the area.

Arland Gross, foreman for the county's road department since 1990, testified that during the summer of 1993, the county scooped out the drainage ditches on both sides of Five Mile Road and placed the dirt in piles on the road. This dirt, along with dirt from other areas, was eventually smoothed out and leveled into a new road surface, with gravel placed on the top.

The county then replaced a single 3-foot culvert at the southwest corner of the Quarter with two 4-foot culverts (the west culverts). The county also added a new culvert (the east culvert) at the southeast corner of the Quarter where the dip in the road had been. This culvert was added in part to alleviate standing water on the road.

Robert Dupsky, another employee of the county's road department, testified that after the east culvert was installed, the county used a backhoe and "scratched around" to start a

drainage path for the east culvert. This path directed the water out of the drainage ditch and across the Preisters' property.

Janice Preister testified that prior to 1993, the east end of the property would flood along with the rest of the property in heavy rain, but the water spread out across the entire area. Prior to 1993, they were able to farm the entire east end and drove their equipment in and out of the property at the east end. After the road work, they were not able to farm all of the land and they could no longer drive their equipment in and out of the Quarter at the east end because of the mud and standing water caused by the new drainageway.

LaVerne Torczon, a real estate appraiser, testified as to the fair market value of the land in the Quarter. He testified that the land was located in a flood plain and was fit only for agricultural use. Using a comparable sales appraisal method, he estimated that the fair market value of the land was $1,050 per acre. Torczon's testimony regarding the fair market value of the land, and its limited use for agricultural purposes, was not refuted by the county.

Both Patrick Diederich, hydrology expert for the county, and Lee Becker, hydrology expert for the Preisters, testified about the effect that raising Five Mile Road and installing the culverts had on the surrounding land. They agreed that Five Mile Road was sufficiently raised by the road work to cause more water to back up onto the south side of the road during heavy rains, but disagreed as to whether the backed-up water had a significant effect on the Preisters' land.

Becker testified that prior to the road work, floodwaters would reach the east end of the Quarter only if the water came up over the road, and then the water would be generally diffused over the entire area. He further stated that there was no evidence that a significant drainageway existed at the east end of the Quarter before the road work occurred. After the road work was completed, the higher road level and the additional culvert caused water to enter the east end much more frequently, in a concentrated fashion, cutting away at the soil. This concentration of waterflow produced the new drainageway on the east end of the Quarter. Regarding the west culverts, Becker testified that replacing one 3-foot culvert with two 4-foot culverts at least

doubled the amount of floodwater that would empty onto the west half of the Quarter.

Becker concluded that the county, by raising Five Mile Road and installing the culverts, created a new drainageway across the east end of the Quarter and enlarged the drainage channel on the west end. These actions by the county, according to Becker's calculations, permanently damaged 7 acres of the Quarter.

Diederich testified that there was evidence of a natural drainageway existing on the east end of the Quarter prior to the road work. This evidence consisted of an aerial photograph taken of the Quarter and surrounding areas in the spring of 1993. Diederich also determined that the drainageway from the single west culvert was not changed by the road work.

On cross-examination, Diederich admitted that he had viewed the property in question the day before he testified. He observed water standing in the east end of the Quarter, north of the east culvert, although none of the area surrounding the Quarter was flooded. Diederich also testified that the U.S. Geological Survey maps he consulted did not indicate any intermittent waterflow lines on or near the east end of the Quarter prior to 1993. In addition to considering the testimony from witnesses and the exhibits, the court, at the request of the parties, viewed the land in question.

The trial court, sitting without a jury, rendered its opinion in the case on April 22, 1998. The court found that the Preisters were not entitled to crop damages because the evidence failed to quantify the amount of damages attributable solely to the county's road work. The court also denied the Preisters any form of injunctive relief, finding that the county's need to avoid the flooding of Five Mile Road outweighed the Preisters' claims for injunctive relief.

The court did find, however, that the Preisters' land was damaged by the installation of the east culvert. The court stated that

> the water [from the east culvert] now has essentially taken a part of plaintiffs' farm ground on the east side out of production . . . .
>
> . . . .
>
> . . . Having considered the testimony and evidence, and its view of the property, the Court finds that the

> property damaged by flow from the east culvert is a strip approximately 100 feet wide and 1300 feet in length . . . . This constitutes approximately three acres . . . .

The court categorized the effect of the east culvert as "property damage" under the Nebraska Constitution, rather than as a taking. The court awarded the Preisters the total fair market value of the 3 acres, $3,150.

The court denied any recovery for alleged damage to the land based on the west culverts, finding that there was no evidence of greater damage to the land caused by replacing the single culvert with the two larger ones. The court further found that the Preisters' § 1983 cause of action failed because there was not a taking under the U.S. Constitution. Because the § 1983 action failed, the court determined that the Preisters were not entitled to attorney fees under 42 U.S.C. § 1988 (1994 & Supp. III 1997).

The Preisters appealed the trial court's decision to the Nebraska Court of Appeals, asserting that the trial court erred in not awarding recompense for the crop damages, in refusing injunctive relief, in awarding damages for 3 acres rather than 7 acres, and in failing to award attorney fees under § 1988, because the findings of the trial court showed that in fact a taking had occurred. The county cross-appealed, asserting that the trial court erred in awarding the Preisters $3,150 in damages because the Preisters did not prove the difference in the value of the land before and after the road work and because the trial court's findings regarding the amount of land taken were not supported by sufficient evidence.

The Court of Appeals affirmed the trial court's decision in all respects except for the award of $3,150 in damages, which was reversed. *Preister v. Madison County*, No. A-98-471, 1999 WL 452203 (Neb. App. June 8, 1999) (not designated for permanent publication). The court determined that under article I, § 21, of the Nebraska Constitution, in order to recover when property is damaged but not taken, the measure of damages is the difference between the land's value before and after the damage occurs, rather than the land's fair market value. *Id.* The Court of Appeals further determined that because the award of damages was being reversed, the Preisters were not the prevailing parties and thus

it need not reach the issue of attorney fees. *Id.* The Preisters then petitioned this court for further review, which we granted.

ASSIGNMENTS OF ERROR

The Preisters asserted in their petition for further review that the Court of Appeals erred in (1) holding that the Preisters were not entitled to $3,150 for permanent damages to their property when in fact the Preisters' land was taken by the county, (2) denying the Preisters' motion for attorney fees pursuant to § 1988 when the Preisters were the prevailing party, (3) failing to award the Preisters crop damages for the years from 1994 through 1996, and (4) failing to grant the Preisters injunctive relief.

STANDARD OF REVIEW

[1] In an appeal from an equitable action, the reviewing court reviews the action de novo on the record and reaches a conclusion independent of the factual findings of the lower court; however, where credible evidence is in conflict on a material issue of fact, the reviewing court considers and may give weight to the circumstance that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 660, 515 N.W.2d 390 (1994).

ANALYSIS

Upon granting the petition for further review, we limited our review to the following issues: (1) whether a taking of the Preisters' land occurred under the Fifth Amendment to the U.S. Constitution; (2) whether, if there was a taking, there was an appropriate measure of damages; and (3) whether the Preisters are entitled to attorney fees pursuant to §§ 1983 and 1988. See Neb. Ct. R. of Prac. 2G (rev. 1999).

[2] Under the Supremacy Clause of the U.S. Constitution, state courts have a concurrent duty to enforce federal law. *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990). A court may not deny or ignore a federal right when the parties and controversy are properly before it. *Id.* Over 100 years ago, in *Pumpelly v. Green Bay Company*, 80 U.S. (13 Wall.) 166, 181, 20 L. Ed. 557 (1871), the U.S. Supreme Court

held that "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution . . . ." See, also, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982). Regarding the west culverts, we conclude, based on our de novo review of the record, that an established drainageway physically occupied the west end of the Quarter prior to the road work. While Becker testified that replacing the single west culvert with two larger culverts would increase the flow of water in the drainageway, the evidence fails to show that this increased volume actually enlarged the size of the west drainageway. Thus, we determine, as did the trial court, that there has been no damage or taking with regard to the effect of the west culverts.

However, as set out below, we conclude that the county's actions in adding a culvert to the east end of the Quarter resulted in a taking of the Preisters' property in the form of a permanent physical occupation of the east end of the Quarter by a new drainageway.

The county asserts that there was no taking because a drainageway existed across the east end of the Quarter prior to the road work. However, our de novo review of the evidence shows that there was no channel or drainageway across the east end until after the road work was completed. Janice Preister testified that prior to the road work, when the Quarter flooded, the floodwater at the east end would diffuse across the entire area. She also testified that prior to the road work, the Preisters farmed all of the east end, but that now, because of the new drainageway, they cannot. Both experts admitted that the effect of the east culvert was to send more frequent amounts of water to the east end of the Quarter. In fact, the county's expert testified that in the spring of 1998, there was standing water in the east end of the Quarter even when no flooding occurred.

The county relies on a 1993 aerial map of the area taken prior to the road work—but during heavy flooding—to assert that a drainageway existed at the east end of the Quarter prior to the road work. We note that under our standard of review, where credible evidence is in conflict on a material issue of fact, we

may give weight to the circumstance that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 660, 515 N.W.2d 390 (1994). In the present case, the trial court listened to the testimony of the Preisters and two hydrology experts, in addition to viewing the land in question. The trial court found that the east culvert concentrated floodwaters onto the east end of the Quarter in a manner that did not occur prior to the road work. We conclude, as did the trial court, that the drainageway across the east end of the Quarter did not exist prior to the county's road work in 1993.

[3] The county further argues that the Quarter is simply prone to flooding; thus, the creation of any additional drainageway at the east end of the Quarter caused by the road work is irrelevant. However, when the character of a governmental action is a permanent physical occupation of property, there is a taking to the extent of that occupation. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982).

We find, under our de novo review, that the east end of the Quarter has been permanently occupied by a new drainageway. This drainageway was created by the county's actions in raising Five Mile Road and installing the east culvert in 1993. The new drainageway renders a portion of the Quarter unfit for use. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 436 ("the permanent physical occupation of property forever denies the owner any power to control the use of the property"). The county's actions in creating a new drainageway at the east end of the Quarter resulted in a taking of the Preisters' land in violation of the Fifth Amendment to the U.S. Constitution.

DAMAGES

[4] The Preisters are entitled to the fair market value of the portion of land taken. *United States v. 50 Acres of Land*, 469 U.S. 24, 25-26, 105 S. Ct. 451, 83 L. Ed. 2d 376 (1984) ("Fifth Amendment requires . . . 'just compensation'—normally measured by fair market value—whenever it takes private property for public use"); *United States v. 564.54 Acres of Land*, 441 U.S. 506, 99 S. Ct. 1854, 60 L. Ed. 2d 435 (1979). The Court of

Appeals correctly concluded that without evidence of the difference between the value of the land before and after the damage, the Preisters were not entitled to a property damage award under our state Constitution. However, under the Fifth Amendment to the U.S. Constitution, when the government has worked a complete physical taking of the land, the landowner need only show the fair market value of the land taken. See *United States v. 50 Acres of Land, supra.*

The county asserts that the trial court erred in determining that the east culvert took 3 acres of the Preisters' land. The county asserts that the trial court had no evidence upon which to determine the specific amount of land taken by the east culvert because the expert for the Preisters testified only that 7 acres, combined, were affected by the east and west culverts. We disagree.

[5] The record shows that the trial court viewed the land in question and, in its findings, gave the specific dimensions of the new drainageway across the east end of the Quarter. The trial court's findings are also supported by various exhibits and photographs of the area before and after the road work. When the trial court has viewed the land in question, an appellate court is required to consider and may give weight to any findings made by the trial court, provided that the record contains competent evidence to support the findings. *Riha v. FirsTier Bank*, 248 Neb. 785, 539 N.W.2d 632 (1995).

Based on our de novo review, we conclude that the evidence shows that the Preisters are entitled to $3,150 in damages, the fair market value of 3 acres of land taken by the county's actions.

ATTORNEY FEES

Given that we have found that the county violated the takings clause of the Fifth Amendment, we next consider attorney fees under § 1988(b), which provides in relevant part: "In any action or proceeding to enforce a provision of . . . § 1983 . . . of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ." See, also, *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999).

[6] The U.S. Supreme Court has held that a plaintiff is considered a prevailing party when he or she obtains actual relief on the merits of any of the asserted claims, but need not prevail on all claims. See *Farrar v. Hobby*, 506 U.S. 103, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992). Further, relief need not be judicially decreed in order to justify a fee award under § 1988(b). *Id.* See, also, *Shearer v. Leuenberger, supra*. Accordingly, we determine that the Preisters are entitled to reasonable attorney fees under §§ 1983 and 1988.

CONCLUSION

The decision of the Court of Appeals finding that the Preisters were not prevailing parties and were not entitled to $3,150 in damages is reversed. The cause is remanded to the Court of Appeals with directions to remand to the district court for Madison County for entry of judgment on behalf of the Preisters and against Madison County in the sum of $3,150 in damages for the taking of 3 acres of the Preisters' land and for a determination of attorney fees consistent with this opinion.

The Preisters are further granted 2 weeks' leave to file a motion in support of any claimed attorney fees for services rendered in the Court of Appeals and this court. See Neb. Ct. R. of Prac. 9F (rev. 1999).

REVERSED AND REMANDED WITH DIRECTIONS.

WANDA M. KRUMWIEDE, APPELLEE, V. WILHELM F. KRUMWIEDE, APPELLANT.

606 N.W.2d 778

Filed February 11, 2000. No. S-98-1102.

1. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
2. **Appeal and Error.** Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.

3. **Statutes: Divorce: Proof.** Implicit within the dissolution statutes is the requirement that there be proof that both parties are alive at the time of the dissolution.

Appeal from the District Court for Burt County: DARVID D. QUIST, Judge. Vacated and dismissed.

David A. Domina and Nora M. Kane, of Domina Law, P.C., for appellant.

Dennis J. Moynihan, of Johnson and Mock, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

This is an appeal from a decree of dissolution of marriage entered in the district court for Burt County, Nebraska. Appellant Wilhelm F. Krumwiede argues that his criminal defense expenses should have been treated as a marital debt and that appellee Wanda M. Krumwiede should not have been awarded interest on her deferred property settlement. Wilhelm filed a petition to bypass the Nebraska Court of Appeals, which we granted. We do not reach the issues raised because implicit within the dissolution statutes is the requirement that there be proof that both parties are alive at the time of the dissolution. There being a lack of such proof, we vacate the decree of dissolution and dismiss this action.

BACKGROUND

Wilhelm and Wanda were married on March 21, 1969. They have three children, all of whom have reached the age of majority. On December 1, 1994, Wanda filed a verified petition for dissolution of marriage, alleging that the marriage between Wilhelm and herself was irretrievably broken, that all reasonable efforts to reconcile the marriage have been made to no avail, and that any further efforts would likely be futile. In Wilhelm's responsive pleading, he denied Wanda's allegation that the marriage was irretrievably broken. The parties have been separated since the commencement of the dissolution of marriage action.

In June 1995, Wanda disappeared and has been unaccounted for since that time. Sometime after Wanda disappeared, Wilhelm was charged with the first degree murder of Wanda. Wilhelm borrowed $16,878.15 from the estate of his mother, and he used $41,213.61 out of Wilhelm and Wanda's Piper Jaffray account to help pay for the attorney fees and costs involved with the criminal proceeding. The proceeding against Wilhelm resulted in a mistrial. After a transfer of venue, the case was retried, and Wilhelm was acquitted. After these expenditures and at the time of the dissolution hearing, Wilhelm still owed his attorney $69,934.59.

On April 20, 1998, a hearing for the dissolution of the marriage between Wilhelm and Wanda was held. Wanda's attorney, Wilhelm, and Wilhelm's attorney were present for the hearing. Wanda did not appear. Wilhelm was the only witness that testified. Wilhelm testified that he has not had contact with Wanda since she disappeared in 1995 and does not know of her whereabouts. Wilhelm refused to give an opinion as to whether the marriage between himself and Wanda was irretrievably broken. The only other evidence presented at the hearing was Wanda's verified petition; four affidavits, which were executed 3 years prior to the hearing by persons who knew Wanda, stating opinions about the status of the parties' marriage; and three exhibits that went to the issue of property division.

The trial court found that the marriage of Wilhelm and Wanda was irretrievably broken despite reasonable efforts at reconciliation which had failed, that there was no reasonable possibility that the marriage would be reconciled, and that the marriage should be dissolved. The trial court found that Wilhelm's criminal defense expenses were his alone and were not a marital debt subject to division in the divorce proceeding. In dividing the marital property, the trial court found that Wilhelm and Wanda's residence and a Quonset were Wilhelm's separate property. Wilhelm was awarded all of the marital property and was also ordered to assume all debts of the parties, with the exception that each party was to be responsible for all debts incurred since the date of their separation. The trial court awarded Wanda ownership of all personal effects whether currently in her possession or in the possession of her children or her siblings. Wanda was

also awarded a property settlement of $135,338.01, which was to be paid in installments over a 10-year period with interest at 6.375 percent per annum.

ASSIGNMENTS OF ERROR

Wilhelm contends, restated, that the trial court erred in finding that his criminal defense expenses were not marital debts subject to division in the divorce proceedings and that the trial court erred in awarding postjudgment interest to Wanda on her deferred property settlement.

SCOPE OF REVIEW

[1] 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. *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W.2d 528 (1999); *State v. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999).

ANALYSIS

[2] Wilhelm has not assigned or argued that the trial court erred in dissolving the marriage of Wilhelm and Wanda. Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Hajenga v. Hajenga*, *supra*; *State v. Paul*, *supra*.

[3] Implicit within the dissolution statutes is the requirement that there be proof that both parties are alive at the time of the dissolution. Simply put, before a marriage can be dissolved, both parties must be alive. In the instant case, Wilhelm was acquitted of the murder of Wanda. Wanda has not been seen or heard from for over 4 years. Under the facts of this case, we conclude from our de novo review that there is no proof Wanda was alive at the time of the dissolution, and accordingly, we vacate the decree of dissolution and dismiss this action.

VACATED AND DISMISSED.

IN RE ESTATE OF LYLE C. EMERY, JR., DECEASED. NATIONAL BANK OF COMMERCE TRUST & SAVINGS ASSOCIATION, APPELLANT, V. BARBARA D. OTTO, PERSONAL REPRESENTATIVE OF THE ESTATE OF LYLE C. EMERY, JR., DECEASED, ET AL., APPELLEES.

606 N.W.2d 750

Filed February 11, 2000. No. S-98-1180.

1. **Judgments: Jurisdiction: Appeal and Error.** The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its own conclusion independent from that of the trial court.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.
4. **Standing: Jurisdiction.** Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.
5. **Standing: Jurisdiction: Justiciable Issues.** As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.
6. **Wills.** Actions in the county court for probate of a will are in rem, and every person interested in the subject matter is a party in the county court whether named or not.
7. **Claims: Final Orders: Time: Appeal and Error.** While a peremptory denial of permission to file a claim is a final, appealable order, permission to file a claim after the time for filing has run is an interlocutory order.
8. **Statutes.** In applying the rules of statutory construction, effect must be given, if possible, to all the several parts of a statute. No sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.
9. **Appeal and Error.** Errors assigned but not argued will not be addressed.

Appeal from the County Court for Lancaster County: DAVID A. BUSH, Judge. Affirmed.

Stanley H. Foster for appellant.

John M. McHenry and Stephanie R. Hupp, of McHenry, Haszard, Hansen & Roth, special administrators of the Estate of Lyle C. Emery, Jr., deceased.

Donald H. Bowman and Jennifer S. Liliedahl, of Bowman & Krieger, for appellee First Concord Group, Inc.

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

WRIGHT, J.

NATURE OF CASE

National Bank of Commerce Trust & Savings Association (NBC) resisted the filing of a claim by First Concord Group, Inc. (FCG), against the estate of Lyle C. Emery, Jr. The probate court permitted the filing of the claim, and a special administrator was appointed who subsequently allowed part of FCG's claim. NBC objected to the allowance and appeals from the probate court's subsequent order allowing the claim.

SCOPE OF REVIEW

[1] The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its own conclusion independent from that of the trial court. *State ex rel. Stenberg v. Moore, ante* p. 199, 602 N.W.2d 465 (1999).

[2] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Ferguson v. Union Pacific RR. Co., ante* p. 78, 601 N.W.2d 907 (1999).

FACTS

Emery was the president and majority shareholder of FCG at the time of his death on August 10, 1997. Barbara D. Otto, the acting president of FCG, was appointed personal representative of Emery's estate on August 19. Thomas J. Fitchett, who had been the attorney for FCG, also became the attorney for the estate. Eventually, David R. Wilson was retained by FCG as its attorney, and Fitchett continued to represent the estate.

On August 27, 1997, notice to creditors was published in a local legal newspaper. The notice stated that October 27 was the deadline by which all creditors of the estate were to file their claims with the Lancaster County Court. It is undisputed that FCG was not mailed a copy of this public notice, did not waive the need for such notice, did not enter a voluntary appearance,

and was not personally served with a summons. See Neb. Rev. Stat. § 25-520.01 (Reissue 1995).

Other creditors, including NBC, filed claims against the estate prior to the October 27, 1997, deadline. FCG prepared and filed a claim against the estate on November 7. On January 6, 1998, FCG filed a motion for approval of the filing of the claim. NBC filed an objection to this motion.

On March 11, 1998, FCG's motion to file a claim and NBC's objection to that motion were heard before the county court. On April 29, the court entered an order approving FCG's filing of the claim. The court found that the personal representative knew of FCG's claim and should have sent notice to FCG. Relying upon Neb. Rev. Stat. § 30-2485(a)(2) (Reissue 1995), the court reasoned that because notice was not properly sent, FCG was entitled to 3 years in which to file its claim.

A special administrator was appointed, and on August 7, 1998, the special administrator filed a notice of allowance of part of FCG's claim. NBC objected to the allowance, and a hearing was held on that objection. The county court subsequently overruled NBC's objection, and NBC appeals from that order.

ASSIGNMENTS OF ERROR

NBC claims, summarized and restated, that the county court erred (1) in its April 29, 1998, order which overruled NBC's objection to FCG's motion to approve the filing of its claim; (2) in assuming subject matter jurisdiction over FCG's claim and failing to find that such claim was barred because it was not timely filed; (3) in holding that FCG did not have to comply with § 30-2485(a)(1); (4) in holding that due to the failure of the personal representative to mail notice of the probate to FCG, FCG had 3 years to file its claim; (5) in finding that actual notice of the claim deadline by FCG's president and its attorney was irrelevant; (6) in failing to take judicial notice of the evidence presented at the March 11 hearing; (7) in holding that NBC lacked standing to object to the special administrator's allowance of part of the claim filed by FCG; (8) in finding that its order of April 29 was res judicata, thereby precluding NBC from challenging the subject matter jurisdiction of the court to allow FCG's claim; and (9) in overruling NBC's objection to the

special administrator's allowance of part of the claim filed by FCG.

ANALYSIS

As a preliminary matter, we address FCG's claim that this court does not have jurisdiction over this matter because NBC lacked standing to object to the allowance of FCG's claim and because NBC filed its appeal out of time. The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion. *Cotton v. Steele*, 255 Neb. 892, 587 N.W.2d 693 (1999).

[3-5] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. *Id.* Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. *Id.* As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf. *Id.*

[6] We conclude that NBC has standing to object to the claim. The basis for NBC's standing is set forth in Neb. Rev. Stat. § 30-2209(21) (Reissue 1995). At the time NBC filed its objection to FCG's claim, NBC was a creditor which had an interest in the estate. Actions in the county court for probate of a will are in rem, and every person interested in the subject matter is a party in the county court whether named or not. *In re Estate of Reikofski*, 144 Neb. 735, 14 N.W.2d 379 (1944). Such person may appear for the purpose of protecting his or her interest in the county court. *Id.*

The evidence shows that NBC has an interest in the assets of the estate. If FCG's claim is allowed, NBC's recovery from the assets of the estate will be greatly diminished. Therefore, NBC has a personal stake in the outcome of the controversy and, as a creditor of the estate, has standing to bring this suit.

[7] FCG also argues that NBC's appeal was not timely filed because NBC should have appealed from the order of April 29,

1998. This order permitted FCG to file its claim against the estate but made no determination of the merits of the claim. In *In re Estate of Golden*, 120 Neb. 226, 231 N.W. 833 (1930), the court allowed a creditor to file a belated claim against an estate. We held that while a peremptory denial of permission to file a claim is a final, appealable order, permission to file a claim after the time for filing has run is an interlocutory order.

Neb. Rev. Stat. § 30-2488(d) (Reissue 1995) provides: "A final judgment in a proceeding in any court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim." Therefore, until the claim of FCG was allowed, NBC did not have a final order from which to appeal. NBC could not have appealed from the April 29 order, and thus, NBC properly appealed after the special administrator allowed part of FCG's claim.

NBC's numerous assignments of error can be combined into three basic arguments: (1) that the county court erred in determining that § 30-2485 gave FCG 3 years in which to file its claim, (2) that FCG did not need to receive notice by mail because it had actual notice of the deadline for filing its claim, and (3) that the personal representative lacked authority to allow a creditor to file a claim beyond the deadline.

NBC claims the county court erred by overruling its objection that FCG's claim was filed out of time and in finding that FCG had 3 years in which to file its claim. Since the claim was not filed within the 2-month deadline, we review the requirements set forth in chapter 30, article 24, of the Nebraska Revised Statutes to determine whether the court properly allowed part of FCG's claim. Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Ferguson v. Union Pacific RR. Co.*, *ante* p. 78, 601 N.W.2d 907 (1999).

Neb. Rev. Stat. § 30-2483 (Reissue 1995) provides that within 30 days after the appointment of a personal representative, the clerk of the county court shall publish a notice announcing the appointment and notifying creditors that claims must be presented within 2 months. A party instituting or maintaining a proceeding, or his or her attorney, is required to mail the published

notice and give proof thereof in accordance with § 25-520.01. § 30-2483.

Section 25-520.01 requires that

> a party instituting or maintaining [an] action or proceeding . . . shall within five days after the first publication of notice send by United States mail a copy of such published notice to each and every party appearing to have a direct legal interest in such action . . . whose name and post office address are known to him. . . . It shall not be necessary to serve the notice prescribed by this section upon any competent person . . . who has waived notice in writing, entered a voluntary appearance, or has been personally served with summons or notice in such proceeding.

As a creditor, FCG had a direct legal interest, and therefore, pursuant to §§ 25-520.01 and 30-2483, the personal representative was required to mail notice to FCG unless FCG had waived notice in writing, had entered a voluntary appearance, or had previously been served with summons or notice. The county court found that FCG had not received written notice that Emery's estate was being probated even though investigation and diligence on the part of the personal representative would have disclosed the existence of the claim. We agree and therefore treat FCG as a creditor who did not receive proper notice.

Section 30-2485 limits the time in which claims may be presented against an estate and specifically explains what is to be done when a creditor is not provided with proper notice. Section 30-2485(a)(2) states that if notice to creditors has not been given in compliance with §§ 25-520.01 and 30-2483, the creditor has 3 years after the decedent's death in which to file a claim.

Section 30-2485(a)(1) states that any creditor with a claim that arose before the death of the decedent which was not presented within 2 months, including any creditor who did not receive notice, may apply within 60 days after the expiration date for additional time to file a claim for good cause shown. NBC argues that § 30-2485(a)(2) does not apply to FCG and that FCG must comply with § 30-2485(a)(1) before it can file a claim out of time.

NBC relies upon *In re Estate of Masopust*, 232 Neb. 936, 443 N.W.2d 274 (1989), which held that any creditor who did not file its claim in time must apply to the court for an extension. There, the creditor was not allowed to file a claim even though it had not been given written notice. We held that in order to give the county court authority to extend the time in which to file a claim, the creditor must make application within the time allotted for filing claims and then only by showing good cause for doing so. *In re Estate of Masopust* does not apply because § 30-2485(a)(2) has since been amended to provide that effective September 6, 1991, a creditor has 3 years to file a claim if he or she has not received notice as provided in §§ 25-520.01 and 30-2483.

[8] Some confusion may arise since the amendment did not change the language of § 30-2485(a)(1). In applying the rules of statutory construction, we must give effect, if possible, to all the several parts of a statute. No sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. See *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995). Section 30-2485(a)(1) applies to all creditors who may ask the county court for an extension of time to file a claim, but § 30-2485(a)(2) applies only to creditors who do not receive notice. Therefore, both § 30-2485(a)(1) and (2) apply to creditors who do not receive notice.

However, we cannot conclude that FCG must request an extension pursuant to § 30-2485(a)(1) prior to filing a claim after the deadline set forth in the notice. Although § 30-2485(a)(1) provides that any creditor "may apply" for additional time to file a claim, the operative language relates to creditors who have missed the deadline and who may apply for an extension by showing good cause. FCG could have sought an extension pursuant to § 30-2485(a)(1), but since FCG did not receive notice, it was also entitled to the 3-year extension provided for in § 30-2485(a)(2). FCG's failure to ask for an extension pursuant to § 30-2485(a)(1) did not deprive the county court of jurisdiction over FCG's claim.

In summary, the county court found that FCG was not bound by the 2-month period for filing its claim because it had not

received proper notice, and we agree. We find no error in the court's conclusion that FCG, as a creditor which did not receive notice, was entitled to 3 years from the date of Emery's death to file its claim. Thus, NBC's assigned errors attacking FCG's claim as being untimely are without merit.

Next, NBC argues that FCG had actual notice that Emery's estate was being probated and therefore did not need to receive written notice of the probate. Again, this argument is answered by §§ 25-520.01 and 30-2483, which provide that if the identity and address of the interested party is known or reasonably ascertainable, the interested party shall receive notice by mail.

NBC also argues that the personal representative lacked authority to consent to the filing of FCG's claim out of time. Neb. Rev. Stat. § 30-2484 (Reissue 1995) provides in part: "Unless an estate is insolvent the personal representative, with the consent of all successors, may waive any defense of limitations available to the estate." NBC's argument is without merit. FCG did not need the personal representative's consent to file a claim because FCG did not receive proper notice and therefore was entitled to 3 years in which to file its claim.

[9] We decline to address NBC's other assignments of error because it has not argued these errors in its brief. Errors assigned but not argued will not be addressed. *Van Ackeren v. Nebraska Bd. of Parole*, 251 Neb. 477, 558 N.W.2d 48 (1997).

CONCLUSION

After reviewing the assignments of error made and argued by NBC, we find them to be without merit. Thus, we affirm the determination of the county court that a portion of FCG's claim should be allowed.

AFFIRMED.

HENDRY, C.J., and STEPHAN, J., not participating.

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

606 N.W.2d 781

Filed February 11, 2000. No. S-98-1321.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision.
3. **Final Orders: Appeal and Error.** A party may appeal from a court's order only if the decision is a final, appealable order.
4. ____: ____. An order is final if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on a summary application in an action after judgment is rendered.
5. **Words and Phrases.** A substantial right is an essential legal right, not merely a technical right.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Appeal dismissed.

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

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

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

WRIGHT, J.

NATURE OF CASE

This is an appeal by Stuart R. Pruett from an order of the district court which overruled his motion to quash count II of the information filed against him.

SCOPE OF REVIEW

[1] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *US Ecology v. State, ante* p. 10, 601 N.W.2d 775 (1999).

[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision. *Id.*

FACTS

On August 18, 1998, an information was filed against Pruett in the district court for Lancaster County. Count I charged Pruett with manslaughter, in violation of Neb. Rev. Stat. § 28-305 (Reissue 1995), and count II charged Pruett with use of a firearm to commit a felony, in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1995). Manslaughter is a Class III felony punishable by a maximum of 20 years' imprisonment, a $25,000 fine, or both. Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 1998). Use of a firearm to commit a felony is a Class II felony punishable by a maximum of 50 years' imprisonment and a minimum of 1 year's imprisonment. *Id.*

On August 25, 1998, Pruett filed a motion to quash count II of the information on the basis that it charged him with using a weapon to commit an unintentional act. The motion was subsequently overruled.

ASSIGNMENT OF ERROR

Pruett's sole assignment of error is that the district court erred in overruling his motion to quash.

ANALYSIS

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *US Ecology v. State, supra.* A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision. *Id.*

[3,4] The issue presented is whether the overruling of a motion to quash is a final, appealable order. A party may appeal from a court's order only if the decision is a final, appealable order. An order is final if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on a summary applica-

tion in an action after judgment is rendered. *City of Omaha v. Morello*, 257 Neb. 869, 602 N.W.2d 1 (1999).

The first category of final, appealable orders includes those which determine the action and prevent judgment. See *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997). This category is inapplicable here. Even if the motion to quash had been sustained, Pruett would still be charged with count I, manslaughter.

The third category of final, appealable orders includes those made on summary application after judgment. See *Moulton v. Board of Zoning Appeals*, 251 Neb. 95, 555 N.W.2d 39 (1996). No judgment has been rendered in this case. Thus, this category is also inapplicable here.

[5] The remaining category includes orders which affect a substantial right and are made in a special proceeding. See *Hernandez v. Blankenship*, 257 Neb. 235, 596 N.W.2d 292 (1999). A substantial right is an essential legal right, not merely a technical right. *Id.* When an order affects the subject matter of the litigation, by diminishing a claim or defense available to a defendant, this affects a substantial right. *Id.*

The charge alleged in count II does not diminish a claim or defense available to Pruett with regard to count I. If Pruett were to be convicted of the charges, he would not be prohibited from raising on appeal the issue of whether one can be charged with using a weapon to commit an unintentional act. Therefore, we conclude that the overruling of the motion to quash does not affect a substantial right and is therefore not a final, appealable order.

CONCLUSION

Having concluded that there is no final, appealable order in this case, we must dismiss the appeal for lack of jurisdiction.

APPEAL DISMISSED.

IN RE INTEREST OF CLIFFORD M. ET AL., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. SUZETTE M., APPELLANT.

606 N.W.2d 743

Filed February 11, 2000. No. S-98-1339.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the juvenile court's findings; however, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **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.
3. **Juvenile Courts: Appeal and Error.** A proceeding before a juvenile court is a special proceeding for appellate purposes.
4. **Judgments: Appeal and Error: Words and Phrases.** To be appealable, an order in a special proceeding must affect a substantial right. A substantial right is an essential legal right, not a mere technical right.
5. **Parental Rights: Visitation.** Nebraska jurisprudence allows for recognition that a no contact or a no visitation order can significantly impact parental rights and that a no visitation order can affect substantial rights.

Appeal from the Separate Juvenile Court of Douglas County: JOHN J. MCGRATH, Judge. Appeal dismissed.

Stephanie Weber Milone for appellant.

James S. Jansen, Douglas County Attorney, and Karen S. Kassebaum for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Suzette M., the mother of Clifford M., Colette M., and Chelsea M., appeals from two orders of the separate juvenile court of Douglas County. The first order, entered November 20, 1998, overruled Suzette's motion, which was styled in the alternative as a motion to dismiss, motion for partial summary judgment, or demurrer ore tenus (hereinafter referred to as "motion

to dismiss"). By her motion to dismiss, Suzette sought to have the State's motion to terminate her parental rights dismissed. The second order, entered December 10, denied Suzette's motion for visitation with her children. For the reasons stated below, we conclude that the two orders Suzette challenges are not appealable orders, and accordingly, we dismiss this appeal for lack of appellate jurisdiction.

STATEMENT OF FACTS

This is the second appearance of this juvenile proceeding before the Nebraska appellate courts. In the first appeal, the Nebraska Court of Appeals reversed the juvenile court's order of March 27, 1997, which had terminated Suzette's parental rights to all three children. *In re Interest of Clifford M. et al.*, 6 Neb. App. 754, 577 N.W.2d 547 (1998). The Court of Appeals concluded that termination of Suzette's parental rights based on her refusal to comply with a court-ordered plan which required her to admit to her sexual abuse of her children violated Suzette's constitutional right to be free from self-incrimination. *Id.* A petition for further review was denied on May 14, 1998.

The facts regarding the early procedural history of this case can be found in the opinion of the Court of Appeals. *Id.* In the first appeal, the Court of Appeals noted that Clifford, born on February 17, 1990; Colette, born on February 1, 1992; and Chelsea, born on December 28, 1992, had been adjudicated children as described in Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) on the basis of a second amended petition dated November 10, 1994. The adjudication was based upon the faults and habits of Suzette, with the juvenile court finding that Clifford had been thrown into a wall by Suzette's live-in boyfriend on or about February 22, 1994, and that all three children had been subjected to sexual contact by both the boyfriend and Suzette. Custody of the children was placed with the then Department of Social Services.

Following the adjudication, Suzette was subject to a series of rehabilitation plans approved by the juvenile court. On March 3, 1995, the juvenile court entered a rehabilitation plan designed to continue efforts toward the eventual reunification of the family. The Court of Appeals summarized the plan as follows:

> Among other requirements, the court ordered Suzette to submit to psychiatric examinations, participate in a YWCA domestic violence program, find appropriate housing, find a legal source of income, and participate in the children's therapy as requested by their therapist. Suzette was granted reasonable rights of visitation, at a minimum of once per week and twice per week if possible. The rehabilitation order was thereafter periodically reviewed and reaffirmed.

In re Interest of Clifford M. et al., 6 Neb. App. at 756, 577 N.W.2d at 550.

The Court of Appeals noted that subsequent to the March 1995 plan, the juvenile court entered an order continuing the prior rehabilitation plan, and further ordered Suzette to participate in a program entitled "Parents United," a program designed specifically for families affected by sexual abuse. Suzette refused to comply with the Parents United program requirement that she admit to sexually abusing her children. Because of this refusal, Suzette was denied admission into the program. Because she did not participate in the Parents United program, the juvenile court concluded that Suzette had " 'not addressed the issue of sexual abuse which placed her children into protective custody . . . .' " *Id.* at 757, 577 N.W.2d at 550. This conclusion led the juvenile court to terminate Suzette's parental rights, which termination was subsequently reversed by the Court of Appeals.

In reversing the order terminating Suzette's parental rights, the Court of Appeals stated as follows:

> As a result of our decision, the termination order is reversed, and the matter is remanded with directions. The children will remain in the custody of the State until further order of the juvenile court, a rehabilitation plan will remain in effect, and the juvenile court judge will continue to enter appropriate orders guaranteeing the safety, health, and welfare of these children. The State is not prejudiced from filing another motion to terminate Suzette's parental rights on lawful grounds and presenting evidence to support such motion . . . .

In re Interest of Clifford M. et al., 6 Neb. App. 754, 774, 577 N.W.2d 547, 559 (1998). The cause was remanded to the juvenile court.

Upon remand, the juvenile court, in accordance with the mandate of the Court of Appeals, dismissed the first motion to terminate Suzette's parental rights on June 26, 1998. On July 1, the State and the guardian ad litem appointed to represent the children filed a second motion to terminate Suzette's parental rights. The second motion to terminate was based on Neb. Rev. Stat. § 43-292(7) (Reissue 1998), operative July 1, 1998, which provides:

> The court may terminate all parental rights between the parents or the mother of a juvenile born out of wedlock and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> . . . .
>
> (7) The juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months.

Suzette responded by filing her motion to dismiss the second motion to terminate her parental rights on the ground that the motion to terminate was based upon the improper retroactive application of the statutory amendment to § 43-292(7). Prior to July 1, 1998, § 43-292(7) had provided for termination based on out-of-home placement for 18 months or more and failure to correct conditions leading to the out-of-home placement. See § 43-292(7) (Cum. Supp. 1996). In her motion to dismiss, Suzette claimed that she had been denied her statutory and due process rights to be informed of the basis of the second termination proceedings brought against her. For the sake of completeness, we note that the original motion to terminate filed on December 5, 1996, had also alleged out-of-home placement under § 43-292(7), as it then existed, as one of the bases of termination. In December 1996, § 43-292(7) required a period of 18 months of out-of-home placement compared to 15 months under § 43-292(7), operative July 1, 1998. Following the remand from the Court of Appeals, Suzette also moved for visi-

tation with her children, which visitation had been suspended due to the original termination.

The record in the instant appeal discloses a series of review hearings following remand, but no new rehabilitation plans were approved by the juvenile court. Accordingly, pursuant to the direction of the Court of Appeals on remand, the previous rehabilitation plan remained in effect, except that Suzette could not be compelled to waive her right against self-incrimination. At the September 2, 1998, combined review and permanency hearing, a case plan and progress report were submitted into evidence without objection. See Neb. Rev. Stat. § 43-1312 (Reissue 1998). As recognized by the juvenile court at the September 2 hearing, reunification of the children with Suzette remained the permanency objective of the juvenile proceedings.

On November 19, 1998, the juvenile court heard Suzette's motion to dismiss. The motion to dismiss was denied on November 20.

On December 9, 1998, the juvenile court heard Suzette's motion for visitation. The evidence showed, inter alia, as follows: Dr. Cynthia Topf, a clinical psychologist specializing in sexual abuse cases, and Deniz Leuenberger, the Nebraska Department of Health and Human Services caseworker assigned to these juvenile proceedings, both testified against permitting Suzette visitation with the children. According to their testimony, each of the children was severely traumatized by the mere discussion of visitation with Suzette. The foster mother, with whom all three of the children were placed, reported to Dr. Topf that after the children had met with Dr. Topf and Leuenberger to discuss visitation with Suzette, Chelsea had wet her pants and had a nightmare in which a man had told her to remove her clothing and from which she awoke naked; Colette became extremely dependent and would cry; and Clifford began to act out at day care and destroyed a tape recorder which Suzette had given him. Dr. Topf identified the children's behaviors as resulting from their having been sexually abused and stated that as a result of the children's responses to the possibility of visitation with Suzette and Suzette's failure to admit the sexual abuse and receive treatment therefor, it would not be in the best interests of the children to have visitation with their mother. The children's

caseworker, Leuenberger, also testified that in her opinion, it would not be in the best interests of the children for Suzette to have visitation with them at that time. Suzette's motion for visitation with her children was denied on December 10, 1998.

Suzette appeals from the orders denying her motion to dismiss and her motion for visitation.

ASSIGNMENTS OF ERROR

On appeal, Suzette assigns, restated, two errors: (1) The juvenile court erred in denying her motion to dismiss the second motion to terminate her parental rights because such motion to terminate is based upon the improper retroactive application of amended provisions in the juvenile code, thus violating her due process and statutory rights, and (2) the juvenile court erred in denying her motion for visitation with her children.

STANDARDS OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the juvenile court's findings; however, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Sarah K.*, *ante* p. 52, 601 N.W.2d 780 (1999); *In re Interest of Tabatha R.*, 255 Neb. 818, 587 N.W.2d 109 (1998).

[2] 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. *In re Interest of Sarah K.*, *supra*; *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997).

ANALYSIS

Before we address Suzette's assigned errors, we must first consider the issue of whether this court possesses jurisdiction to hear the instant appeal. *Breeden v. Nebraska Methodist Hosp.*, 257 Neb. 371, 374, 598 N.W.2d 441, 443 (1999) (stating "[i]t is not only within the power, but it is the duty, of an appellate court to determine whether it has jurisdiction over the matter before it"). Neb. Rev. Stat. § 25-1911 (Reissue 1995) provides for

appellate review of final orders. A final order is defined as "[a]n order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment . . . ." Neb. Rev. Stat. § 25-1902 (Reissue 1995). Since each of the challenged orders neither determines the action and prevents a judgment nor was made upon a summary application in an action after judgment, we must determine whether the challenged orders affect a substantial right and are made in a special proceeding.

[3,4] A proceeding before a juvenile court is a "special proceeding" for appellate purposes. *In re Interest of Sarah K., supra*; *In re Interest of Tabatha R., supra*. To be appealable, an order in a special proceeding must affect a substantial right. *Id.* A substantial right is an essential legal right, not a mere technical right. *In re Interest of Anthony G.*, 255 Neb. 442, 586 N.W.2d 427 (1998).

This court has previously noted that "a judicial determination made following an adjudication in a special proceeding which affects the substantial rights of parents to raise their children is a final, appealable order." *In re Interest of Tabatha R.*, 255 Neb. at 827, 587 N.W.2d at 116. Accordingly, to determine the appealability of the orders in this case, it is necessary for us to consider the nature of the court's orders denying Suzette's motion to dismiss and denying Suzette's motion for visitation, and what parental rights, if any, were affected by these orders.

Motion to Dismiss.

We first analyze the appealability of the denial of Suzette's motion to dismiss. We have previously considered the appealability of a denial of a motion to dismiss in a juvenile proceeding. See *In re Interest of L.W.*, 241 Neb. 84, 486 N.W.2d 486 (1992). In *In re Interest of L.W.*, we stated:

> "To be final, an order [regarding a motion to dismiss] must dispose of the whole merits of the case and must leave nothing for the 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. [Citation omitted.] Furthermore, if a party's substantial rights are not determined by the court's order and the cause is retained for further action, the order is not final. [Citations omitted.]"

241 Neb. at 95-96, 486 N.W.2d at 495 (quoting *Larsen v. Ralston Bank*, 236 Neb. 880, 464 N.W.2d 329 (1991)).

It is apparent in the instant case that following the dismissal of Suzette's motion to dismiss, further action will be required in the juvenile court. Upon remand from the Court of Appeals, Suzette continues to be subject to a rehabilitation plan and the juvenile court continues to administer the plan, with the exception that Suzette cannot be compelled to waive her right against self-incrimination in connection with her counseling. Further, following remand by the Court of Appeals, the juvenile court made a specific finding that reunification remains the stated permanency objective in the case. Thus, although a second motion to terminate parental rights has been filed, Suzette may still contest that motion by a showing that she has rehabilitated herself through compliance with the rehabilitation plan, thereby achieving permanency and regaining custody of her children, who have been in out-of-home placement. See *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998). Suzette's parental rights were not substantially affected by the denial of her motion to dismiss.

The denial of Suzette's motion to dismiss did not dispose of the whole merits of the case, and the case remains pending in the juvenile court for further action. To the extent there could be merit to Suzette's motion to dismiss, about which we make no comment, the substance of her challenge to the application of § 43-292(7) as amended can be preserved at the termination hearing, if any, and considered on appeal therefrom. Accordingly, we conclude that the juvenile court's denial of Suzette's motion to dismiss did not affect a substantial right and was not a final order for purposes of appeal.

Motion for Visitation.

We next analyze the appealability of the denial of Suzette's motion for visitation. Suzette argues in effect that denial of visitation with her children is tantamount to the termination of her parental rights. Given the facts of the case, we conclude that the

denial of Suzette's motion for visitation did not affect a substantial right, and therefore, the order is not appealable.

As noted above, the terms of Suzette's rehabilitation and potential reunification with her children have been outlined in the rehabilitation plans adopted by the juvenile court in this case over several years and remain in effect. Those terms include Suzette's finding suitable housing for the children, finding a legal source of income, and profitably participating in therapy. Furthermore, after remand and notwithstanding the filing of the second motion to terminate, the stated permanency goal in this case remains reunification. The success of Suzette's being reunified with her children does not hinge solely on whether or not she engages in visitation with her children at this time, but, rather, on her overall progress in meeting the reasonable goals of the reunification plan, see, e.g., *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987), so that the children can be returned to her custody and cease their out-of-home placement status. The juvenile court's order denying visitation does not purport to terminate visitation. See *In re Interest of Zachary L.*, 4 Neb. App. 324, 543 N.W.2d 211 (1996). Rather, Suzette remains free to regain visitation upon a showing that such visitation is in the best interests of the children.

[5] The court is aware of the case of *In re Interest of B.J.M. et al.*, 1 Neb. App. 851, 510 N.W.2d 418 (1993), in which the Court of Appeals reversed an order terminating a father's parental rights to his four children based upon "abandonment," following a no contact order imposed by the juvenile court. The Court of Appeals found the State had "systematically created [a] series of impediments" to the father's efforts to see his children, first by the action of the Department of Social Services and later by the juvenile court. *Id.* at 864, 510 N.W.2d at 426. The Court of Appeals determined that based upon the evidence in that case, the actions by the State and the juvenile court had effectively blocked repeated efforts by the father to see his children, and thus the State had failed to prove by clear and convincing evidence that the father had abandoned his children for a period of 6 months immediately prior to the filing of the petition. Thus, our jurisprudence allows for recognition that a no contact or a no visitation order can significantly impact parental rights and that

a no visitation order can affect substantial rights. Indeed, it has been held that an order terminating visitation can be a final order. *In re Interest of Zachary L., supra.*

In contrast to the proceedings in *In re Interest of B.J.M. et al.*, the termination proceedings pending against Suzette are not based upon her lack of visitation with or abandonment of the children. In the instant case, the State and the guardian ad litem seek to terminate Suzette's parental rights based upon the out-of-home placement of the children for 15 of the most recent 22 months. See § 43-292(7). The out-of-home placement of the children, in turn, is due to Suzette's own sexual abuse of the children and her failure to protect the children from sexual abuse and other abuses by her boyfriend. Indeed, it is undisputed that the children were initially removed from the home and adjudicated due to the faults and habits of Suzette. In sum, it is the habits of Suzette and her failure to rehabilitate herself rather than the suspension of visitation which perpetuate the out-of-home placement of her children. The denial of visitation in the context of the instant case did not affect a substantial parental right of Suzette to raise her children. See *In re Interest of Anthony G.*, 255 Neb. 442, 586 N.W.2d 427 (1998).

We conclude, therefore, that the court's order denying Suzette's motion for visitation does not affect a substantial right and, accordingly, is not a final order for purposes of an appeal. In the absence of a judgment or appealable order, this court has no authority or jurisdiction to act, and in the absence of such judgment or order, the appeal will be dismissed.

CONCLUSION

Neither of the juvenile court's orders denying Suzette's motion to dismiss and denying Suzette's motion for visitation affected a substantial right. Therefore, the orders are not appealable orders. The appeal must be dismissed for lack of jurisdiction for the reasons stated above.

APPEAL DISMISSED.

PHELPS COUNTY BOARD OF EQUALIZATION, APPELLANT, V. G. DARLENE GRAF, PHELPS COUNTY ASSESSOR, ET AL., APPELLEES.

606 N.W.2d 736

Filed February 11, 2000. No. S-99-009.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
3. **Taxation: Judgments: Appeal and Error.** Decisions rendered by the Tax Equalization and Review Commission shall be reviewed by the court for errors appearing on the record.
4. **Taxation: Appeal and Error.** Appeals are to be taken from any action of a county board of equalization to the Tax Equalization and Review Commission in accordance with the Tax Equalization and Review Commission Act, Neb. Rev. Stat. §§ 77-5001 to 77-5031 (Reissue 1996, Cum. Supp. 1998 & Supp. 1999).
5. ___: ___. The authority for an assessor to appeal the action of a county board is derived from Neb. Rev. Stat. §§ 77-5007 and 77-5007.01 (Cum. Supp. 1998).
6. **Statutes.** Statutes relating to the same subject matter are to be construed together so as to maintain a consistent and sensible scheme.
7. **Taxation: Appeal and Error.** A protest described in Neb. Rev. Stat. § 77-1504 (Cum. Supp. 1998) is not a prerequisite to an appeal by an assessor.
8. **Judgments: Appeal and Error.** When reviewing an order for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
9. **Taxation: Valuation: Presumptions: Evidence: Appeal and Error.** There is a presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence presented to the contrary.
10. **Administrative Law: Words and Phrases.** A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion.
11. **Taxation: Valuation.** Pursuant to Neb. Rev. Stat. § 77-5027 (Cum. Supp. 1998), the authority to make adjustments by class or subclass is specifically reserved to the Tax Equalization and Review Commission.

Appeal from the Nebraska Tax Equalization and Review Commission. Affirmed.

Jeffrey M. Cox, of Dier, Osborn & Cox, P.C., for appellant.

Robert J. McCormick for appellee G. Darlene Graf.

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

WRIGHT, J.

NATURE OF CASE

The Phelps County Board of Equalization (Board) reduced the assessed value on certain parcels of real estate that had previously been valued by the Phelps County assessor (Assessor). The Assessor appealed to the Tax Equalization and Review Commission (TERC), which vacated and reversed the Board's action, finding that the Board had made an adjustment to a subclass of property and that such action was unreasonable and arbitrary.

SCOPE OF REVIEW

[1] Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Parnell v. Madonna Rehab. Hosp., ante* p. 125, 602 N.W.2d 461 (1999).

[2] In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *State ex rel. Stenberg v. Moore, ante* p. 199, 602 N.W.2d 465 (1999).

[3] Decisions rendered by TERC shall be reviewed by the court for errors appearing on the record. *Pittman v. Sarpy Cty. Bd. of Equal., ante* p. 390, 603 N.W.2d 447 (1999).

FACTS

In the fall of 1997, the Board began the process of transferring residential valuation data to its new computer software program. The process included changing the valuation formula for residential lots from one based on front footage to one based on the square footage of a lot and included updating the residential lot values to their fair market value as of January 1, 1998. The last prior valuation of the lots was done in 1989.

On July 21, 1998, the Board reduced by 25 percent the value of more than 80 parcels of real estate located in Holdrege,

Nebraska. The Board took this action pursuant to Neb. Rev. Stat. § 77-1504 (Cum. Supp. 1998), which provides in part: "The county board of equalization may meet on or after June 1 and on or before July 25 to consider and correct the current year's assessment of any real property which has been undervalued, overvalued, or omitted."

Thereafter, the Board mailed notices of valuation change to the subject property owners between July 23 and August 1, 1998. No protests were filed. However, on August 10, the Assessor appealed to TERC regarding the Board's action of July 21. After TERC issued notices in lieu of summons to the Board and various property owners, TERC set the matter for hearing on December 15. TERC subsequently overruled the Board's motion for a continuance and change of venue. At the hearing, the Board moved for summary dismissal on the basis that the Assessor had not filed a protest with the Board prior to appealing to TERC and therefore had not properly perfected the appeal. This motion was overruled.

On December 23, 1998, TERC vacated and reversed the action of the Board, having concluded that the action of the Board was unreasonable and arbitrary and constituted an adjustment to a subclass of real property. The Board timely appealed to the Nebraska Court of Appeals, and we moved this appeal to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.

ASSIGNMENTS OF ERROR

The Board asserts that TERC erred in (1) determining that the Assessor had perfected an appeal and that TERC had jurisdiction to hear the appeal, (2) determining that the action of the Board was unreasonable and arbitrary, (3) determining that the action of the Board constituted an adjustment of a class or subclass of real property, (4) prematurely deciding the case, and (5) denying the Board's motion for a continuance and change of venue.

ANALYSIS

We first address whether TERC had jurisdiction to hear the Assessor's appeal. In determining whether an appeal was prop-

erly perfected, we examine the provisions of § 77-1504 and Neb. Rev. Stat. §§ 77-1510, 77-5007, and 77-5007.01 (Cum. Supp. 1998).

Section 77-1504 provides in part:

> The action of the county board of equalization may be protested to the board within thirty days after the mailing of the notice required by this section. If no protest is filed, the action of the board shall be final. If a protest is filed, the county board of equalization shall hear the protest in the manner prescribed in section 77-1502, except that all protests shall be heard and decided on or before September 15.
>
> The action of the county board of equalization upon a protest filed pursuant to this section may be appealed to the Tax Equalization and Review Commission on or before October 15.

The Assessor argues that the procedure set forth in § 77-1504 applies to taxpayers only and does not apply to an assessor in his or her official capacity. Instead, the Assessor relies on § 77-5007, which gives county assessors the authority to appeal decisions by county boards to TERC. Under § 77-5007,

> [t]he commission has the power and duty to hear and determine appeals of:
>
> (1) Decisions of any county board of equalization equalizing the value of individual tracts, lots, or parcels of real property so that all real property is assessed uniformly and proportionately.
>
> . . . .
>
> (9) Any other decision of any county board of equalization.

In addition, § 77-5007.01 provides in part: "In appeals by a county assessor in his or her official capacity pursuant to section 77-5007, the county assessor may request that the district court appoint an attorney to represent the county assessor before the commission."

[4,5] Section 77-1510 provides that appeals are to be taken from any action of a county board of equalization to TERC in accordance with the Tax Equalization and Review Commission Act (Act), Neb. Rev. Stat. §§ 77-5001 to 77-5031 (Reissue 1996,

Cum. Supp. 1998 & Supp. 1999), and therefore, the authority for an assessor to appeal the action of a county board is derived from §§ 77-5007 and 77-5007.01. It is clear that an assessor may appeal a decision of a county board to TERC. The issue is whether an assessor must file a protest with the county board before an appeal can be taken to TERC.

Although *Pittman v. Sarpy Cty. Bd. of Equal., ante* p. 390, 603 N.W.2d 447 (1999), dealt with an appeal from a county board's grant of a tax exemption under Neb. Rev. Stat. § 77-202 (Cum. Supp. 1998), it is instructive in that appeals regarding tax exemptions are brought in the same manner as set forth in § 77-1510 and Neb. Rev. Stat. § 77-1511 (Reissue 1996). In *Pittman*, a nonprofit corporation claimed the county assessor lacked standing to appeal the county board's grant of a tax exemption. The corporation relied on *Bemis v. Board of Equalization of Douglas County*, 197 Neb. 175, 247 N.W.2d 447 (1976), in which we held that a county assessor had no standing to bring an appeal of a tax exemption determination and that the county assessor's responsibility was limited to an advisory rather than an adversary capacity. In *Pittman*, we recognized that the statutory scheme changed with the adoption of the Act and that a county assessor now has the authority to appeal a decision by a county board to TERC in a variety of situations as described in § 77-5007, including "(9) [a]ny other decision of any county board of equalization."

[6] 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. *Parnell v. Madonna Rehab. Hosp., ante* p. 125, 602 N.W.2d 461 (1999). In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *State ex rel. Stenberg v. Moore, ante* p. 199, 602 N.W.2d 465 (1999). Statutes relating to the same subject matter are to be construed together so as to maintain a consistent and sensible scheme. *Pittman v. Sarpy Cty. Bd. of Equal., supra.*

[7] We find no valid reason why an assessor in his or her official capacity should be required to file a protest with the county

board before taking an appeal to TERC under § 77-5007. We therefore conclude that since the authority of county assessors to appeal decisions of the county boards is derived from the Act, a protest described in § 77-1504 is not a prerequisite to an appeal by an assessor. Accordingly, TERC had jurisdiction to hear the Assessor's appeal.

We next address the Board's claim that TERC erred in finding the action of the Board was unreasonable and arbitrary. TERC hears the appeals in accordance with § 77-1511, which provides:

> The Tax Equalization and Review Commission shall hear appeals and cross appeals taken under section 77-1510 as in equity and without a jury and determine anew all questions . . . which relate to the liability of the property to assessment, or the amount thereof. The commission shall affirm . . . the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary or . . . that the property of the appellant is assessed too low.

[8] Once TERC enters its decision, any person aggrieved by a final decision by TERC may obtain judicial review in the Court of Appeals. See § 77-5019(1). Decisions rendered by TERC shall be reviewed by the court for errors appearing on the record. *Pittman v. Sarpy Cty. Bd. of Equal., ante* p. 390, 603 N.W.2d 447 (1999). When reviewing an order for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999). Therefore, our review is to determine whether TERC's decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

TERC concluded the Assessor had established that the decision of the Board which reduced the property value of certain parcels of real estate by 25 percent was unreasonable and arbitrary. In response, the Board argues that TERC ignored evidence which the Board considered in making its determination. The Board claims to have considered numerous protests by owners of certain unimproved lots which brought to the Board's atten-

tion the issue of overvaluation. It further asserts that the Assessor had repeatedly recommended that the Board reduce the value of other vacant lots which lacked certain access by as much as 75 percent. The Board claims that two of its members conducted personal investigations of market and sales data based on information received from the Assessor and that these members visited with area real estate agents to get a "feel" for the market. One board member testified that he obtained a qualified residential sales roster from the Assessor before the Board took its action, and from that, he was able to compare assessed values to actual sales information on numerous residential lots in the county.

[9] There is a presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence presented to the contrary. See *US Ecology v. Boyd Cty. Bd. of Equal., supra.* The Board claims that the Assessor did not overcome this presumption, and therefore, we examine the record to determine whether the Assessor successfully rebutted the presumption that the Board acted upon sufficient competent evidence to justify its action.

Prior to 1998, a vacancy adjustment for unimproved residential lots in Phelps County had been in place. The adjustment ranged from 25 to 50 percent. As a part of the 1998 revaluation, the Assessor eliminated this adjustment because all lots, whether improved or unimproved, should be appraised as vacant and available for sale according to standard professional mass appraisal practices. This process was completed by the appraiser on March 20, 1998.

The mass appraisal valuation formulas arrived at for the residential lots in Phelps County were tested by comparing the results from the application of the formula to an independent sales study. The revaluation process was uniformly and proportionately applied to all residential lots in Holdrege to bring them to fair market value as of January 1, 1998.

After June 1 and before July 21, 1998, a member of the Board requested that the assistant assessor provide him with a list of all unimproved lots and all residential lots with improvements of

$1,500 or less in the city of Holdrege. This list, which was compiled from the electronic database maintained by the Assessor, was divided into two parts. The first part listed all unimproved residential lots in the city of Holdrege, and the second part listed all improved residential lots in the city of Holdrege with improvements valued at $1,500 or less. The Board member then fashioned a list of lots in the city of Holdrege which was introduced to the Board for discussion on July 21 with the following introductory statement:

> All lots valued above $5,000 which have not been adjusted due to other considerations, such as farmed and etc. I propose that these lots get a 25% reduction basked [sic] on the fact they are not readily marketable unless you can find someone who is willing to build on these lots. This being that some of these lots have been available for sale for over 20 years. No lot to be valued below $5,000.00.

The Board amended the proposal by deleting the phrase "[n]o lot to be valued below $5,000.00" and then adopted the proposal as amended.

On December 23, 1998, TERC vacated and reversed the action of the Board, finding that the subclass of property created by the Board was vacant residential real property within the city of Holdrege, with an assessed value of $5,000 or more and improvements of $1,500 or less.

At the hearing, TERC found that the Assessor had valued certain parcels of residential real property in Holdrege for tax year 1998. The parcels either were vacant or had improvements of $1,500 or less. The Board, on its own motion, reduced the assessed values of the above parcels by 25 percent.

TERC found that the Assessor had established the per-square-foot values for the land component of residential real property assessments in Holdrege based on a market analysis and that all residential land within Holdrege was valued using these per-square-foot values for tax year 1998.

TERC found that in utilizing these values, the Assessor was performing her statutory duty to uniformly and proportionately value residential real property within the county for tax year 1998 and that there was no evidence to rebut or contradict the

Assessor's testimony regarding the determination of these assessed values.

TERC found that the action of the Board was based upon conversations with " 'real estate people' " regarding eight or nine parcels of vacant real property and that no competent evidence of actual or fair market value of the parcels comprising the subclass was adduced by the Board at the hearing before either the Board or TERC. The adjustment by the Board did not address improved lots and did not address vacant lots with an assessed value of less than $5,000.

TERC found that the action of the Board did not promote uniform and proportionate assessments and, in fact, had the opposite effect.

TERC concluded that the Board had no jurisdiction to adjust the values of the subclass of vacant residential real property in Holdrege with a value of $5,000 or more and with improvements of $1,500 or less and that as a matter of law, the Assessor had established that the decision of the Board was unreasonable and arbitrary.

[10] A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion. *Pittman v. Sarpy Cty. Bd. of Equal., ante* p. 390, 603 N.W.2d 447 (1999). The evidence showed that one Board member testified that the amount of $5,000 was selected because he "felt that that was an area where you could stop and go from" and that this cutoff was "possibly" arbitrary. There was no evidence which showed that the Board researched the valuation of lower priced lots to determine if these lots should have received the same reduction. The evidence did not support the Board's decision to exclude lots with improvements in excess of $1,500. One Board member testified that this exclusion was an error of the Board. Another member testified that once a house is constructed on a lot, the value of the lot should be increased and, therefore, agreed with the assessed value of the lots with houses on them.

The evidence presented to TERC was sufficient to rebut the presumption of the validity of the Board's actions. The 25-percent reduction by the Board was based upon a Board member's conversation with real estate agents concerning only eight

or nine lots, yet the Board reduced all the lots based upon this recommendation. Therefore, the real property was valued by a method different from the method applied by the Assessor to other residential lots in Phelps County. As a result, the real property in Phelps County was not uniformly and proportionately assessed as required by Neb. Const. art. VIII, § 1.

The Board did not establish a clear-cut procedure by which it was able to justify such valuation, and we conclude that TERC's decision is not contrary to law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.

[11] We next consider whether the action of the Board constituted an adjustment to a subclass of real property. Pursuant to § 77-5027, the authority to make adjustments by class or subclass is specifically reserved to TERC.

TERC determined that by reducing the values of certain parcels of residential real estate, the Board had made an adjustment to a subclass. We agree. The subclass created by the Board was vacant residential real property located in Holdrege with an assessed value of $5,000 or more and improvements of $1,500 or less. The Board's action of July 21, 1998, reduced by 25 percent the assessed value of real property described in the subclass.

The Board claims it did not make adjustments to a subclass of real property, but, instead, reduced the values of various parcels of real property specifically identified in its motion. The Board asserts that since its minutes list the lots to be given the 25-percent downward adjustment instead of defining the subclass, it has created no subclass. We find this argument to be without merit. The Board did not consider the lots individually, but gave all the lots the same percentage reduction.

The power to make adjustments to a subclass of real property is reserved to TERC, see § 77-5027, and TERC correctly determined that the Board had made an adjustment to a subclass of property contrary to law.

We do not address the Board's remaining assignments of error other than to note that they are without merit. The decision of TERC is affirmed.

AFFIRMED.

CHRISTOPHER C. HUFF, APPELLANT, V. RAYMOND SWARTZ, APPELLEE.

606 N.W.2d 461

Filed February 18, 2000. No. S-97-1045.

1. **Torts: Intent: Proof.** The elements of tortious interference with a business relationship or expectation are (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.
2. **Torts: Words and Phrases.** To be actionable as tortious interference with a business relationship, the interference must necessarily impact on a valid business relationship or expectancy.
3. **Termination of Employment.** Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason.
4. **Torts: Employer and Employee.** At-will employment status, in and of itself, does not preclude a claim for tortious interference with the employment relationship.
5. **Torts: Employer and Employee: Intent: Proof.** In order to constitute actionable interference with an employment relationship, actions of a coemployee must be shown to have been committed in furtherance of some purpose other than the lawful purposes of the employer. If such interference is established, it must also be proved to be unjustified in order to be actionable.
6. **Torts: Employer and Employee.** Factors which are to be considered in determining whether interference with a business relationship is improper include: (1) the nature of the actor's conduct, (2) the actor's motive, (3) the interests of the other with which the actor's conduct interferes, (4) the interests sought to be advanced by the actor, (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (6) the proximity or remoteness of the actor's conduct to the interference, and (7) the relations between the parties.
7. **Torts.** While a malicious motive is a factor which may be considered in determining whether interference is unjustified, and may indeed weigh heavily toward such a finding, it is generally insufficient standing alone to establish that fact.
8. **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.
9. **Summary Judgment: Evidence: Proof.** After the movant makes a prima facie case for summary judgment, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and HANNON and SIEVERS, Judges,

on appeal thereto from the District Court for Douglas County, J. PATRICK MULLEN, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

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

Robert F. Rossiter, Jr., of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

STEPHAN, J.

Christopher C. Huff brought this civil action for damages against Raymond Swartz, alleging tortious interference with a business relationship. The district court for Douglas County, Nebraska, granted Swartz' motion for summary judgment, and Huff appealed. In an unpublished opinion, the Nebraska Court of Appeals determined that there were genuine issues of material fact which precluded summary judgment, and reversed and remanded for further proceedings. See *Huff v. Swartz*, No. A-97-1045, 1999 WL 247123 (Neb. App. Apr. 13, 1999) (not designated for permanent publication). We granted Swartz' petition for further review, and we conclude that the district court did not err in entering summary judgment in favor of Swartz.

I. FACTS

The following facts are reflected in the pleadings, depositions, affidavits, and discovery responses which comprise the record: Huff was employed by AT&T, now known as Lucent Technologies, for 29 years. Until March 1994, Huff was employed at an AT&T plant in Shreveport, Louisiana. At that time, Huff requested and was granted a transfer to an AT&T plant in Omaha, Nebraska. Huff requested the transfer because downsizing at the Shreveport plant was likely to affect his wife, who was an hourly-wage employee there. In conjunction with his application for transfer, Huff forwarded letters of recommendation from his previous AT&T supervisors in Shreveport, including Thomas Toms, Don Scriber, and Richard Lutz, to AT&T executives in Omaha.

At all material times, Swartz was employed by AT&T as the manager for engineering and operations at its Omaha plant. He was considered to be a third-level manager. His duties included supervising approximately 1,000 people, roughly one-third of the plant's work force. Swartz had authority to hire and terminate employees within company guidelines.

Three months after transferring to the Omaha plant, Huff was assigned to a first-level managerial position of directly supervising the second-shift cabinet production line. After Huff began this job, Swartz came to the shop floor and asked him how the work was progressing. At that time, Huff informed Swartz that only 10 of the 45 cabinet types which the plant was producing were listed in the departmental computer, representing only about 2 to 3 percent of the total output. Huff expressed concern that this partial production data was the basis for the department's production efficiency rating of 85 percent. Huff informed Swartz that he would not post any additional information until the misleading information was corrected. Swartz responded by nodding. According to Huff, this was one of the few contacts he had with Swartz prior to August 18, 1994, and none of these contacts resulted in any problems between him and Swartz.

Huff's direct supervisor at the Omaha plant was Steve Condra. Condra, in turn, reported to Swartz. In late July or early August 1994, Condra voiced concerns to Swartz about Huff's job performance. After learning of these concerns, Swartz contacted Penney Bromell of the human resources department at AT&T's Shreveport plant and inquired about Huff's job performance during his employment there. Swartz described to Bromell Huff's performance deficiencies as reported to him by Condra and asked Bromell if similar problems had been noted while Huff had worked at the Shreveport plant. Bromell gave an affirmative response and told Swartz that Huff had been reassigned from the production floor to a nonsupervisory position.

After speaking to Swartz, Bromell contacted Alex Vukovich, who was in charge of human resources and public relations for the AT&T plants in Shreveport and Denver, Colorado. Vukovich then spoke with Swartz. During this conversation, Swartz questioned why the letters of recommendation sent on behalf of Huff were "glowing" when the Omaha plant was experiencing prob-

lems with his performance. Vukovich questioned those who wrote the letters and was told that the letters were based upon Huff's performance in a nonsupervisory position. According to Vukovich, Swartz did not direct him to review the letters. The individuals who had written the letters denied that they were asked to rewrite them or that they felt threatened to do so.

Bromell stated that during one of several conversations she had with Swartz, he stated that the Shreveport plant was obligated to take Huff back because of the misleading letters of recommendation. Swartz also told her that he would be the person in Omaha responsible for deciding if future transfers from Shreveport would be allowed and that Shreveport's refusal to take Huff back would be a factor in considering future transfers. Swartz denied telling Bromell that if Huff was not returned to Shreveport there would be no future transfers. According to Vukovich, if Swartz made such a statement to Bromell, he would be acting beyond the scope of his authority. Vukovich also stated that the Omaha plant had no authority to dictate labor relations in Shreveport.

On August 17, 1994, Condra again approached Swartz and stated that he felt Huff's job performance was detrimental to the cabinet production line and wanted to make a change. On August 18, Condra called Huff and asked him to come to Swartz' office. Both Condra and Swartz were in the office when Huff arrived. Huff testified that after he greeted the two men, Swartz asked Huff in a loud voice, "What in the hell do you think you're doing down on that shop floor . . . ." When Huff requested some explanation, Swartz replied that Condra had reported having Huff in his office on several occasions. Huff responded that this was a lie and explained that his two prior contacts with Condra involved issues that had been resolved. Huff testified that on two separate occasions during this meeting, Swartz stated: "I'm going to do whatever it takes to bust you, fire you, demote you or send you back to Shreveport." At the conclusion of the meeting, Swartz removed Huff from the cabinet production line and assigned him to a nonsupervisory job at the same pay level.

Huff performed his new tasks for approximately 3 days. He then sought medical treatment from a physician, who diagnosed

and began treating Huff for depression. Huff never returned to work in Omaha and sought further medical treatment for his depression. His subsequent treating physician opined that he sustained major depression and posttraumatic stress disorder due to his problems at work. Huff was eventually transferred back to Shreveport, but retired for medical reasons.

Huff filed this action on January 29, 1996. In his operative second amended petition, Huff alleged that Swartz tortiously interfered with his business relationship with AT&T. Specifically, Huff alleged that Swartz contacted Huff's former supervisors in Shreveport and demanded that his employment background be investigated, that Swartz directed that Huff's letters of recommendation be altered, and that Swartz effectuated Huff's transfer back to Shreveport by threatening to bar all future transfers unless Huff's transfer was made. Huff alleged that such conduct forced him to incur emotional distress and anguish.

On September 17, 1997, the district court for Douglas County granted Swartz' motion for summary judgment. The court found that Swartz' actions were within the scope of his employment and that there was no evidence that he acted maliciously or that he profited by his conduct. In reversing this judgment, the Court of Appeals determined that a genuine issue of material fact existed because there was evidence that Swartz used a threatening tactic to get Shreveport to accept Huff back and that such action was outside the scope of Swartz' authority. *Huff v. Swartz*, No. A-97-1045, 1999 WL 247123 (Neb. App. Apr. 13, 1999) (not designated for permanent publication). The court also found, as an independent basis for reversing the order of summary judgment, that there was a genuine issue of material fact regarding whether Swartz' actions were malicious. We granted Swartz' petition for further review.

II. ASSIGNMENT OF ERROR

Swartz contends in his petition for further review, restated and summarized, that the Court of Appeals failed to properly analyze the claim of tortious interference with a business relationship in the context of at-will employment.

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. *Parnell v. Madonna Rehab. Hosp., ante* p. 125, 602 N.W.2d 461 (1999); *Ferguson v. Union Pacific RR. Co., ante* p. 78, 601 N.W.2d 907 (1999).

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. *Ferguson v. Union Pacific RR. Co., supra.*

IV. ANALYSIS

1. Existence of Cause of Action

[1] The elements of tortious interference with a business relationship or expectation are

> "(1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted."

Koster v. P & P Enters., 248 Neb. 759, 764, 539 N.W.2d 274, 278-79 (1995). Because Huff did not allege the existence of a contract applicable to his employment with AT&T, it must be inferred that he was an at-will employee. See, *Matheson v. Stork*, 239 Neb. 547, 477 N.W.2d 156 (1991); *White v. Ardan, Inc.*, 230 Neb. 11, 430 N.W.2d 27 (1988). This court has never decided whether a cause of action for tortious interference with a business relationship may be brought by an at-will employee against a coemployee. The issue was presented in *Matheson v. Stork*, 239 Neb. at 552, 477 N.W.2d at 160, wherein we stated that "[a]ssuming, but not deciding, that there can ever be a tortious interference with such an employment relationship, and assuming further, but again not deciding, that another employee

acting outside his or her employment authority may under any circumstances tortiously interfere with such a relationship," no actionable claim was stated because there were no allegations of harm or damage resulting from the alleged interference.

Subsequently, in *Hoschler v. Kozlik*, 3 Neb. App. 677, 529 N.W.2d 822 (1995), the Court of Appeals determined that an at-will employee had stated a cause of action against her former supervisor for intentional interference with a business relationship. That holding provided the framework for the judgment reached by the Court of Appeals in the present case. Our disposition on further review therefore requires that we specifically resolve the two issues of law identified but not decided in *Matheson v. Stork, supra.*

(a) Is At-Will Employment "Business Relationship or Expectancy" Which May Be Object of Tortious Interference?

[2-4] In *Hoschler*, the Court of Appeals correctly noted that to be actionable as tortious interference with a business relationship, the interference must necessarily impact on a valid business relationship or expectancy. Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason. *Walpus v. Milwaukee Elec. Tool Corp.*, 248 Neb. 145, 532 N.W.2d 316 (1995); *Hamersky v. Nicholson Supply Co.*, 246 Neb. 156, 517 N.W.2d 382 (1994). Relying upon the holdings of a majority of courts which have addressed the issue, as well as Restatement (Second) of Torts § 766 (1979), the Court of Appeals in *Hoschler* held that "at-will employment status, in and of itself, does not preclude a claim for tortious interference" with the employment relationship. 3 Neb. App. at 682, 529 N.W.2d at 826. The court reasoned that the fact that at-will employment "may be terminated by the parties without liability does not necessarily privilege another individual, business, or entity, in other words, a 'third person,' to unjustifiably induce the termination." *Id.* We agree with and adopt this holding and the rationale upon which it is based.

(b) Under What Circumstances Can Coemployee Commit Actionable "Unjustified Intentional Act of Interference" With At-Will Employment Relationship?

In *Hoschler*, the Court of Appeals determined that the third element of the cause of action for tortious interference with a business relationship or expectation required an examination of "what is sufficient to constitute an 'unjustified' interference." 3 Neb. App. at 682, 529 N.W.2d at 826. While we agree with this statement, we conclude that it is first necessary to determine what constitutes "interference" with an at-will employment relationship by a supervisor or other coemployee; in other words, at what point does the coemployee become a "third person" subject to liability for tortious interference with the at-will employment relationship of another on the basis of an "unjustified intentional act"?

In addressing this issue, other courts have drawn a distinction between actions which fall within the general scope of the alleged interferer's authority as an agent of the employer and those which are in furtherance of some individual or private purpose not related to the interests of the employer. For example, in *Nordling v. Northern States Power Co.*, 478 N.W.2d 498, 505-06 (Minn. 1991), an opinion cited by the Court of Appeals in *Hoschler v. Kozlik*, 3 Neb. App. 677, 529 N.W.2d 822 (1995), the court stated:

> The general rule is that a party cannot interfere with its own contract. [Citation omitted.] If a corporation's officer or agent acting pursuant to his company duties terminates or causes to be terminated an employee, the actions are those of the corporation; the employee's dispute is with the company employer for breach of contract, not the agent individually for a tort. To allow the officer or agent to be sued and to be personally liable would chill corporate personnel from performing their duties and would be contrary to the limited liability accorded incorporation.

[5] Similarly, under Alabama law, " '[s]o long as the officer or employe [sic] acts within the general range of his authority intending to benefit the corporation, the law identifies his actions with the corporation.' " *Hickman v. Winston County Hosp. Bd.*, 508 So. 2d 237, 239 (Ala. 1987), quoting *Wampler v.*

Palmerton, 250 Or. 65, 439 P.2d 601 (1968). And in *Wilcox v. Niagara of Wisconsin Paper Corp.*, 965 F.2d 355, 365 (7th Cir. 1992), the court found that in order to constitute interference with an employment relationship under Wisconsin law, it was necessary to show that the employee was serving a master other than the employer or was pursuing "some benefit to himself, at odds with the interests" of the employer. We agree with these authorities and hold that in order to constitute actionable interference with an employment relationship, actions of a coemployee must be shown to have been committed in furtherance of some purpose other than the lawful purposes of the employer. If such interference is established, it must also be proved to be "unjustified" in order to be actionable. *Koster v. P & P Enters.*, 248 Neb. 759, 539 N.W.2d 274 (1995); *Matheson v. Stork*, 239 Neb. 547, 477 N.W.2d 156 (1991).

[6] Restatement (Second) of Torts § 766 at 7 (1979) describes a cause of action similar to that which we have recognized for intentional interference with a business relationship or expectancy, imposing liability upon one who "intentionally and improperly interferes" with the performance of a contract. The Restatement, *supra*, § 767 at 26-27, lists seven factors to consider in determining whether interference with a business relationship is "improper":

> (a) the nature of the actor's conduct,
>
> (b) the actor's motive,
>
> (c) the interests of the other with which the actor's conduct interferes,
>
> (d) the interests sought to be advanced by the actor,
>
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
>
> (f) the proximity or remoteness of the actor's conduct to the interference and
>
> (g) the relations between the parties.

In the introductory note to the Restatement, *supra*, ch. 37 at 7, that authority states that in making its analysis, the factfinder is to engage in a balancing process, noting: "The determination of whether an interference is improper depends upon a comparative appraisal of these factors. And the decision is, whether it was improper under the circumstances—that is under the partic-

ular facts of the individual case, not in terms of rules of law or generalizations." Furthermore, the Restatement, *supra*, § 767, *comment b.* at 28, notes:

> The issue in each case is whether the interference is improper or not under the circumstances; whether, upon a consideration of the relative significance of the factors involved, the conduct should be permitted without liability, despite its effect of harm to another. The decision therefore depends upon a judgment and choice of values in each situation. This Section states the important factors to be weighed against each other and balanced in arriving at a judgment; but it does not exhaust the list of possible factors.

In *Hoschler v. Kozlik*, 3 Neb. App. 677, 529 N.W.2d 822 (1995), the Court of Appeals concluded that the factors recited by the Restatement for determining whether interference is "improper" should be used to determine whether interference is "unjustified" under our law. We agree with and adopt this conclusion.

[7] We respectfully disagree, however, with the statement of the Court of Appeals in *Hoschler* that

> the intentional interference by a fellow employee, including an officer, director, or other employee, in the employment relationship of another employee with a common employer, when it is malicious and thus unjustified or is outside the scope of authority of the interfering employee, gives rise to a cause of action for tortious interference.

Hoschler v. Kozlik, 3 Neb. App. at 686, 529 N.W.2d at 828. As noted above, a showing that a coemployee acts in furtherance of interests other than those of the employer provides proof of interference but does not necessarily establish *unjustified* interference, as this statement suggests. Moreover, the court's equation of "malicious" with "unjustified" is inconsistent with its prior correct statement that malice is not an element of tortious interference with a business relationship. While a malicious motive is a factor which may be considered in determining whether interference is unjustified, and may indeed weigh heavily toward such a finding, it is generally insufficient standing alone to establish that fact under the seven-factor balancing test of the Restatement (Second) of Torts § 767 (1979) discussed

above. To hold otherwise would be inconsistent with the fact that Nebraska law does not recognize a cause of action for malicious termination of at-will employment. *White v. Ardan, Inc.*, 230 Neb. 11, 430 N.W.2d 27 (1988).

2. Application of Law to Facts

Huff's transfer from Shreveport to Omaha was effective March 21, 1994. Huff testified that prior to being summoned to the meeting in Swartz' office in August of that year, he had experienced no problems with Swartz. There is no evidence in the record which would support an inference that this meeting, or the statements made by Swartz during the meeting, were motivated by anything other than perceived shortcomings in Huff's job performance which had been reported to Swartz by Condra, Huff's immediate supervisor who was also present during the meeting. Thus, while the tone and substance of Swartz' statements during the meeting as recounted by Huff could lead to an inference that Swartz spoke and acted boorishly, there is no evidence that Swartz did so in any capacity other than as an AT&T manager addressing a job performance issue involving a subordinate employee. Thus, because Swartz made the statements in his capacity as an agent of Huff's employer, they are not the statements of a "third party" to the employment relationship and cannot constitute "interference" with that relationship.

Likewise, there is nothing in the record which would permit an inference that Swartz' contacts with persons at the Shreveport facility where Huff had previously worked were made on behalf of anyone other than AT&T. The contacts pertained to Huff's job performance in Shreveport as it related to his perceived performance deficiencies in Omaha. Even if we assume the truth of the disputed allegation that Swartz requested that favorable letters of recommendation be rewritten after learning of a problem with Huff's performance while in a supervisory capacity in Shreveport, there is no evidence that he acted in furtherance of any purposes other than those of AT&T.

As the manager of the Omaha facility, Swartz had authority to discuss employee transfers to other AT&T facilities with

other AT&T employees. When asked at his deposition if he disputed that Swartz had authority to transfer him to a position where he felt he was better suited, Huff replied, "He is the boss. He can do what he wanted." Even assuming the truth of the disputed evidence that Swartz threatened to block future transfers from Shreveport to Omaha if Shreveport officials did not agree to accept Huff's transfer back to that facility, there is no evidence that Swartz pursued the topic of transferring Huff for any reason other than perceived deficiencies in Huff's job performance at the Omaha facility. Whether or not his perception was correct, Swartz had authority by virtue of his supervisory position with AT&T to deal with the issue of Huff's job performance, and even if he threatened to take action regarding future transfers from Shreveport, which would have exceeded his authority, there is no evidence that he did so for any purpose unrelated to his managerial responsibilities with AT&T.

[8,9] 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. *Nebraska Popcorn v. Wing, ante* p. 60, 602 N.W.2d 18 (1999); *Knudsen v. Mutual of Omaha Ins. Co.*, 257 Neb. 912, 601 N.W.2d 725 (1999). After the movant makes a prima facie case for summary judgment, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Nebraska Popcorn v. Wing, supra.* If uncontroverted, the evidence adduced by Swartz in support of his motion for summary judgment would entitle him to judgment as a matter of law. Huff failed to produce any evidence upon which a reasonable inference could be drawn that the actions of Swartz of which Huff complains were not taken on behalf of AT&T and, therefore, presented no proof of "interference" with his employment relationship with that entity.

V. CONCLUSION

To summarize, we hold that an at-will employment relationship can be the subject of a tort action for intentional interference with a business relationship or expectancy and that such an action may be maintained against a coemployee who acts as a

third party to the relationship by taking actions for his or her own personal benefit, or for the benefit of an entity other than the employer. In the present case, there is no evidence that any actions taken by Swartz affecting Huff's employment with AT&T were taken on behalf of any entity other than AT&T, and thus as a matter of law, it cannot be said that Swartz interfered with Huff's employment relationship, whether with justification or otherwise. Therefore, upon further review, we reverse the judgment of the Court of Appeals and remand the cause with directions to reinstate the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTIONS.

ROBERT D. KINSEY, JR., SPECIAL ADMINISTRATOR OF THE ESTATE OF MAUDE A. DOLLIVER, DECEASED, APPELLANT, V. COLFER, LYONS, WOOD, MALCOM & GOODWIN, A PARTNERSHIP, ET AL., APPELLEES.

606 N.W.2d 78

Filed February 18, 2000. No. S-98-996.

1. **Jurisdiction: Appeal and Error.** It is not only within the power, but it is the duty, of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Judgments: Plea in Abatement: Res Judicata.** As a general rule, where a judgment in a prior suit would be a bar to a judgment in the second suit brought in the same or another court of concurrent jurisdiction, the plea in abatement should be sustained.
3. **Motions for New Trial: Final Orders: Appeal and Error.** When a motion for new trial is seasonably filed, the cause remains in the district court so long as the motion is undisposed of, and there can be no final judgment until its disposition.
4. ___: ___: ___. Where the record shows the filing of a motion for new trial, but no final, appealable order by the trial court disposing of the motion, an attempted appeal in the action will be dismissed as prematurely taken.
5. **Courts: Judgments: Time: Appeal and Error.** A motion for reconsideration does not toll the time for appeal and is considered nothing more than an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment.
6. **Courts: Judgments: Appeal and Error.** A motion to reconsider is not to be treated as a motion for new trial for purposes of being ruled upon by the trial court before an appellate court has jurisdiction.
7. ___: ___: ___. Once a notice of appeal has been filed, any pending motions to reconsider that have not been ruled upon by the trial court become moot and the trial court no longer has jurisdiction.
8. **Courts: Actions: Plea in Abatement.** An action which has been abated by an earlier action generally continues until an order of dismissal is entered by the court. The trial

court usually has discretion as to whether to dismiss an action on the basis that there is another action pending between the same parties for the same cause.

9. **Actions: Plea in Abatement.** A plea in abatement does not go to the merits of an action, but, by presentation of facts extrinsic to the merits of an action, demonstrates irregularities or circumstances which preclude further prosecution of the action or require suspension of the proceedings.
10. **Courts: Actions: Plea in Abatement.** A trial court has discretion whether to dismiss a case after it grants a plea in abatement, thereby precluding further prosecution of the action, or to not dismiss the action and suspend the proceedings pending the outcome of the other case.
11. **Plea in Abatement: Demurrer: Final Orders: Appeal and Error.** A plea in abatement is similar to a demurrer, and the granting of a plea in abatement without an order of dismissal is not a final, appealable order.
12. **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 final, appealable order.

Petition for further review from the Nebraska Court of Appeals, on appeal thereto from the District Court for Lancaster County, BERNARD J. MCGINN, Judge. Judgment of Court of Appeals affirmed.

Robert D. Kinsey, Jr., pro se, and Nicholas L. Ackerman, of Kinsey, Ridenour, Becker & Kistler, for appellant.

John Wightman and Jeffrey M. Wightman, of Cook, Wightman & Doyle, for appellees.

Stanley C. Goodwin, pro se.

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

PER CURIAM.

NATURE OF CASE

Robert D. Kinsey, Jr., petitioned for further review from the Nebraska Court of Appeals' summary dismissal of Kinsey's appeal for lack of jurisdiction. Kinsey also asks this court to review the trial court's order which granted the pleas in abatement of appellees Thomas F. Colfer, Joseph D. Wood (J. Wood), Philip P. Lyons, Paul M. Wood (P. Wood), and Stanley C. Goodwin, finding that there was a same or similar action pending between the parties.

BACKGROUND

On February 17, 1993, Maude A. Dolliver (decedent), a domiciliary of Red Willow County, Nebraska, died testate. On February 25, decedent's will was admitted for informal probate in the Red Willow County Court and Daniel B. Funk was appointed personal representative of decedent's estate and was issued letters testamentary in decedent's estate. Thereafter, Funk retained Terrence D. Malcom to serve as the attorney for the estate. At the time Funk retained Malcom and until September 6, 1993, Malcom was a partner in a law firm with Colfer, J. Wood, Lyons, Goodwin, and P. Wood (hereinafter the partners). The partnership was known as Colfer, Lyons, Wood, Malcom & Goodwin (the partnership).

According to the terms of decedent's will, the following specific bequests were to be made: $50,000 to the Shriners Hospital for Children (Shriners Hospital) and $35,000 to the First Church of Christ Scientist, McCook, Nebraska (First Church). One-fourth of the residue of decedent's estate was devised to each of the following: (1) the American Cancer Society (Cancer Society), (2) the National Camps for Blind Children (National Camps), (3) the American Heart Association (Heart Fund), and (4) Funk.

On March 18, 1993, Funk paid $235,000 in estate funds to Malcom for distribution in full to the Shriners Hospital and the First Church, and partial distributions of $50,000 each to the Cancer Society, the National Camps, and the Heart Fund.

On May 17, 1993, Funk paid $127,500 in estate funds to Malcom for partial distribution in the amount of $42,500 each to the Cancer Society, the National Camps, and the Heart Fund.

On September 6, 1993, the partnership dissolved because Malcom withdrew from the law firm. When the partnership ended, Funk sent a request to the remaining partners that legal representation continue with Malcom and that all files and documents continue in Malcom's possession or be delivered to him.

On November 1, 1993, Funk paid $12,135.11 in estate funds to Malcolm for final distribution in the amount of $4,045.04 each to the Cancer Society and the Heart Fund, and $4,045.03 to the National Camps.

On December 18, 1996, Funk, as personal representative of decedent's estate, filed suit against Malcom in the Red Willow County District Court for the conversion of funds from the estate which were to be paid to the charities. On February 25, 1997, a default judgment was entered by the Red Willow County District Court against Malcom in the amount of $219,635.12, representing the loss sustained by decedent's estate as a result of Malcom's conversion of the estate's funds.

On January 7, 1997, Funk filed a personal representative's final accounting with the Red Willow County Court disclosing the transfers to the Heart Fund, the Cancer Society, the Shriners Hospital, and the National Camps.

On January 27, 1997, the Heart Fund filed an objection to the final accounting asserting it had received only $60,000 of the $96,545.04 allegedly transferred to it according to the final accounting. The Cancer Society filed a similar objection on the same date, asserting it also had received only $60,000 of the $96,545.04 allegedly transferred to it. On February 10 and 18, 1997, respectively, the Shriners Hospital and the National Camps filed objections, each asserting it had failed to receive any portion of the money allegedly transferred to it as reported in the final accounting.

On August 18, 1997, the Shriners Hospital filed a petition for appointment of a special administrator for decedent's estate. The Cancer Society; the National Camps; the Heart Fund; and Funk, in his capacity as a residuary devisee, consented to immediate entry of an order conforming to the Shriners Hospital's petition for appointment of a special administrator.

On September 30, 1997, the Red Willow County Court appointed Kinsey as special administrator of decedent's estate, finding such appointment was necessary to preserve the estate, to secure proper administration of the estate, and to recover wrongly converted assets belonging to the estate. Kinsey was issued letters of special administration that same day.

On December 3, 1997, Kinsey filed the present action in the Lancaster County District Court against the partnership and the individual partners, seeking to recover funds allegedly converted by Malcom on theories of breach of trust, negligence, and fraud and conversion committed by a partner.

On December 5, 1997, Kinsey filed a petition against Funk in the Red Willow County District Court alleging that Funk was negligent in overseeing the funds of decedent's estate based on theories of breach of fiduciary duty, vicarious liability, and negligence. The petition filed against Funk, as well as the petition filed against the partnership and the partners in Lancaster County, prayed that the respective partners be held liable for $219,635.12, the amount Malcom converted from decedent's estate.

On February 24, 1998, Funk responded to the action filed against him in Red Willow County by seeking leave to file a third-party complaint against the partnership and the individual partners. The Red Willow County District Court granted leave to file the third-party complaint on June 4, 1998. Funk's third-party complaint against the partnership and the individual partners alleged breach of trust, negligence, and fraud and conversion committed by a partner.

On March 30, 1998, Colfer and P. Wood responded as defendants to the present action by filing a plea in abatement. J. Wood and Lyons filed a separate plea in abatement that same day. On April 2, Goodwin also filed a plea in abatement. Each of the pleas in abatement were substantially similar to the others and prayed that the present action against the partnership and the individual partners be abated. The pleas in abatement prayed that the Lancaster County District Court enter judgment abating Kinsey's petition on various grounds, including (1) Kinsey's cause of action was barred because there was another action pending between the same parties involving the same or substantially the same subject matter (in Red Willow County), (2) Kinsey had no legal capacity to sue, and (3) Kinsey's action concerning the subject matter of this case was barred because a judgment concerning the same subject matter had been obtained (the default judgment against Malcom on February 25, 1997).

On July 17, 1998, the partners, as third-party defendants in the Red Willow County lawsuit, filed pleas in abatement substantially similar to those filed in the present action.

On August 14, 1998, the Lancaster County District Court granted each of the partners' pleas in abatement, thereby abating the present action, finding that the present case and the case

before the Red Willow County District Court involve the same subject matter, the same causes of action, and seek the same type of relief for decedent's estate. On August 21, Kinsey filed a motion to reconsider asking the Lancaster County District Court to reconsider its August 14 order on the basis that the court should not have abated the first lawsuit filed (the Lancaster County action) against the partners in favor of a subsequent proceeding (the Red Willow County action).

On August 31, 1998, Funk, acting as a third-party plaintiff in the Red Willow County action, moved to dismiss the third-party petition he had filed against the partnership and the partners. We cannot tell from the record whether Funk's motion was ever ruled upon by the Red Willow County District Court.

On September 10, 1998, Kinsey filed a notice of appeal in the present case. On September 18, the Lancaster County District Court concluded that Kinsey's motion to reconsider was moot, finding that "[t]his court no longer has jurisdiction due to said appeal."

On November 24, 1998, the Court of Appeals issued an order treating Kinsey's motion to reconsider as a motion for new trial and summarily dismissed the appeal based on lack of jurisdiction. Kinsey petitioned this court for further review, which we granted.

ASSIGNMENTS OF ERROR

Kinsey assigns that the Court of Appeals erred in treating his motion to reconsider as a motion for new trial and in dismissing his appeal. Kinsey further assigns that the trial court erred in granting the partners' pleas in abatement and in abating Kinsey's petition in favor of a subsequent lawsuit.

STANDARD OF REVIEW

[1] It is not only within the power, but it is the duty, of an appellate court to determine whether it has jurisdiction over the matter before it. *Breeden v. Nebraska Methodist Hosp.*, 257 Neb. 371, 598 N.W.2d 441 (1999); *In re Conservatorship of Holle*, 254 Neb. 380, 576 N.W.2d 473 (1998).

[2] As a general rule, where a judgment in a prior suit would be a bar to a judgment in the second suit brought in the same or

another court of concurrent jurisdiction, the plea in abatement should be sustained. *State ex rel. Pederson v. Howell*, 239 Neb. 51, 474 N.W.2d 22 (1991); *Farmers State Bank v. Germer*, 231 Neb. 572, 437 N.W.2d 463 (1989).

ANALYSIS

Dismissal of Appeal

We first address whether the Court of Appeals erred in dismissing Kinsey's appeal. On August 14, 1998, the trial court sustained the partners' pleas in abatement and abated the present action. On August 21, Kinsey filed a motion to reconsider, asking the trial court to reconsider its August 14 order. On September 10, Kinsey timely filed a notice of appeal. On September 18, the trial court concluded that because of Kinsey's appeal, it no longer had jurisdiction to consider the motion for reconsideration.

[3,4] On appeal, the Court of Appeals determined that it lacked jurisdiction because it treated Kinsey's motion to reconsider as a motion for new trial which had not been decided; therefore, the cause remained in the district court "so long as the motion is undisposed of, and there can be no final judgment until its disposition." See *Jerabek v. Ritz*, 221 Neb. 448, 449, 377 N.W.2d 540, 540 (1985). Where the record shows the filing of a motion for new trial, but no final, appealable order by the trial court disposing of the motion, an attempted appeal in the action will be dismissed as prematurely taken. *Dvorak v. Bunge Corp.*, 256 Neb. 341, 590 N.W.2d 682 (1999).

The only notations regarding the trial court's decision on Kinsey's motion to reconsider are the trial judge's minutes for September 18, 1998, indicating that the motion to reconsider is moot and that the trial court no longer has jurisdiction due to Kinsey's notice of intention to appeal. The Court of Appeals elected to treat Kinsey's motion to reconsider as a motion for new trial, and because there was no rendition of the judgment regarding the motion to reconsider, the Court of Appeals concluded it was without jurisdiction to consider Kinsey's appeal.

[5] This court previously addressed whether a motion to reconsider should have the same tolling effect on the time for

filing an appeal as a motion for new trial. In *Bechtold v. Gomez*, 254 Neb. 282, 288, 576 N.W.2d 185, 189-90 (1998), we stated that "[a] motion for reconsideration does not toll the time for appeal and is considered nothing more than an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment." In *Breeden v. Nebraska Methodist Hosp.*, 257 Neb. 371, 376, 598 N.W.2d 441, 445 (1999), we stated:

> [F]rom October 1, 1999, forward, if the pleading does not state explicitly that a new trial is requested and does not set forth the statutory grounds for a new trial as provided in [Neb. Rev. Stat.] § 25-1142 [(Reissue 1995)], the pleading will not be treated as a motion for new trial and will not toll the time for filing an appeal.

In the present case, Kinsey's notice of appeal was filed within 30 days of the trial court's order as required by Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1998), and therefore, the Court of Appeals erred in concluding that the appeal was premature.

[6,7] We have made it clear that a motion to reconsider is not to be treated as a motion for new trial for purposes of tolling the time for filing an appeal. It would create confusion to hold that a motion to reconsider should be treated as a motion for new trial for other purposes. As we stated in *Bechtold v. Gomez, supra*, a motion to reconsider is nothing more than an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment. Therefore, a motion to reconsider is not to be treated as a motion for new trial for purposes of being ruled upon by the trial court before an appellate court has jurisdiction. Once a notice of appeal has been filed, any pending motions to reconsider that have not been ruled upon by the trial court become moot and the trial court no longer has jurisdiction.

[8] The next issue is whether the granting of a plea in abatement is a final, appealable order.

> An action which has been abated by an earlier action generally continues until an order of dismissal is entered by the court . . . . The trial court usually has discretion as to whether to dismiss an action on the basis that there is another action pending between the same parties for the same cause . . . .

1 Am. Jur. 2d *Abatement, Survival, and Revival* § 50 at 106 (1994).

[9] A plea in abatement does not go to the merits of an action, but, by presentation of facts extrinsic to the merits of an action, demonstrates irregularities or circumstances which preclude further prosecution of the action or require suspension of the proceedings. *State ex rel. Pederson v. Howell*, 239 Neb 51, 474 N.W.2d 22 (1991); *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989).

[10] A trial court has discretion whether to dismiss a case after it grants a plea in abatement, thereby precluding further prosecution of the action, or to not dismiss the action and suspend the proceedings pending the outcome of the other case. Here, there is no indication in the record that the trial court dismissed the present action after it granted the plea in abatement, and therefore, the action is simply abated.

[11,12] A plea in abatement is similar to a demurrer, and the granting of a plea in abatement without an order of dismissal is not a final, appealable order. The sustaining of a general demurrer, not followed by a judgment of dismissal terminating the litigation, does not constitute a final, appealable order. *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998); *Cobb v. Sure Crop Chem. Co.*, 255 Neb. 625, 587 N.W.2d 355 (1998). The Court of Appeals was correct in dismissing the appeal, but erred in treating the motion for reconsideration as a motion for new trial. The plea in abatement, without a dismissal, did not constitute a final, appealable order.

CONCLUSION

The Court of Appeals erred in treating Kinsey's motion to reconsider as a motion for new trial. The Court of Appeals was correct in dismissing this appeal, but not for the reasons it stated. The granting of a plea in abatement without an order of dismissal does not constitute a final, appealable order. Therefore, we affirm the judgment of dismissal.

AFFIRMED.

McCORMACK, J., participating on briefs.

JEFFREY A. SCHWARZ AND ANGELA SCHWARZ, APPELLANTS, V. PLATTE VALLEY EXTERMINATING, INC., APPELLEE.

606 N.W.2d 85

Filed February 18, 2000. No. S-98-1265.

1. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. ____: ____. In a bench trial of a law action, a trial court's findings have the effect of a jury verdict and will not be set aside on appeal 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. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
5. **Pretrial Procedure: Evidence.** A party's failure to make a timely and appropriate response to a request for admission constitutes an admission of the subject matter of the request, which matter is conclusively established unless, on motion, the court permits withdrawal of the admission.
6. **Pretrial Procedure: Evidence: Proof.** Neb. Ct. R. of Discovery 36 (rev. 1996) is not self-executing, but requires that a party, claiming another party's admission by failure to respond properly to a request for admission, must prove service of the request for admission and the served party's failure to answer or object to the request and must subsequently offer the request for admission as evidence. However, rule 36 is self-enforcing, without the necessity of judicial action to effect an admission which results from a party's failure to answer or object to a request for admission.
7. **Evidence: Words and Phrases.** Evidence is relevant if it has any tendency to make the existence of any fact 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.
8. **Breach of Contract.** Accompanying every contract is a common-law duty to perform with care, skill, reasonable expediency, and faithfulness the thing agreed to be done. A failure to observe any of these conditions is a breach of contract.
9. **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.

Appeal from the District Court for Dawson County, JOHN P. MURPHY, Judge. Affirmed.

Kelly L. Sudbeck, of Berreckman & Berreckman, P.C., for appellants.

Mark R. McKeone, of Hart Law Office, P.C., for appellee.

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

STEPHAN, J.

Appellants, Jeffrey A. Schwarz and Angela Schwarz, brought this action for damages against Platte Valley Exterminating, Inc. (Platte Valley), alleging that Platte Valley breached a contract to perform a termite inspection of a home which they were purchasing. Following a bench trial, the district court for Dawson County, Nebraska, entered judgment in favor of Platte Valley and subsequently denied a motion for new trial. We moved this appeal to our docket on our own motion and now affirm the judgment of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

This action was filed on February 11, 1997. The Schwarzes, in their petition, alleged that on November 2, 1994, they entered into a contract whereby Platte Valley agreed to inspect a home which they intended to purchase in order to determine the presence of wood-destroying insects; that Platte Valley breached the contract by failing to inspect the entire premises and to observe "unobstructed evidence of wood destroying insects in the residence"; and that as a result of the breach, they sustained damages. Platte Valley filed an answer generally denying the allegations.

On September 12, 1997, the Schwarzes' counsel served a discovery document entitled "Request for Admissions and Interrogatories, and Request for Production of Documents" by mailing it to counsel for Platte Valley. On October 21, counsel for Platte Valley served a document entitled "Response to Request for Admissions, Answers to Interrogatories, and Response to Production of Documents" by mailing it to the Schwarzes' counsel. This document was included in the trial

exhibits which were received at trial upon the Schwarzes' and Platte Valley's stipulations of admissibility.

Trial to the court commenced on September 18, 1998. Jeffrey Schwarz testified that on October 1, 1994, he and his wife, Angela Schwarz, moved into a rental home located at 1111 North Jefferson Street in Lexington, Nebraska, which they intended to purchase. Sometime prior to November 2, the real estate agent retained by the owner to sell the home asked Jeffrey Schwarz if he wanted a termite inspection of the home prior to closing the sale, and he agreed. The real estate agent contacted Platte Valley and requested the inspection.

On November 2, 1994, an inspector from Platte Valley inspected the home for termites and other wood-destroying insects. Following the inspection, Platte Valley issued to the real estate agent a "Wood Destroying Insect Information Existing Construction" report signed by the inspector, which indicated that there was no visible evidence of wood-destroying insects in unobstructed areas. The real estate agent gave this report to Jeffrey Schwarz approximately 9 days later, at which time he signed it. Platte Valley submitted a billing invoice for the inspection to the real estate agent, and the real estate agent paid Platte Valley from the proceeds of the sale. The cost of the inspection was listed on the closing statement settlement sheet dated November 7, 1994, as an expense to be paid by the Schwarzes.

On May 18, 1995, a representative of Orkin Exterminating Company, Inc., inspected the Schwarz home at their request and found evidence of termite infestation, which included "mud runs" in the basement and damage to floor joists. Jeffrey Schwarz testified that at the time Platte Valley inspected the home, he had noticed evidence of what was later determined to be termite activity, although he did not recognize it as such at that time.

The Platte Valley technician who inspected the Schwarz home testified that the inspection was intended to detect visible evidence of wood-destroying insects in unobstructed, accessible areas of the home. He stated that his inspection extended to only the basement, front porch, and the exterior of the home. He stated that the industry standard was to begin a termite inspection by entering the lowest level of the structure. He further

stated that where the basement walls extend above ground level and none of the walls below ground level are covered, thereby preventing detection of visible evidence of termites, the inspection need not involve the upper levels of the home. Such was the condition of the Schwarz home. The Orkin inspector who inspected the Schwarz home in May 1995, the owner of Platte Valley, and the owner of another pest extermination company each testified that this was indeed the industry standard.

Jeffrey Schwarz testified that when he moved into the home and at the time of the Platte Valley inspection, duct tape covered a crack in the basement wall, which was subsequently determined to be termite infested. The Platte Valley inspector testified that he did not remove the duct tape or any other wall coverings because it was not an industry standard or his normal procedure to remove objects from walls during a termite inspection. The owner of Platte Valley testified that the duct tape was not removed because Platte Valley does not perform destructive inspections, such as moving or removing objects, but that it performs visual inspections of only readily accessible, unobstructed areas. The Orkin inspector and the owner of another pest extermination company in the area both testified that, normally, whether they would have asked Jeffrey Schwarz to remove the duct tape would depend on what they had found up to that point; if there was no visible evidence of termites, the tape would not have been pulled off because it is not usual practice to move or remove objects. The Platte Valley inspector testified that there were no visible mud trails present during his inspection on November 2, 1994. He stated that in his opinion, his inspection of the Schwarz home complied with the industry standard at that time and that he possessed the skill and knowledge possessed by other termite inspectors in the community on that date.

The Orkin inspector testified on direct examination that based upon the nature of the termite infestation visible at the time of his inspection, it was his opinion that there probably would have been evidence of termite damage in the basement floor joists at the time of the Platte Valley inspection on November 2, 1994, which should have been detected. He further stated that if the mud trails he discovered were present during the November 2

inspection, the Platte Valley inspector should have seen them and should have concluded that there was evidence of termites. He testified that failure to report any evidence of termites on the inspection report form would not be considered a reasonable termite inspection. On cross-examination, the Orkin inspector agreed that termites can construct tunnels overnight and that it was therefore possible that mud tunnels were not present on the date of the Platte Valley inspection, but were constructed a short time thereafter. He further testified that termite damage to floor joists takes some time to develop.

The owner of Platte Valley testified that Jeffrey Schwarz contacted him in May 1995 and informed him that he had discovered termites in his home. Platte Valley's owner went to the Schwarz home and discovered a termite tunnel in a crack above the window in the upstairs bathroom, found evidence of termites in the crack in the basement wall which had been covered by duct tape, and also found a few termite tunnels in the floor joists in the basement. In October, he returned with an employee of Rhodes Chemical Company, bringing a boroscope to determine the extent of the termite damage, which they determined to be minor. He testified that he did not believe termites were present during the November 2, 1994, inspection based on his experience and the amount of damage he observed. He testified that it is possible for termites to be present in a home without any visible evidence of their presence. In the opinion of Platte Valley's owner, its inspector performed a reasonable inspection and his report of that inspection was accurate.

The owner of another pest extermination company in the area also testified that it is possible for termites to be present in a home without any visible evidence of their presence. He testified that based upon all of the testimony and his 8½ years of experience as a termite inspector, the inspector from Platte Valley had the skill and knowledge normally possessed by termite inspectors in the area.

Vickey Fulkerson resided in the Schwarz home for 6½ years, vacating it on September 23, 1994, approximately 1 week before the Schwarzes moved in. She testified that when she moved out, all of the wood walls in the basement were painted. After reviewing a videotape of the house prepared around the time of

the Orkin inspection in May 1995, Fulkerson testified that she noticed several new pieces of raw lumber had been added to the walls which were not present when she moved out. She also noticed that the walls in the bathroom were painted a different color and that a wallpaper border appeared over the crack above the window in the bathroom which was not there when she moved out. She also testified that at the time she vacated the home, the crack in the basement wall was not covered with duct tape and there were no weak spots in any of the floors, including that in the upstairs bathroom.

During the presentation of the Schwarzes' case in chief, their counsel called the court's attention to Platte Valley's discovery responses received as exhibit 23 and requested that the court take judicial notice of the date of serving requests for admissions, the date of response, and the provisions of Neb. Ct. R. of Discovery 36 (rev. 1996). The trial court did so, but noted that the taking of judicial notice of those matters "does not lead to the conclusion . . . of being deemed admitted."

On October 9, 1998, the trial court issued its order, finding for Platte Valley and dismissing the petition. The court concluded that determination of issues involving the requests for admission was unnecessary "in light of the fact that the evidence is clear that [the Schwarzes] failed to prove the allegations of the Petition by a preponderance of the evidence." The court further determined that assuming without deciding the existence of a contract, the evidence supported Platte Valley's contention that its inspection of the Schwarz home was in conformance with industry standards, and that there was insufficient evidence as to the presence of wood-destroying insects on November 2, 1994. Based upon these findings, the trial court entered judgment in favor of Platte Valley and subsequently denied the Schwarzes' motion for new trial.

ASSIGNMENTS OF ERROR

The Schwarzes contend on appeal, summarized and restated, that the district court erred both in failing to deem as admitted their requests for admissions and in failing to find that the evi-

dence they had adduced at trial proved their breach of contract claim against Platte Valley.

STANDARD OF REVIEW

[1] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Spulak v. Tower Ins. Co.*, 257 Neb. 928, 601 N.W.2d 720 (1999); *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999).

[2] In a bench trial of a law action, a trial court's findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. *General Fiberglass Supply v. Roemer*, 256 Neb. 810, 594 N.W.2d 283 (1999); *Bauers v. City of Lincoln*, 255 Neb. 572, 586 N.W.2d 452 (1998); *Hansen v. Lien Termite & Pest Control Co.*, 229 Neb. 596, 428 N.W.2d 195 (1988).

[3] 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).

[4] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Hausman v. Cowen*, 257 Neb. 852, 601 N.W.2d 547 (1999); *Nguyen v. Rezac*, 256 Neb. 458, 590 N.W.2d 375 (1999).

ANALYSIS

We initially address the question of whether the district court erred in not deeming as admitted the facts asserted in the requests for admissions served by the Schwarzes on Platte Valley, because resolution of this issue affects our analysis of the other assignments of error. Rule 36 provides, in pertinent part:

> The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is

> directed serves upon the party requesting the admission a written answer or objection addressed to the matter . . . .
>
> . . . .
>
> (b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him or her in maintaining his or her action or defense on the merits.

[5,6] We have held that a party's failure to make a timely and appropriate response to a request for admission constitutes an admission of the subject matter of the request, which matter is conclusively established unless, on motion, the court permits withdrawal of the admission. *Wibbels v. Unick*, 229 Neb. 184, 426 N.W.2d 244 (1988). Rule 36 is not self-executing, but requires that a party, claiming another party's admission by failure to respond properly to a request for admission, must prove service of the request for admission and the served party's failure to answer or object to the request and must subsequently offer the request for admission as evidence. *Wibbels v. Unick, supra*; *Arcadia State Bank v. Nelson*, 222 Neb. 704, 386 N.W.2d 451 (1986). However, rule 36 is self-enforcing, without the necessity of judicial action to effect an admission which results from a party's failure to answer or object to a request for admission. *Mason State Bank v. Sekutera*, 236 Neb. 361, 461 N.W.2d 517 (1990). Thus, if the necessary foundational requirements are met and there is no motion to withdraw an admission, a trial court is obligated to give effect to the provisions of rule 36.

The record reflects that the requests for admission were served on September 12, 1997, and that the expiration of the 30-day period specified in rule 36, computed as required by Neb. Rev. Stat. § 25-2221 (Reissue 1995), expired on October 13. However, because service was by mail upon opposing counsel, an additional 3 days is added to the prescribed period pursuant to Neb. Rev. Stat. § 25-534 (Reissue 1995), so that the responses were due on October 16. The responses were served on October

21, approximately 11 months prior to trial but 5 days after they were due. The record does not reflect that Platte Valley sought or received an enlargement of time in which to file its responses. Accordingly, the record establishes that Platte Valley failed to make a timely response to the requests for admission.

In addition to proving the absence of a timely response, a party seeking to prove admissions by an opposing party pursuant to rule 36 must offer the requests for admission as evidence. *Wibbels v. Unick, supra.* The obvious purpose of this requirement is to make an evidentiary record of the substance of the admissions. Here, it is urged that this requirement was met by the reception of exhibit 23, which is a copy of Platte Valley's responses to the requests for admission. This document contains each request for admission, but also reflects Platte Valley's responses, which included admissions of some of the facts as to which admission was requested, and denials of others. In some instances, the denials were accompanied by factual assertions upon which the denials were based. The response was signed in the presence of a notary public by the president of Platte Valley.

[7] The Schwarzes' and Platte Valley's stipulations to the admissibility of exhibit 23 without any limitation as to the purpose for which it was offered established the relevance of its content. Evidence is relevant if it has any tendency to make the existence of any fact 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. *Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999); *Alexander v. Warehouse*, 253 Neb. 153, 568 N.W.2d 892 (1997); Neb. Rev. Stat. § 27-401 (Reissue 1995). Thus, the trial court was obligated by rule 36(b) to treat the matters admitted in exhibit 23 as conclusively established for purposes of this action. However, it was also free to give whatever weight it chose to Platte Valley's denials and stated reasons therefor contained in the same exhibit, since they were relevant to the nonexistence of the facts as to which admission was requested.

[8] With this in mind, we turn our consideration to the Schwarzes' contentions that the trial court erred in finding that

they had failed to meet their burden of proof and in overruling their motion for new trial. As noted, the Schwarzes' theory of recovery was an alleged breach of contract by Platte Valley. We have stated that "accompanying every contract is a common-law duty to perform with care, skill, reasonable expediency, and faithfulness the thing agreed to be done. A . . . failure to observe any of these conditions is a . . . breach of contract." *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 437, 345 N.W.2d 300, 305 (1984). In order to succeed on the breach of contract claim, the Schwarzes were required to prove the existence of a contract and its breach by Platte Valley in failing to conduct an adequate inspection. See *Doupnik v. Usher Pest Control Co.*, 217 Neb. 1, 346 N.W.2d 699 (1984).

While we have some doubt as to whether the existence of a contract was established by the evidence, for purposes of our analysis, we assume without deciding that it was established. Whether the contract was breached depends upon whether Platte Valley's inspector failed to exercise the skill and knowledge normally possessed by members of his trade in good standing in similar communities. See *Doupnik v. Usher Pest Control Co., supra.* Factual issues related to this determination include whether there was visible evidence of termite infestation at the time of the inspection on November 2, 1994; and if not, whether the inspector complied with industry standards in searching for latent termite activity. See *id.*

There is conflicting testimony on these issues. Jeffrey Schwarz testified that he saw mud trails near a bathroom window and on the basement wall of the home on November 2, 1994, but did not realize until later that they were indicative of termite activity. The Platte Valley inspector denied seeing mud trails during his inspection on November 2. The Orkin inspector hired by Schwarz testified that based upon his inspection in May 1995 and the nature of the infestation at that time, it was his opinion that there probably was evidence of termites present in the basement floor joists, which evidence should have been detected during the inspection by Platte Valley 6½ months earlier. However, on cross-examination, he conceded that termites can construct tunnels overnight and that therefore, it was possible that visible evidence of termite activity was not present dur-

ing the inspection by Platte Valley on November 2, but may have appeared a short time thereafter. The previous occupant of the home, Fulkerson, testified that at the time she vacated the premises shortly before the Schwarzes moved in, there was a crack but no mud near the bathroom window, and that there were no weak spots in any of the floors. The testimony of the Platte Valley inspector that he conducted the inspection in accordance with industry standards was supported by the testimony of other witnesses.

[9] 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. *Sullivan v. Sullivan*, 249 Neb. 573, 544 N.W.2d 354 (1996). Applying this principle and the applicable standard of review, which requires that we consider the evidence in a light most favorable to Platte Valley as the prevailing party at trial, we cannot say that the factual determinations by the trial court were clearly erroneous or that it abused its discretion in overruling the motion for new trial.

CONCLUSION

Because Platte Valley's responses to requests for admission were received in evidence without limitation and pursuant to a stipulation of admissibility, the trial court was obligated to treat as admissions only those facts which Platte Valley specifically admitted. From our review of the admissions and all of the other evidence under the applicable standard, we cannot say that the findings upon which the trial court based its judgment were clearly erroneous or that it abused its discretion in overruling the motion for new trial. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

SCOTT A. COLLINS, APPELLEE, V. GENERAL CASUALTY AND PAT CLINCH, DOING BUSINESS AS PAT CLINCH CONSTRUCTION, APPELLANTS.

606 N.W. 2d 93

Filed February 18, 2000. No. S-99-395.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____:____. 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. **Workers' Compensation: Proof.** In order to avoid liability on the basis that an employee was willfully negligent, an employer must prove a deliberate act knowingly done or at least such conduct as evidences a reckless indifference to the employee's own safety.
4. ____:____. For an employee to be willfully negligent, the conduct of the employee must manifest a reckless disregard for the consequences coupled with a consciousness that injury will naturally or probably result.
5. ____:____. It is the employer's burden to prove willful negligence on the part of the employee.
6. **Workers' Compensation.** Vocational rehabilitation benefits are properly awarded when an injured employee is unable to return to the work for which he or she has previous training or experience.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

John R. Hoffert, of Knudsen, Berkheimer, Richardson & Endacott, for appellants.

James J. Paloucek, of Norman, Paloucek & Herman Law Offices, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Scott A. Collins sought workers' compensation benefits for an injury which occurred in 1997 during his employment with

Pat Clinch Construction (Clinch). Clinch and General Casualty (collectively referred to as "the defendants"), Clinch's workers' compensation insurance carrier, alleged that Collins' injury resulted from his willful negligence.

The trial judge found that Collins had sustained a compensable injury and awarded benefits, including vocational rehabilitation. A review panel of the Nebraska Workers' Compensation Court affirmed the award in all respects except the review panel concluded that the trial judge had erred in estimating Collins' loss of earning capacity to be 5 percent after successful completion of vocational rehabilitation. The cause was remanded to the trial judge for determination of Collins' present loss of earning capacity, and the defendants timely appealed.

SCOPE OF REVIEW

[1] An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Frank v. A & L Insulation*, 256 Neb. 898, 594 N.W.2d 586 (1999).

[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. *Id.*

FACTS

In 1991, Collins sustained a back injury involving the disk at L5-S1 while working for the American Door Company. He underwent medical treatment until the late summer or fall of 1992. At that time, Collins was specifically admonished to abide by work restrictions defined by a functional capacity assessment conducted in 1992 and not to return to heavy physical labor. The recommended lifting capacity was 14 pounds occasionally, 10 pounds frequently, and 8 pounds constantly. The rehabilitation counselor who evaluated Collins recommended that he pursue a diploma through the GED program in order to increase his mar-

ketability. Collins did not pursue such diploma, settled his compensation claim without taking part in vocational rehabilitation.

Subsequently, Collins worked in the meat department of a grocery store as part of the cleanup crew. This work routinely involved lifting items that weighed in excess of 50 pounds. Collins was then employed by an automobile parts store as a deliveryman, which required him to frequently lift and carry items in excess of 50 pounds. For 3½ years prior to the 1997 injury, Collins worked as a laborer in the construction industry. His duties included concrete work, carpentry, and lifting materials in excess of 50 pounds. While employed in these occupations, Collins incurred occasional pain in his lower back which was resolved without medical intervention. Collins did not seek medical attention for back problems between November 1992 and June 3, 1997.

In the spring of 1997, Collins began working for Clinch. As part of his duties, he was required to use a shovel to disperse concrete and to use a board to smooth the concrete. While working on June 3, 1997, Collins noticed a burning sensation along his left leg and into his foot. He attempted to continue working, but the pain increased to the extent that his leg and foot began to feel numb. Collins left work and sought treatment at a local hospital.

A CT scan revealed a posterior herniation of the L5-S1 disk. Dr. Patrick McGrath, an orthopedic surgeon, prescribed bed rest, which failed to improve the symptoms, and surgery was performed in October 1997. Following surgery, McGrath provided a written report in which he opined that Collins had sustained an injury to his back in June 1997 while scooping concrete. McGrath further opined that there was no question that the work injury described by Collins which took place in 1997 was responsible for his present condition.

On April 16, 1998, McGrath assessed a 10-percent whole-body impairment rating. Collins then underwent a functional capacity assessment on May 12. Karen Stricklett, the vocational consultant, reported that Collins' loss of earning capacity was approximately 40 percent. She stated:

> [I]f the Court finds that Mr. Collins had a pre-existing loss of earning capacity in the 30% to 35% range, then the

> majority of the current loss of earning capacity estimate would be pre-existing. If, however, the Court finds that Mr. Collins had sustained a prior injury in October of 1991, but was eventually able to resume his pre-injury activities without restriction, then it would appear that the current loss of earning capacity estimate would be solely attributable to his 06/03/97 incident.

Stricklett noted that if the court found that Collins was eligible for vocational rehabilitation services, such services should consist of Collins' acquisition of a diploma through GED followed by a short-term training program or job placement plan.

The trial judge found that Collins had sustained a compensable injury and ordered certain payments and vocational rehabilitation. On appeal, the review panel affirmed the trial judge's award in all respects except for the trial judge's determination that Collins would sustain a 5-percent loss of earning capacity were he to successfully complete vocational rehabilitation. The review panel remanded the cause to the trial judge for determination of the present loss of earning capacity.

ASSIGNMENTS OF ERROR

The defendants assign as error that the Workers' Compensation Court erred (1) in failing to find that Collins' claim was barred by his own intervening actions and/or willful negligence, (2) in awarding vocational rehabilitation benefits in that Collins' inability to continue work did not result from his accident while employed by Clinch, and (3) in requiring that Collins' loss of earning capacity be determined without considering the benefits of vocational rehabilitation.

ANALYSIS

We first consider whether Collins' injury was the result of willful negligence. Neb. Rev. Stat. § 48-101 (Reissue 1998) precludes recovery by an employee if the injury is a result of the employee's willful negligence. "Willful negligence consists of (a) a deliberate act, (b) such conduct as evidences reckless indifference to safety, or (c) intoxication . . . ." Neb. Rev. Stat. § 48-151(7) (Supp. 1999).

[3-5] In order to avoid liability on the basis that the employee was willfully negligent, an employer must prove a deliberate act knowingly done or at least such conduct as evidences a reckless indifference to the employee's own safety. *Krajeski v. Beem*, 157 Neb. 586, 60 N.W.2d 651 (1953). Mere negligence is not sufficient. The conduct of the employee must manifest a reckless disregard for the consequences coupled with a consciousness that injury will naturally or probably result. *Id.* Reckless indifference to safety means more than want of ordinary care. It implies a rash and a careless spirit, not necessarily amounting to wantonness, but approximating it in degree—a willingness to take a chance. It is the employer's burden to prove willful negligence on the part of the employee. *Id.*

The defendants argue that Collins was willfully negligent because he knowingly worked in jobs that exceeded his physical restrictions even though he understood and appreciated that he could be further injured. They rely on *Fenner v. Trimac Transp., Inc.*, 554 N.W.2d 485 (S.D. 1996), in which the South Dakota Supreme Court denied an employee benefits because the employee had intentionally and deliberately disregarded his physical limitations and physician's orders. The defendants argue that the same reasoning should apply to Collins because he engaged in heavy physical labor against medical advice after he sustained a herniated disk injury in 1991 and that, therefore, Collins was willfully negligent because he disregarded his physician's orders and engaged in employment that was medically prohibited.

The issue before the trial judge was whether Collins' decision to work outside his physical limitations for approximately 5½ years prior to the 1997 injury constituted willful negligence. The trial judge found that it did not, and we agree. 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. *Frank v. A & L Insulation*, 256 Neb. 898, 594 N.W.2d 586 (1999). After Collins was released to work in November 1992, he engaged in a variety of occupations involving heavy manual labor which required him to lift in excess of 50 pounds on a frequent basis. He performed this work

with no significant adverse effects until he sustained his injury on June 3, 1997. Thus, we conclude that the trial judge's finding that Collins was not willfully negligent and that his injury was compensable was not clearly wrong.

[6] We next consider the defendants' claim that Collins was not entitled to vocational rehabilitation. Vocational rehabilitation benefits are properly awarded when an injured employee is unable to return to the work for which he or she has previous training or experience. Neb. Rev. Stat. § 48-162.01 (Reissue 1998). The trial judge awarded vocational rehabilitation benefits because he found that Collins' injury was compensable and that he could not return to his occupation in construction.

The defendants argue that since Collins waived his opportunity to receive vocational rehabilitation following his injury in 1991, they should not now be required to pay for vocational rehabilitation. The defendants cite to no legal authority for this position, and we find that such argument has no merit. The trial judge correctly determined that Collins had sustained a compensable injury in the course and scope of his employment and could not return to his occupation in construction. Therefore, the trial judge's award of vocational rehabilitation benefits was not clearly wrong.

The defendants argue that the review panel erred in assessing Collins' loss of earning capacity without considering the benefits of vocational rehabilitation. They claim that the review panel has misinterpreted our opinion in *Gibson v. Kurt Mfg.*, 255 Neb. 255, 583 N.W.2d 767 (1998). We find no merit in this argument.

In *Gibson*, the trial judge awarded vocational rehabilitation benefits but found that it was not appropriate to determine Gibson's loss of earning power until after Gibson had completed vocational rehabilitation. The trial judge stated that if after retraining, the parties could not agree as to Gibson's loss of earning power, either party could apply to the court for further hearing. The employer appealed the award of vocational rehabilitation, and Gibson cross-appealed the trial judge's failure to make a determination as to his loss of earning power prior to vocational rehabilitation.

The review panel found that since, at the time of trial, Gibson had reached maximum medical improvement and had received an impairment rating with restrictions, the trial judge was clearly wrong in not assessing Gibson's loss of earning power. The review panel, inter alia, remanded the cause for a determination of permanent loss of earning power. We affirmed.

In affirming the review panel's decision, we noted that because Gibson's temporary total disability ceased December 27, 1993, and he had reached maximum medical improvement, Gibson could not receive temporary total disability benefits. The employer had appealed the award for vocational rehabilitation, and since the trial judge made no determination of Gibson's loss of earning power, Gibson could not receive any benefits until the issue of vocational rehabilitation had been resolved. Without a determination of loss of earning power, there was no basis for payment of benefits to Gibson during the appeal of the vocational rehabilitation issue. Despite the fact that the trial judge found that Gibson had a substantial loss of earning power, the trial judge had effectively denied Gibson compensation for that loss of earning power until resolution of all the appeals. We held that once Gibson reached maximum medical improvement, unless there was a valid reason for not determining loss of earning power, the trial judge was obligated to make such a determination.

In the case at bar, the review panel correctly determined that since Collins had reached maximum medical improvement, the trial judge was obligated to determine his loss of earning power, and that the trial judge erred in speculating what would be the result of the vocational rehabilitation when determining loss of earning capacity. Therefore, we affirm the judgment of the review panel.

CONCLUSION

The judgment of the review panel is affirmed. Collins is awarded the sum of $2,800 to apply toward the services of his attorney in this court.

AFFIRMED.

STEPHAN, J., not participating.

JOSE L. TORRES, APPELLANT, V. AULICK LEASING, INC., AND ST. PAUL FIRE AND MARINE INSURANCE COMPANY, ITS WORKERS' COMPENSATION INSURANCE CARRIER, APPELLEES.

606 N.W.2d 98

Filed February 18, 2000. No. S-99-594.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1998), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. **Workers' Compensation.** Neb. Rev. Stat. § 48-101 (Reissue 1998) compensates injury caused an employee by an accident arising out of and in the course of his or her employment.
3. ___. Under the going to and from work rule, injuries sustained by an employee while going to and coming from work do not arise out of and in the course of employment unless it is determined that a distinct causal connection exists between an employer-created condition and the occurrence of the injury.
4. ___. A commercial traveler is regarded as acting in the course of his or her employment during the entire period of travel on the employer's business.
5. ___. Where an employee, in the performance of his or her duties, is required to travel and an accident occurs while he or she is so engaged, the accident arises out of and in the course of his or her employment and is within the scope of the Nebraska Workers' Compensation Act.
6. ___. Traveling employees are generally within the course of their employment from the time they leave home on a business trip until they return, for the self-evident reason that the traveling itself is a large part of the job.
7. ___. Under the special errand exception to the going to and from work rule, when an employee, having identifiable time and space limits on the employment, makes an off-premises journey which would not normally be compensable under the usual going to and from work rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself.
8. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.
9. ___. In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded with directions.

Samuel W. Segrist, of Meister & Segrist, for appellant.

Marvin O. Kieckhafer, of Kay & Kay, for appellees.

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

MCCORMACK, J.

FACTUAL BACKGROUND

Appellee Aulick Leasing, Inc. (Aulick), is a trucking company engaged in the business of hauling aggregate to highway construction projects. Although Aulick's home office is located in Scottsbluff, Nebraska, the nature of Aulick's business requires that it move its operations from one location to another on a regular basis.

Appellant, Jose L. Torres, began working for Aulick in April 1996 as an over-the-road driver. Torres lived in Scottsbluff but worked for Aulick on several projects at various locations throughout Nebraska, South Dakota, and Wyoming. Torres, like Aulick's other drivers, was assigned a truck for each job. These trucks have sleeper units, and employees were allowed to sleep in the trucks. If a job lasted less than 30 days, the employees were allowed to take a truck to return to their homes for the weekends, but if the job was to last more than 30 days, the employees wishing to return home on weekends would need to use their personal vehicles.

In August 1996, Torres was assigned to a project in the area of Sundance and Gillette, Wyoming. The job was expected to last 4 to 5 months, so employees traveling home on weekends were required to use their personal vehicles. At approximately 3 a.m. on Monday, September 23, Torres was returning to Sundance from Scottsbluff in his personal vehicle when he swerved to miss a deer and rolled his vehicle into a ditch. As a result of the accident, Torres suffered severe injuries and has not been employed since that time.

PROCEDURAL HISTORY

Torres filed a petition seeking workers' compensation benefits. The trial judge of the Workers' Compensation Court dismissed Torres' petition with prejudice, stating:

> In this case, the plaintiff had numerous places of employment during the period of time he was employed by the

> defendant. This is a question of law of whether or not the plaintiff's assignment for three to four months to a specific job site in Wyoming constitutes a fixed place of employment. . . . I leave it to the appellate courts to decide whether or not a job site, which lasts three to four months, constitutes a fixed place of employment. If it does constitute a fixed place of employment then the plaintiff would not be entitled to workers' compensation benefits. If it does not constitute a fixed place of employment then plaintiff would be entitled to workers' compensation benefits.
>
> **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the plaintiff's petition be, and hereby is, dismissed with prejudice.

The Workers' Compensation Court review panel found that it was "implicit in the order of dismissal" that the trial judge did *not* find that Torres had a fixed place of employment and that sufficient evidence existed in the record to support the trial judge's conclusions. Consequently, the review panel affirmed the dismissal of Torres' petition. Torres appeals.

ASSIGNMENTS OF ERROR

Torres assigns, consolidated and restated, that the compensation court erred in finding that Torres had a fixed place of employment, that Torres was not a commercial traveler, and that the special errand exception to the going to and from work rule did not apply.

STANDARD OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1998), an appellate court may modify, reverse, or set aside a 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. *Frank v. A & L Insulation*, 256 Neb. 898, 594 N.W.2d 586 (1999); *Variano v. Dial Corp.*, 256 Neb. 318, 589 N.W.2d 845 (1999).

ANALYSIS

[2,3] Neb. Rev. Stat. § 48-101 (Reissue 1998) compensates injury caused an employee by an accident arising out of and in the course of his or her employment. *Johnson v. Holdrege Med. Clinic*, 249 Neb. 77, 541 N.W.2d 399 (1996), *overruled on other grounds, La Croix v. Omaha Public Schools*, 254 Neb. 1014, 582 N.W.2d 283 (1998). Under the going to and from work rule, injuries sustained by an employee while going to and coming from work do not arise out of and in the course of employment unless it is determined that a distinct causal connection exists between an employer-created condition and the occurrence of the injury. See *La Croix v. Omaha Public Schools, supra*. See, also, *Johnson v. Holdrege Med. Clinic, supra* (Gerrard, J., concurring).

[4-6] A commercial traveler is regarded as acting in the course of his or her employment during the entire period of travel on the employer's business. *McGee v. Panhandle Technical Sys.*, 223 Neb. 56, 387 N.W.2d 709 (1986). Where an employee, in the performance of his or her duties, is required to travel and an accident occurs while he or she is so engaged, the accident arises out of and in the course of his or her employment and is within the scope of the Nebraska Workers' Compensation Act. *Id.* "[T]raveling employees are generally within the course of their employment from the time they leave home on a business trip until they return, for the self-evident reason that the traveling itself is a large part of the job." 1 Arthur Larson and Lex K. Larson, Larson's Workers' Compensation Law § 14.01 at 14-2 (1999). Consequently, commercial travelers are not subject to the going to and from work rule, because they are already "on the job" during the time that they are traveling.

[7] Under the special errand exception to the going to and from work rule, when an employee, having identifiable time and space limits on the employment, makes an off-premises journey which would not normally be compensable under the usual going to and from work rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the

service itself. *Id.*, § 14.05. See, also, *Reynolds v. School Dist. of Omaha*, 236 Neb. 508, 461 N.W.2d 758 (1990).

[8,9] Our review of these matters is precluded, however, by the fact that these issues were not decided by the trial judge. An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *In re Interest of Sunshine A. et al.*, 258 Neb. 148, 602 N.W.2d 452 (1999); *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 571 N.W.2d 53 (1997). In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court. *Bartunek v. Geo. A. Hormel & Co.*, 2 Neb. App. 598, 513 N.W.2d 545 (1994); *Barthel v. Liermann*, 2 Neb. App. 347, 509 N.W.2d 660 (1993).

Workers' Comp. Ct. R. of Proc. 11 (1998) provides:

> All parties are entitled to reasoned decisions which contain findings of fact and conclusions of law based upon the whole record which clearly and concisely state and explain the rationale for the decision so that all interested parties can determine why and how a particular result was reached. The judge shall specify the evidence upon which the judge relies. The decision shall provide the basis for a meaningful appellate review.

In *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998), this court determined that certain statements in the order of the trial judge were contradictory on the question of the employer's liability. Citing rule 11, we determined that "[n]either party should prevail on the basis of an ambiguity." 254 Neb. at 695, 578 N.W.2d at 64. Finding that the failure of the trial judge to clearly determine the issue precluded meaningful appellate review, we remanded the cause to the trial judge with directions to enter an order complying with the requirements of rule 11. *Owen v. American Hydraulics, supra.*

The review panel in the instant case determined that the necessary factual findings were "implicit" in the trial judge's order. This determination is contradicted by the plain language of the trial judge's order. Moreover, rule 11 clearly requires explicit findings of fact and conclusions of law so that all interested parties and a reviewing court can determine the legal and factual basis upon which a decision is made. Without such findings,

there can be no meaningful appellate review. See *Owen v. American Hydraulics, supra.*

CONCLUSION

The judgment of the compensation court is reversed and the cause remanded to the trial judge with directions to enter an order which complies with the requirements of rule 11, taking into consideration how the going to and from work rule applies to the facts of the instant case and whether Torres was a commercial traveler or on a special errand at the time of his injury.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
ROGER DALE BJORKLUND, APPELLANT.
604 N.W.2d 169

Filed February 25, 2000. Nos. S-94-856, S-94-994.

SUPPLEMENTAL OPINION

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge, and PAUL D. MERRITT, JR., Judge. Supplemental opinion: Former opinion modified. Motions for rehearing overruled.

Dennis R. Keefe, Lancaster County Public Defender, Scott P. Helvie, and Richard L. Goos, and Alan G. Stoler, Steven E. Tennies, and Jerry M. Hug for appellant.

Roger Dale Bjorklund, pro se.

Don Stenberg, Attorney General, and J. Kirk Brown, and Gary E. Lacey, Lancaster County Attorney, and John A. Colborn for appellee.

CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and IRWIN, Chief Judge, and SIEVERS, Judge.

PER CURIAM.

Case No. S-94-994 is before this court on the motions for rehearing of the appellant, Roger Dale Bjorklund, and of the appellee, State of Nebraska, regarding our opinion reported at *State v. Bjorklund, ante*. p. 432, 604 N.W.2d 169 (2000). We overrule both motions, but for purposes of clarification, modify the opinion as follows:

In that portion of the opinion designated "IV. ANALYSIS," under the subheading "1. JURISDICTION," the last sentence of the second full paragraph, *id.* at 444, 604 N.W.2d at 190, is withdrawn, and the following sentence is substituted in its place: "Bjorklund was then sentenced to death by Judge Endacott on September 20, and a mandatory direct appeal initiated pursuant to Neb. Rev. Stat. § 29-2525 (Reissue 1989) was docketed as case No. S-94-994."

Under the sentencing subheading "(c) Analysis," the first full paragraph, *id.* at 488, 604 N.W.2d at 216, is withdrawn, and the following is substituted in its place:

> Section 29-2523(1)(d) provides as an aggravating circumstance that "[t]he murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." This section contains two separate disjunctive components which may operate together or independently of one another. *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), *disapproved on other grounds, State v. Reeves, ante* p. 511, 604 N.W.2d 151 (2000); *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995). The trial court found, and the evidence supports beyond a reasonable doubt, that the first component of § 29-2523(1)(d), i.e., that the murder was especially heinous, atrocious, and cruel, is present in this case. The evidence, which includes Bjorklund's statements, the physical evidence, and the expert testimony in this case, establishes that Harms was abducted, bound with duct tape, sexually assaulted by Bjorklund, and sexually assaulted by Barney. Harms was taken to a remote location, choked by Bjorklund, shot in the head by Barney, and left in a field to die. Bjorklund and Barney returned to

retrieve a blanket, and when Bjorklund realized that Harms was not dead, he shot her several more times in the head.

In that same sentencing analysis portion of *Bjorklund*, the fourth full paragraph, *ante* at 488, 604 N.W.2d at 216, is withdrawn, and the following is substituted in its place:

"In summary, we conclude that the evidence amply demonstrates a murder that was especially heinous, atrocious, and cruel and, thus, that the trial court properly found that aggravating circumstance."

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.

MOTIONS FOR REHEARING OVERRULED.

HENDRY, C.J., and WRIGHT, J., not participating.

CONSTRUCTORS, INC., ET AL., APPELLANTS, V. CASS COUNTY BOARD OF EQUALIZATION AND NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION, APPELLEES.

606 N.W.2d 786

Filed February 25, 2000. Nos. S-99-163 through S-99-180.

1. **Taxation: Judgments: Appeal and Error.** Appellate review of a Tax Equalization and Review Commission decision shall be conducted for error on the record.
2. **Judgments: Appeal and Error.** When reviewing an order for errors appearing on the record, the appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. ___:___. In instances where an appellate court is required to review cases for error appearing in the record, questions of law are nonetheless reviewed de novo on the record.
4. **Taxation: Valuation: Presumptions: Evidence: Proof: Appeal and Error.** There is a presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.
5. **Taxation: Valuation: Presumptions: Proof.** After the presumption favoring a county board is overcome, the reasonableness of the valuation fixed by the board

becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the complaining taxpayer.

6. **Taxation.** While absolute uniformity of approach for taxation may not be possible, there must be a reasonable attempt at uniformity.
7. **Taxation: Valuation: Constitutional Law.** The object of the uniformity clause is accomplished if all the property within the taxing jurisdiction is assessed and taxed at a uniform standard of value.
8. **Taxation: Valuation.** Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value.
9. **Taxation: Valuation: Constitutional Law.** The constitutional requirement of uniformity in taxation extends to both rate and valuation.
10. **Taxation: Valuation: Public Officers and Employees.** The rules as to uniformity and equal protection of the laws apply not only to acts of the legislative department but also to the valuation by the assessing officers. Discrimination in valuation, where it exists, does not necessarily result from the terms of the tax statute, but may be caused by the acts of the taxing officer or officers.
11. **Taxation: Valuation: Public Policy.** There can be no difference in the method of determining the valuation or rate of tax to be imposed unless separate classifications rest on some reason of public policy or some substantial difference of situation or circumstance that would naturally suggest justice or expediency of diverse legislation with respect to the objects to be classified.
12. **Taxation: Valuation: Real Estate.** Real property taxes may not be equalized by merely classifying property and then arbitrarily applying a given value to all properties of that classification. The mere fact that a formula is devised, by which property is nonuniformly and disproportionately assessed, does not satisfy the constitutional requirement.

Appeal from the Nebraska Tax Equalization and Review Commission. Reversed and remanded for further proceedings.

James W. Hewitt for appellants.

Charles E. Dorwart, of James R. Brown, P.C., for appellee Cass County Board of Equalization.

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

GERRARD, J.

NATURE OF CASE

Constructors, Inc.; Ken Lauritzen; Doris R. Tiedeman; and Kerford Limestone Company are all landowners in Cass County. In 1998, their respective properties were assessed at a higher value because of mineral interests lying beneath their

land, and consequently, their property taxes increased. This was the first time their mineral interests were separately assessed and valued for tax purposes. The parties protested this increase with the Cass County Board of Equalization (Board), which affirmed the assessment. They then appealed the Board's decision to the Nebraska Tax Equalization and Review Commission (TERC). TERC affirmed the decision of the Board by dismissing the appeal as a matter of law. Constructors, Inc.; Lauritzen; Tiedeman; and Kerford Limestone then filed petitions for appellate review pursuant to Neb. Rev. Stat. § 77-5019 (Cum. Supp. 1998). Their appeals were consolidated, and as they are similarly situated for purposes of this appeal, they will be referred to collectively as "the appellants."

The question with which we are presented is whether the increased value and the resulting higher tax on the appellants' properties because of the mineral interests lying beneath their land violate the uniformity clause of article VIII, § 1, of the Nebraska Constitution in that there are other Cass County property owners with mineral interests lying beneath their land that were not assessed a higher tax. We answer in the affirmative and, therefore, reverse TERC's order of dismissal and remand this cause for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

In 1997, the Cass County assessor, Veda Copenhaver, decided to begin the process of appraising properties with possible mineral value in Cass County. She hired an appraisal company, Iowa Appraisal and Research Corporation. Its employee, Patrick Schulte, appraised several parcels of Cass County land. Copenhaver told Schulte that there were several properties on which she had seen evidence of sales and use, causing her to suspect that they were not assessed at market value and that she needed an appraisal done on those properties to bring them up to market value. Schulte's primary assignment was to appraise all mineral interests of value in Cass County.

Copenhaver gave Schulte a list of 84 properties to appraise. Schulte appraised additional properties which he discovered were owned or leased by mining companies or properties that had been previously mined. He determined that approximately

62 properties that he inspected did not have any increased value from subsurface mineral rights. Schulte submitted reports to Copenhaver regarding the appellants' properties in which the mineral reserves were valued separately from the land. These landowners were sent two statements, one for the surface rights and the other for the mineral interest(s). In explaining his appraisal, Schulte testified that the properties with increased value were deemed so because they were situated near one of the ledges or reserves of limestone that could possibly be productive within 30 years.

The only landowners in Cass County who received additional mineral interest notices were mining companies or those who had property under lease to the mining companies. These landowners include the appellants because Constructors, Inc., and Kerford Limestone are mining companies; Lauritzen leased his property to Kerford Limestone; and Tiedeman sold her property to Kerford Limestone in an unrecorded sale. Although under the mining companies' control, the subject land was not being currently mined at the time of the appraisal; rather, it was being farmed. However, Copenhaver testified that the fact that these properties received an increased value was not because of the mining companies' control, but, rather, because the past sales and use of the property justified an increased value.

It is undisputed that there are other properties in Cass County with subsurface mineral interests that did not receive tax statements for their minerals. The appellants' expert witness, Raymond Burchett, a geologist, testified that there was limestone with commercial value in nearby land other than that of the appellants. Cass County maintained, however, that the mineral interests in these other properties had no commercial value and that the presence of these minerals would not increase the overall value of the land. Upon examination by the commissioners and on recross-examination, Burchett admitted that he did not know if it was economically feasible to extract the minerals. However, Burchett also testified on redirect examination that these other mineral interests would have significant commercial value if the existing mines were extended into those other parcels of property.

The appellants filed a tax property valuation protest. In their protest, the appellants claimed:

> The mineral interests in this land are not to be separately valued because the fee and the mineral interests have not been severed. They should be calculated as part of the total market value of the land. Further, all taxpayers in Cass County have not been treated uniformly. Many with minerals under their land did not receive a separate valuation.

The Board affirmed the decision of the assessor. The appellants then appealed to TERC, which affirmed the decision of the Board by dismissing the appeal as a matter of law. In its decision, TERC stated that "although the tax is a single and indivisible tax, the components of the real estate may be assessed separately" and that "no evidence has been adduced to establish that the valuation of mineral interests within Cass County for tax year 1998 was the result of a '. . . deliberate and intentional discrimination systematically applied. . . .' "

The appellants filed a petition for review, pursuant to § 77-5019, in the Nebraska Court of Appeals. These appeals were consolidated, and the appellants' motion to bypass the Court of Appeals was granted.

ASSIGNMENTS OF ERROR

The appellants allege that TERC erred (1) by affirming the assessments of the appellants' property because the assessments violate the constitutional command that property within the same classification is to be valued uniformly and proportionately, (2) by sanctioning the procedure by which Cass County assessed the mineral interests because the mineral interests should not have been assessed separately as they had not been severed from the surface estate, (3) by holding that the assessments of the appellants' property were not arbitrary and unreasonable and were based on credible evidence, (4) by erroneously applying the presumption that the Board faithfully performed its duties, and (5) in affirming the assessments because such affirmation denies the appellants equal protection of the law under the Nebraska Constitution, as similarly situated property owners have been treated differently and there is no rational justification for this disparate treatment.

STANDARD OF REVIEW

[1-3] Section 77-5019(5) provides that appellate review of a TERC decision shall be conducted for error on the record. When reviewing an order for errors appearing on the record, the appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Pittman v. Sarpy Cty. Bd. of Equal., ante* p. 390, 603 N.W.2d 447 (1999). However, in instances where we are required to review cases for error appearing in the record, questions of law are nonetheless reviewed de novo on the record. *County of Adams v. State Bd. of Equal.*, 247 Neb. 179, 525 N.W.2d 629 (1995).

[4] There is a presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board. *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999).

ANALYSIS

PRESUMPTION

The threshold hurdle that the appellants must overcome is the presumption that the Board faithfully performed its official duties in making an assessment and acted upon sufficient competent evidence to justify its action. *Id.* In its findings in the case at bar, TERC determined that there was *no* evidence presented which (1) established that "the value of the land, improvements, and mineral interests of the subject property as determined by the County, taken as a whole, exceeds market value"; (2) "establish[ed] that the valuation of mineral interests within Cass County for tax year 1998 was the result of a '. . . deliberate and intentional discrimination systematically applied' "; and (3)

"establish[ed] that the decision of the County was unreasonable or arbitrary."

The appellants argue that TERC committed patent error on the record in finding that there was *no* evidence of the unreasonableness of Cass County's action. We agree. Clearly, there was *some* evidence which called into question the reasonableness of the action, especially the admission that there were other Cass County properties with mineral interests which were not valued.

In Copenhaver's and Schulte's testimony regarding the valuation scheme, both suggested that no other land (besides appellants') had added value from the minerals. Schulte, however, testified that he did not appraise the property held by others which was immediately west of the Kerford Limestone holdings and admitted that there is probably limestone under the surface. Copenhaver testified that the increased value due to the minerals was not really related to the mining companies' control, but, in fact, it is apparent that Schulte saw a direct relation in that he stopped appraising the land west of the Kerford Limestone holdings. Further, Burchett testified that there was limestone with commercial value in nearby land other than that of the appellants. The cumulative effect of this evidence overcame the presumption favoring the Board.

[5] Thus, the reasonableness of the valuation fixed by the Board becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the appellants. *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999). With the foregoing principles in mind, we address the appellants' claims regarding the lawfulness of the valuation scheme.

UNIFORMITY CLAUSE

There is no question an assessor may take into account the value of minerals contained within the land when assessing it: "Mineral interests, either producing or nonproducing, are real property and shall be valued for taxation as any other real property whether or not such mineral interests are severed from the surface interests." 316 Neb. Admin. Code, ch. 47, § 002.01 (1993) (readopted July 2, 1999; current version at 350 Neb. Admin. Code, ch. 13, § 002.01 (1999)).

However, in valuing the land, the uniformity clause of the Nebraska Constitution, article VIII, § 1, sets the parameters, and that clause provides in part, "(1) Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution."

[6-9] Several principles of uniformity clause jurisprudence guide our analysis. Initially, we note that while absolute uniformity of approach for taxation may not be possible, there must be a reasonable attempt at uniformity. *County of Sarpy v. State Board of Equalization & Assessment*, 185 Neb. 760, 178 N.W.2d 765 (1970). The object of the uniformity clause is accomplished "if all of the property within the taxing jurisdiction is assessed and taxed at a uniform standard of value." *County of Gage v. State Board of Equalization & Assessment*, 185 Neb. 749, 755, 178 N.W.2d 759, 764 (1970). Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value. *Equitable Life v. Lincoln Cty. Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987). The constitutional requirement of uniformity in taxation extends to both rate and valuation. *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964). In the instant case, the appellants are contesting the valuation method applied in that the mineral interests in their property were valued, whereas other similarly situated property owners' interests were not valued.

[10] We note that a tax statute is not at issue here; rather, it is the assessor's and the Board's decisions which are being scrutinized. Nonetheless, our uniformity clause analysis remains the same. The rules as to uniformity and equal protection of the laws apply not only to acts of the legislative department but also to the valuation by the assessing officers. Discrimination in valuation, where it exists, does not necessarily result from the terms of the tax statute, but may be caused by the acts of the taxing officer or officers. See 1 Thomas M. Cooley, The Law of Taxation § 302 (4th ed. 1924).

The appellants argue that the uniformity clause has been violated because they have been taxed on the mineral interests beneath their property in Cass County when other similarly situated landowners have not been taxed on minerals beneath their respective properties. The appellants assert that in effect, the assessor created two subclasses of agricultural land by implementing the valuation scheme: (1) land controlled by someone who does not operate mining operations elsewhere in Cass County and (2) land controlled by the appellants, who own or have entered some type of agreement with companies who operate mining operations elsewhere in Cass County. We agree and determine that such a classification scheme does, in fact, violate the uniformity clause.

[11] There can be no difference in the method of determining the valuation or rate of tax to be imposed unless separate classifications rest on some reason of public policy or some substantial difference of situation or circumstance that would naturally suggest justice or expediency of diverse legislation with respect to the objects to be classified. *State ex rel. Meyer v. McNeil*, 185 Neb. 586, 177 N.W.2d 596 (1970). In *State ex rel. Meyer*, we held that a statute which created a separate taxation class for agricultural income-producing machinery and equipment apart from all other tangible property violated the uniformity clause. We noted that although reasonable classifications are permissible,

> the classification must rest on real differences of situation and circumstances surrounding the members of the class, relevant to the subject of legislation, which render appropriate its enactment. . . . But the establishment of two methods of valuation of property in the same class for taxation purposes results in a want of uniformity within the constitutional prohibition of Article VIII, section 1.

State ex rel. Meyer, 185 Neb. at 588, 177 N.W.2d at 598. We stated that the classification did not rest on public policy reasons or on a substantial difference of situation or circumstance and concluded: "It is therefore an attempt to create a classification within a classification without any reasonable grounds for so doing other than to secure advantages for those falling within the purview of the act. It is violative of the uniformity provisions

of Article VIII, section 1, of the Constitution." *State ex rel. Meyer*, 185 Neb. at 589-90, 177 N.W.2d at 599.

Similarly, in the case at bar, the classification scheme created by the selective valuation of mineral interests in Cass County must rest on a substantial difference of situation between the appellants and others whose minerals were attributed to have no value. The record reveals no substantial difference, and therefore, we must conclude that there is no substantial difference or public policy reason that justifies differential tax treatment between farmland controlled by mining companies and similar farmland not controlled by mining companies. Thus, the classification scheme created in which only those minerals contained in lands owned by the appellants were given value for tax purposes, whereas other mineral interests were ignored, violates the uniformity provisions of article VIII, § 1, of the Nebraska Constitution.

[12] In *Warner v. Board of Equalization*, 214 Neb. 730, 335 N.W.2d 556 (1983), we struck down a classification scheme as violative of the uniformity clause. The assessor in *Warner* created a classification system in which 1-acre tracts were valued at $2,000; 2- to 5-acre tracts were valued at $1,500 per acre; 6- to 10-acre tracts were valued at $1,000 per acre; 11- to 20-acre tracts were valued at $850 per acre; and land holdings of 21 acres or more were valued at $80 per acre. The taxpayer in *Warner* possessed an almost 15-acre lot, so his property was valued at $850 per acre, although similar property down the road was valued at $80 per acre. This court determined that this system violated the uniformity clause:

> Real property taxes may not be equalized by merely classifying property and then arbitrarily applying a given value to all properties of that classification. . . . The mere fact that a formula is devised, by which property is nonuniformly and disproportionately assessed, does not satisfy the constitutional requirement. . . . [The assessor and the Board of Equalization], in assessing Warner's property at $850 an acre acted arbitrarily and capriciously. The action of the trial court in reducing the value to $80 an acre was proper.

Id. at 733-34, 335 N.W.2d at 557-58. We see no reason to apply a different rationale to the instant case.

Property of the same character must be taxed the same. Differential tax treatment can only be based on the use or nature of the property, not upon who controls the property, i.e., mining companies versus farmers. Schulte testified that there were other lands with limestone interests, but he stopped attributing value to these interests beyond the Kerford Limestone property holdings. Thus, the adjacent landowners escaped the increased tax that burdened their neighbor, even though both are similarly situated as property owners with subsurface mineral interests. A heavier tax burden on the appellants, who own farmland with subsurface mineral interests, like others in Cass County, cannot be justified merely by the fact that the appellants or their lessees own other property upon which mining is conducted. To allow such a valuation scheme to withstand scrutiny would defeat the purpose of the uniformity clause: to assess and tax at a uniform standard of value all the property within a taxing jurisdiction. *County of Gage v. State Board of Equalization & Assessment*, 185 Neb. 749, 178 N.W.2d 759 (1970). Under the circumstances of this case, the valuation system used by Cass County, which effectively is a de facto ownership classification, violates the uniformity clause. Because we have concluded that the valuation scheme employed in the instant case violates the uniformity clause, we need not address the other assignments of error.

CONCLUSION

For the foregoing reasons, we reverse the order of dismissal by TERC, and remand this cause to TERC for further proceedings regarding the 1998 tax year, consistent with this opinion and in conformity with Neb. Rev. Stat. § 77-5017 (Reissue 1996).

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE INTEREST OF LEO L. II, A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. LEO L. II, APPELLANT.

606 N.W.2d 783

Filed February 25, 2000. No. S-99-386.

1. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **Criminal Law: Venue.** Under Neb. Rev. Stat. § 29-1301 (Reissue 1998), a criminal defendant has a right to be tried in the county in which the criminal offense is alleged to have been committed.
3. **Criminal Law: Venue: Proof.** The State must prove proper venue beyond a reasonable doubt in criminal cases.
4. **Minors: Juvenile Courts.** The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect a juvenile's best interests.
5. **Juvenile Courts.** A juvenile court proceeding is not a prosecution for crime, but a special proceeding that serves as an ameliorative alternative to a criminal prosecution.
6. **Minors: Venue: Proof.** Proof of venue is immaterial to the determination of whether a juvenile falls within the meaning of Neb. Rev. Stat. § 43-247 (Reissue 1998).
7. **Juvenile Courts: Venue: Proof.** In a proceeding under the Nebraska Juvenile Code, the State is not required to prove proper venue.

Appeal from the Separate Juvenile Court of Douglas County: JOHN J. MCGRATH, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Douglas A. Johnson for appellant.

James S. Jansen, Douglas County Attorney, and Melissa A. Stanosheck for appellee.

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

CONNOLLY, J.

The separate juvenile court of Douglas County found Leo L. II to be a child within the meaning of Neb. Rev. Stat. § 43-247(1) (Reissue 1998). Leo contends that the evidence is insufficient as a matter of law to sustain this adjudication because the State failed to establish venue for the underlying offense. We conclude that in a juvenile case, the State need not prove that the juvenile's underlying act occurred within the county in which the petition was filed. We therefore affirm.

BACKGROUND

Leo was arrested on October 14, 1998, and was charged with obstructing a peace officer, a Class I misdemeanor. See Neb. Rev. Stat. § 28-906(1) (Reissue 1995). A petition was filed in the separate juvenile court of Douglas County, alleging that Leo, born July 7, 1983, was a child as defined by § 43-247, which states in part: "The juvenile court in each county as herein provided shall have jurisdiction of: (1) [a]ny juvenile who has committed an act other than a traffic offense which would constitute a misdemeanor or an infraction under the laws of this state, or violation of a city or village ordinance."

The arresting officers and Leo testified at the adjudication hearing on March 15, 1999. Officers Steve Jennum and Joseph B. Baudler of the Omaha Police Department each testified that on October 14, 1998, they responded to a disturbance at North High School, 36th Street and Ames Avenue. While there, they placed Leo under arrest for his interference with the arrests of two other individuals.

At the close of the State's case, Leo made a motion to dismiss for the State's failure to prove a prima facie case. Counsel for Leo argued, "I think there's a question of whether this occurred in Douglas County, Nebraska. I don't think there's any evidence to support that, and we'd move to dismiss." The State responded that "there is evidence that the event occurred at 36th and Ames in Omaha at North High School." The juvenile court overruled the motion.

The third witness, Leo himself, made no reference to the site of the arrest.

At the close of all the evidence, counsel for Leo renewed his motion to dismiss. He argued that "again, there is — it's a technicality, but there's no evidence that this occurred in Douglas County, Nebraska, and I would ask the Court to dismiss the charge."

The juvenile court found that the State proved beyond a reasonable doubt that the allegations in the petition were true. Leo was adjudged to be a juvenile within the meaning of § 43-247(1). The court ordered that a predisposition evaluation be conducted and that the matter be set for a disposition hearing. Leo appealed from the adjudication hearing.

STANDARD OF REVIEW

[1] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Spulak v. Tower Ins. Co.*, 257 Neb. 928, 601 N.W.2d 720 (1999); *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999).

ASSIGNMENT OF ERROR

Leo assigns as error, restated, the trial court's finding that the allegations in the petition were true because venue was never established.

ANALYSIS

[2,3] The issue on appeal is whether, in a juvenile proceeding, the State must prove venue beyond a reasonable doubt. Under Neb. Rev. Stat. § 29-1301 (Reissue 1995), a *criminal* defendant has a right to be tried in the county in which the criminal offense is alleged to have been committed. Additionally, we have held that the State must prove proper venue beyond a reasonable doubt in criminal cases. *State v. Vejvoda*, 231 Neb. 668, 438 N.W.2d 461 (1989). Leo argues that under *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), the venue requirement for criminal cases should be extended to juvenile cases. In other words, Leo contends that the State should be required in juvenile proceedings to prove venue beyond a reasonable doubt. We disagree.

In *In re Gault*, the U.S. Supreme Court reiterated the determination announced in *Kent v. United States*, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966), that the Due Process Clause of the 14th Amendment required juvenile court hearings to measure up to the essentials of due process and fair treatment. Specifically, the Court in *In re Gault* held that in proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, a juvenile has the same constitutional rights as an adult to receive notice of the charges, to be represented by counsel, to confront and cross-examine witnesses, and to invoke the privilege against self-incrimination. Subsequent to *In re Gault*, however, the Court held in *McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S. Ct.

1976, 29 L. Ed. 2d 647 (1971), that the right to a jury trial in criminal proceedings does not extend to juvenile proceedings.

Leo argues that because *In re Gault* afforded juveniles many of the same rights and protections that criminal defendants possess, the requirement of proof of venue beyond a reasonable doubt in criminal cases should be extended to juvenile proceedings. Our reading of *In re Gault*, however, does not lead us to the same conclusion. *In re Gault* recognized four specific due process rights of a juvenile offender in a delinquency adjudication in which the juvenile's freedom could be curtailed. None of those due process rights are even tangentially related to the statutory requirement of proof of venue in a criminal case. In addition, *McKeiver* made clear that juveniles are not entitled to the same rights and protections as criminal defendants. In light of the longstanding view in Nebraska that juvenile offenders and adult offenders are not similarly situated, we decline the invitation to extend *In re Gault* and impose upon the State in a delinquency proceeding the burden of proving venue beyond a reasonable doubt. See *In re Interest of A.M.H.*, 233 Neb. 610, 616, 447 N.W.2d 40, 44 (1989) (quoting *State v. Pinkerton*, 186 Neb. 225, 182 N.W.2d 198 (1970), " 'It has been the policy of this state, at least since 1879, to authorize special treatment for juvenile offenders' ").

One appellate court that addressed the issue of venue as a material element of proof in a juvenile delinquency proceeding held that evidence of the county in which the charged act was committed was not a necessary element of proof. *State ex rel. Juv. Dept. v. Smith*, 126 Or. App. 646, 870 P.2d 240 (1994). The court reasoned:

> Proof of venue is immaterial to the determination of whether the child committed the charged act and is properly within the court's jurisdiction. Moreover, dismissal of a delinquency petition solely because the state failed to prove venue would prevent the court from fashioning an order that would, in all hope and probability, start the child down the path of reformation. Such a result would frustrate the juvenile system's rehabilitative efforts and, in the long run, would be detrimental to the child's welfare.

Id. at 651, 870 P.2d at 242.

[4-6] Like the Oregon court, we have held that the foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect a juvenile's best interests. See *In re Interest of Lisa O.*, 248 Neb. 865, 540 N.W.2d 109 (1995) (citing *In re Interest of D.D.P.*, 235 Neb. 864, 458 N.W.2d 193 (1990)). We have long recognized that a juvenile court proceeding is not a prosecution for crime, but a special proceeding that serves as an ameliorative alternative to a criminal prosecution. *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996). Proof of venue is immaterial to the determination of whether a juvenile falls within the meaning of § 43-247.

CONCLUSION

[7] We hold that in a proceeding under the Nebraska Juvenile Code, the State is not required to prove proper venue. Evidence that the juvenile's underlying act occurred within the county in which the petition was filed is not a necessary element of proof. We find that the separate juvenile court of Douglas County had jurisdiction of the matter in the adjudication proceeding. We therefore affirm.

AFFIRMED.

SIDNEY OWEN, APPELLEE, V. AMERICAN HYDRAULICS, INC., AND AETNA CASUALTY & SURETY COMPANY, APPELLANTS.

606 N.W.2d 470

Filed February 25, 2000. No. S-99-686.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing.
3. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.

4. **Workers' Compensation: Evidence: Appeal and Error.** When testing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court, the evidence must be considered in a light most favorable to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence.
5. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
6. **Workers' Compensation: Words and Phrases.** An accident is defined by the Nebraska Workers' Compensation Act as an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.
7. ____: ____. The unexpected or unforeseen requirement of the Nebraska Workers' Compensation Act is satisfied if either the cause was of an accidental character or the effect was unexpected or unforeseen.
8. ____: ____. In the context of an "accident" as defined by the Nebraska Workers' Compensation Act, "suddenly and violently" does not mean instantaneously and with force, but, rather, the element is satisfied if the injury occurs at an identifiable point in time requiring the employee to discontinue employment and seek medical treatment.
9. ____: ____. The requirement that an accident in a workers' compensation case produces objective symptoms is satisfied if the symptoms manifest themselves according to the natural course of such things without any independent intervening cause.
10. **Workers' Compensation: Proof.** In a workers' compensation case, the plaintiff must establish by a preponderance of the evidence that the injury for which an award is sought arose out of and in the course of employment.
11. **Workers' Compensation: Expert Witnesses.** If the nature and effect of a claimant's injury are not plainly apparent, then the claimant must provide expert medical testimony showing a causal connection between the injury and the claimed disability.
12. ____: ____. Although expert medical testimony need not be couched in the magic words "reasonable medical certainty" or "reasonable probability," it must be sufficient as examined in its entirety to establish the crucial causal link between the plaintiff's injuries and the accident occurring in the course and scope of the worker's employment.
13. ____: ____. It is the role of the Nebraska Workers' Compensation Court as the trier of fact to determine which, if any, expert witnesses to believe.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed and remanded with directions.

Patrick B. Donahue, of Cassem, Tierney, Adams, Gotch & Douglas, for appellants.

Sheldon M. Gallner and Laura L. Pattermann, of Gallner Law Offices, P.C., for appellee.

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

STEPHAN, J.

This workers' compensation case is before us for the second time. In *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998), we held that an award entered by the trial judge on December 12, 1996, did not comply with Workers' Comp. Ct. R. of Proc. 11 (1995) in that it was ambiguous and contradictory and thus afforded no basis for meaningful appellate review. We remanded the cause to the trial judge with directions to enter an order in compliance with rule 11. On remand, the trial judge considered the same evidence which was before him at the time of the initial award and concluded that Sidney Owen sustained a compensable injury and was entitled to certain benefits. A review panel of the workers' compensation court affirmed the finding of liability, but remanded the case for further proceedings with respect to certain issues. American Hydraulics, Inc. (AHI), and its workers' compensation carrier, Aetna Casualty & Surety Company (Aetna), then perfected this appeal. We find no error in the order on remand and conclude that it should be affirmed.

BACKGROUND

The evidence adduced at trial on November 13, 1996, is summarized in *Owen* and will not be repeated here except where pertinent to our discussion. On June 30, 1998, the trial judge entered an order on remand in which he determined that on April 3, 1995, while employed as a welder by AHI, Owen suffered cumulative trauma injuries to his left and right arms and hands as a result of an accident arising out of and in the course of his employment. The injuries included bilateral carpal tunnel syndrome; bilateral tendinitis and DeQuervain's syndrome; bilateral epicondylitis; bilateral pronator syndrome and radial tunnel syndrome; dorsal ganglion cyst and degenerative joint disease of the radial ulnar joint, left wrist; bilateral median proximal nerve entrapment syndrome; and bilateral cubital tunnel entrapment syndrome. The trial judge determined, on the basis of evidence summarized in his order, that Owen was entitled to benefits of

$159.82 per week for 8 5/7 weeks for a 50-percent temporary partial loss of earning capacity and payment of medical and hospital expenses incurred as a result of his injuries. The trial judge further determined that the surgery which was recommended by Owen's treating physician, but not as yet performed, is related to Owen's accident and injuries and is compensable. Finally, the trial judge determined on the basis of specific medical evidence that Owen had not reached maximum medical improvement and, therefore, reserved a finding as to the degree of permanent impairment, if any, pending the performance of the anticipated surgery and any other necessary medical treatment.

In proceedings before a review panel of the workers' compensation court, AHI and Aetna asserted that the trial court erred as a matter of law in its order on remand in finding that Owen had sustained a compensable accident based upon repetitive trauma. AHI and Aetna also asserted that the trial court erred in failing to follow our mandate when the trial court ruled on factual issues which it had previously stated it could not rule on. As to the first of these assignments, a majority of the review panel concluded that the trial judge was not clearly wrong in his determination that a compensable accident had occurred and therefore affirmed that finding. With respect to AHI and Aetna's second assignment, the review panel majority held:

> The trial court has now established liability. In our view, again ordering an independent medical examination pursuant to Rule 63 is now an option available to the trial court. To make factual findings on issues he was previously unable to resolve, however, we believe to be inconsistent and clear error.
>
> We find that to the extent the trial court has made factual findings in his order on remand of June 30, 1998, which are inconsistent with the award of December 12, 1996, it is clearly wrong and must be remanded to [the trial judge] for further proceedings.

In a dissenting opinion, the third member of the review panel concluded that the order on remand should be reversed and dismissed because of its inconsistency with the initial award.

AHI and Aetna perfected this timely appeal, which we moved to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts.

ASSIGNMENTS OF ERROR

AHI and Aetna assign, restated and summarized, that both the trial court and the review panel erred (1) in awarding future medical services and reserving the issue of permanent disability because it was not within the scope of this court's mandate; (2) in finding liability, compensation benefits, and future medical services in favor of Owen, when the court concluded in its first award that it was unable to make such findings without resorting to guesswork and speculation; and (3) in finding that Owen had sustained a compensable accident based upon repetitive trauma within the meaning of Neb. Rev. Stat. § 48-151(2) (Reissue 1993). AHI and Aetna further contend that the review panel erred by authorizing the trial court to appoint an independent medical examiner because that issue was not before the court on appeal and because such an appointment may not be made where the plaintiff has failed to meet its burden of proof.

STANDARD OF REVIEW

[1] An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Jordan v. Morrill County, ante* p. 380, 603 N.W.2d 411 (1999); *Variano v. Dial Corp.*, 256 Neb. 318, 589 N.W.2d 845 (1999).

[2-4] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing. *Jordan v. Morrill County, supra*; *Ideen v. American Signature Graphics*, 257 Neb. 82, 595 N.W.2d 233 (1999). 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. *Harmon v. Irby Constr. Co., ante* p. 420, 604 N.W.2d 813 (1999); *Frank v. A & L Insulation*, 256 Neb. 898, 594 N.W.2d 586 (1999). When testing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court, the evidence must be considered in a light most favorable to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence. *Wilson v. Larkins & Sons*, 249 Neb. 396, 543 N.W.2d 735 (1996); *Stansbury v. HEP, Inc.*, 248 Neb. 706, 539 N.W.2d 28 (1995).

[5] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995).

ANALYSIS

We initially address the question of whether the trial judge was clearly wrong in determining that Owen sustained a compensable injury on April 3, 1995, resulting from cumulative effects of repeated work-related trauma. We have recognized that while such cases have some characteristics of both accidental injury and occupational disease, generally the compensability of a condition resulting from cumulative effects of work-related trauma is to be tested under the statutory definition of accident. See, *Jordan v. Morrill County, supra*; *Frank v. A & L Insulation, supra*; *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992). This case was pled and tried as an accidental injury case, and we therefore analyze it as such on appeal.

[6,7] An accident is defined by the Nebraska Workers' Compensation Act as "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." § 48-151(2). See, also, *Frank v. A & L Insulation, supra*; *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982). The "unexpected or unforeseen" requirement is satisfied if either the cause was of an accidental character or the effect was unexpected or unforeseen. *Jordan v. Morrill County, supra*; *Schlup v. Auburn Needleworks, supra.*

Owen testified that for approximately 8 years prior to April 3, 1995, he worked for AHI as a "shaft welder" involved in the

repair and manufacture of railroad coupling devices. These devices were made of steel and weighed 60 to 100 pounds, depending upon their length. He worked with these devices throughout his shift, handling each piece five times in order to perform the necessary welding tasks. Owen testified that while he gradually began experiencing pain in his hands and arms in 1994, no definitive diagnosis was made at that time, and that he continued performing his duties as a shaft welder. There is no evidence that Owen knew, prior to April 3, that the repetitive tasks which he performed as a shaft welder could cause the injuries which were diagnosed subsequent to that date, and the record is therefore sufficient to support a finding that the injuries were "unexpected and unforeseen."

[8] The second element of the definition of a compensable accidental injury is that it occur "suddenly and violently." § 48-151(2). We have held that in this context, "suddenly and violently" does not mean instantaneously and with force, but, rather, the element is satisfied if the injury occurs at an identifiable point in time requiring the employee to discontinue employment and seek medical treatment. *Jordan v. Morrill County, ante* p. 380, 603 N.W.2d 411 (1999); *Frank v. A & L Insulation*, 256 Neb. 898, 594 N.W.2d 586 (1999). Owen testified that beginning in March 1994, the pain in his hands and arms gradually increased and his production at work decreased. While working on April 3, 1995, Owen was experiencing pain in both hands and arms and his left wrist "went out," causing him to drop the materials with which he was working. At that point, Owen determined that he had "had enough" and advised his supervisor that he could no longer perform his duties. The supervisor instructed Owen to submit an accident report and referred him for medical treatment, which resulted in lost time at work. Although he returned to work, Owen never resumed his duties as a shaft welder and was instead transferred to a position requiring less strenuous activity. This evidence is sufficient to support a finding that Owen's injury occurred "suddenly and violently" within the meaning of § 48-151(2).

[9] The third statutory requirement, that the accident produce objective symptoms, is satisfied if the symptoms manifest themselves according to the natural course of such things without any

independent intervening cause. *Jordan v. Morrill County, supra*; *Frank v. A & L Insulation, supra*; *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992). " ' "[S]ymptoms of pain, and anguish, such as weakness, pallor, faintness, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by the statute." ' " *Sandel v. Packaging Co. of America*, 211 Neb. 149, 157, 317 N.W.2d 910, 915-16 (1982), quoting *Harrington v. Missouri Valley Constr. Co.*, 182 Neb. 434, 155 N.W.2d 355 (1967). The evidence summarized above supports a finding that Owen's accident produced "objective symptoms" within the meaning of § 48-151(2).

Accordingly, we agree with the review panel that the trial court was not clearly wrong in determining that Owen sustained an injury caused by an accident arising out of and in the course and scope of his employment with AHI. We therefore turn our attention to AHI and Aetna's contention, accepted to some degree by the review panel, that findings made by the trial judge in his order on remand were precluded by his characterization of the evidence in the original award which was before us in *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998). Our determination in that opinion that the original award was ambiguous, contradictory, and not in compliance with rule 11 effectively rendered it a nullity. We concluded in *Owen* that "[n]either party should prevail on the basis of an ambiguity," 254 Neb. at 695, 578 N.W.2d at 64, and remanded the cause with specific directions "to enter an order based upon the evidence adduced at trial which complies with the requirements of rule 11," 254 Neb. at 696, 578 N.W.2d at 64. The trial judge has now done so, and therefore the issue on appeal, both before the review panel and this court, is not whether the order on remand is inconsistent with the original award, which we found insufficient for meaningful appellate review, but, rather, whether it is supported by the evidence under the applicable standard of review. That standard prevents both the review panel and an appellate court from substituting their view of the facts for that of the trial judge if there is competent evidence in the record to support the trial judge's decision. *Jordan v. Morrill County, ante*

p. 380, 603 N.W.2d 411 (1999). See, also, Neb. Rev. Stat. §§ 48-179 and 48-185 (Reissue 1998).

[10-12] In a workers' compensation case, the plaintiff must establish by a preponderance of the evidence that the injury for which an award is sought arose out of and in the course of employment. § 48-151(2); *Frank v. A & L Insulation*, 256 Neb. 898, 594 N.W.2d 586 (1999). If the nature and effect of a claimant's injury are not plainly apparent, then the claimant must provide expert medical testimony showing a causal connection between the injury and the claimed disability. *Frank v. A & L Insulation, supra*; *Catlin v. Prairie Marketing*, 239 Neb. 363, 476 N.W.2d 234 (1991). Although expert medical testimony need not be couched in the magic words "reasonable medical certainty" or "reasonable probability," it must be sufficient as examined in its entirety to establish the crucial causal link between the plaintiff's injuries and the accident occurring in the course and scope of the worker's employment. *Frank v. A & L Insulation, supra.*

[13] It is the role of the Nebraska Workers' Compensation Court as the trier of fact to determine which, if any, expert witnesses to believe. *U S West Communications v. Taborski*, 253 Neb. 770, 572 N.W.2d 81 (1998). In making the factual determination that Owen's injuries were caused by the accident, the trial judge relied upon opinions expressed by three physicians who examined Owen. Dr. James R. Rochelle, a specialist in orthopedics and sports medicine, diagnosed Owen's injuries as bilateral carpal tunnel syndrome; tendinitis and DeQuervain's syndrome; lateral epicondylitis of both elbows; possible presentation of pronator syndrome and radial tunnel syndrome; and dorsal ganglion cyst and degenerative joint disease of the radial-ulnar joint, left wrist. He stated his "strong opinion that these are work-related conditions" which were "caused and significantly aggravated" by the "repetitive heavy work that he did at American Hydraulic [sic], Inc." Rochelle further opined that because of the persistence of Owen's symptoms, "it seems appropriate for him to consider surgery in the near future."

The trial judge also relied upon opinions expressed by Dr. Jack A. McCarthy, an orthopedic surgeon who began treating Owen in May 1995. McCarthy imposed temporary restrictions

limiting Owen to working 4 hours per day during a period in June and July. When these restrictions failed to alleviate Owen's symptoms, McCarthy recommended surgery, which was scheduled for August 24, but was subsequently canceled, apparently as the result of an objection by Aetna. McCarthy stated in a letter dated October 9, 1995, "It would still be my thought that [Owen] has significant compromise over the forearm area. I think his job as a welder and the heavy associated work activities over the last several years did contribute to the development of his symptoms." As of March 14, 1996, approximately 8 months prior to trial, McCarthy was still of the opinion that surgical intervention was warranted.

Finally, the trial judge considered and relied upon the opinion of Dr. John M. Kalec, expressed on February 21, 1996, that the repetitive work which Owen performed as a welder was a "material and substantial factor in his bilateral arm problems" which included "bilateral median proximal nerve entrapment syndrome . . . bilateral carpal tunnel nerve entrapment syndrome and bilateral cubital tunnel entrapment syndrome." Kalec also expressed his opinion that Owen was "in need of surgical correction."

Based upon this evidence, we cannot say that the trial judge was clearly wrong in finding that Owen's injuries are causally related to the April 3, 1995, accident, that the surgery proposed by McCarthy is related to the accident and therefore compensable, and that Owen is entitled to temporary partial disability benefits for a period of 8 5/7 weeks and payment of medical and hospital expenses as set forth in the order on remand. We likewise conclude that there is competent evidence supporting the trial judge's finding that Owen has not reached a point of maximum medical improvement and that a final determination of permanent impairment, if any, should be reserved.

We further conclude that because there is competent evidence in the record to support the trial judge's decision, the review panel exceeded its authority under § 48-179 when it reversed certain factual findings by the trial judge and remanded the case with a suggestion to order an independent medical examination pursuant to Workers' Comp. Ct. R. of Proc. 63 (1998). In so holding, we express no opinion as to whether an independent

medical examination may be utilized with respect to the issues on which the trial judge has reserved ruling because this matter is not presently before us for determination.

CONCLUSION

For the reasons stated above, we find no error by the trial judge and therefore affirm that part of the order of the review panel affirming the trial judge's determination that Owen has sustained a compensable injury based upon repetitive trauma, and reverse the remainder of the review panel's order. We further direct that the review panel remand the case to the trial judge for further proceedings consistent with this opinion.

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

JEFFREY S. ANDERSON, APPELLANT AND CROSS-APPELLEE, V. DENNIS A. CUMPSTON ET AL., APPELLEES AND CROSS-APPELLANTS, PHYLLIS E. HASTINGS AND PAULSEN, INC., A NEBRASKA CORPORATION, APPELLEES, AND ROBERT BEHRENS, INTERVENOR-APPELLEE.

606 N.W.2d 817

Filed March 3, 2000. No. S-97-863.

1. **Equity: Boundaries: Appeal and Error.** An action to ascertain and permanently establish corners and boundaries of land under Neb. Rev. Stat. § 34-301 (Reissue 1998) is an equity action.
2. **Equity: Appeal and Error.** In an appeal from an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Pleadings: Waiver.** Admissions contained in pleadings, answers, and replies are judicial in nature and waive all controversy concerning the matter admitted.
4. **Pleadings: Evidence: Waiver: Words and Phrases.** A judicial admission, as a formal act done in the course of judicial proceedings, is a substitute for evidence and thereby waives and dispenses with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by an opponent is true.
5. **Waters: Boundaries.** Under Nebraska law, title to riparian lands runs to the thread of the contiguous stream.

6. **Waters: Boundaries: Words and Phrases.** The thread, or center, of a channel is the line which would give the landowners on either side access to the water, whatever its stage might be and particularly at its lowest flow.
7. ___: ___: ___. Where the thread of the main channel of a river is the boundary line between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel.
8. **Waters: Words and Phrases.** Avulsion is a sudden and perceptible loss or addition to land by the action of water, or a sudden change in the bed or course of a stream.
9. ___: ___. When a stream which forms the boundary between two parties suddenly abandons its old bed and seeks a new one, such a change of channel works no change of boundary; the boundary remains as it was in the center of the old channel, although no water may be flowing therein.
10. **Waters.** The applicability of the law of avulsion is not dependent upon the navigability of the waterway.

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

Patrick J. Nelson, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., for appellant.

Gregory C. Lauby and Donald J. Pepperl, of Pepperl & McMahon Law Offices, for appellees Dennis A. Cumpston, Richard L. Cumpston, Robert L. Vitera, Karen S. Vitera, and Lori S. Cumpston.

Larry R. Baumann, of Kelley, Scritsmier & Byrne, P.C., for appellees Phyllis E. Hastings and Paulsen, Inc., and intervenor-appellee Robert Behrens.

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

PER CURIAM.

NATURE OF CASE

Jeffrey S. Anderson filed an equitable action to establish the corners and boundaries between his land and the land of the defendants pursuant to Neb. Rev. Stat. § 34-301 (Reissue 1998). Anderson owns land accretive to the south bank of the Platte River, while the defendants own land across the Platte River from Anderson, including land accretive to the north bank. After a bench trial, the district court established the boundary between Anderson's property and that of the defendants at the geograph-

ical centerline of the Platte River. Anderson timely appealed, alleging that the court erred by not establishing the boundary at the thread of the stream, which he asserts is currently in the north channel of the Platte River. Defendants Dennis A. Cumpston, Richard L. Cumpston, Lori S. Cumpston, Robert L. Vitera, and Karen S. Vitera cross-appealed (collectively defendants Cumpstons and Viteras), claiming that the district court erred by not establishing the boundary at the thread of the stream, which they allege is currently in the south channel of the Platte River. For the reasons that follow, we affirm.

FACTUAL BACKGROUND

Anderson owns land along the south meander line, or bank, of the Platte River generally described as all Platte River accretion lands deriving from and adjacent to government Lots 1, 2, and 3, Section 16, and deriving from and adjacent to government Lot 2, Section 9, all in Township 9 North, Range 22 West of the 6th P.M., Dawson County, Nebraska. Defendants Cumpstons and Viteras; Paulsen, Inc.; and intervenor, Robert Behrens, own adjacent parcels of property along the north meander line, or bank, of the Platte River; the property is located directly north from and has a south boundary contiguous with the north boundary of Anderson's property. Anderson filed the instant action to have certain corners and boundaries of his land ascertained and permanently established under § 34-301. Shortly thereafter, Behrens intervened as a defendant because he had recently entered a contract to purchase land involved in this controversy from defendant Phyllis E. Hastings.

In his petition, Anderson requested that the north boundary of his property be established at the thread of the stream of the Platte River, which he asserts is in the north channel. Defendants Cumpstons and Viteras filed an answer; in paragraph 3 thereof, it was alleged that when the United States of America conveyed the land described in Anderson's petition to the parties' predecessors in title,

> the Platte River flowed seasonally bank to bank and the geographical center line roughly corresponded to the thread of the stream; that thereafter artificial structures and diversions led to sudden reductions and shifts in the flow

> of the stream resulting in the Platte River becoming a braided stream with many small channels.

In the same pleading, defendants Cumpstons and Viteras counterclaimed, asserting that if the court were to conclude that the thread of the stream no longer corresponded to the geographical centerline, the boundary to Anderson's property should be established at the thread of the Platte River, which they claim is presently located in the south channel. Anderson filed a reply to defendants Cumpstons and Viteras' answer and counterclaim, denying certain claims and admitting the aforementioned allegations contained in paragraph 3 of their answer.

As the case progressed, but prior to trial, several landowners who were initially named as defendants in Anderson's petition either settled or were dismissed from the lawsuit by order of the district court. At the time of trial, those defendants still involved in the dispute were the Cumpstons; the Viteras; Paulsen, Inc.; Hastings; and intervenor, Behrens (collectively the defendants).

At trial, the deposition of James L. Brown, state surveyor for the State of Nebraska, was admitted into evidence. Brown testified therein that the Platte River is a braided stream, which is a river or stream that does not flow in one confined channel but actually has numerous channels. A braided river or stream does not have one deep thread, but covers a very large area and contains many channels which move around in its normal bed; such interoperative channels cross one another and are subject to rapid change. Brown explained that the "thread" of the stream is that portion of the river or stream which would be the last portion to dry up. Having observed such characteristics in the Platte River, Brown's office instructed county surveyors to treat the Platte River as a braided stream.

The record amply demonstrates that the Platte River is a "braided stream," as two streams of water flow in the Platte River near the property involved in this appeal. These streams are commonly referred to as the "north channel" and the "south channel." At trial, Anderson maintained that the north boundary of his land should be established at the thread of the Platte River, which he claimed was in the north channel. The defendants requested that Anderson's north boundary be set at the geographical centerline of the Platte River or, in the alternative, at

the thread of the stream, which they allege is currently located in the south channel. The present location of the thread of the Platte River was the main issue at trial.

The bed of the Platte River is composed of sand; flowing water may recede below the sand and resurface downstream, causing the Platte River to dry up in a manner different from most streams. This characteristic of the Platte River makes it very difficult, if not impossible, to determine the present location of the thread of the river. Brown testified that for tax assessment purposes, taxes on accretion land may be assessed to the geographical centerline of the Platte River in lieu of actually locating the thread of the stream. Brown acknowledged that assessment of taxes on accretion land to the geographical centerline contradicts an instruction by his office that taxes on accretion land were to be assessed to the thread of the contiguous stream. Brown explained, however, that the geographical centerline is utilized as a line of convenience and is allowed, in great part, because of the difficulty of locating the thread of the Platte River, which would ideally serve as the boundary for accretion lands were it able to be located.

Gary Donnelson, the Dawson County surveyor, testified that the determination of the banks of the main channel of the Platte River, other than from an 1869 U.S. Government survey, would be difficult because the Platte River contains many channels, any of which could appear to be the main channel at any given time. John Phillip Moore, the Dawson County assessor, testified that real estate taxes on accretion land in Dawson County are assessed to the geographical centerline. Accretion land in the area was first taxed in 1962 or 1963, at which time it was taxed to the geographical centerline. Tax assessments are based in part on cadastral maps transmitted from the Dawson County surveyor, on which the geographical centerline is determined from the original meander line as determined in the 1869 U.S. Government survey.

Landowners in the area testified that they have become accustomed to having their land taxed to the geographical centerline and, for many years, have acknowledged the geographical centerline as the shared boundary at issue in this appeal. In 1971 or 1972, a fence was built along what is roughly the geographical

centerline on Behrens' property. The Viteras' property is also fenced, on the eastern border, to the centerline. Although the Cumpstons have never constructed a fence on their south boundary, they have lived there since 1968—with the exception of 4 years—and have paid property taxes on the accretion land to the geographical centerline.

The district court found that it could not ascertain the location of the current thread of the Platte River. In its memorandum opinion and judgment, the district court concluded that prior to Anderson's acquiring interest in the property, his predecessor in title and the defendants or their predecessors in title had accepted the geographical centerline as the boundary between the accretion lands for a period of more than 10 years. In addition to concluding that this agreement was voluntary, the district court also determined that the defendants or their predecessors in title had met the requirements for adversely possessing the property to the geographical centerline. The district court subsequently established the north boundary of Anderson's property at the geographical centerline of the Platte River. It is from this judgment that Anderson appeals and defendants Cumpstons and Viteras cross-appeal.

ASSIGNMENTS OF ERROR

Andersen alleges, summarized and restated, that the district court erred in (1) determining the thread of the Platte River to be at or near the geographical centerline of the Platte River, (2) determining the geographical centerline of the Platte River to be the south boundary of the defendants' properties and the north boundary of Anderson's property under the doctrine of adverse possession, (3) determining the location of a fence line along the south side of land claimed by Behrens, and (4) determining the geographical centerline of the Platte River to be the south boundary of the defendants' properties and the north boundary of Anderson's property under the doctrine of either adverse possession or recognition and acquiescence.

On cross-appeal, defendants Cumpstons and Viteras assert that the district court erred in failing to find the thread of the stream of the Platte River to be in the south channel thereof.

STANDARD OF REVIEW

[1,2] An action to ascertain and permanently establish corners and boundaries of land under § 34-301 is an equity action. *Cofer v. Kuhlmann*, 214 Neb. 341, 333 N.W.2d 905 (1983). In an appeal from an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Franksen v. Crossroads Joint Venture*, 257 Neb. 597, 599 N.W.2d 603 (1999).

ANALYSIS

All of Anderson's assignments of error presuppose that it was error for the district court to establish the geographical centerline of the Platte River as the north boundary of Anderson's property. Anderson urges this court to establish the boundary at the thread of the Platte River, which he contends is currently located in the north channel of the Platte River. We conclude, for reasons different than the district court's, that the court correctly established the north boundary of Anderson's property at the geographical centerline of the Platte River; thus, based upon our de novo review of the record, we affirm the judgment of the district court.

[3,4] We begin our analysis by reviewing the pleadings and noting that Anderson, in his reply to the answer and counterclaim of defendants Cumpstons and Viteras, admitted that when the land at issue in this appeal was conveyed by the United States of America to Anderson's and the defendants' predecessors in title, "the Platte River flowed seasonally bank to bank and the geographical center line roughly corresponded to the thread of the stream." Admissions contained in pleadings, answers, and replies are judicial in nature and waive all controversy concerning the matter admitted. See *Schmid v. Malcolm Sch. Dist.*, 233 Neb. 580, 447 N.W.2d 20 (1989). We have stated that a judicial admission, as a formal act done in the course of judicial proceedings, is a substitute for evidence and thereby

waives and dispenses with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by an opponent is true. See *U S West Communications v. Taborski*, 253 Neb. 770, 572 N.W.2d 81 (1998). By admitting that the thread of the Platte River roughly corresponded with the geographical centerline at the time of the initial conveyance to his predecessors in interest, Anderson has conceded for the purposes of this litigation that such a proposition is true. Once the thread of the Platte River is initially established, we apply the law of avulsion to determine whether the north boundary of Anderson's property was correctly established at the geographical centerline of the Platte River.

[5-8] Under Nebraska law, title to riparian lands runs to the thread of the contiguous stream. *Cofer v. Kuhlmann*, 214 Neb. 341, 333 N.W.2d 905 (1983). The thread, or center, of a channel is the line which would give the landowners on either side access to the water, whatever its stage might be, and particularly at its lowest flow. See *State v. Ecklund*, 147 Neb. 508, 23 N.W.2d 782 (1946). As explained at trial, the thread of the stream is that portion of a waterway which would be the last to dry up. Where the thread of the main channel of a river is the boundary line between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel. *Ziemba v. Zeller*, 165 Neb. 419, 86 N.W.2d 190 (1957). The processes of accretion and reliction are not, however, to be confused with avulsion; avulsion has been defined by this court as a "'"sudden and perceptible loss or addition to land by the action of water, or a sudden change in the bed or course of a stream."'" *Valder v. Wallis*, 196 Neb. 222, 224, 242 N.W.2d 112, 114 (1976). In the instant case, Anderson's boundary should have been established by applying the law of avulsion.

[9,10] The doctrine of avulsion is well-settled law in Nebraska. See, e.g., *Cofer v. Kuhlmann, supra*; *Valder v. Wallis, supra*; *Ziemba v. Zeller, supra*; *State v. Ecklund, supra*; *Iowa Railroad Land Co. v. Coulthard*, 96 Neb. 607, 148 N.W. 328 (1914). We have previously held that when a stream which forms the boundary between two parties suddenly abandons its old bed and seeks a new one, such change of channel works no

change of boundary; the boundary remains as it was in the center of the old channel, although no water may be flowing therein. *Ziemba v. Zeller, supra*. See, also, *Nebraska v. Iowa*, 143 U.S. 359, 12 S. Ct. 396, 36 L. Ed. 186 (1892), *enforced* 145 U.S. 519, 12 S. Ct. 976, 36 L. Ed. 798. The applicability of the law of avulsion is not dependent upon the navigability of the waterway. Compare *Valder v. Wallis, supra* (applying rule of avulsion in case concerning navigable stream), with *State v. Ecklund, supra* (applying rule of avulsion in case involving nonnavigable stream). With the foregoing legal principles in mind, we proceed to resolve the instant boundary dispute.

Anderson's reply to defendants Cumpstons and Viteras' answer and counterclaim not only admitted that the geographical centerline initially corresponded with the thread of the Platte River, but also admitted that "artificial structures and diversions led to sudden reductions and shifts in the flow of the stream resulting in the Platte River becoming a braided stream with many small channels." Further, the evidence establishes that, for all practical purposes, it is impossible to ascertain the present location of the thread of the Platte River. We need not make such a determination in this case, however, because Anderson has admitted that the change in the thread of the Platte River was brought about suddenly by artificial structures and diversions. In view of Anderson's foregoing admissions, the doctrine of avulsion provides that the boundary of Anderson's property should remain "'as it was[,] in the center of the old channel.'" See *Ziemba v. Zeller*, 165 Neb. at 422, 86 N.W.2d at 193. Applying the well-settled law of avulsion to the instant case, we conclude that the north boundary of Anderson's property is the geographical centerline of the Platte River.

Our de novo review of the record leads us to the same conclusion, based on both equitable principles and the doctrine of avulsion. The evidence establishes that in 1869, the thread of the Platte River was at or very near the geographical centerline of the Platte River. In approximately 1903, again in the 1930's, and finally in the 1970's, a series of bridges known as the Darr bridges were built across the Platte River, after which the flow of the river shifted and began to flow in two channels, the south

channel initially being the wider channel. In 1941, the flow of the river was once again affected by the Kingsley Dam, the construction of which caused the north channel to carry more water than its southern counterpart. In addition to such artificial diversions, the nature of the bed of the Platte River is such that there is no way to predict which channel will be the last to dry up. Moreover, there is absolutely no evidence of either channel completely drying up after the construction of the third Darr bridge in the 1970's.

Finally, except for Anderson, each of the landowners in the area who testified at trial expressed a long-held belief that the boundary between accretion lands on the north bank and the south bank was the geographical centerline. Although Anderson testified at trial that he was unaware that he was being taxed on accretion land extending north to the geographical centerline, his failure to investigate the boundary of the property upon which he has been taxed does not justify basing our conclusion on his alleged lack of knowledge. Equity would not be done by taking land away from those who have paid taxes thereon, and regarded and treated it as their own for so long, and granting the land to another who has absolutely no reason, on the record before us, to believe that the land was his property.

Our review of the record reveals that the district court correctly determined the thread of the Platte River to be the geographical centerline thereof and accordingly established the north boundary of Anderson's property along that geographical centerline. Simply put, the establishment of the thread of the stream at anywhere but the geographical centerline would be, on the record before us, nothing but pure speculation and conjecture. This conclusion should have been reached, however, via application of the law of avulsion, rather than reliance upon the theories of adverse possession or recognition and acquiescence invoked by the district court. Nonetheless, Anderson's assignments of error are without merit.

Having determined that the boundary between the property of Anderson and that of the defendants was properly established at the geographical centerline of the Platte River, we need not address defendants Cumpstons and Viteras' cross-appeal.

CONCLUSION

The law of avulsion applies to the instant case, and upon our application of that doctrine, we conclude that the north boundary of Anderson's property and the south boundary of the defendants' properties is properly established at the geographical centerline of the Platte River as measured from the original meander line of the Platte River according to the original government plat of Township 9 North, Range 22 West of the 6th P.M., in Dawson County, Nebraska, dated January 25, 1869, and filed in the Nebraska State Surveyor's office. The decision of the district court is therefore affirmed.

AFFIRMED.

WRIGHT and CONNOLLY, JJ., concur in the result.

BILLY ROY TYLER, APPELLANT, V.
CALVIN HEYWOOD ET AL., APPELLEES.

607 N.W.2d 186

Filed March 3, 2000. No. S-97-1301.

1. **Contempt: Judgments: Final Orders: Appeal and Error.** An appellate court, reviewing a final judgment or order in a contempt proceeding, reviews for errors appearing on the record. When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. A trial court's factual finding in a contempt proceeding will be upheld on appeal unless the finding is clearly erroneous.
2. **Appeal and Error.** Appellate review of a district court's use of inherent power is for an abuse of discretion.
3. **Contempt.** Insolent, insulting, or notorious language directed at the court constitutes grounds for a finding of contempt.
4. ___. Direct contempt occurs in the presence of the court, so that the court has personal knowledge of the facts and has no need to inform itself of them by using witnesses or other evidence. Direct contempt may be punished summarily.
5. **Contempt: Courts.** The power to punish for contempt is incident to every judicial tribune, derived from its very constitution, without any expressed statutory aid and inherent in all courts of record.
6. ___: ___. The court's inherent authority to punish contempt is not circumscribed by statute.
7. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and HANNON and SIEVERS, Judges, on appeal thereto from the District Court for Lancaster County, STEVEN D. BURNS, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Billy Roy Tyler, pro se.

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

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

PER CURIAM.

FACTUAL BACKGROUND

On September 17, 1997, Billy Roy Tyler (appellant) filed an action in the district court for Lancaster County, naming as defendants various State officials (the defendants). Appellant was granted leave to proceed in forma pauperis. His handwritten claim asserts the following:

> NeB Rev Stats [sic] 83-4114 says that 15 out of 45 days . . . respite is mandated but under practices Policies of Respondents (acting in concert and under color of state law) relator Has been Held continually in solitary confinement for 400 days or so. As complained of in 557-119 Relator Has Received ALmost 1,000 days disciplinary segregation in the "Hole." Relator invokes the jurisdiction of this Court pursuant to NeB Rev Stats §§ 25-101, 83-4,111, 83-4,114 et seq., Art I §§ 1 thru 25 the 5th, 8th, 13th & 14th Amendments to [the] US Constitution and Requests (1) a declaration that His 400 day confinement in Hole as is said violates relator's legal & constitutional rights (2) a injunction against further violations of 83-4,114 as well as a order immediately Removing Relator from Hole for said aggregate 15 days Respite as suBtracted from 400 days (3) $50,000,000 punitive and compensatory damages as well as whatever else the court deems just and meet in the Premises.

The defendants filed a motion to make more definite and certain, asserting that "the Petitioner's Petition [is] so vague and ambiguous that they cannot reasonably frame a responsive pleading." The district court conducted a telephonic hearing with the parties regarding this motion on November 25, 1997. The substance of this hearing was as follows:

> [Appellant's attorney]: Mr. Tyler has filed this as a civil action, but has not delineated further what action it is. He has not made a definite statement in relation to whether it might be a civil rights action, a declaratory judgment action, a mandamus. Because it makes a big difference in qualified immunity how the people — individuals should be served. A variety of issues are raised, depending upon which type of action this is. And also it's very vague as to what each one of the defendants did that brought them into this action.
>
> And we're asking for a more definite statement in relation to the action or inaction of each defendant that would have brought them into this action.
>
> THE COURT: All right. Mr. Tyler.
>
> PETITIONER TYLER: She can tell from reading the lawsuit. If you read it — Have you read it?
>
> THE COURT: Yes, sir, I have.
>
> PETITIONER TYLER: Can you tell what I'm talking about?
>
> THE COURT: That's the issue we're going to decide.
>
> PETITIONER TYLER: I'm asking you, you're the judge. Are you able to ascertain what it is or is it so vague you just don't have a clue?
>
> THE COURT: Do you have an argument to be made, Mr. Tyler?
>
> PETITIONER TYLER: No. Fuck you, mother fucker.
>
> THE COURT: Mr. Tyler, you're in contempt of court.
>
> PETITIONER TYLER: Fuck you, mother fucker, —
>
> THE COURT: This hearing is at a conclusion.
>
> PETITIONER TYLER: — fuck you —

On November 25, 1997, after the hearing had been concluded, the court made a minute entry stating that "[b]ased on

plaintiff's contemptuous conduct during this hearing, this case is dismissed."

Appellant then appealed the dismissal of his case, asserting that the "Trial Court Erred in denying Relator Plenary Review and erred In dismissing Appellant's case upon demurrer." The Nebraska Court of Appeals found that the case had not been dismissed on a demurrer, but on the district court's own motion, as a sanction for appellant's direct act of contempt upon the court. *Tyler v. Heywood*, 8 Neb. App. 553, 598 N.W.2d 73 (1999). The Court of Appeals further determined that the district court lacked the authority to dismiss a case upon its own motion for contempt because Neb. Rev. Stat. § 25-601 (Reissue 1995) does not list contempt as one of the grounds available for dismissal upon the court's own motion. The Court of Appeals then reversed the order of dismissal and remanded the cause for further proceedings. The State petitioned for further review, which we granted.

ASSIGNMENTS OF ERROR

In its petition for further review, the State asserts that the Court of Appeals erred in determining that the district court improperly dismissed appellant's suit as a sanction for his direct contempt.

STANDARD OF REVIEW

[1] An appellate court, reviewing a final judgment or order in a contempt proceeding, reviews for errors appearing on the record. When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. A trial court's factual finding in a contempt proceeding will be upheld on appeal unless the finding is clearly erroneous. *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997).

[2] Appellate review of a district court's use of inherent power is for an abuse of discretion. *Schindler v. Walker*, 256 Neb. 767, 592 N.W.2d 912 (1999).

ANALYSIS

[3] We first consider whether the district court correctly found that appellant's actions constituted contempt. It is a long-

standing rule that insolent, insulting, or notorious language directed at the court constitutes grounds for a finding of contempt. *In re Dunn*, 85 Neb. 606, 124 N.W. 120 (1909). Appellant's language here obviously fits within that definition. We also note that this is not a case where appellant uttered an unreflective expletive in open court due to the pressures of the moment, or where appellant and the court were engaged in an argumentative colloquy being fed by both sides. See *Connell v. State*, 80 Neb. 296, 114 N.W. 294 (1907), *overruled on other grounds, State, ex rel. Wright v. Barlow*, 132 Neb. 166, 271 N.W 282 (1937). Instead, we have here an unprovoked stream of obscenities in open court, directed toward the court during a hearing, "calculated . . . to lessen respect in the authority, dignity, and integrity of courts generally, and particularly the court toward which [the language] was directed." See *McFarland v. State*, 172 Neb. 251, 261, 109 N.W.2d 397, 404 (1961).

[4] Appellant's conduct was an act of direct contempt. Direct contempt occurs in the presence of the court, so that the court has personal knowledge of the facts and has no need to inform itself of them by using witnesses or other evidence. *In re Contempt of Potter*, 207 Neb. 769, 301 N.W.2d 560 (1981). Direct contempt may be punished summarily. *Id.* Indirect contempt, in contrast, occurs outside the presence of the court and requires "some notice of the facts allegedly constituting the contempt and a hearing or opportunity to be heard." *Id.* at 773, 301 N.W.2d 563.

In a concurring opinion in *Tyler v. Heywood*, 8 Neb. App. 553, 598 N.W.2d 73 (1999), a concern is raised about the sufficiency of the district court's order, citing *Gonzalez v. State*, 119 Neb. 13, 226 N.W. 801 (1929), and *Tastee Inn, Inc. v. Beatrice Foods Co., Inc.*, 167 Neb. 264, 92 N.W.2d 664 (1958). However, unlike the present case, the records in *Gonzalez, supra*, and *Tastee Inn, Inc., supra*, did not adequately set out the allegedly contemptuous conduct. In this case, the bill of exceptions, as quoted above, adequately identifies the behavior occurring in the presence of the court upon which appellant was found in contempt.

After the court informed appellant that he was in contempt, appellant's use of obscenities continued. The court then appropriately ended the hearing, at which time appellant used still

more obscenities. As we first noted in *Ferson v. Armour & Co.*, 109 Neb. 648, 651, 192 N.W. 125, 127 (1923), "A court is not a mere instrument of litigants for the settlement of private controversies. It is a separate department of government. Out of its findings and judgments . . . grow rules of conduct applicable to society as a whole." We determine that the district court was not clearly erroneous in finding that appellant's language during the hearing constituted contempt. *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997); *In re Dunn, supra.*

[5] We next turn to the issue of whether the district court possessed the authority to dismiss appellant's case as a sanction for his contempt. It is a longstanding and well-established rule in this State that "[t]he power to punish for contempt is incident to every judicial tribune, derived from its very constitution, without any expressed statutory aid [and] inherent in all courts of record." *Kregel v. Bartling*, 23 Neb. 848, 352, 37 N.W. 668, 670 (1888). See, also, *In re Interest of Krystal P. et al.*, 251 Neb. 320, 557 N.W.2d 26 (1996); *In re Contempt of Potter*, 207 Neb. 769, 301 N.W.2d 560 (1981); *Bahm v. Raikes*, 200 Neb. 195, 263 N.W.2d 437 (1978); *Paasch v. Brown*, 199 Neb. 683, 260 N.W.2d 612 (1977); *State ex rel. Beck v. Frontier Airlines, Inc.*, 174 Neb. 172, 116 N.W.2d 281 (1962); *Butterfield v. State*, 144 Neb. 388, 13 N.W.2d 572 (1944); *In re Dunn*, 85 Neb. 606, 124 N.W. 120 (1909); *Nebraska Children's Home Society v. State*, 57 Neb. 765, 78 N.W. 267 (1899). Accordingly, Neb. Rev. Stat. § 25-2121 (Reissue 1995), which grants courts the power to punish contempt by "fine and imprisonment," does not limit the court's inherent authority to impose sanctions in addition to what is listed in § 25-2121. *In re Interest of Krystal P. et al., supra.*

[6] The Court of Appeals reasoned that the district court lacked authority under § 25-601 to dismiss appellant's case. Section 25-601 states:

> An action may be dismissed without prejudice to a future action . . . by the court where the plaintiff fails to appear at the trial . . . for want of necessary parties . . . on the application of some of the defendants where there are others whom the plaintiff fails to diligently prosecute [and]

> for disobedience by the plaintiff of an order concerning the proceedings in the action.

However, in *In re Interest of Krystal P. et al.*, we expressly held that the court's inherent authority to punish contempt is not circumscribed by statute. See, also, *In re Contempt of Potter, supra.* As we have already stated, the court's contempt powers are inherent and not derived from or circumscribed by statute. *Id.*

In *Pressey v. State*, 173 Neb. 652, 114 N.W.2d 518 (1962), we noted that dismissing an action is one of the more coercive measures available to the court and as such, should be used sparingly. However, we also noted that "[i]t should be equally evident that it is necessary on occasions for courts to resort to such action in the interest of the orderly administration of justice." *Id.* at 657, 114 N.W.2d at 522.

[7] Having determined that the court possesses the inherent authority to dismiss a case for direct contempt, the remaining question is whether the district court abused its discretion in doing so. "A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition." *Parde v. Parde, ante* p. 101, 106, 602 N.W.2d 657, 661 (1999), citing *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997).

Given the facts of this case, we conclude that the district court's dismissal of appellant's case as a sanction for direct contempt was not clearly untenable. It is undeniable that appellant's language was contemptuous. Even after appellant was told that he was in contempt, he continued to use contemptuous language. Additionally, as noted by the dissenting judge in *Tyler v. Heywood*, 8 Neb. App. 553, 598 N.W.2d 73 (1999), the imposition of a fine or incarceration would not be meaningful, given that the record shows appellant is indigent and already incarcerated.

CONCLUSION

The decision of the Court of Appeals is reversed, and the cause is remanded to the Court of Appeals with directions to reinstate the district court's order of dismissal.

REVERSED AND REMANDED WITH DIRECTIONS.

LYMAN-RICHEY CORPORATION, A NEBRASKA CORPORATION, APPELLANT, V. NEBRASKA DEPARTMENT OF REVENUE ET AL., APPELLEES.

606 N.W.2d 813

Filed March 3, 2000. No. S-98-991.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. ___: ___. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
3. **Taxation: Motor Vehicles.** When a concrete mixer is attached to a truck chassis, it forms an integrated unit, and that unit is a motor vehicle under the Employment and Investment Growth Act.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Affirmed.

Nicholas K. Niemann, of McGrath, North, Mullin & Kratz, P.C., for appellant.

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

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

MCCORMACK, J.

NATURE OF CASE

This is an action involving a denial by the Nebraska Department of Revenue (the Department) of a sales and use tax refund claim against the Department; M. Berri Balka, Nebraska Tax Commissioner; and the State of Nebraska. Lyman-Richey Corporation appeals from the order of the district court for Lancaster County upholding the Department's denial of the refund claim. On our own motion, we removed the matter to this court pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals.

BACKGROUND

Lyman-Richey is a Nebraska corporation engaged in the business of processing, transporting, distributing, and selling various

products, primarily concrete. All of the concrete manufacturing by Lyman-Richey occurs either fully or partially in concrete mixers that are attached to truck chassis. On March 29, 1990, Lyman-Richey submitted an application to the Department for a project under the Employment and Investment Growth Act (the Act), Neb. Rev. Stat. §§ 77-4101 to 77-4112 (Cum. Supp. 1988). Under the Act, if a taxpayer agrees to undertake a project that will result in a minimum investment of $3,000,000 and the creation of 30 new jobs in Nebraska, the taxpayer is eligible to receive certain tax incentives provided under the Act. §§ 77-4104(3) and 77-4105. One such incentive is a refund of all sales and use taxes paid on all purchases of "qualified property" used as a part of the project. § 77-4105(3). Lyman-Richey's application proposed a project related to the "general expansion of [Lyman-Richey's] employment base and various plant and office additions."

Lyman-Richey's application was approved, and the Department and Lyman-Richey entered into an agreement under the Act. See § 77-4104(3) and (4).

Subsequently, Lyman-Richey filed a "Claim for Overpayment of Sales and Use Tax," requesting a refund of sales or use taxes paid on concrete mixers purchased by Lyman-Richey between April and July 1992. Lyman-Richey asserted that the concrete mixers were "qualified property" under what was then § 77-4103(12), now codified at § 77-4103(13) (Supp. 1999), and that as an entity eligible to receive tax benefits under the Act, it was entitled to a refund of sales or use tax paid on its purchase of the mixers. The total amount of the claim was $19,293. Lyman-Richey explained in its claim that it had acquired the concrete mixers from a mixer manufacturer and the truck chassis from a truck manufacturer. The mixer manufacturer mounts the mixers to the trucks and then delivers the trucks and the mixers to Lyman-Richey.

The Department denied Lyman-Richey's refund claim. The Department found that the concrete mixers were not "qualified property" as was defined in § 77-4103(12). The Department determined that processing equipment is not defined to be qualified property under the Act and that while much processing equipment meets the criteria for qualified property, a determina-

tion that a machine is processing equipment does not mean that it is also qualified property. The Department also found that "[w]hether purchased separately or as one unit, the concrete mixers are, and have to be, a part of the motor vehicle when they are operating. The entire unit is required to be licensed when operated on the highways."

Lyman-Richey appealed the Department's denial to the district court for Lancaster County. The district court found that the Department had not made a finding in accordance with § 77-4103(12), which required that qualified property be "located and used at the project." The district court remanded the case to the Department to resolve the relevance of this language with regard to Lyman-Richey's concrete mixers.

On remand, the Department found that the concrete mixers were " 'located and used at the project' " in accordance with § 77-4103(12). The Department reaffirmed its original basis for denying Lyman-Richey's refund claim.

Lyman-Richey subsequently filed a new petition, appealing the Department's denial of the refund claim. The parties agreed that the only issue to be determined by the district court was whether the concrete mixers at issue, each of which was attached to a truck chassis, constituted "qualified property" under § 77-4103(12), or whether they constituted "motor vehicles" excluded from the definition of "qualified property." The district court affirmed the denial of Lyman-Richey's requested refund, concluding as follows:

> I am persuaded by the evidence before me that the mixers [Lyman-Richey] bought must be attached to the trucks to work. They are specifically designed this way. The mixers are of no use to [Lyman-Richey] without the trucks and the trucks are of no use to [Lyman-Richey] without the mixers. [Lyman-Richey] bought the trucks and the mixers to function as a unit and that is what they do. The fact that [Lyman-Richey] chose to buy them from separate manufacturers is of no consequence to this fact and has no bearing on whether what [Lyman-Richey] got from its purchases was a motor vehicle as defined by the Act.
>
> In essence [Lyman-Richey] asks that I define motor vehicles to exclude mobile machinery and equipment. I

> cannot help but note, however, that the Act provides a specific definition of motor vehicles and I cannot rewrite that definition. If the Legislature had wanted to provide a tax break on mobile machinery and equipment such as cement mixers, it could have done so. It didn't and I can't.

Lyman-Richey appeals from the district court's decision.

ASSIGNMENTS OF ERROR

Lyman-Richey assigns that the district court erred in concluding (1) that because a "unit" is created by the bolting together of a truck (motor vehicle) and a concrete mixer (nonmotor vehicle), the unit is to be treated as a motor vehicle; (2) that the concrete mixers were subject to licensing for operation on the highways; and (3) that mobile machinery and equipment does not qualify for the Act's sales and use tax refund.

SCOPE OF REVIEW

[1] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Ferguson v. Union Pacific RR. Co., ante* p. 78, 601 N.W.2d 907 (1999).

ANALYSIS

The Act provides sales and use tax benefits on "qualified property" used as part of a project approved by the State. See § 77-4105(3). "Qualified property" is defined under the Act as

> any tangible property of a type subject to depreciation, amortization, or other recovery under the Internal Revenue Code of 1986, or the components of such property, that will be located and used at the project. Qualified property shall not include (a) aircraft, barges, motor vehicles, railroad rolling stock, or watercraft or (b) property that is rented by the taxpayer qualifying under the Employment and Investment Growth Act to another person.

§ 77-4103(12).

The Act defines a motor vehicle as "any motor vehicle, trailer, or semitrailer as defined in section 60-301 and subject to licens-

ing for operation on the highways." § 77-4103(8). Neb. Rev. Stat. § 60-301(16) (Cum. Supp. 1992) defines "motor vehicle" as

> any vehicle propelled by any power other than muscular power, except (a) mopeds, (b) farm tractors, (c) self-propelled equipment designed and used exclusively to carry and apply fertilizer, chemicals, or related products to agricultural soil and crops and other implements of husbandry designed for and used primarily for tilling the soil and harvesting crops or feeding livestock, (d) power unit hay grinders or a combination which includes a power unit and a hay grinder when operated without cargo, (e) vehicles which run only on rails or tracks, (f) off-road designed vehicles, including, but not limited to, golf carts, go-carts, riding lawnmowers, garden tractors, all-terrain vehicles as defined in section 60-2801, snowmobiles, and minibikes, and (g) road and general-purpose construction and maintenance machinery not designed or used primarily for the transportation of persons or property, including, but not limited to, ditchdigging apparatus, asphalt spreaders, bucket loaders, leveling graders, earthmoving carryalls, power shovels, earthmoving equipment, crawler tractors, and self-propelled invalid chairs.

The parties agreed the only issue in this case was whether the mixers when attached to truck chassis constituted "qualified property" under § 77-4103(12), or whether they constituted "motor vehicles" which were excluded from the definition of "qualified property." Lyman-Richey argues that a mixer is a separate, independent piece of manufacturing equipment and that it does not become a motor vehicle when attached to a truck chassis. The Department contends that when a mixer is attached to the truck chassis, it forms an integrated unit and that unit is a motor vehicle.

[2] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Ferguson v. Union Pacific RR. Co., supra.* In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not

resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Id.*

[3] The parties do not dispute that a truck chassis on its own is a motor vehicle. The question we are faced with is whether a mixer, when attached to a truck chassis, is a motor vehicle excluded from the definition of "qualified property" under the Act. We answer in the affirmative. When a mixer is attached to a truck chassis, it forms an integrated unit, and that unit is a motor vehicle. The mixer is powered by the truck chassis, a motor vehicle. It cannot function and is of no use to Lyman-Richey if it is not attached to the truck chassis. Counsel for Lyman-Richey conceded at oral argument that Lyman-Richey does not use a mixer without a truck chassis; a mixer is used only symbiotically with a truck chassis. When the mixer is attached to the truck chassis, it is dependent on the truck to operate, and therefore, the mixer and the truck form an integrated unit. Lyman-Richey bought the mixers and trucks to function as a unit, and that is what they do. It makes no difference that Lyman-Richey bought the mixers and the truck chassis from different manufacturers. The fact remains that the mixers must be attached to the truck chassis in order to manufacture concrete. Therefore, a unit is created when a mixer is attached to a truck chassis, and that unit is a motor vehicle.

In order for the unit to be a motor vehicle under the Act, two requirements must be met. First, the unit must be a motor vehicle as defined in § 60-301. See § 77-4103(8). Section 60-301 defines a motor vehicle as "any vehicle propelled by any power other than muscular power." The unit created when a mixer is attached to a truck chassis falls under this definition. Second, it must be subject to licensing for operation on the highways. See § 77-4103(8). Neb. Rev. Stat. § 60-331 (Reissue 1988) provides:

> The registration fee on commercial trucks . . . shall be based upon the gross vehicle weight . . . . Gross vehicle weight shall mean the sum of the empty weights of a truck or truck-tractor and the empty weights of any trailer, semi-trailer, or combination thereof with which it is to be operated in combination at any one time, plus the weight of the maximum load to be carried thereon at any one time.

In registering the truck with the mixer attached, the registration fee is based on the weight of the truck chassis, the mixer, and the load to be carried in the mixer. Therefore, since the weight of the mixer and its load is included in determining the truck's registration fee, the whole unit is subject to licensing for operation on the highways. The unit created when the mixer is attached to the truck meets the definition of a motor vehicle under the Act.

CONCLUSION

When a concrete mixer is attached to a truck chassis, an integrated unit is created, and that unit is a motor vehicle excluded from the definition of "qualified property" under the Act. Lyman-Richey was not entitled to a refund on sales and use taxes paid on the mixers.

AFFIRMED.

STEPHAN, J., not participating.

IN RE INTEREST OF LISA W. & SAMANTHA W., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MARK W. AND PATRICIA W., APPELLANTS.

606 N.W.2d 804

Filed March 3, 2000. No. S-99-038.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the juvenile court's findings; however, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Parental Rights: Proof.** Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests.
3. **Constitutional Law: Appeal and Error.** Generally, an appellate court will not consider a constitutional question on appeal that was not raised and properly presented for disposition by the trial court.
4. **Statutes: Constitutional Law.** A litigant who invokes the provisions of a statute may not challenge a statute's constitutionality as applied to that litigant in the same action during which the statute's protection is invoked.
5. **Parental Rights.** When poor housekeeping degenerates into a continuing health hazard, the best interests of the children require termination of parental rights.

6. ___. A child cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.
7. **Parental Rights: Proof.** Only one ground for termination need be proved in order for parental rights to be terminated.

Appeal from the Separate Juvenile Court of Douglas County: JOHN J. MCGRATH, Judge. Judgment of termination affirmed.

Ann C. Mangiameli and Laura Hilliard, of Legal Aid Society, Inc., for appellants.

James S. Jansen, Douglas County Attorney, and Karen S. Kassebaum for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Mark W. and Patricia W. are the natural parents (collectively the parents) of Lisa W. and Samantha W. (collectively both children). The parents appeal from the December 31, 1998, order of the separate juvenile court of Douglas County which terminated their parental rights to both children pursuant to Neb. Rev. Stat. § 43-292(2), (6), and (7) (Reissue 1998), and continued the custody of both children with the Nebraska Department of Health and Human Services. Although the juvenile court erred in terminating the parents' parental rights as to Samantha under § 43-292(6) and (7), we nevertheless conclude that there is clear and convincing evidence which supports termination of parental rights as to both children under § 43-292(2) and therefore affirm the order of the juvenile court terminating the parents' parental right to both children.

STATEMENT OF FACTS

Lisa was born on January 22, 1996. On March 22, Lisa was removed from the parents' home and placed in protective custody with the Nebraska Department of Social Services, now known as the Department of Health and Human Services (hereinafter DHHS), by the Omaha Police Division due to an unsafe and unsanitary home environment. She has been in foster care

continuously since March 24, 1996. At the adjudication hearing, the parents admitted that on March 22, Lisa was "in an unwholesome manner to include caked dirt on the child's feet and ears; matted hair; long, dirty fingernails; and a bad diaper rash on the child's bottom," and the juvenile court concluded that Lisa was a child as described in Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993), being under the age of 18 years and lacking proper parental care by reason of the faults or habits of her parents.

On June 26, 1996, the juvenile court implemented its first rehabilitative plan with the expressed goal of reunifying the family. Five additional court-ordered rehabilitative plans were implemented between February 1997 and September 1998. These plans generally contained the following provisions and objectives:

Plan 1—June 26, 1997—required the parents to (1) obtain and maintain stable, adequate, independent, and sanitary housing for themselves and Lisa; (2) undergo psychological evaluations; (3) cooperate with the family support worker and with all professionals involved to learn basic housekeeping techniques and parenting training; (4) maintain a legal source of income to provide for themselves and Lisa; (5) maintain supervised visitation with Lisa of not less than 3 hours, two times per week, and not more than 4 hours, three times per week; (6) immediately inform their attorney, DHHS, and the juvenile court of any change in address or telephone number; and (7) be informed of Lisa's medical appointments so that they could attend the same.

Subsequent plans continued to contain essentially the same provisions, with the following additional terms:

Plan 2—February 12, 1997—required the parents to (8) continue individual therapy.

Plan 3—August 15, 1997—required the parents to (9) undergo psychiatric evaluations as arranged by DHHS.

Plan 4—November 7, 1997—required the parents to (10) continue individual therapy to address issues of anger control for Mark and the reduction of depressive symptoms and the development of appropriate emotional expression for Patricia.

Plan 5—December 15, 1997—required the parents to (11) participate in "in-house" therapy.

Plan 6—September 15, 1998—was essentially unchanged from the prior plans.

Throughout the juvenile court proceedings, DHHS supplied the parents with a wide variety of support and services. The parents were provided with a family support worker to address housekeeping and parenting skills. This support worker also assisted in referrals to low-income housing and employment. The parents were provided the services of visitation specialists, as well as bus tickets to aid in transportation. The parents both received in-office and in-home therapy. Patricia was provided vocational rehabilitation services.

During the pendency of the juvenile court proceedings, the parents were afforded three visits and one family support session per week. From the end of September 1997 to January 1998, the visits took place in the parents' home. Following numerous reports in January 1998 that the home was unsafe for Lisa due to filthy conditions and a cockroach infestation, in which it was reported that cockroaches were "literally cascad[ing] out" of cupboards, the visits took place in a neutral setting.

Samantha was born on July 21, 1998. Immediately after her birth, DHHS provided the parents with 2 weeks of "crisis intervention," which consisted of a specialist visiting in the parents' home for several hours each day. The specialist worked one-on-one with the parents on infant care issues. Despite this assistance, however, on August 14, the State filed a supplemental petition alleging Samantha was a child within the meaning of § 43-247(3)(a) (Reissue 1998), lacking proper parental care by reason of the faults of her parents. On the same date, following a motion by DHHS, the juvenile court entered an order directing DHHS to take Samantha into immediate custody.

On September 24, 1998, the State filed its amended supplemental petition, seeking, inter alia, the termination of the parents' parental rights with respect to both children. The amended supplemental petition sought termination as to Lisa based upon § 43-292(2), neglect of the child or a sibling; § 43-292(6), failure to follow rehabilitative plans and correct conditions leading to adjudication; and § 43-292(7), out-of-home placement for 15

of the most recent 22 months. Termination of parental rights was sought as to Samantha pursuant to § 43-292(2).

A termination hearing was held on December 2, 1998, and continued on December 10. Ten witnesses testified, and numerous exhibits were received. On December 31, the juvenile court ordered the termination of parental rights of the parents as to both children, pursuant to § 43-292(2), (6), and (7). The parents timely appealed.

ASSIGNMENTS OF ERROR

The parents allege, restated, that the juvenile court erred (1) in its retroactive application of certain 1998 amendments to the juvenile code found in Neb. Rev. Stat. § 43-283.01 (Reissue 1998) and § 43-292, which application violated their due process rights guaranteed under the 5th and 14th Amendments to the U.S. Constitution and article I of the Nebraska Constitution; (2) in its determination that the State did not fail to make reasonable efforts to reunite Samantha with the parents, in accordance with the provisions of § 43-283.01, and that there was no violation of the parents' due process and equal protection rights guaranteed under the 5th and 14th Amendments to the U.S. Constitution; (3) in its termination of the parents' parental rights to Samantha under § 43-292(6) and (7) because the State did not allege those provisions as grounds for termination in the amended supplemental petition; (4) in its determination that the State proved by clear and convincing evidence that reasonable efforts failed to correct the conditions leading to adjudication under § 43-292(6) and (7) and that termination of the parents' parental rights is in the best interests of both children; and (5) in its determination that the State proved by clear and convincing evidence that the parents substantially and continuously neglected both children and refused to give both children necessary parental care and protection in accordance with § 43-292(2).

STANDARDS OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the juvenile court's findings; however, when the evidence is in

conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Clifford M. et al., ante* p. 800, 606 N.W.2d 743 (2000); *In re Interest of Sarah K., ante* p. 52, 601 N.W.2d 780 (1999).

[2] Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests. *In re Interest of Natasha H. & Sierra H., ante* p. 131, 602 N.W.2d 439 (1999).

ANALYSIS

Retroactive Application.

The parents claim that their due process rights were violated by the retroactive application of §§ 43-292 and 43-283.01 as amended. This assignment of error is without merit.

Operative July 1, 1998, certain portions of the Nebraska Juvenile Code were amended. In particular, § 43-283.01 was added to the code, and it provided, inter alia, as follows:

> (2) Except as provided in subsection (4) of this section, reasonable efforts shall be made to preserve and reunify families prior to the placement of a juvenile in foster care to prevent or eliminate the need for removing the juvenile from the juvenile's home and to make it possible for a juvenile to safely return to the juvenile's home.
>
> . . . .
>
> (4) Reasonable efforts to preserve and reunify the family are not required if a court of competent jurisdiction has determined that:
>
> . . . .
>
> (c) The parental rights of the parent to a sibling of the juvenile have been terminated involuntarily.

Section 43-292 was also amended. Prior to July 1, 1998, § 43-292(2) had provided for termination of parental rights if the parents "have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection." § 43-292(2) (Cum. Supp. 1996). Operative July 1, § 43-292(2) provided for termination if the parents "have substantially and continuously or repeatedly

neglected and refused to give the juvenile *or a sibling of the juvenile* necessary parental care and protection." (Emphasis supplied.) § 43-292(2) (Reissue 1998). Prior to July 1, § 43-292(7) had provided for termination based on out-of-home placement for 18 months or more and failure to correct conditions leading to the out-of-home placement. § 43-292(7) (Cum. Supp. 1996). Operative July 1, § 43-292(7) was amended to permit termination of parental rights if "[t]he juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months." § 43-292(7) (Reissue 1998).

By virtue of the State's allegations in its amended supplemental petition filed on September 24, 1998, the parents were notified that the State was seeking the termination of their parental rights as to both children under the amended code and in particular under § 43-292 as amended in 1998 and, consequently, that if termination were successful, reunification efforts would cease. Although the parents had notice that the State was proceeding under the amended version of the code, the parents did not raise a constitutional or other objection to proceedings under the amended code generally or § 43-292 as amended in particular either before or during the termination proceedings.

[3] Generally, an appellate court will not consider a constitutional question on appeal that was not raised and properly presented for disposition by the trial court. *In re Interest of Rachael M. & Sherry M., ante* p. 250, 603 N.W.2d 10 (1999); *In re Interest of Kassara M., ante* p. 90, 601 N.W.2d 917 (1999). This is because a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *In re Interest of Kassara M., supra.* We have also recently stated that "[f]ailure to make a timely objection waives the right to assert prejudicial error on appeal." *Id.* at 94, 601 N.W.2d at 922. Accordingly, we do not address the parents' constitutional challenge presented for the first time on appeal concerning the retroactivity of the 1998 amendments to §§ 43-283.01 and 43-292.

Reasonable Efforts at Reunification.

[4] The parents complain that the State failed to prove that it had provided them with adequate services and used reasonable efforts to reunite Samantha with them, as required under the

provisions of § 43-283.01. On appeal, the parents also attack the constitutionality of § 43-283.01. The record shows that the parents sought to invoke the benefits of the provisions of § 43-283.01 by availing themselves of a variety of social services and demanding additional social services and that on appeal, they both complained about the adequacy of the services and attacked the constitutionality of the statute pursuant to which those services were provided. We have held that a litigant who invokes the provisions of a statute may not challenge a statute's constitutionality as applied to that litigant in the same action during which the statute's protection is invoked. *State ex rel. Bellino v. Moore*, 254 Neb. 385, 576 N.W.2d 793 (1998); *State ex rel. Sileven v. Spire*, 243 Neb. 451, 500 N.W.2d 179 (1993). This assignment of error is, therefore, without merit.

Termination of Parental Rights Under § 43-292(2).

The parents assign as error a lack of clear and convincing evidence to terminate their parental rights as to both children under § 43-292(2). We conclude that the evidence was sufficient and that termination of the parents' parental rights under § 43-292(2) was in the best interests of both children.

In order to terminate parental rights with respect to a child on the basis of neglect under § 43-292(2), as amended, the State must prove by clear and convincing evidence that (1) the parents have substantially and continuously or repeatedly neglected and refused to give the child or a sibling of said child necessary parental care and protection and (2) termination of parental rights is in the best interests of the child. See, generally, *In re Interest of Natasha H. & Sierra H., ante* p. 131, 602 N.W.2d 439 (1999); *In re Interest of Kassara M., ante* p. 90, 601 N.W.2d 917 (1999); *In re Interest of J.H.*, 242 Neb. 906, 497 N.W.2d 346 (1993). "Clear and convincing evidence" means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Interest of Kalie W., ante* p. 46, 601 N.W.2d 753 (1999).

Based upon our de novo review of the evidence, summarized in part below, we conclude that the record before us shows by clear and convincing evidence that the parents have substantially and continuously or repeatedly neglected and refused to give both children, siblings of one another, necessary parental care

and protection and that termination of parental rights as to both children is in the best interests of both children.

The record of the termination hearing consists of over 230 pages of testimony and 16 exhibits. The State called various witnesses who worked with the parents, including Child Protective Services workers, family support workers, and family therapists. These witnesses universally described the parents' unkempt household, lack of parenting skills, and failure to understand the basic needs of both children despite efforts to educate the parents regarding parenting skills.

Among the witnesses who testified was Harry DiLise, the first Child Protective Services worker assigned to the case. DiLise testified that despite DHHS-provided family support workers who attempted to help the parents with housekeeping, budgeting, and hands-on parenting skills, the parents made little progress from one review period to the next, allowing the condition of the home to continue to be unsanitary, failing to maintain a budget, and requiring a great deal of direction and supervision with Lisa during visits. DiLise felt that the parents could not provide adequate parenting without prompting.

Darin Nelson, another Child Protective Services worker assigned to the case, also testified that the parents' home was very unclean, that the parents missed numerous visitations with Lisa, and that the safety of both children would be jeopardized if they were placed with the parents.

Kay McMahon, a therapist-counselor assigned to the case, provided family counseling to the parents. She noted there was little emotional or physical interaction between Patricia and Lisa and that Lisa did not want to visit the parents and would be upset after visits. McMahon testified that during the 7 months she worked with the parents, "[t]hey were no more able to [parent] at the end of the seven months than at the beginning . . . ." She concluded that the parents did not possess the skills necessary to independently care for a child.

Sue Johnson, a family support worker, also testified. Johnson provided step-by-step demonstrations to the parents concerning how housekeeping tasks should be performed. She also created chore lists and schedules. Despite this assistance, Johnson testified that during her time working with the parents, the condition

of the home "deteriorated immensely." She further testified that in addition to the unkempt condition, there were safety concerns, with tools, knives, and cigarette lighters left out where Lisa could reach them. Johnson reported that despite her efforts to work with the parents on a household budget, they would spend their money on unnecessary personal items, such as cellular telephones and a pager. Johnson also provided the 14-day "crisis intervention" when Samantha was born, and she testified that despite daily, ongoing assistance, the parents were not able to retain parenting skills that were taught to them or independently handle their parenting responsibilities. It was at the end of this "crisis intervention" period that Samantha was placed in foster care.

Finally, therapists Jack Dunn and Ann Pearson testified. Dunn provided individual and family therapy to the parents. Dunn testified that as a result of events in Mark's childhood involving abuse and neglect, Mark had had little opportunity to be treated as a child, which concerned Dunn about Mark's ability to relate to his own children. Dunn further testified that as a result of abuse which Patricia had suffered as a child, Patricia "has very little emotional energy available for anyone else at this time." In visits Dunn had with Patricia when Lisa was present, Dunn witnessed essentially no connection between Lisa and Patricia. In Dunn's opinion, it was not possible for Patricia, in her current condition, to parent Lisa.

Pearson conducted a parenting assessment of the parents in June 1998, the goal of which was to assist the family with reunification. As part of the assessment, the parents were asked to complete certain assignments concerning basic nutrition and safety issues, which they failed to do. In Pearson's opinion, the parents seemed to have no emotional involvement in the parenting process and did not understand the importance of what was being asked of them. Pearson testified that at the time of her visit, the home was so cluttered, she recommended that an assessment be conducted to address safety concerns she had regarding the home. Pearson also observed that Lisa had no connection with her parents and that the parents had done nothing to prepare the household for the arrival of a newborn baby. She

testified that "at best," the parents had a minimal knowledge of parenting.

We note that the parents both testified as to their efforts at keeping the house clean. Also testifying on behalf of the parents was Cindy Heinsen, a friend of the parents, who claimed she visited them three or four times a week and the home was always clean. In its order terminating parental rights, the juvenile court questioned the credibility of this testimony given the amount of evidence to the contrary. On appeal, we give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Clifford M. et al., ante* p. 800, 606 N.W.2d 743 (2000); *In re Interest of Sarah K., ante* p. 52, 601 N.W.2d 780 (1999).

Based upon the foregoing evidence, we conclude that the record clearly and convincingly shows that the parents have neglected both children as contemplated by § 43-292(2). The record amply demonstrates that the parents have either ignored or been unable to apply the parenting skills to which they have been introduced by the professionals working with them. Several witnesses testified that the parents simply do not possess the necessary parenting skills nor have they learned the necessary skills to adequately care for both children, despite the provisions of DHHS designed to teach parenting. The record supports the conclusion that the parents have failed to bond with Lisa. The record clearly and convincingly demonstrates the parents' unwillingness or inability to put themselves in a position to provide the necessary care and protection which both children need and deserve. Further evidence of neglect is the parents' failure to complete simple tasks assigned to assist in a parenting assessment designed to reunify the family. Additionally, parental neglect is shown because there is no evidence that the parents have economically contributed to the maintenance of both children and that despite assistance provided by DHHS, the parents remain unable to prepare a household budget, but willingly spend funds on items of questionable necessity.

[5] Considerable evidence was devoted to the unsanitary condition of the parents' household. In this regard, we recognize that "poor housekeeping, alone, is not a sufficient basis for terminating parental rights." *In re Interest of E.R., J.R., and A.R.,*

230 Neb. 646, 651, 432 N.W.2d 834, 838 (1988). However, as we have previously noted, when " 'poor housekeeping' degenerates into a continuing health hazard, the best interests of the children require termination of parental rights." *Id.* Parental neglect is amply demonstrated when, as in the instant case, despite abundant assistance, the parents fail to maintain a clean, safe, and healthy household. The parents' lack of skills to effectively care for their home is an endangerment to the health and safety of both children.

There is clear and convincing evidence of neglect of both children under § 43-292(2), as the juvenile court has concluded.

Best Interests.

In addition to showing by clear and convincing evidence that the parents have neglected both children under § 43-292(2), the State must also prove by clear and convincing evidence that it is in the best interests of both children to terminate the parental rights of the parents. See *In re Interest of Kassara M., ante* p. 90, 601 N.W.2d 917 (1999).

[6] The evidence adduced during the termination hearing clearly and convincingly demonstrates that termination of the parents' parental rights is in the best interests of both children. Testimony from caseworkers, therapists, and a family support worker indicates that the parents do not possess the parenting skills necessary to care for both children nor have they learned the necessary skills to adequately care for both children, notwithstanding reasonable efforts to impart parenting skills to the parents. Thus, the best interests of both children are served by termination of the parents' rights and the permanent placement of both children in a setting in which they can receive care and nurturing. This court has repeatedly stated that a child cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of Natasha H. & Sierra H., ante* p. 131, 602 N.W.2d 439 (1999); *In re Interest of Kassara M., supra*; *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). We conclude there is clear and convincing evidence that it is in both children's best interests that the parents' parental rights be terminated under § 43-292(2).

Termination Under § 43-292(6) and (7).

[7] Only one ground for termination need be proved in order for the parents' parental rights to be terminated. See *In re Interest of Kalie W., ante* p. 46, 601 N.W.2d 753 (1999). In the instant case, termination under § 43-292(2) was proper as to both children. Because the propriety of termination of the parents' parental rights was sufficiently demonstrated pursuant to § 43-292(2) and we affirm on the basis of § 43-292(2), we need not consider the parents' assigned errors relating to the sufficiency of evidence under other statutory provisions identified by the trial court as grounds for termination of their parental rights. However, we rule that because termination as to Samantha was alleged only under § 43-292(2), the juvenile court erred when it terminated the parents' parental rights as to Samantha under § 43-292(6) and (7). See *In re Interest of Tina L.K. & Billy M.*, 3 Neb. App. 483, 528 N.W.2d 357 (1995).

CONCLUSION

Based upon our de novo review of the record, we conclude that there is clear and convincing evidence that the parents have substantially and continuously or repeatedly failed to give both children necessary parental care and protection under § 43-292(2) and that there is clear and convincing evidence that termination is in the best interests of both children. Accordingly, we affirm the judgment of the juvenile court terminating the parental rights of the parents to both children pursuant to § 43-292(2).

JUDGMENT OF TERMINATION AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. TOD PORTSCHE, APPELLEE.

606 N.W.2d 794

Filed March 3, 2000. No. S-99-533.

1. **Appeal and Error.** The purpose of appellate review in error proceedings is to provide an authoritative exposition of the law to serve as precedent in future cases.
2. **Judgments: Appeal and Error.** To the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the courts below.

3. **Statutes: Legislature: Intent: Presumptions.** If, in a subsequent enactment on the same or similar subject, the Legislature uses different terms in the same connection, a court interpreting the subsequent enactment must presume that the Legislature intended a change in the law.
4. **Statutes: Judicial Construction: Legislature: Intent: Presumptions.** Generally, where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.
5. **Prior Convictions: Right to Counsel: Proof: Waiver.** In order to use a prior conviction as proof that a defendant has been convicted of a felony for purposes of the felon in possession statute, Neb. Rev. Stat. § 28-1206 (Reissue 1998), the State must establish that at the time of the prior conviction, the defendant had or waived counsel.
6. **Right to Counsel: Records: Waiver: Presumptions: Appeal and Error.** Where a record is silent as to a defendant's opportunity for counsel, an appellate court may not presume that such rights were respected, and waiver will not be presumed. However, a checklist or other such docket entry which shows waiver of counsel made by one authorized to make such entry imports verity and stands as evidence of waiver.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Exception overruled.

Gary E. Lacey, Lancaster County Attorney, and Amy G. Jacobsen for appellant.

Dennis R. Keefe, Lancaster County Public Defender, and Joseph D. Nigro for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Tod Portsche, appellee, was charged in the district court for Lancaster County with being a felon in possession of a firearm in violation of Neb. Rev. Stat. § 28-1206 (Reissue 1998). The case was tried to the court which entered an order finding that because Portsche's prior felony conviction was uncounseled, he was not a convicted felon for purposes of § 28-1206, and that, therefore, his prior conviction could not be used to establish the material element of being a convicted felon pursuant to § 28-1206. The trial court found Portsche not guilty.

The State sought leave to docket error proceedings under Neb. Rev. Stat. § 29-2315.01 (Reissue 1995) on April 26, 1999.

The Nebraska Court of Appeals granted leave. The case was thereafter moved to the docket of the Nebraska Supreme Court. The State assigns as error the district court's rulings that Portsche was not a convicted felon for purposes of § 28-1206 and that Portsche's prior conviction could not be used as a predicate for the instant charge of being a felon in possession of a firearm.

We conclude that the district court correctly determined that Portsche's prior uncounseled conviction could not be used to establish that he was a convicted felon for purposes of § 28-1206 and that Portsche was not guilty of the felon in possession charge that was brought under § 28-1206. Accordingly, the State's exception is overruled.

STATEMENT OF FACTS

Portsche was charged on August 21, 1998, in the district court for Lancaster County with being a felon in possession of a firearm. Specifically, the State charged that on June 7, Portsche was in possession of a semiautomatic rifle. In 1991, Portsche had been convicted in the district court for Seward County of operating a motor vehicle during a time of suspension, a Class IV felony under Neb. Rev. Stat. § 60-6,196(6) (Cum. Supp. 1999), then found at Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1990).

On November 24, 1998, Portsche entered a plea of guilty, and the plea was accepted by the district court. Portsche was found guilty, and sentencing was set for January 26, 1999.

On November 30, 1998, the district court sent letters to counsel for both Portsche and the State indicating concern as to whether a prior uncounseled felony conviction could be used as the predicate for Portsche's instant charge of being a felon in possession of a firearm and ordered counsel to submit letter memoranda addressing the issue by January 8, 1999. After reviewing the information submitted by counsel, the district court on January 20, 1999, sent letters to counsel advising them of its conclusion that "since there was no finding Mr. Portsche freely, voluntarily, knowingly and intelligently waived his right to counsel during the Seward County proceeding, [the district

court was] of the opinion the Seward County conviction cannot be used to support a conviction" in the instant case.

On January 26, 1999, the district court vacated and set aside its November 24, 1998, finding of guilt based on a guilty plea. When the case came on for trial on February 22, 1999, the State moved the district court to reconsider its ruling of January 26. The district court reconsidered and, on March 12, issued its order again concluding that the State could not use Portsche's uncounseled 1991 conviction as a predicate for the charge of being a felon in possession of a firearm.

Portsche waived a jury trial and agreed to proceed with a stipulated trial, which was conducted on March 29, 1999. At the trial, the parties stipulated that Portsche was in possession of a firearm on June 7, 1998. The State offered Portsche's 1991 felony conviction. The district court found that the prior conviction was not valid for purposes of § 28-1206 because the record did not reflect that Portsche had an attorney or waived his right to an attorney at the time of his plea on August 30, 1991. The district court therefore found Portsche not guilty of the instant charge of being a felon in possession of a firearm.

On April 16, 1999, the State presented to the district court an application for leave to docket an appeal, which application the district court approved the same day. The State filed the application with the Court of Appeals on April 26. The Court of Appeals granted the application on May 14, and the appeal was subsequently moved to this court's docket.

ASSIGNMENTS OF ERROR

The State asserts that the district court erred in ruling (1) that Portsche was not a convicted felon for the purpose of committing the crime of being a felon in possession of a firearm pursuant to § 28-1206 and (2) that Portsche's prior uncounseled conviction could not be used as a predicate for the crime of being a felon in possession of a firearm.

SCOPE AND PURPOSE OF REVIEW IN ERROR PROCEEDING

[1] The instant appeal is before this court as an error proceeding filed by the Lancaster County Attorney pursuant to

§ 29-2315.01, which states in part that "[t]he county attorney may take exception to any ruling or decision of the court made during the prosecution of a cause by presenting to the trial court the application for leave to docket an appeal with reference to the rulings or decisions of which complaint is made." The scope and purpose of appellate review in error proceedings are defined in Neb. Rev. Stat. § 29-2316 (Reissue 1995). The purpose of the review is to provide an authoritative exposition of the law to serve as precedent in future cases. *State v. Dorcey*, 256 Neb. 795, 592 N.W.2d 495 (1999). However, in the instant case, because jeopardy has attached, this court's decision will not affect the judgment of the trial court herein. See, *State v. Jennings*, 195 Neb. 434, 238 N.W.2d 477 (1976); *State v. Wilen*, 4 Neb. App. 132, 539 N.W.2d 650 (1995).

STANDARD OF REVIEW

[2] The State's assignments of error present questions of law. To the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the courts below. *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999).

ANALYSIS

Section 28-1206(1) provides as follows: "Any person who possesses any firearm or brass or iron knuckles and who has previously been convicted of a felony or who is a fugitive from justice commits the offense of possession of a deadly weapon by a felon or a fugitive from justice."

In the instant case, it is uncontested that Portsche possessed a firearm on June 7, 1998. It is also uncontested that in 1991, Portsche was convicted of a Class IV felony in the district court for Seward County. The district court in the instant case found that the record of Portsche's 1991 conviction did not reflect that Portsche either had an attorney or waived his right to an attorney at the time of his plea. The State does not challenge this finding. Therefore, the sole issue in this proceeding is whether Portsche's uncounseled 1991 conviction can be used to establish that Portsche is a felon for purposes of Nebraska's felon in possession statute, § 28-1206.

Although not cited by either party, in *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991), this court has previously held, albeit without exposition, that to prove a prior conviction for felon in possession purposes, the State need only establish that at the time of the prior conviction, the defendant had or waived counsel. In *Groves*, the defendant was convicted of being a felon in possession of a firearm and, on appeal, argued that his prior felony conviction should have been excluded because the record in that case failed to affirmatively reflect that he was represented by counsel, that he waived counsel, or that he was advised of certain other constitutional rights. We stated in *Groves* as follows:

> This court has held that to prove a prior conviction for enhancement purposes and for habitual criminal proceedings, the State need only establish that at the time of the prior conviction, the defendant had or waived counsel. . . . This rule is equally applicable to use of a prior conviction as proof that the defendant is a convicted felon.

(Citation omitted.) *Id.* at 676, 477 N.W.2d at 801. We then found in *Groves* that the record of the prior conviction showed that the defendant had his attorney present with him at each court appearance up to and including sentencing and that therefore the prior counseled felony conviction was properly admitted for establishing that Groves was a felon in possession. *Id.*

In *Groves,* we held that in a felon in possession case, in order to use a prior felony conviction as proof that the defendant is a convicted felon, the State must establish that at the time of the prior conviction, the defendant had or waived counsel. We find that rule to be applicable in the instant case. We therefore conclude that the district court properly ruled that Portsche's uncounseled 1991 conviction could not be used to establish that Portsche had "previously been convicted of a felony" under § 28-1206, and we dismiss the State's exception brought to this court under § 29-2315.01. However, because the purpose of our review in an error proceeding is to provide an authoritative exposition of the law to serve as precedent in future cases, *State v. Dorcey*, 256 Neb. 795, 592 N.W.2d 495 (1999), and because *Groves* contained little discussion beyond the conclusion quoted

above, we take this opportunity to further explain the rationale behind our holding.

The State relies mainly on two cases, a Nebraska case and a U.S. Supreme Court case, in support of its argument that a prior uncounseled conviction may be used to establish that a defendant has "previously been convicted of a felony" under § 28-1206. The cases are *State v. Lee*, 251 Neb. 661, 558 N.W.2d 571 (1997), and *Lewis v. United States*, 445 U.S. 55, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980). We find *Lee* distinguishable and *Lewis* inapposite.

The State claims that the validity of a prior conviction may not be attacked on any basis in a subsequent action in which the prior conviction is an element of the offense being prosecuted. In support of its argument, the State relies in part on *Lee*. In *Lee*, the defendant was charged in district court and eventually convicted of driving while his operator's license was suspended in violation of § 60-6,196(6) (Reissue 1993). Prior to trial on the driving during a suspension charge, Lee filed a petition in a separate proceeding in county court to set aside his prior conviction for driving while under the influence of alcohol (DUI), third-offense, which conviction resulted in the suspension. In the separate proceeding, Lee argued that the plea-based third-offense DUI conviction was constitutionally infirm because he had not been advised of his right to a trial by jury.

In the separate proceeding, the county court found that Lee had not in fact been advised of his right to a trial by jury in the third-offense DUI case. The county court concluded in the separate proceeding that the failure to advise Lee of his right to a trial by jury in the DUI case was a violation of *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) (*Boykin*), which mandates that a criminal defendant must be advised of certain constitutional rights. The county court ruled that the prior third-offense DUI conviction and suspension could not be used as evidence of suspension in the later driving during a suspension case.

Subsequently, at the district court trial on the driving during a suspension charge, the district court overruled Lee's motion in limine which had sought to prevent the State from presenting evidence of the prior third-offense DUI conviction and suspen-

sion, which the county court had previously found to be constitutionally infirm. The district court found Lee guilty of driving during a suspension based in part on Lee's prior conviction for third-offense DUI.

In *Lee*, where the collateral attack was a *Boykin* challenge, we held that Lee was not permitted to collaterally attack in a special proceeding the prior conviction that was an element of the subsequent offense. We distinguished our *Lee* holding from a line of cases which included *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995); *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992); and *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989), where we held that a defendant could raise a collateral attack based on *Boykin* in a separate proceeding commenced expressly for the purpose of setting aside a prior DUI conviction sought to be used for subsequent DUI enhancement pursuant to the DUI statutes. In *Lee*, we disapproved of separate proceedings raising *Boykin* rights where the prior conviction was used to establish an element of the offense, and we left untouched the *LeGrand* line of cases which permitted a separate proceeding designed to raise a *Boykin* challenge where the prior DUI convictions were sought to be used for DUI penalty enhancement.

We recently overruled the *LeGrand* line of cases in *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999), and held that a defendant may no longer use a separate proceeding to raise a *Boykin* challenge to a prior DUI conviction sought to be used for DUI enhancement pursuant to the DUI statutes. We also recently ruled that a defendant may not use a separate proceeding to raise a *Boykin* challenge to a prior conviction sought to be used for enhancement pursuant to the habitual criminal statute. *State v. Kuehn, ante* p. 558, 604 N.W.2d 420 (2000). However, we explicitly held in both *Louthan* and *Kuehn* that in order to use a prior conviction for the foregoing enhancement purposes, the State was still required to establish in the current proceeding that at the time of the prior conviction, the defendant had counsel or had validly waived counsel.

In the instant case, the State claims that the distinction made in *State v. Lee*, 251 Neb. 661, 558 N.W.2d 571 (1997), between prior convictions used for enhancement purposes and prior convictions used to establish an element of a subsequent offense is

dispositive of the issue at hand and urges upon us the conclusion that prior convictions used to establish an element of a subsequent offense are completely immune from attack. We do not agree with the State's analysis.

In *Lee*, we made the distinction between prior convictions for enhancement purposes and prior convictions used to establish an element of a subsequent offense in support of our prior rulings that separate proceedings were then limited to enhancement but that separate proceedings could not be used to raise a *Boykin* challenge to a prior conviction used to establish an element of a subsequent offense. Following our holdings in *Louthan* and *Kuehn*, a separate proceeding to raise a *Boykin* challenge is no longer valid to challenge a prior conviction sought to be used for enhancement, and under *Lee*, separate proceedings to raise a *Boykin* challenge remain invalid to challenge a prior conviction used to establish an element of a subsequent offense. Thus, separate proceedings raising a *Boykin* challenge have now been disapproved for DUI and habitual criminal enhancement purposes as well as for purposes of challenging prior convictions where the prior conviction is an element of the subsequent offense.

For purposes of the present proceeding, the critical analytical distinction is the use which may be made of a prior conviction challenged on *Boykin* grounds as distinguished from a prior conviction challenged as uncounseled. The U.S. Supreme Court recognized this distinction in *Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994), in which it held that a prior conviction could not be challenged on *Boykin* grounds in a subsequent enhancement proceeding. However, the Court in *Custis* nevertheless recognized that the Constitution bars the use of a prior conviction for enhancement purposes where there was a denial of the Sixth Amendment right to counsel in the prior proceeding. The right to counsel was recognized by the Court in *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), wherein the Court established the rule that the right to counsel guaranteed by the Sixth Amendment made it unconstitutional to try a person for a felony in state court unless the defendant had a lawyer or had waived one. The Court later held that "[t]o permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person

either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case." (Citation omitted.) *Burgett v. Texas*, 389 U.S. 109, 115, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967). The result of such use of a prior uncounseled conviction is that "the accused in effect suffers anew from the deprivation of that Sixth Amendment right." *Id.*

Our decisions have similarly recognized the importance of the right to counsel and the unique nature of a challenge to the denial of the Sixth Amendment right to counsel. *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999); *State v. Kuehn, ante* p. 558, 604 N.W.2d 420 (2000). We have recently held in *Louthan* and *Kuehn* that while a *Boykin* challenge to a prior conviction may not be raised either in the enhancement proceeding or in a separate proceeding, the State must nevertheless affirmatively establish in the enhancement proceeding that at the time of the prior conviction, the defendant had or waived counsel. Indeed, in *Lee*, we noted that a *Boykin* challenge was " '[u]nlike a lack-of-counsel challenge, [the latter of] which automatically makes the conviction unreliable . . . .' " *State v. Lee*, 251 Neb. 661, 664-65, 558 N.W.2d 571, 574 (1997).

In *Lee*, our holding was to the effect that a defendant could not use a separate proceeding to raise a *Boykin* challenge to a prior conviction sought to be used to establish an element of a subsequent offense. Notably, in *Lee*, there was no allegation that the defendant's prior conviction was uncounseled and we were not required to rule on whether a prior uncounseled conviction could be used to establish an element of a subsequent offense although, as noted above, we had indicated in *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991), that a prior uncounseled felony conviction could not be used to establish the element of being a felon in a felon in possession case. Contrary to the State's argument, our ruling in *Lee* was simply not dispositive of the issue in the instant case as to whether a prior uncounseled felony conviction could be used to establish that the defendant was a felon for felon in possession purposes under § 28-1206.

The State relies heavily on *Lewis v. United States*, 445 U.S. 55, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980), in which the U.S. Supreme Court, construing the federal felon in possession statute, held that a prior uncounseled felony conviction could be

used to establish an element of the federal offense of being a felon in possession of a firearm pursuant to 18 U.S.C. app. § 1202(a) (1976). In *Lewis*, the U.S. Supreme Court noted that it "has never suggested that an uncounseled conviction is invalid for all purposes." 445 U.S. at 66-67.

Construing the federal statute, the Court found that the federal statute in question focused "not on [the constitutional] reliability [of the prior conviction], but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons." 445 U.S. at 67. The Court specifically found that 18 U.S.C. § 922(g)(1) and (h)(1) (1976) imposed a firearms disability not only on a convicted felon but also on a person under a felony indictment, even if that person subsequently was acquitted of the felony charge. *Lewis v. United States, supra.* The Court further stated that in enacting the federal statute, it was "Congress' judgment that a convicted felon, even one whose conviction was allegedly uncounseled, is among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness . . . ." 445 U.S. at 67.

The Court found the language of 18 U.S.C. app. § 1202(a) to be "sweeping," reflecting Congress' "expansive legislative approach" in enacting the Omnibus Crime Control and Safe Streets Act of 1968, of which the statute was a part. 445 U.S. at 60-61. The Court found the legislative history of the federal statute to reflect "an intent to impose a firearms disability on any felon based on the fact of conviction," 445 U.S. at 62, and an intent for § 1202(a) to be "a sweeping prophylaxis, in simple terms, against misuse of firearms." 445 U.S. at 63. The Court noted that Congress did not see fit to make any exception for persons whose outstanding felony convictions may prove to be invalid, in contrast to other federal statutes that explicitly permitted a defendant to challenge, by way of defense, the validity or constitutionality of the predicate felony. *Lewis v. United States, supra.* Finally, 18 U.S.C. app. § 1203(2) (1976) and 18 U.S.C. § 925(c) (1976) provided that the firearms disability could be removed by a qualifying pardon or with the consent of the Secretary of the Treasury. *Lewis v. United States, supra.* The *Lewis* Court therefore concluded that it was "clear" and "plain"

that "§ 1202(a)(1) prohibits a felon from possessing a firearm despite the fact that the predicate felony may be subject to collateral attack on constitutional grounds." 445 U.S. at 65.

The U.S. Supreme Court's holding in *Lewis* was based on its interpretation of the federal statute before it, 18 U.S.C. app. § 1202(a), and the corresponding legislative history. The Court concluded that the statute showed a plain and clear intent to sweep so broadly as to include prior uncounseled felony convictions as the predicate for the firearms disability. The lesson in *Lewis* for present purposes is that a prior uncounseled conviction may be used to establish an element of the subsequent federal offense of being a felon in possession of a firearm without offending the Sixth Amendment because there was a plain and clear federal legislative intent to include such uncounseled convictions under the federal statute. In the instant proceeding, it is the Nebraska statute, § 28-1206, and the legislative intent in the enactment of § 28-1206, as distinguished from the federal statute, which are relevant to our decision.

The U.S. Supreme Court's interpretation of the federal statute, 18 U.S.C. app. § 1202(a), is not binding upon our interpretation of the state statute, § 28-1206. See, *Phillips v. Industrial Machine*, 257 Neb. 256, 597 N.W.2d 377 (1999) (Gerrard, J., concurring); *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994), *overruled on other grounds, State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997). See, similarly, *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999) (holding in double jeopardy case that Nebraska Legislature intended forfeiture actions pursuant to Neb. Rev. Stat. § 28-431 (Cum. Supp. 1998) to be criminal proceedings in contrast to U.S. Supreme Court's holding that Congress intended federal forfeiture proceedings pursuant to similar federal statutes to be civil in nature). Neither the federal and state statutes nor the case law under those statutes are identical, and the legislative history of the Nebraska statute does not indicate that the state statute was derived from the federal statute. In this regard, we note that other state appellate courts have found that *Lewis v. United States*, 445 U.S. 55, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980), was not controlling in the interpretation of their respective states' "felon in possession of a firearm" statutes. E.g., *People v.*

Quintana, 707 P.2d 355 (Colo. 1985) (holding that prior conviction obtained in violation of defendant's constitutional rights cannot be used as underlying conviction in prosecution under Colorado's felon with gun statute); *State v. Gore*, 101 Wash. 2d 481, 681 P.2d 227 (1984) (noting that principle of lenity required that state provisions be interpreted to require constitutionally valid prior conviction).

We recognize that neither the federal statute at issue in *Lewis* nor Nebraska's § 28-1206 expressly limit their scope to those who have been *validly* convicted of a felony. However, compared to 18 U.S.C. app. § 1202(a), § 28-1206 does not use "sweeping" language. For example, the firearms disability imposed by § 28-1206 applies to only two classes of persons: those who have been convicted of a felony and those who are fugitives from justice. By contrast, 18 U.S.C. app. § 1202(a) imposes a firearms disability on any person who (1) has been convicted of a felony, (2) has been dishonorably discharged from the Armed Forces, (3) has been adjudged mentally incompetent, (4) has renounced U.S. citizenship, or (5) is an alien illegally or unlawfully in the United States. See *Lewis v. United States, supra.* In addition, as the U.S. Supreme Court noted in *Lewis*, 18 U.S.C. § 922(g)(1) and (h)(1), also enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968, imposed a firearms disability "not only on a convicted felon but also on a person under a felony indictment, even if that person subsequently is acquitted of the felony charge." 445 U.S. at 64.

[3] The Nebraska statute clearly applies to a more narrow class of persons than does the federal statute. The current § 28-1206, originally enacted in 1977, is substantially similar to Neb. Rev. Stat. § 28-1011.15 (Reissue 1975), enacted in 1967, which in turn was substantially similar to Neb. Rev. Stat. § 28-1011.07 (Reissue 1964), enacted in 1961. Notably, § 28-1011.07 imposed a firearms disability on "any person who is charged either by complaint, information or indictment with a crime of violence, or who has been convicted of a crime of violence amounting to a felony." However, this sweeping language was narrowed in § 28-1011.15 to "any person who has been convicted of a felony," which is the language used in the current § 28-1206. If, in a subsequent enactment on the same or similar

subject, the Legislature uses different terms in the same connection, a court interpreting the subsequent enactment must presume that the Legislature intended a change in the law. *In re Interest of Artharena D.*, 253 Neb. 613, 571 N.W.2d 608 (1997). In enacting § 28-1011.15, the Legislature dropped the language from § 28-1011.07, referring to a person "charged either by complaint, information or indictment." We must presume the Legislature intended to narrow the breadth of the firearms disability in this respect.

Construing § 28-1206, we do not find the same sort of broad, sweeping language that the U.S. Supreme Court found present in the federal statute in *Lewis v. United States*, 445 U.S. 55, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980), which language evinced an intent to include a broad range of individuals as persons who could not possess firearms. The legislative history of § 28-1206 does not indicate that the Nebraska Legislature considered whether an uncounseled felony conviction could provide the predicate for a violation of the statute and, therefore, does not demonstrate any specific intent on the issue. In contrast to the observations in *Lewis* pertaining to the federal statute, neither the language nor the legislative history of § 28-1206 indicate the "plain" and "clear" intent to permit prior uncounseled convictions as predicate convictions for the charge of being a felon in possession of a firearm.

[4] We note that the Nebraska Legislature has not amended § 28-1206 in response to *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991), which was decided in 1991. Generally, where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent. *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999).

[5,6] Although the U.S. Supreme Court held in *Lewis* that a prior uncounseled conviction may be used as a prior conviction to establish an element of the subsequent federal offense of being a felon in possession of a firearm without offending the Sixth Amendment where there was a plain and clear legislative intent to include such uncounseled convictions in the sweep of the statute, we do not find such a plain and clear legislative

intent in connection with Nebraska's felon in possession statute, § 28-1206. Absent such plain and clear intent and given the importance of the right to counsel in connection with felony convictions, we find the better rule to be that in order to use a prior conviction as proof that a defendant has been convicted of a felony for purposes of the felon in possession statute, § 28-1206, the State must establish that at the time of the prior conviction, the defendant had or waived counsel. Where a record is silent as to a defendant's opportunity for counsel, an appellate court may not presume that such rights were respected, and waiver will not be presumed. *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996). However, a checklist or other such docket entry which shows waiver of counsel made by one authorized to make such entry imports verity and stands as evidence of waiver. *Id.* Before a prior felony conviction can be used to prove that a defendant is a felon in a felon in possession case, the State must prove either that the prior felony conviction was counseled or that counsel was waived. This requirement serves to protect the right to counsel and is consistent with our holdings in the DUI and habitual criminal enhancement contexts in *State v. Louthan, supra*, and *State v. Kuehn, ante* p. 558, 604 N.W.2d 420 (2000).

CONCLUSION

We conclude that in order to prove that a defendant is a convicted felon for purposes of the Nebraska felon in possession statute, § 28-1206, the State must establish in the felon in possession case that at the time of the prior felony conviction, the defendant had or waived counsel. Therefore, the State's exception to the district court's ruling that Portsche's prior uncounseled felony conviction could not be used to establish that Portsche was a felon for purposes of the felon in possession statute, § 28-1206, brought to this court under § 29-2315.01, is overruled.

EXCEPTION OVERRULED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. EUGENE M. FRESE, RESPONDENT.

606 N.W.2d 825

Filed March 3, 2000. No. S-00-148.

Original action. Judgment of disbarment.

John W. Steele for relator.

Robert J. Mathias, of Piper Marbury Law Firm, for respondent.

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

PER CURIAM.

On February 11, 2000, Eugene M. Frese, respondent, filed with this court a voluntary surrender of license to practice law. Respondent states that he voluntarily consents to an order of disbarment in the State of Nebraska.

Respondent was admitted to the practice of law in the State of Nebraska on June 19, 1959.

In his voluntary surrender of license, respondent admits that pursuant to a plea agreement with the United States, he entered a plea of guilty to one count of a pending indictment. Specifically, he pled that he had violated 18 U.S.C. § 1029(a)(1), fraud and related activity in connection with access devices, and 18 U.S.C. § 2, aiding and abetting. Judgment on these criminal charges was entered on January 6, 2000.

In his voluntary surrender of license, respondent freely, knowingly, and voluntarily admits that his conduct violated Canon 1, DR 1-102(A)(1), (3), and (4), of the Code of Professional Responsibility, as adopted by the Nebraska Supreme Court.

In his voluntary surrender of license, respondent freely, knowingly, and voluntarily waives his right to notice, appearance, or hearing prior to the entry of an order of disbarment.

Upon due consideration of the pleadings in this matter, the court accepts respondent's surrender of his license to practice

law, finds that respondent should be disbarred, and hereby orders respondent disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with Neb. Ct. R. of Discipline 16 (rev. 1996), and upon failure to do so, he shall be subject to punishment for contempt of court.

JUDGMENT OF DISBARMENT.

MILLER-LERMAN, J., not participating.

EDWARD O. SLAYMAKER, APPELLEE, V. KENNETH BREYER AND ELAINE BREYER, HUSBAND AND WIFE, APPELLANTS.

607 N.W.2d 506

Filed March 10, 2000. No. S-98-596.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
3. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
4. **Actions: Pleadings: Parties.** Neb. Rev. Stat. § 25-331 (Reissue 1995) requires leave of the trial court before filing a third-party complaint, and whether to grant such leave is entrusted to the discretion of the trial court.
5. ___: ___: ___. Generally, a trial court may exercise its discretion to permit the filing of a third-party complaint only if it is shown that the proposed third-party defendant is or may be liable to the defendant and third-party plaintiff for all or part of the plaintiff's claim. Thus, a third-party claim under Neb. Rev. Stat. § 25-331 (Reissue 1995) may be asserted when a third party's liability is in some way dependent upon the outcome of the main claim or when the third party is secondarily liable to the defendant.
6. **Actions: Parties.** The basic function of third-party practice is the original defendant's seeking to transfer to the third-party defendant the liability asserted by the original plaintiff.
7. **Actions: Parties: Words and Phrases.** The term "defendant" in Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995) includes a third-party defendant brought into an action pursuant to Neb. Rev. Stat. § 25-331 (Reissue 1995).

8. **Final Orders.** To determine the action and prevent a judgment, an order must dispose of the whole merits of the case and must leave nothing for further consideration of the court, and thus, the order is final when no further action of the court is required to dispose of the pending cause; however, if the cause is retained for further action, the order is interlocutory.

Appeal from the District Court for Holt County, WILLIAM B. CASSEL, Judge. Appeal dismissed.

C.J. Gatz and Todd B. Vetter, of Gatz, Fitzgerald & Vetter, for appellants.

William A. Wieland, of Healey Wieland Law Firm, and Forrest F. Peetz, of Peetz & Peetz Law Firm, for appellee.

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

STEPHAN, J.

Kenneth Breyer and Elaine Breyer, husband and wife, are named as defendants in this personal injury action filed in the district court for Holt County, Nebraska, by Edward O. Slaymaker. The Breyers appeal from an order of the district court denying their motion to institute third-party proceedings seeking indemnity and contribution from Green Valley Irrigation, Inc. (Green Valley).

PROCEDURAL HISTORY

In his petition filed November 5, 1996, Slaymaker alleged that he was injured on March 2, 1996, while working on a grain bin which was owned by the Breyers and situated on their real property. Slaymaker alleged that pursuant to a prior oral agreement with the Breyers, he was in the process of checking grain in a bin, which necessitated that he climb a ladder attached to the bin's exterior. He alleged that a rung of the ladder became loose as he grasped it, causing him to fall to the ground and sustain injuries. Slaymaker alleged that his injuries were proximately caused by the Breyers' negligence in failing to inspect and maintain the ladder, failing to warn him of the unsafe condition of the ladder, and failing to provide him with a reasonably safe place to work.

In an answer filed March 25, 1997, the Breyers denied the allegations of negligence and alleged that Slaymaker's injury "occurred without any negligence on the part of the defendants whatsoever" and that they "exercised due and proper care at all times relevant." The Breyers alleged assumption of risk and contributory negligence on the part of Slaymaker and further alleged, pursuant to Neb. Rev. Stat. § 25-21,185.07 (Reissue 1995), that

> in the event there is a finding that the plaintiff's contributory negligence is in a percentage less than a percentage equal to the total negligence of all persons against whom recovery is sought, then it is alleged that the aforesaid contributory negligence chargeable to the plaintiff diminishes, proportionately, any award made herein.

On April 29, 1997, the district court entered a progression order scheduling a final pretrial conference for August 29 and establishing an August 1 deadline for completion of discovery and filing of all pretrial motions. Based upon stipulations of the parties, the court entered two subsequent orders extending the discovery deadline and continuing the pretrial conference to February 26, 1998. The record does not reflect any extension of the August 1, 1997, deadline for filing pretrial motions which was established by the initial progression order.

On February 26, 1998, the day of the scheduled final pretrial conference, the Breyers filed a motion to institute third-party proceedings against Green Valley and a proposed third-party petition which they sought leave to file pursuant to Neb. Rev. Stat. §§ 25-323 and 25-331 (Reissue 1995). In their third-party petition, the Breyers reasserted their denial of any liability for Slaymaker's injuries and alleged that the "sole and proximate cause" of the accident was the negligence of Green Valley in erecting the grain bin, including the attached ladder, prior to Slaymaker's accident. The Breyers further alleged that if they were adjudged liable to Slaymaker, Green Valley was liable to them for "contribution and/or indemnity."

Slaymaker filed an objection to the motion to institute third-party proceedings, asserting that it was filed late in the proceedings for purposes of delay; that the third-party claim was barred by the statute of limitations; that any claim Slaymaker may have

had against Green Valley was barred by the statute of repose; and that the proposed third-party proceedings would delay trial, confuse the jury, and jeopardize Slaymaker's interests. Following a hearing conducted immediately prior to the pretrial conference, the district court sustained Slaymaker's objections "for the reasons stated in the Motion" and denied the motion to institute third-party proceedings. On March 30, 1998, the court granted the Breyers' motion to reconsider this ruling and took the issue back under advisement.

On June 4, 1998, the district court entered an order generally denying the motion to institute third-party proceedings. The Breyers then commenced this appeal, assigning as error the overruling of their motion to institute third-party proceedings. We granted Slaymaker's petition to bypass.

SCOPE OF REVIEW

A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *In re Application of SID No. 384*, 256 Neb. 299, 589 N.W.2d 542 (1999).

ANALYSIS

[1,2] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Interest of Alycia P., ante* p. 258, 603 N.W.2d 7 (1999); *US Ecology v. State, ante* p. 10, 601 N.W.2d 775 (1999); *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999); *In re Interest of William G.*, 256 Neb. 788, 592 N.W.2d 499 (1999); *Crabb v. Bishop Clarkson Mem. Hosp.*, 256 Neb. 636, 591 N.W.2d 756 (1999). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *In re Application of SID No. 384, supra*. The jurisdictional issue posed in this case is whether the order denying the Breyers leave to institute third-party proceedings pursuant to § 25-331 is a final, appealable order.

Although we have reviewed such orders in the past, we have never done so in an appeal taken directly from the denial of leave to commence third-party proceedings. Rather, our review of such orders has been within the context of appeals taken from a subsequent judgment disposing of the action on the merits of the controversy between the plaintiff and defendant. See, *Employers Reins. Corp. v. Santee Pub. Sch. Dist. No. C-5*, 231 Neb. 744, 438 N.W.2d 124 (1989) (involving appeal from judgment for plaintiff entered upon bench trial); *Bank of Valley v. Shunk*, 208 Neb. 200, 302 N.W.2d 711 (1981), *disapproved on other grounds, Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992) (involving appeal from judgment entered upon granting of plaintiff's motion for summary judgment); *Northwestern Bell Tel. Co. v. Woodmen of the World Life Ins. Soc.*, 189 Neb. 30, 199 N.W.2d 729 (1972) (involving appeal following judgment entered upon jury verdict in favor of plaintiff). Similarly, in *AgriStor Credit Corp. v. Radtke*, 218 Neb. 386, 356 N.W.2d 856 (1984), we reviewed and reversed an order granting leave to commence third-party proceedings in an appeal from a subsequent judgment on the merits.

[3] The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999). This case does not fit within the third category, because no judgment had been entered when the motion to commence third-party proceedings was filed. An order denying leave to file third-party proceedings pursuant to § 25-331 does not fall in the second category of final orders, because a "special proceeding" entails civil statutory remedies *not* encompassed in chapter 25 of the Nebraska Revised Statutes. See, *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998); *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998). Thus, our analysis is narrowed to the question of whether the order fits within the first category, i.e.,

whether it "affect[s] a substantial right" *and* "in effect determines the action and prevents a judgment."

[4-6] To resolve this issue, it is necessary to examine the nature of the third-party practice procedure codified in § 25-331, which was patterned on rule 14 of the Federal Rules of Civil Procedure. *Employers Reins. Corp. v. Santee Pub. Sch. Dist. No. C-5, supra*; *Church of the Holy Spirit v. Bevco, Inc.*, 215 Neb. 299, 338 N.W.2d 601 (1983). Section 25-331 requires leave of the trial court before filing a third-party complaint, and whether to grant such leave is entrusted to the discretion of the trial court. *Employers Reins. Corp. v. Santee Pub. Sch. Dist. No. C-5, supra*; *Life Investors Ins. Co. v. Citizens Nat. Bank*, 223 Neb. 663, 392 N.W.2d 771 (1986). Generally, a trial court may exercise its discretion to permit the filing of a third-party complaint only if it is shown that the proposed third-party defendant is or may be liable to the defendant and third-party plaintiff for all or part of the plaintiff's claim. *AgriStor Credit Corp. v. Radtke, supra*. Thus, a third-party claim under § 25-331 may be asserted when a third party's liability is in some way dependent upon the outcome of the main claim or when the third party is secondarily liable to the defendant. *Dammann v. Litty*, 234 Neb. 664, 452 N.W.2d 522 (1990); *Schuyler State Bank v. Cech*, 228 Neb. 588, 423 N.W.2d 464 (1988); *Church of the Holy Spirit v. Bevco, Inc., supra*. The basic function of third-party practice is the original defendant's seeking to transfer to the third-party defendant the liability asserted by the original plaintiff. *Id.* We note that under rule 14, an order denying leave to assert a third-party claim is not considered an appealable order because the "[d]efendant is free to assert the third-party claim as a separate suit." 6 Charles A. Wright et al., Federal Practice and Procedure: Civil § 1463 at 470 (2d ed. 1990).

[7] The Breyers argue, however, that the denial of leave to file their third-party petition affects their substantial rights under Nebraska's comparative negligence law. Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995) provides:

> In an action involving more than one defendant when two or more defendants as part of a common enterprise or plan act in concert and cause harm, the liability of each

> such defendant for economic and noneconomic damages shall be joint and several.
>
> In any other action involving more than one defendant, the liability of each defendant for economic damages shall be joint and several and the liability of each defendant for noneconomic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of negligence, and a separate judgment shall be rendered against that defendant for that amount.

Section 25-323 provides:

> The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in.
>
> Any person whose negligence was or may have been a proximate cause of an accident or occurrence alleged by the plaintiff, other than parties who have been released by the plaintiff and are not subject to suit pursuant to section 25-21,185.11, may be brought into the suit by any defendant in the manner provided in section 25-331 or by any plaintiff in the manner provided in sections 25-849 and 25-852.

The term "defendant" in § 25-21,185.10 includes a third-party defendant brought into an action pursuant to § 25-331. *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999). The Breyers argue that by denying them leave to bring Green Valley into the action as a third-party defendant, the trial court extinguished their "right to join the third party defendant to allocate the negligence of the third party defendant for noneconomic damages" and imposed upon them "the entire burden of the plaintiff's damages that may be attributable to the third party defendant." Brief for appellants at 21.

[8] Assuming without deciding that the order potentially affects a substantial right, we conclude that it is not a final, appealable order because it does not determine the action and

prevent a judgment. To determine the action and prevent a judgment, an order must dispose of the whole merits of the case and must leave nothing for further consideration of the court, and thus, the order is final when no further action of the court is required to dispose of the pending cause; however, if the cause is retained for further action, the order is interlocutory. *O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998); *Moulton v. Board of Zoning Appeals*, 251 Neb. 95, 555 N.W.2d 39 (1996). By its nature, the Breyers' claim against Green Valley is dependent upon the outcome of Slaymaker's negligence claim against the Breyers, which has yet to be resolved in the trial court. If the Breyers are successful in defending that claim, no issue of indemnity, contribution, or comparative negligence will ever arise. On the other hand, if Slaymaker obtains a final judgment against the Breyers, the Breyers would then have a right to an appeal in which they could obtain review of the order denying them leave to assert the third-party claim against Green Valley. Further action by the trial court is necessary before an appellate court can determine whether the order denying the Breyers leave to commence third-party proceedings affects a substantial right.

CONCLUSION

We conclude that we lack jurisdiction in this matter because the order denying the Breyers' motion for leave to commence third-party proceedings is not a final, appealable order. Accordingly, the appeal is dismissed.

APPEAL DISMISSED.

JEROME W. NEILL, APPELLANT, V. THOMAS C. HEMPHILL, AN INDIVIDUAL, AND EMERY, NYE, BLAZEK, AND HEMPHILL, A NEBRASKA PARTNERSHIP, APPELLEES.

607 N.W. 2d 500

Filed March 10, 2000. No. S-98-885.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Malpractice: Physician and Patient: Proof: Proximate Cause.** In a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was the proximate cause of the plaintiff's alleged injuries.
4. **Trial: Witnesses: Evidence.** Where a party without reasonable explanation testifies to facts materially different concerning a vital issue, the change clearly being made to meet the exigencies of pending litigation, such evidence is discredited as a matter of law and should be disregarded. The important considerations are that the testimony pertains to a vital point, that it is clearly apparent the party has made the change to meet the exigencies of the pending case, and that there is no rational or sufficient explanation for the change in testimony.
5. **Trial: Expert Witnesses.** The good faith self-contradiction of an expert witness presents a question for the trier of fact.
6. **Malpractice: Physicians and Surgeons: Expert Witnesses: Words and Phrases.** Although expert medical testimony need not be couched in the magic words "reasonable medical certainty" or "reasonable probability," it must be sufficient as examined in its entirety to establish the crucial causal link between the plaintiff's injuries and the defendant's negligence.
7. ____: ____: ____: ____. Medical expert testimony regarding causation based upon possibility or speculation is insufficient; it must be stated as being at least "probable," in other words, more likely than not.

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

James R. Welsh, of Bradford, Coenen & Welsh, for appellant.

Dean F. Suing, of Katskee, Henatsch & Suing, for appellees.

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

MCCORMACK, J.

NATURE OF CASE

This is a legal malpractice case brought by Jerome W. Neill against Thomas C. Hemphill and the law firm of Emery, Nye, Blazek, and Hemphill (collectively Hemphill). Neill alleged that he retained Hemphill to represent him in a medical malpractice action against Dr. John V. Fernandez and Mercy Hospital

(Mercy) in Council Bluffs, Iowa. Neill further alleged that no action was filed prior to the expiration of the statute of limitations and that he was damaged as a result. Hemphill filed a motion for summary judgment, alleging that there was no credible evidence to show that Hemphill's negligence, if any, was the proximate cause of any loss to Neill. The district court granted the motion, and Neill appeals.

FACTUAL BACKGROUND

Neill was involuntarily committed to Mercy on March 11, 1993, for a psychiatric evaluation under the care of Fernandez. Neill's past medical history included hypertension, and at the time of his admission to Mercy, he was being treated for hypertension by Dr. Martin M. Mancuso.

Neill's initial examination at Mercy showed elevated blood pressure, and his blood pressure remained elevated until March 13, 1993, when Fernandez increased the dosage of Neill's antihypertensive medication and placed Neill on a restricted diet. Neill's blood pressure was charted as normal on March 14, but by March 15, was again elevated. Fernandez again increased Neill's medication. Neill's blood pressure remained high, but returned to normal on March 17. Neill's blood pressure on the morning of March 18 was on the borderline between normal and mild hypertension. Neill was then discharged from Mercy.

On April 11, 1993, Neill complained to Mancuso about chest pains. At that time, according to Mancuso, Neill suffered an injury to the lower portion of his heart, which we reasonably infer to be the myocardial infarction discussed in Mancuso's deposition. Neill was admitted to Archbishop Bergan Mercy Hospital, where a coronary angioplasty was performed. Neill alleges that he has suffered myocardial damage and thickening of his coronary arteries. The focus of this appeal is Neill's allegation that Fernandez did not appropriately treat Neill's heart condition which would have prevented the later myocardial damage.

In December 1994, Neill allegedly retained Hemphill to represent him in a medical malpractice action against Fernandez and Mercy. On March 10, 1995, Hemphill allegedly assured Neill, "I'm on my way to file your lawsuit today." The statute of

limitations on the action allegedly expired with no action having been filed. A petition was subsequently filed on April 12, 1995, in the district court for Pottawattamie County, Iowa, but the petition was dismissed pursuant to Iowa's 2-year statute of limitations for malpractice actions. See Iowa Code Ann. § 614.1(9)(a) (West 1999).

PROCEDURAL BACKGROUND

In the instant case, Hemphill filed a motion for summary judgment alleging, in sum, that Neill could prove no damages resulting from the alleged legal malpractice because there was insufficient evidence to show that Neill could have been successful in the underlying medical malpractice action. The district court stated:

> Dr. Mancuso testified that the [sic] Dr. Fernandez treated Plaintiff's high blood pressure appropriately. Dr. Mancuso opined that the [sic] Dr. Fernandez should have given additional tests, but could not state whether the results of those tests would show that Plaintiff had a cardiac problem.
>
> Further, in a subsequent affidavit, Dr. Mancuso did not given [sic] an opinion to a reasonable degree of medical certainty that Plaintiff suffered heart damage due to Dr. Fernandez' and Mercy Hospital's negligence, but "in all likelihood" Plaintiff would "not have suffered a myocardial infarction and permanent damage to his heart." Finally, He [sic] gave no satisfactory explanation for this in his affidavit for why the tests "should" have shown heart disease rather than in his deposition testimony where he couldn't say for sure that the tests would show heart disease.

The district court granted Hemphill summary judgment, stating that evidence from Neill's expert witness "failed to show that the negligence, if any, of the [sic] Dr. Fernandez and Mercy Hospital was the proximate cause of Plaintiff's heart damage."

ASSIGNMENTS OF ERROR

Neill assigns that the district court erred in (1) disregarding the affidavit of Mancuso and (2) determining that insufficient evidence existed on the issue of causation and granting summary judgment to Hemphill.

STANDARD OF REVIEW

[1] 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. *Parnell v. Madonna Rehab. Hosp., ante* p. 125, 602 N.W.2d 461 (1999); *Ferguson v. Union Pacific RR. Co., ante* p. 78, 601 N.W.2d 907 (1999).

[2] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Knoll v. Board of Regents, ante* p. 1, 601 N.W.2d 757 (1999); *Bargmann v. State*, 257 Neb. 766, 600 N.W.2d 797 (1999).

ANALYSIS

Neill's petition alleges three different theories of recovery based upon Hemphill's failure to file the underlying medical malpractice action: breach of contract, professional negligence, and fraudulent concealment. Hemphill argues that Neill cannot prevail on any of these theories of recovery because Neill was not damaged by Hemphill's allegedly negligent conduct. Hemphill's motion for summary judgment was predicated on his argument that Neill was not damaged by Hemphill's failure to timely file Neill's malpractice action against Fernandez, because Neill failed to show that his malpractice action against Fernandez would have resulted in a recovery for Neill.

[3] In a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was the proximate cause of the plaintiff's alleged injuries. *McLaughlin v. Hellbusch*, 256 Neb. 615, 591 N.W.2d 569 (1999); *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999).

ISSUE OF CONTRADICTORY TESTIMONY

The evidence offered by Hemphill at the hearing on the motion for summary judgment consisted of portions of the

depositions of Mancuso and Fernandez. Neill offered the remainder of the depositions, as well as a subsequent affidavit from Mancuso which purported to clarify his deposition testimony. Although it is not entirely clear from the district court's order, it appears that the district court may not have considered the affidavit because the court determined that there was a conflict between the affidavit and deposition. Neill assigns this as error.

[4] Neill argues that the district court relied upon *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 53, 313 N.W.2d 208, 213 (1981), in which this court stated that "'"[w]here a party without reasonable explanation testifies to facts materially different concerning a vital issue, the change clearly being made to meet the exigencies of pending litigation, such evidence is discredited as a matter of law and should be disregarded."'" This court noted that "[t]he important considerations are that the testimony pertains to a vital point, that it is clearly apparent the party has made the change to meet the exigencies of the pending case, and that there is no rational or sufficient explanation for the change in testimony." *Id.* at 55, 313 N.W.2d at 213.

As noted above, it is not clear from the district court's order whether the court relied upon *Momsen v. Nebraska Methodist Hospital, supra*, or otherwise determined that Mancuso's affidavit was discredited as a matter of law. To the extent that the district court may have relied upon *Momsen v. Nebraska Methodist Hospital*, however, this reliance was in error.

Even if it is assumed, but not decided, that Mancuso's deposition and subsequent affidavit are contradictory, the question of what the facts are is for the jury. See *Hawkes v. Lewis*, 252 Neb. 178, 560 N.W.2d 844 (1997). In *Hawkes v. Lewis*, the plaintiff sued Dr. Kirk Lewis, her surgeon, and Dr. Jeffrey Itkin, the assistant surgeon, for alleged negligence in packing her bowel during an abdominal hysterectomy. Itkin moved for and was granted a directed verdict at the close of the plaintiff's case based upon his testimony that he had not been involved with the packing of plaintiff's bowel. *Id.*

[5] This court reversed the directed verdict, finding that a jury question had been presented regarding Itkin's involvement in packing the plaintiff's bowel. *Id.* In pretrial deposition testi-

mony, offered into evidence by the plaintiff, Itkin had denied that he performed any of the packing. *Id.* Lewis stated at one point, however, that he and Itkin had both packed the bowel and then at another point that he, Lewis, could not remember how many of the packs he had inserted. *Id.* We thus determined that directed verdict was error, holding that the good faith self-contradiction of an expert witness presents a question for the trier of fact. *Id.*

In the instant case, Mancuso testified in his deposition and affidavit that Fernandez was negligent in failing to perform a battery of tests that Mancuso believes could have diagnosed Neill's coronary artery condition prior to Neill's myocardial infarction. Mancuso's deposition includes the following colloquy with defense counsel:

> Q. Just a couple minutes here, Doctor, and I'll — Doctor, can blood pressure rise because of a stressful situation, in your experience?
>
> A. Certainly.
>
> Q. Such as a committment [sic] to a psychiatric ward?
>
> A. I believe so, yes.
>
> Q. Could that certainly be a reason that, in your opinion, that Mr. Neill's blood pressure spiked as it did for a period of time?
>
> A. It could well be, yes.
>
> Q. Could actually have had absolutely nothing to do with a cardiac problem, more of a stress-related problem?
>
> A. Certainly.
>
> Q. And whether that's indeed what the situation was when he was at Mercy Hospital between 3-11 of 1993 to 3-18-1993, can you say one way or the other?
>
> A. No, I cannot.
>
> Q. Okay. So that, in fact — And I want to make sure I understand your opinion the way that you mean it, and I think I do, but I want to make sure I get it fleshed out here a little bit. Your criticism of Dr. Fernandez was that there was some tests that he could have indeed performed that were not done; is that correct?
>
> A. That's correct.

> Q. All right. And whether those tests would have shown that — or whether they would have been perfectly normal or not, we don't know that because they were not performed, correct?
>
> A. That's correct.
>
> Q. All right. And indeed it may well have been that those tests could have been normal, correct?
>
> A. Could have been, yes.
>
> Q. They could have been abnormal, correct?
>
> A. Correct.

In his affidavit, Mancuso explained:

> On page 31 of your Affiant's deposition, he was asked whether or not Mr. Neill's blood pressure could have spiked because of a stressful situation, whether or not Mr. Neill's spiked blood pressure could have had nothing to do with his cardiac problem, and whether any tests performed by Dr. Fernandez could have been normal. Certainly these "could" questions are things that could possibly happen, but it is your Affiant's opinion that Mr. Neill's high blood pressure was because of his coronary artery disease and that had the appropriate tests been performed, his coronary artery disease should have been diagnosed which he would have been treated for, and, in all likelihood, he would not have suffered a myocardial infarction and permanent damage to his heart.

(Emphasis in original.)

We conclude that the contradictions, if any, between Mancuso's deposition and his affidavit go to the weight or credibility of this testimony and are matters for the trier of fact. Therefore, the trial court erred if, in fact, the trial court discredited Mancuso's testimony in deciding to sustain Hemphill's motion for summary judgment.

Issue of Material Fact

Neill argues that Mancuso's testimony was sufficient to defeat summary judgment. In addition to the evidence noted above, Mancuso's affidavit states that

> these medical care providers failed to order and do diagnostic workups such as an electrocardiogram, cardiac

> enzymes and probably an echocardiogram which in your Affiant's opinion would likely have led to the diagnosis of Mr. Neill's coronary heart disease. That his coronary heart disease would have been appropriately treated with medication and, in your Affiant's opinion, would have prevented or avoided his myocardial infarction. That in your Affiant's opinion, Mr. Neill's heart has been permanently damaged because of the myocardial infarction he suffered.

[6,7] We have said that although expert medical testimony need not be couched in the magic words "reasonable medical certainty" or "reasonable probability," it must be sufficient as examined in its entirety to establish the crucial causal link between the plaintiff's injuries and the defendant's negligence. *Frank v. A & L Insulation*, 256 Neb. 898, 594 N.W.2d 586 (1999); *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999). Medical expert testimony regarding causation based upon possibility or speculation is insufficient; it must be stated as being at least "probable," in other words, more likely than not. *Doe v. Zedek, supra.*

Mancuso's affidavit states that had Neill been treated appropriately, such treatment would "likely" have led to the diagnosis of his condition, which "would have" led to appropriate care which "would have," "in all likelihood," prevented Neill's subsequent myocardial infarction and coronary damage. Taken in its entirety, this evidence is sufficient to create a genuine issue of material fact regarding whether Fernandez and Mercy could have, by providing the appropriate care, prevented Neill's heart attack and resulting injury. Consequently, the district court erred in entering Hemphill's summary judgment.

Hemphill's appellate argument is, in essence, that "there is no genuine issue of material fact deducible from the testimony of Dr. Mancuso that the blockage of the right artery and resultant surgery was occasioned by any treatment he received by Dr. Fernandez and personnel at Mercy Hospital." Brief for appellee at 9. Hemphill claims that the only injury shown by Neill was this blockage and the resultant angioplasty. Thus, Hemphill argues that there is no issue of material fact connecting Neill's injury to Mercy and Fernandez. This argument represents a misunderstanding of Neill's theory of the case.

Mancuso concedes in his deposition that Mercy and Fernandez' treatment was unrelated to Neill's angioplasty and to a later incident requiring hospitalization. The angioplasty, however, is not the substance of Neill's claimed injuries. Rather, the theory advanced by Mancuso is that Neill suffered a myocardial infarction prior to the angioplasty. The gravamen of Mancuso's testimony was that although the April 1993 angioplasty to the right coronary artery was probably inevitable, the heart attack before the angioplasty, and resulting cardiac injury, could have been avoided if Mercy and Fernandez had performed the correct diagnostic tests when they treated him in March.

While Hemphill is correct in arguing that Neill did not establish a causal connection between the treatment of Mercy and Fernandez and the angioplasty, that is not what Neill was trying to prove. Mancuso proffered an opinion that Neill's heart attack, and resulting coronary damage, would likely have been prevented had Mercy and Fernandez not been negligent. This evidence is sufficient to establish a material issue of fact regarding causation.

CONCLUSION

For the reasons stated above, we conclude that the district court erred in entering summary judgment based upon the evidence presented. The judgment of the district court is reversed, and the cause is remanded to that court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

COMBINED INSURANCE, APPELLANT, V. LOIS J. SHURTER, APPELLEE.

607 N.W.2d 492

Filed March 10, 2000. No. S-98-1038.

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. **Workers' Compensation: Subrogation: Tort-feasors.** Neb. Rev. Stat. § 48-118 (Reissue 1993) grants an employer who has paid workers' compensation benefits to

an employee injured as a result of the actions of a third party a subrogation interest against that third party.

3. **Workers' Compensation: Subrogation.** Under Neb. Rev. Stat. § 48-118 (Reissue 1993), an employer's subrogation interest becomes vested as soon as an employee's injury occurs.
4. **Workers' Compensation: Subrogation: Tort-feasors.** An employee's settlement of a claim against a third-party tort-feasor out of time does not extinguish an employer's vested statutory subrogation interest in the settlement proceeds under Neb. Rev. Stat. § 48-118 (Reissue 1993).

Appeal from the District Court for Adams County: STEPHEN ILLINGWORTH, Judge. Reversed and remanded for further proceedings.

Richard R. Endacott, of Knudsen, Berkheimer, Richardson & Endacott, for appellant.

Robert J. Parker, Jr., of Seiler, Parker & Moncrief, P.C., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Combined Insurance (Combined), the employer of Lois J. Shurter, appeals the decision of the district court for Adams County dismissing its petition for declaratory judgment filed against Shurter in which, pursuant to Neb. Rev. Stat. § 48-118 (Reissue 1993), Combined sought $34,045 of the $75,000 settlement proceeds which Shurter had received from Southern Nebraska Rural Public Power District (Southern Nebraska Power), the alleged tort-feasor. Section 48-118 pertains to an employer's subrogation rights under the Nebraska Workers' Compensation Act. We find that the trial court erred in ruling that Combined had no subrogation rights to the proceeds of the $75,000 settlement received by Shurter, and we therefore reverse, and remand for further proceedings.

STATEMENT OF FACTS

The parties have stipulated to the relevant facts, and there are no factual disputes in this case. The facts may be summarized as

follows: On February 2, 1994, Shurter, an employee of Combined, was injured in a work-related accident involving the collision of her automobile with a truck owned by Southern Nebraska Power and driven by one of its employees. Combined, through its workers' compensation insurer, CNA Insurance (CNA), paid workers' compensation benefits totaling $34,045 to or on behalf of Shurter. GAB Robins North America, Inc. (GAB), was an agent and third-party administrator for CNA and had full authority to make and receive payments on behalf of Combined and CNA.

Notwithstanding the provisions of the Political Subdivisions Tort Claims Act (the Act), Neb. Rev. Stat. §§ 13-901 to 13-926 (Reissue 1991 & Cum. Supp. 1994), neither Combined nor Shurter filed a timely claim with or petition against Southern Nebraska Power, a political subdivision as defined under the Act, with regard to the February 2, 1994, accident. Neither Combined nor Shurter complied with the notice requirements and statute of limitations provisions of the Act. Nevertheless, according to the stipulated facts, Shurter hired an attorney on May 9, 1996, who made an out-of-time claim against Southern Nebraska Power for Shurter's damages resulting from the accident. Notwithstanding the provisions of § 48-118, Shurter did not give written notice by certified or registered mail to CNA, GAB, or Combined of the claim she was making against Southern Nebraska Power.

On February 6, 1997, Southern Nebraska Power offered to settle Shurter's claim for $75,000. Shurter accepted the offer on February 17. CNA, GAB, and Combined were neither involved in the negotiations nor consulted regarding Shurter's decision to accept the offer.

GAB had previously notified Southern Nebraska Power of its subrogation interest and lien on behalf of CNA and Combined, but GAB's notice was not in compliance with the provisions of the Act. Nevertheless, Southern Nebraska Power made the $75,000 settlement check payable to the order of Shurter, her attorney, and GAB. The check was endorsed by all payees, and the proceeds were placed in a trust account of Shurter's attorney's law firm, pursuant to an agreement between Combined and Shurter that the proceeds would not be distributed until the

amount of the proceeds distributable to each party was determined either by mutual agreement of Combined and Shurter or by judgment of the district court.

Combined and Shurter were apparently unable to mutually agree upon the distribution of the settlement proceeds, and on September 16, 1997, Combined filed a petition for declaratory judgment against Shurter in the district court for Adams County. Combined alleged that pursuant to § 48-118, it was subrogated to the rights of its employee, Shurter, and was entitled to payment from the $75,000 settlement in the amount of the $34,045 benefits paid to Shurter by Combined through CNA. Combined requested, among other things, a judgment requiring that the amount of $34,045 be paid to Combined from the $75,000 settlement, without deduction for expenses or attorney fees, and that the balance be paid to Shurter and her attorney.

In her answer, Shurter opposed paying any subrogation. Shurter answered that Combined was only entitled to subrogation under § 48-118 when Southern Nebraska Power was liable to Shurter and that because the statute of limitations under the Act had run, Southern Nebraska Power was no longer liable to her and, therefore, Combined had no subrogation interest in the settlement proceeds.

The parties submitted the case to the trial court on the stipulated facts recited above. On August 25, 1998, the district court entered its written order adopting Combined and Shurter's stipulation of facts as its findings of fact and dismissing Combined's petition for declaratory judgment. In its decision, the trial court recited the language of § 48-118 which provides that the employer may recover any amount which the employee "should have been entitled to recover." The court then reasoned that because the statute of limitations under the Act had run, Shurter was not "entitled to recover" from Southern Nebraska Power, and that therefore, Combined had no right of recovery from Shurter under the subrogation provisions of § 48-118. Combined appealed.

ASSIGNMENTS OF ERROR

Combined asserts that the district court erred (1) in finding that the statute of limitations under the Act prevented or barred

Combined from recovering, pursuant to its subrogation rights under § 48-118, the $34,045 it had paid out to or on behalf of Shurter; (2) in failing to find that the statute of limitations under the Act was waived by Southern Nebraska Power when, before any claim was filed against it under the Act, or petition filed, Southern Nebraska Power voluntarily paid $75,000 in settlement of any potential claim against Southern Nebraska Power; and (3) in failing to find that no attorney fees should be paid to Shurter's attorney out of the $34,045. Combined asserts in the alternative that if the trial court was correct in holding that neither Combined nor Shurter had a right to pursue a tort claim against Southern Nebraska Power because the claim was barred by the Act's statute of limitations, the trial court erred in failing to find that the payment of $75,000 to Combined and Shurter was a voluntary transfer which Combined and Shurter are entitled to share equally.

STANDARD OF REVIEW

[1] In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court. *Johnson v. Clarke, ante* p. 316, 603 N.W.2d 373 (1999); *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999).

ANALYSIS

Subrogation Interest.

Combined assigns as error the dismissal of its petition which was based on the trial court's reasoning that because the statute of limitations under the Act had run at the time of the settlement, Shurter was not entitled to recover from Southern Nebraska Power, and that consequently, Combined had no subrogation interest under § 48-118 in the $75,000 settlement between Shurter and Southern Nebraska Power. We conclude that the trial court erred as a matter of law in its interpretation of § 48-118, and we remand this cause for further proceedings.

Section 48-118 pertaining to subrogation in the workers' compensation context was amended by 1994 Neb. Laws, L.B. 594. See § 48-118 (Reissue 1998). See, also, *Jackson v. Branick Indus.*, 254 Neb. 950, 581 N.W.2d 53 (1998). The amendment

dealt in part with the manner of distribution of third-party settlement proceeds between an employee and employer or between an employee and the employer's insurer. We held in *Jackson* that with respect to the amendment regarding the manner of distribution, "L.B. 594 worked a substantive change, rather than a procedural change," 254 Neb. at 961, 581 N.W.2d at 59, and therefore, such amendment resulting from L.B. 594 should be applied prospectively only. *Id.* The L.B. 594 amendment was effective July 16, 1994. Shurter's injury occurred February 2, 1994. Accordingly, the pre-July 16, 1994, version of § 48-118 (Reissue 1993) applies to the instant case. We note for the sake of completeness that the provisions of § 48-118 relating to lawsuits against third parties and notice were unaffected by L.B. 594.

Section 48-118 (Reissue 1993), on which the trial court relied, provides, inter alia, as follows:

> When a *third person is liable to the employee* or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his or her dependents *should have been entitled to recover.*

(Emphasis supplied.) Elsewhere, § 48-118 provides that an injured employee may sue the third person, but the employee must make the employer a party to the lawsuit. Furthermore, before the employee can make a claim or file a lawsuit against the third person, the employee must give the employer notice of the opportunity to join in making the claim or instituting the lawsuit, all in accordance with § 48-118. It is undisputed that Shurter did not sue Southern Nebraska Power and that she did not notify Combined of her claim against Southern Nebraska Power or of her settlement negotiations with Southern Nebraska Power.

[2,3] Section 48-118 grants an employer who has paid workers' compensation benefits to an employee injured as a result of the actions of a third party a subrogation interest against that

third party. *Jackson v. Branick Indus., supra.* In *Jackson*, we held that under the pre-L.B. 594 version of § 48-118, the employer's "subrogation interest . . . became vested as soon as the injury occurred, because that is when the employer became liable to the employee for compensation to be paid according to the provisions of the workers' compensation statutes." 254 Neb. at 961, 581 N.W.2d at 59. Thus, Combined's subrogation rights vested on February 2, 1994, the date Shurter was injured.

Subrogation has been explained as follows:

> "Subrogation is substitution of one person who is not a volunteer, the subrogee [the employer or its insurance carrier], for another, the subrogor [the employee], as the result of the subrogee's payment of a debt owed to the subrogor so that the subrogee succeeds to the subrogor's right to recover the amount paid by the subrogee. . . . A party's right to subrogate may arise under principles of equity, may be contractual, or may be set out in statute."

Neumann v. American Family Ins., 5 Neb. App. 704, 709, 563 N.W.2d 791, 794 (1997). In the instant case, Combined's subrogation rights are derived from statute. See § 48-118.

On February 2, 1994, Shurter was injured in an automobile accident involving the collision of her automobile and a truck owned by Southern Nebraska Power. Under the Act, Southern Nebraska Power was potentially liable to Shurter, and such potential liability of Southern Nebraska Power accrued on the date of the accident. See, e.g., *Bohl v. Buffalo Cty.*, 251 Neb. 492, 557 N.W.2d 668 (1997) (noting that date automobile accident occurred was date action accrued for purposes of statute of limitations under Act); *Davis v. Town of Clatonia*, 231 Neb. 814, 438 N.W.2d 479 (1989). See, also, *Polinski v. Omaha Pub. Power Dist.*, 251 Neb. 14, 554 N.W.2d 636 (1996) (holding that for purposes of § 13-919(1), cause of action accrues when potential plaintiff discovers political subdivision's negligence). Section 13-919(1) sets forth the timing requirements which a potential plaintiff must follow in order to seek recovery from a potentially liable political subdivision. Under § 13-919(1), a person must make a written claim to the governing body of the political subdivision within 1 year after such claim accrued and must begin suit against the political subdivision within 2 years

after such claim accrued. It is undisputed that neither party complied with the Act's notice requirements and that the Act's statute of limitations on a suit either party might have brought against Southern Nebraska Power had run at the time of the settlement. However, the stipulation of the parties states that Shurter made a claim at an unspecified time against Southern Nebraska Power for the injuries she had suffered. Further, according to the stipulation, Southern Nebraska Power thereafter "made an offer to Shurter to settle the claim of Shurter for $75,000," Shurter accepted the offer, and "Southern Nebraska Power sent a check to Shurter's attorney for $75,000 in settlement of the claim."

We have observed that a settlement is, inter alia, " 'an adjustment of differences' " and an " '[a]greement to terminate or forestall all or part of a lawsuit.' " *Horace Mann Cos. v. Pinaire*, 248 Neb. 640, 646, 538 N.W.2d 168, 172 (1995) (quoting Black's Law Dictionary 1372 (6th ed. 1990)). Thus, as a result of their stipulation, Shurter and Combined have agreed that Southern Nebraska Power's payment of the "$75,000 in settlement" is evidence of the resolution of possible liability of Southern Nebraska Power, and such concession is consistent with Combined's acquiring a subrogation interest in the settlement proceeds paid by Southern Nebraska Power to avoid such liability.

The trial court ruled in its order dismissing Combined's petition that because neither Shurter nor Combined had filed a timely claim nor a lawsuit against Southern Nebraska Power, the statute of limitations under the Act, § 13-919(1), had run, and thus Southern Nebraska Power was not liable to Shurter. The trial court concluded that under the language of § 48-118, no " 'third person [was] liable [to Shurter],' " and there was no amount of money which Shurter " 'should have been entitled to recover [from Southern Nebraska Power],' " and therefore, there was no recovery subject to subrogation. The trial court misinterpreted § 48-118.

[4] In the instant case, Southern Nebraska Power was potentially liable to Shurter on the date of the accident, see, *Bohl, supra*; *Polinski, supra*; *Davis, supra*, and Combined's subrogation interest became vested on February 2, 1994, the date of

Shurter's injury, see *Jackson v. Branick Indus.*, 254 Neb. 950, 581 N.W.2d 53 (1998). On the date of the injury, Southern Nebraska Power was potentially liable to Shurter, Shurter was "entitled to recover" from Southern Nebraska Power, and Combined's subrogation interest vested. Black's Law Dictionary 1557 (7th ed. 1999) defines "vested" as that which "has become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute." The fact that Shurter pursued her claim against Southern Nebraska Power out of time did not extinguish Combined's vested statutory subrogation interest in the settlement proceeds under § 48-118.

Accordingly, we hold that the trial court erred as a matter of law when it concluded that Combined had no right of subrogation under § 48-118, and we remand this cause to the trial court to enter an order distributing the settlement proceeds pursuant to the 1993 version of § 48-118.

Attorney Fees.

Having concluded that the trial court erred as a matter of law with regard to its interpretation of § 48-118 and in view of our remand of this cause for further proceedings, it is unnecessary for us to consider all of Combined's other assigned errors. Nevertheless, we note that on appeal, Shurter has asserted that she is entitled to receive reasonable attorney fees out of any settlement proceeds Combined might receive as a result of its subrogation interest, and Combined assigns as error the trial court's failure to declare that Shurter is not entitled to attorney fees under § 48-118. Thus, although we remand this cause for further proceedings, we address the attorney fees issue because it is likely to arise on remand. See *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998).

Under § 48-118, before Shurter made a claim against Southern Nebraska Power, she should have given Combined or its insurer "notice of not less than thirty days, by certified or registered mail, an opportunity to join in the making of such claim or the instituting of an action [against Southern Nebraska Power] and to be represented by counsel." Section 48-118 also provides that "[i]f either party makes a claim or prosecutes such

action without the giving of a notice to the other party, the party bringing the claim . . . shall not deduct expenses or attorney's fees from the amount payable to the other party." Thus, as a general rule, when the party bringing the claim has failed to give notice, such party shall not deduct attorney fees from the amount payable to the remaining party who did not receive notice.

We have previously stated, however, that " '[a] reading of the entire statute [§ 48-118] makes it quite clear that a strict compliance with the written, certified, or registered mail notice provision was not intended to be mandatory and jurisdictional.' " *Versch v. Tichota*, 192 Neb. 251, 253, 220 N.W.2d 8, 10-11 (1974) (quoting *Gillotte v. Omaha Public Power Dist.*, 189 Neb. 444, 203 N.W.2d 163 (1973), *overruled on other grounds, Nekuda v. Waspi Trucking, Inc.*, 222 Neb. 806, 388 N.W.2d 438 (1986)). We have also held that such "notice may be waived in writing or may be implied from unequivocal conduct." *Versch*, 192 Neb. at 253, 220 N.W.2d at 11.

In the instant case and on appeal, Combined does not challenge Shurter's settlement with Southern Nebraska Power. On the contrary, Combined has petitioned for a judicial division and distribution of the settlement in which it wishes to share. Legal authorities recognize that if a party seeks to enjoy the benefits of a settlement, such action constitutes a ratification of the settlement and a waiver of any objections or rights which that party might otherwise have had in connection with the procurement of the settlement. 15A C.J.S. *Compromise & Settlement* § 40 (1967 & Supp. 1999); 15A Am. Jur. 2d *Compromise & Settlement* § 44 (1976 & Cum. Supp. 1999). Combined, through its "unequivocal conduct" of seeking to share in the settlement proceeds, has ratified Shurter's settlement with Southern Nebraska Power and thereby waived the objections it might have had to such settlement based on a lack of notice under § 48-118. See *Versch, supra.*

Therefore, upon remand, the trial court shall award Shurter attorney fees in accordance with the provisions of § 48-118.

CONCLUSION

We conclude that as a matter of law the trial court erred when it ruled that Combined had no subrogation interest in proceeds

paid by Southern Nebraska Power to Shurter; her attorney; and GAB, an agent of Combined, in settlement of a claim Shurter had against Southern Nebraska Power. We remand this cause to the trial court for a determination of the distribution of those settlement proceeds under § 48-118 and an award to Shurter of attorney fees in accordance with § 48-118.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
JON C. BAUE, APPELLANT.

607 N.W.2d 191

Filed March 10, 2000. No. S-99-198.

1. **Motions to Suppress: Probable Cause: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress, an appellate court reviews the ultimate determination of probable cause de novo and reviews the findings of fact made by the trial court for clear error, giving due weight to the inferences drawn from those facts by the trial court.
2. **Police Officers and Sheriffs: Arrests: Probable Cause.** When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant.
3. **Blood, Breath, and Urine Tests: Drunk Driving: Evidence: Proof.** The four foundational elements which the State must establish as a foundation for the admissibility of a breath test in a driving under the influence prosecution are as follows: (1) that the testing device was working properly at the time of the testing; (2) that the person administering the test was qualified and held a valid permit; (3) that the test was properly conducted under the methods stated by the Department of Health; and (4) that all other statutes were satisfied.
4. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. In determining whether error in admitting evidence was harmless, an appellate court bases its decision on the entire record in determining whether the evidence materially influenced the jury in a verdict adverse to the defendant.
5. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but,

rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.

6. **Drunk Driving: Evidence: Proof.** A violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1993) is one offense which can be proved in more than one way.
7. **Police Officers and Sheriffs: Drunk Driving: Witnesses.** After sufficient foundation is laid, a law enforcement officer may testify that in his or her opinion a defendant was driving under the influence.
8. **Judgments: Appeal and Error.** To the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the courts below.
9. **Blood, Breath, and Urine Tests: Evidence: Case Overruled.** A reading of the test results from an Intoxilyzer Model 4011AS is not to be automatically adjusted as a matter of law on the basis of the testimony of a witness who does not speak on behalf of the State. Whether an adjustment is required in this circumstance is dependent upon the credible evidence in each case. To the extent that *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987), is inconsistent with this holding, it is overruled.
10. **Rules of Evidence: Expert Witnesses.** When a court is faced with an offer of a novel form of expertise which has not yet received judicial sanction, it must conduct an initial inquiry to determine whether the new technique or principle is sufficiently reliable to aid the jury in reaching accurate results.
11. ____: ____. In accordance with *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), the Nebraska Supreme Court has held that the admissibility of expert testimony based on a technique or process which utilizes or applies a scientific principle depends on general acceptance of the principle, technique, or process in the relevant scientific community. Whether this standard has been met may be determined by the trial court on the basis of an evidentiary hearing outside the presence of the jury.
12. **Blood, Breath, and Urine Tests: Drunk Driving: Evidence: Proof: Case Overruled.** The horizontal gaze nystagmus field sobriety test meets the *Frye* standard, as established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), for acceptance in the relevant scientific communities, and when the test is given in conjunction with other field sobriety tests, the results are admissible for the limited purpose of establishing that a person has an impairment which may be caused by alcohol. To the extent that *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986), is inconsistent with this holding, it is overruled.
13. **Drunk Driving: Evidence: Proof.** While a horizontal gaze nystagmus field sobriety test result is relevant to show that an individual is impaired, such a result, standing alone, is insufficient to prove the offense of driving under the influence as defined by Neb. Rev. Stat. § 60-6,196 (Reissue 1993) beyond a reasonable doubt.
14. **Drunk Driving: Police Officers and Sheriffs: Testimony.** A police officer may testify to the results of horizontal gaze nystagmus field sobriety testing if it is shown that the officer has been adequately trained in the administration and assessment of the test and has conducted the testing and assessment in accordance with that training.
15. **Trial: Expert Witnesses.** The right of an indigent defendant to the appointment of an expert witness at the State's expense generally rests in the discretion of the trial court.
16. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.

17. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.

Appeal from the District Court for Pierce County, RICHARD P. GARDEN, Judge, on appeal thereto from the County Court for Pierce County, PHILIP R. RILEY, Judge. Judgment of District Court reversed, and cause remanded for a new trial.

Jim K. McGough, of Copple & Rockey, P.C., for appellant.

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

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

STEPHAN, J.

Jon C. Baue appeals from an order of the district court for Pierce County, Nebraska, which affirmed his conviction for driving under the influence (DUI) of alcoholic liquor, second offense, following a jury trial in the county court for Pierce County. We reverse Baue's conviction and remand the cause for a new trial because of prejudicial error in the admission of certain evidence.

I. FACTUAL AND PROCEDURAL BACKGROUND

On September 6, 1997, at approximately 1:30 a.m., Baue was stopped for speeding by Nebraska State Patrol Trooper Greg Lammers. At the time of the stop, Baue was driving 79 miles per hour in a 55-miles-per-hour zone on a blacktop county road in Pierce County. Lammers detected a strong odor of alcoholic beverage emitting from the vehicle and observed that Baue had red, watery eyes. When questioned by Lammers, Baue admitted that he had consumed some alcohol.

Lammers then administered six field sobriety tests. Baue failed both a horizontal gaze nystagmus (HGN) test and a pre-

liminary breath test, and passed an alphabet test, a one-legged stand test, a counting backward test, and a walk-and-turn test. Upon completion of the field sobriety tests, Lammers arrested Baue for DUI and transported him to the office of the Pierce County Sheriff for the purpose of administering a breath test utilizing the Intoxilzyer 4011AS testing device. Lammers held a class B permit issued by the Nebraska Department of Health which authorized him to utilize this device to test breath for alcohol content. In administering the test to Baue, Lammers followed a checklist approved and prescribed by a regulation of the Department of Health, 177 Neb. Admin. Code, ch. 1, § 007.04A2 (1990), for infrared absorption analysis using the Intoxilyzer Model 4011AS for breath specimens. When Baue provided the initial breath specimen, the device registered both a digital readout of .12 and an error reading, which required that the test be readministered. Lammers then conducted the test a second time, again utilizing the checklist, and obtained a valid reading of .11.

Prior to trial, Baue filed a motion in limine seeking to exclude all of the Intoxilyzer Model 4011AS test results on various grounds. During a pretrial hearing on this motion, Baue called Dr. John Vasiliades, an expert in toxicology and forensic toxicology, who testified that the Intoxilyzer Model 4011AS has an inherent analytical error of plus or minus .03, so that a reading of .11 could be as low as .08 or as high as .14. The State did not present evidence to rebut Vasiliades' testimony during the pretrial hearing. The county court overruled Baue's motion in limine.

During trial, Baue asserted a foundational objection when Lammers was asked to testify about the result of Baue's first Intoxilyzer test. The county court initially sustained the objection, but later overruled Baue's objection when the question was asked a second time and permitted Lammers to testify that the digital readout was .12. The court then gave the following instruction to the jury with respect to the initial test:

> Okay, the test card did not print and an error light came on in the machine. The error light was an indication to the testing officer that there was a problem with that test. So the fact that the officer observed a .12 on the digital read-

> out on that machine is not to be considered by you as evidence of the level of intoxication of the defendant at that time because the error light came on. So we had two factors. The error light and the digital readout. No printout on the card. The normal — counsel can correct me if I misstate this. Usual procedure would be to insert the card, have the test administered, breathe into the machine, the machine prints. It also shows a digital readout and that would be the result of the test. But in this case an error light came on. So the testimony is to the one — .12 is not evidence of the defendant's intoxication at that time. Do you all understand that. All right, very good.

Lammers' testimony regarding the result of the second Intoxilyzer test was also admitted over Baue's objection that the results of the test should be adjusted as a matter of law to take into account his expert's testimony that the test was subject to a .03 margin of error. The trial court rejected Baue's argument that the test should be adjusted as a matter of law, but permitted Baue to present the expert's testimony at trial. The State then presented a witness to rebut Vasiliades' testimony.

The jury returned a verdict of guilty, upon which Baue was convicted of second-offense DUI, fined $200, and placed on probation. Baue appealed to the district court for Pierce County, which affirmed. Baue then perfected this appeal, which we moved to our docket pursuant to our authority to regulate the caseloads of the Nebraska appellate courts. Additional facts will be set forth where pertinent to our analysis of Baue's various assignments of error.

II. ASSIGNMENTS OF ERROR

Baue assigns, renumbered and restated, that (1) the trial court erred in failing to suppress his arrest for lack of probable cause, (2) the trial court erred in failing to grant his motion to dismiss for insufficient evidence, (3) the trial court erred in failing to appoint him an expert witness to testify regarding the scientific acceptance of the HGN test, (4) the trial court erred in failing to adjust the results of his Intoxilyzer test as a matter of law after he presented unrefuted testimony regarding its margin of error, (5) the trial court erred in allowing the State to present evidence of the first Intoxilyzer test that did not print out a test record

card, (6) the trial court erred in allowing the State to pursue a hearing regarding the admissibility of the HGN field sobriety test outside the presence of the fact finder, and (7) the trial court erred in admitting the evidence and testimony pertaining to the HGN test in the absence of foundational testimony to the trier of fact regarding the pertinent scientific principles.

III. ANALYSIS

1. Probable Cause for Arrest

Baue filed a motion to suppress his arrest and all evidence obtained as a result thereof on the ground that the arrest was accomplished without probable cause. Following a pretrial hearing on this motion at which Lammers testified regarding the events and circumstances leading to Baue's arrest, the county court determined that based upon Lammers' observations of Baue at the time of the traffic stop and the fact that Baue failed the HGN and preliminary breath tests, Lammers had probable cause to arrest Baue for DUI. In making this determination, the court made reference to the fact that the traffic stop occurred at "1:30 in the morning, half hour after the bars close." The district court affirmed, noting the evidence of Baue's speeding, the smell of alcohol emanating from Baue's vehicle, and Baue's failure of the HGN and preliminary breath tests.

[1,2] In reviewing a trial court's ruling on a motion to suppress, an appellate court reviews the ultimate determination of probable cause de novo and reviews the findings of fact made by the trial court for clear error, giving due weight to the inferences drawn from those facts by the trial court. *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997). When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant. *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997); *State v. Nissen, supra.*

Baue argues on appeal that the county court based its probable cause finding in part upon evidence not contained in the record, i.e., the time when the " 'bars close.' " Brief for appellant at 28. It does not appear that the district court considered this

fact in affirming the probable cause finding, nor do we in our de novo review. We conclude that Lammers' observations at the time of the traffic stop, together with Baue's performance on the HGN and preliminary breath tests, established probable cause for the arrest and that the trial court did not err in overruling Baue's motion to suppress the arrest.

2. ADMISSION OF FIRST INTOXILYZER TEST RESULT

[3] We next address Baue's contention that the trial court erred in permitting Lammers to testify over objection regarding the digital readout from the first Intoxylizer test administered following Baue's arrest. In *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980), *overruled on other grounds, State v. Obermier*, 241 Neb. 802, 490 N.W.2d 693 (1992), this court articulated four foundational elements which the State must establish as a foundation for the admissibility of a breath test in a DUI prosecution: (1) that the testing device was working properly at the time of the testing; (2) that the person administering the test was qualified and held a valid permit; (3) that the test was properly conducted under the methods stated by the Department of Health; and (4) that all other statutes were satisfied. Although *Gerber* involved results from a gas chromatograph intoximeter known as a "Breathalyzer," we held in *State v. Bullock*, 223 Neb. 182, 388 N.W.2d 505 (1986), that the same foundational elements were required to establish the admissibility of breath test results from the Intoxilyzer Model 4011AS.

It is apparent from the record that the first foundational requirement was not met with respect to the .12 result obtained from the initial breath test. Testimony adduced by the State established that when operating properly, the testing device generates both a digital readout and a printed test record card reflecting the alcohol content of the breath sample. When Lammers tested the initial breath specimen provided by Baue, he obtained a digital readout of .12, but no printout on the test record card. As Lammers explained in his testimony, "[F]or some reason the machine did not like the sample that was given. It registered out an error reading. That was noted. And the process was all started over again." Because the State did not prove that the testing device was working properly at the time the .12

result was obtained, foundation for the result was not established, and the trial court erred in receiving the result in evidence over Baue's objection.

In reaching this conclusion, we are mindful of our decision in *Keys v. Department of Motor Vehicles*, 249 Neb. 964, 546 N.W.2d 819 (1996), an administrative revocation proceeding based upon a claim that a motorist failed to submit to a chemical test of his breath as required by Neb. Rev. Stat. § 60-6,197(4) (Reissue 1993). The issue in that case was whether the motorist refused to submit to a breath test where he gave a breath sample which was sufficient to generate a digital reading on the Intoxilyzer Model 4011AS but insufficient to generate a test record card. We held that because there was no statutory or regulatory requirement that the results of a chemical breath test be shown on a test record card and there was no evidence of willful noncooperation, the motorist had "submitted" to the breath test as required by law. *Keys* is distinguishable from this case in that it did not involve foundational requirements for the admissibility of breath test results in a criminal action. Here, there is evidence that Lammers considered the failure of the testing device to generate a test record card after the first test to be an error, which necessitated the second test. We note that the insertion and the removal of the test record card into the testing device are specific steps in the procedure for conducting chemical tests of breath according to attachment 3 to 177 Neb. Admin. Code, ch. 1, § 007 (1990), which is the checklist Lammers followed in this case, and we cannot assume that the recording of test results on the test record card is simply a meaningless formality. It is clear that Lammers considered the failure to print a reading on the test record card as an indication that the testing device was not working properly when the initial specimen was tested.

[4,5] The State argues that any error in the admission of this evidence was harmless. In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Myers, ante* p. 300, 603 N.W.2d 378 (1999); *State v. Jackson, ante* p. 24, 601 N.W.2d 741 (1999). In determining whether error in admitting evidence was harmless,

an appellate court bases its decision on the entire record in determining whether the evidence materially influenced the jury in a verdict adverse to the defendant. *Id.* Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996).

[6,7] Baue was convicted of violating Neb. Rev. Stat. § 60-6,196 (Reissue 1993), which proscribes several types of conduct, including the operation of a motor vehicle "[w]hile under the influence of alcoholic liquor" or while having "a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of [the operator's] breath." § 60-6,196(1)(a) and (c). A violation of § 60-6,196 is one offense which can be proved in more than one way. *State v. Blackman*, 254 Neb. 941, 580 N.W.2d 546 (1998). See, also, *State v. Hingst*, 251 Neb. 535, 557 N.W.2d 681 (1997); *State v. Dake*, 247 Neb. 579, 529 N.W.2d 46 (1995). After sufficient foundation is laid, a law enforcement officer may testify that in his or her opinion a defendant was driving under the influence. *State v. Howard*, 253 Neb. 523, 571 N.W.2d 308 (1997). Lammers expressed no such opinion at trial in this case. Although he observed Baue speeding, Lammers did not observe any erratic driving such as swerving or weaving. Lammers testified that he noticed the odor of alcoholic liquor emanating from Baue's vehicle, in which Baue, the driver, and two passengers were seated, and that he observed Baue to have "red, watery eyes." However, he acknowledged that such observations are not necessarily indicative of intoxication and admitted that he did not make a determination of whether or not Baue was intoxicated upon observing him at the time of the stop at approximately 1:30 a.m. Although Baue gave an affirmative response to Lammers' inquiry as to whether "he'd had anything to drink that night," the record does not indicate the amount, time, or duration of any alcohol consumed by Baue prior to his arrest.

It is therefore apparent that the strongest evidence upon which the jury could convict Baue of DUI was the .11 breath test

result, obtained approximately 15 minutes after the .12 result which was erroneously received in evidence. The jury also heard the testimony of Baue's expert that the breath test was subject to a .03 margin of error, so that Baue's actual breath alcohol content could have been as low as .08. Viewing the entire record, including this evidence, we cannot say that the error in permitting Lammers to testify as to the initial .12 breath test result was harmless beyond a reasonable doubt. The inadmissible result of the first test tends to corroborate and validate the admissible but disputed result of the second test, notwithstanding the "limiting instruction" given by the trial court which included two specific references to the .12 digital reading from the first breath test. See *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998). On these facts, we are simply unable to conclude that the verdict was "surely unattributable to the error." Thus, we are required to reverse Baue's conviction and remand the cause for a new trial. While this issue is dispositive of the appeal, we reach Baue's other assignments of error because they involve issues which are likely to recur during retrial.

3. ADJUSTMENT OF TEST RESULTS FOR MARGIN OF ERROR

[8] Baue contends that he was entitled as a matter of law to the benefit of the margin of error which his expert attributed to the Intoxilyzer Model 4011AS test results. To the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the courts below. *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999).

Baue relies upon *State v. Adams*, 251 Neb. 461, 467, 558 N.W.2d 298, 302 (1997), in which we applied a principle articulated in prior cases that "when there is a margin of error in a chemical test for alcohol, the test result must be adjusted and the defendant given the benefit of the adjusted reading." See, also, *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987); *State v. Bjornsen*, 201 Neb. 709, 271 N.W.2d 839 (1978). In *Adams*, the State's expert testified that due to the margin of error inherent in a blood alcohol test, the defendant's blood alcohol content ranged from .084 to .109. We reasoned that this result "fail[ed], as a matter of law, to establish beyond a reasonable doubt" that the defendant had a blood alcohol concentration of .10 or more.

Id. at 467, 558 N.W.2d at 302. Similarly, in *State v. Bjornsen*, 201 Neb. at 710, 271 N.W.2d at 840, we held that the State had not met its burden of proof where the State's witness testified that a blood test indicated alcohol content of .10 but admitted that the test was accurate " 'within five thousandths of a percent.' "

The rationale underlying our holdings in *State v. Adams, supra*, and *State v. Bjornsen, supra*, is that where the State is able to prove alcohol content only within a specified range, the lower point of which falls below the statutory value which affords a basis for a DUI conviction, it has failed to meet its burden of proof of guilt beyond a reasonable doubt. The same rationale would not apply where the State makes a prima facie showing with chemical test results of blood or breath alcohol levels which meet or exceed the statutory threshold for a DUI conviction and the defendant counters with evidence that the tests utilized carry a margin of error which, when applied to the test result, could produce a value which is less than the statutory limit. However, in *State v. Burling, supra*, this court held that where the State offered no evidence at trial to rebut a defense expert's testimony that the defendant's blood alcohol content could be as much as 52.38 percent less than that shown by the testing device utilized by the State, which would cause it to fall below the legal threshold, the chemical test did not establish DUI.

[9] In *State v. Babcock*, 227 Neb. 649, 653, 419 N.W.2d 527, 530 (1988), we stated that in *Burling*, we "did not intend to . . . rule that as a matter of law a reading of the test results from an Intoxilyzer Model 4011AS should automatically be adjusted." We further stated that "[w]hether an adjustment is required is dependent upon the credible evidence in each case." *Id.* In *State v. Hvistendahl*, 225 Neb. 315, 318, 405 N.W.2d 273, 276 (1987), also a DUI case based upon test results generated by an Intoxilyzer Model 4011AS, we held that "when there is a conflict in the evidence as to what [the] margin of error [of the testing device] actually is, we will affirm the decision of the trier of fact so long as there is sufficient evidence in the record, if believed, to sustain its finding of guilt." We also noted that the trial court was not bound to accept the conclusion of a particu-

lar expert. We have subsequently reaffirmed that the weight and credibility of an expert's testimony is a question for the jury, *Lincoln Branch, Inc. v. City of Lincoln*, 245 Neb. 272, 512 N.W.2d 379 (1994) (superseded on other grounds by constitutional amendment), and that triers of fact are not required to take opinions of experts as binding upon them, *Jones v. Meyer*, 256 Neb. 947, 594 N.W.2d 610 (1999); *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 813, 572 N.W.2d 362 (1998). Thus, while Vasiliades' opinion with respect to the margin of error was not specifically rebutted during the pretrial hearing at which he testified, it was not binding upon the trial court, and Baue was not entitled to have the test result adjusted downward as a matter of law at that time. To the extent that *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987), is inconsistent with this holding, it is overruled.

At trial, there was conflicting evidence regarding the margin of error of the Intoxilyzer Model 4011AS. A witness called by the State disputed Vasiliades' opinion that the test result had an inherent error of .03 above or below the test result and stated that the .11 result was accurate to within 5 percent and thus exceeded the .10 threshold. Accordingly, the trial court did not err in refusing to adjust the test result as a matter of law and in submitting the issue to the jury for determination. See *State v. Hvistendahl, supra.*

4. HGN Field Sobriety Test

Prior to trial, Baue filed a motion in limine to exclude evidence of the HGN test administered by Lammers prior to the arrest, citing as authority our decision in *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986). In *Borchardt*, which involved an appeal from a DUI conviction, we concluded that the trial court erred in permitting the arresting officer to testify as to the administration and interpretation of an HGN test. We stated:

> The major difficulty with the testimony is that the record contains no competent evidence that this new test is valid, that is, that it in fact reveals the presence of intoxication. Evidence of a test result cannot be characterized as "scientific" or qualify as "technical or other specialized knowledge," and thus within the purview of [Neb. Rev.

> Stat.] § 27-702 [Reissue 1985], unless and until it is established that the . . . test result demonstrates what it is claimed to demonstrate. It was such a failure of proof which led this court to conclude in *Boeche v. State*, 151 Neb. 368, 37 N.W.2d 593 (1949), that polygraph, or so-called "lie detector test," results had not gained such standing and scientific recognition as to justify being admitted into evidence.

State v. Borchardt, 224 Neb. at 58-59, 395 N.W.2d at 559. When the State subsequently designated experts who would testify in opposition to Baue's motion in limine, he withdrew it. On the State's motion and over Baue's objection, the trial court conducted a pretrial evidentiary hearing concerning the scientific principles underlying HGN testing and their acceptance in the scientific community. Three witnesses called by the State testified at the hearing.

Dr. Marcelline Burns testified she has worked as a research psychologist since 1969. Throughout her career, she has specialized in studying the effects of alcohol and other drugs on human behavior, particularly driving skills. Burns has written and lectured extensively on this subject and has previously testified as an expert on HGN testing in approximately 26 jurisdictions. She also was personally involved in field sobriety studies undertaken for the National Highway Traffic Safety Administration (NHTSA), which resulted in reports issued in 1977 and 1981, as well as a field study for the Colorado Department of Transportation in 1995.

Burns defined HGN as an involuntary "jerking movement of the eyeballs." Based upon her studies, Burns testified that there is a correlation between HGN and alcohol impairment, and that HGN is therefore a behavioral symptom which can be utilized as a part of a battery of field sobriety tests to determine if a motorist is impaired by alcohol or certain other substances which depress the central nervous system. The symptom can be detected by law enforcement officers with proper training. Burns and other trial witnesses explained that to administer the HGN test, the officer holds a pen or similar object 12 to 15 inches from the subject and asks the subject to follow the object with the eyes only as it is slowly moved from side to side in

front of him or her. Each eye is tested for nystagmus in three distinct circumstances. First, the officer observes whether the eye smoothly pursues the object as it is moved from side to side. Second, the officer checks for nystagmus at "maximum deviation," i.e., the point at which the eye has been deviated as far to the side as possible. Third, the officer checks for the angle of onset of the nystagmus. The test is scored by assessing one point for each part of the test that is failed, with a resulting maximum score of 6 points. According to the NHTSA guidelines, a score of 4 out of a possible 6 on the HGN test is a failure which indicates impairment. Burns testified that HGN is a better indicator of impairment than some other field sobriety tests because nystagmus is an involuntary movement which an individual is unable to mask or avoid.

Burns testified the NHTSA has developed HGN training materials for law enforcement officers based upon her studies and research and that training pursuant to these guidelines enables a law enforcement officer to properly administer and interpret the HGN test. According to Burns' studies, a decision to arrest for DUI based upon administration of the HGN and other standard field sobriety tests was validated by subsequent testing in approximately 90 percent of the cases studied. Based upon her studies, Burns has determined that the HGN test is a valid and reliable means of determining alcohol impairment. She testified that HGN testing has been accepted by the relevant scientific community which includes alcohol and drug researchers, professional law enforcement authorities, regulatory agencies dealing with traffic safety issues, and forensic scientists.

Jack Richman is an optometrist and professor of optometry who has studied and worked with law enforcement agencies regarding alcohol and its effect upon eye movement. He defined nystagmus as the loss of one's ability to hold the eyes steady either on a moving or stationary target, which results in a jerking motion of the eyes. Nystagmus can occur naturally when extreme demands are placed on the eyes or when an individual has a disease which affects the central nervous system. It can also occur when a person has ingested alcohol or other drugs which depress the central nervous system. Based upon his per-

sonal knowledge and observations, Richman testified that a properly trained law enforcement officer can detect the difference between naturally occurring nystagmus and that caused by alcohol or other central nervous system depressants. In 1993, the American Optometric Association, of which Richman is a member, adopted a resolution acknowledging "the scientific validity and reliability of the HGN test as a field sobriety test when administered by properly trained and certified police officers." According to Richman, the HGN test is intended to identify an impairment which may be caused by alcohol or other factors, and performance on the HGN test does not, in and of itself, prove that the subject is intoxicated.

The State's third witness was Lt. Darrell Fisher, the director of training for the Nebraska State Patrol. Fisher had personally undergone approximately 700 hours of specialized training in alcohol- and drug-impaired driving, which included training in standardized field sobriety testing. Fisher testified that the standardized battery of three field sobriety tests recommended by the NHTSA, which has been utilized in Nebraska since 1984, includes the HGN test. Fisher is certified by the NHTSA to conduct training in the standardized field sobriety tests. He trained Lammers to administer and interpret field sobriety tests in 1994. Nebraska state troopers receive 24 hours of training in field sobriety testing, with approximately 12 hours devoted to the HGN test. This training program has been audited and found to be acceptable by the NHTSA. Fisher trains Nebraska state troopers to administer and interpret the HGN test in accordance with the NHTSA instructions. Based upon Fisher's training and experience, it was his opinion that law enforcement officers can be trained to administer and interpret the HGN test with a high degree of accuracy and that the test itself "is a reliable indicator of impairment" caused by alcohol or other factors. Officers are trained that the HGN test is to be used as a tool to determine whether there is probable cause for a DUI arrest.

Based upon this testimony, the trial court determined that HGN testing is a valid means to determine alcohol impairment, which testing is generally accepted in the scientific community, and that "[n]o additional foundational evidence is required at trial." The court further determined that Baue could present the

transcript of the pretrial hearing at trial. On appeal, Baue contends that the trial court erred in conducting the pretrial hearing to determine whether HGN testing was sufficiently accepted in the scientific community so as to be a proper subject for expert testimony and, having resolved that issue in the affirmative, that it further erred by admitting testimony regarding HGN testing at trial in the absence of proper foundation. We address these contentions separately.

(a) Scientific Acceptance of HGN Field Sobriety Test

[10,11] When a court is faced with an offer of a novel form of expertise which has not yet received judicial sanction, it must conduct an initial inquiry to determine whether the new technique or principle is sufficiently reliable to aid the jury in reaching accurate results. *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). In accordance with *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), this court has held that the admissibility of expert testimony based on a technique or process which utilizes or applies a scientific principle depends on general acceptance of the principle, technique, or process in the relevant scientific community. *State v. Carter*, 255 Neb. 591, 586 N.W.2d 818 (1998); *State v. Dean, supra*; *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990), *disapproved on other grounds, State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). Whether this standard has been met may be determined by the trial court on the basis of an evidentiary hearing outside the presence of the jury. *State v. Houser*, 241 Neb. 525, 490 N.W.2d 168 (1992).

Baue argues that the separate hearing in this case was improper because "HGN is not a *Frye* issue." Brief for appellant at 14. It is true that some jurisdictions do not consider the HGN test to be "scientific" and thus require no *Frye* hearing or foundation at trial other than the officer's testimony regarding his observations of the test. See, *Whitson v. State*, 314 Ark. 458, 863 S.W.2d 794 (1993); *State v. Sullivan*, 310 S.C. 311, 426 S.E.2d 766 (1993); *State v. Murphy*, 451 N.W.2d 154 (Iowa 1990). These cases generally reason that the HGN test is similar to other field sobriety tests in that it is based upon the officer's

observations and thus does not constitute scientific evidence. See *City of Fargo v. McLaughlin*, 512 N.W.2d 700 (N.D. 1994).

However, *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986), indicates otherwise. We have cited *Borchardt* for the proposition that admissibility of an opinion based upon a scientific principle, technique, or process depends upon its general acceptance in the relevant scientific community. See, also, *State v. Reynolds, supra*. Since *Borchardt*, courts in numerous other jurisdictions have evaluated and determined the admissibility of the HGN test in accordance with the *Frye* standard. See, e.g., *Ballard v. State*, 955 P.2d 931 (Alaska App. 1998); *Williams v. State*, 710 So. 2d 24 (Fla. App. 1998); *State v. Taylor*, 694 A.2d 907 (Me. 1997); *People v. Berger*, 217 Mich. App. 213, 551 N.W.2d 421 (1996); *Hawkins v. State*, 223 Ga. App. 34, 476 S.E.2d 803 (1996); *Schultz v. State*, 106 Md. App. 145, 664 A.2d 60 (1995); *State v. Klawitter*, 518 N.W.2d 577 (Minn. 1994); *City of Fargo v. McLaughlin, supra*; *People v. Wiebler*, 266 Ill. App. 3d 336, 640 N.E.2d 24, 203 Ill. Dec. 597 (1994); *Emerson v. State*, 880 S.W.2d 759 (Tex. Crim. App. 1994); *State v. Sullivan, supra*; *State v. Hill*, 865 S.W.2d 702 (Mo. App. 1993), *overruled on other grounds, State v. Carson*, 941 S.W.2d 518 (Mo. 1997); *Whitson v. State, supra*; *People v. Buening*, 229 Ill. App. 3d 538, 592 N.E.2d 1222, 170 Ill. Dec. 542 (1992); *State v. Garrett*, 119 Idaho 878, 811 P.2d 488 (1991); *State v. Armstrong*, 561 So. 2d 883 (La. App. 1990); *State v. Superior Court*, 149 Ariz. 269, 718 P.2d 171 (1986). However, this court has not specifically addressed the admissibility of HGN test results since *Borchardt*.

We note that after withdrawing his motion in limine, Baue objected to the evidentiary hearing and offered to stipulate that "the [HGN] test is admissible at trial if proper scientific foundation is laid." The county court overruled this objection and proceeded with the hearing. Given the implicit holding in *Borchardt* that the HGN test was required to meet the *Frye* standard before it could be admissible at trial and in the absence of any subsequent appellate opinion conferring judicial acceptance upon the HGN test under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), we cannot conclude that the county court erred in conducting a *Frye* hearing, notwithstanding Baue's offer to

stipulate to admissibility subject to "proper scientific foundation."

[12] Based upon our review of the evidence adduced at the pretrial hearing, we conclude that the basic scientific principle upon which the HGN field sobriety test is based, i.e., that alcohol consumption causes nystagmus, is generally accepted in the relevant scientific community. However, in light of evidence in the record that nystagmus can be caused by factors other than alcohol and that intoxication cannot be established by the HGN test alone, we agree with other courts which have placed limitations upon the purposes for which HGN test results are admissible. See *Ballard v. State, supra*, and cases cited therein. Accordingly, we hold that the HGN field sobriety test meets the *Frye* standard for acceptance in the relevant scientific communities, and when the test is given in conjunction with other field sobriety tests, the results are admissible for the limited purpose of establishing that a person has an impairment which may be caused by alcohol. *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986), is overruled to the extent that it is inconsistent with this holding.

[13] We agree with the conclusion of the court in *Ballard v. State*, 955 P.2d 931, 940 (Alaska App. 1998):

> While HGN testing may not, of itself, be sufficient to establish intoxication, HGN test results are admissible as a factor to be considered by the fact-finder when determining intoxication. Testimony concerning a defendant's performance on a properly administered HGN test is admissible on the issue of impairment, provided that the prosecution claims no greater reliability or weight for the HGN evidence than it does for evidence of the defendant's performance on any of the other standard field sobriety tests, and provided further that the prosecution makes no attempt to correlate the HGN test result with any particular blood-alcohol level, range of blood-alcohol levels, or level of impairment.

Thus, we hold that while an HGN test result is relevant to show that an individual is impaired, such a result, standing alone, is insufficient to prove the offense of DUI as defined by § 60-6,196 beyond a reasonable doubt.

(b) Foundation for HGN Field Sobriety Test Results

Baue contends that the HGN testing was not admissible at trial because adequate foundation was not established. He argues that such foundation should have included the scientific principles and theory underlying HGN testing which were the subject of the pretrial *Frye* hearing but were not established in the presence of the jury. The State argues that the only foundation necessary at trial was Lammers' testimony that he was trained to administer HGN tests and had administered the test to Baue in accordance with that training.

One of the first cases to determine that the HGN test satisfied the *Frye* standard was *State v. Superior Court*, 149 Ariz. 269, 718 P.2d 171 (1986). After making this determination, the court concluded that "with proper foundation as to the techniques used and the officer's ability to use it . . . testimony of defendant's nystagmus is admissible on the issue of a defendant's blood alcohol level as would be other field sobriety test results on the question of the accuracy of the chemical analysis." *Id.* at 279, 718 P.2d at 181. A majority of jurisdictions have arrived at similar conclusions. See, e.g., *State v. Zivcic*, 229 Wis. 2d 119, 128, 598 N.W.2d 565, 570 (1999) ("[a]s long as the HGN test results are accompanied by the testimony of a law enforcement officer who is properly trained to administer and evaluate the test," evidence is admissible); *Ballard v. State, supra* (holding police officer may testify to results of HGN testing if government establishes officer adequately trained in administration and assessment of test); *Williams v. State*, 710 So. 2d 24, 32 (Fla. App. 1998) (noting "HGN test results are generally accepted as reliable and thus are admissible into evidence once a proper foundation has been laid that the test was correctly administered by a qualified [person]"); *State v. Taylor*, 694 A.2d 907 (Me. 1997) (holding proper foundation for admission of HGN test is evidence that officer or administrator of test is trained in procedure and test properly administered); *People v. Berger*, 217 Mich. App. 213, 551 N.W.2d 421 (1996) (holding because HGN test satisfied *Frye* standard, only foundation necessary for introduction of evidence regarding HGN test is evidence that test properly performed and officer administering test qualified to perform it); *Schultz v. State*, 106 Md. App. 145, 664 A.2d 60

(1995) (holding HGN results admissible in future cases without reference to *Frye* standard if officer properly qualified and test conducted properly); *People v. Leahy*, 8 Cal. 4th 587, 882 P.2d 321, 34 Cal. Rptr. 2d 663 (1994) (holding once *Frye* standard met in published opinion regarding HGN, prosecution not required to submit expert testimony to jury, and police officers are sufficient to testify to results of HGN tests); *State v. Hill*, 865 S.W.2d 702 (Mo. App. 1993), *overruled on other grounds, State v. Carson*, 941 S.W.2d 518 (Mo. 1997) (holding when properly administered by adequately trained personnel, HGN test admissible as evidence of intoxication); *State v. Armstrong*, 561 So. 2d 883 (La. App. 1990) (proper foundation for admitting HGN test is showing officer trained in procedure, certified in its administration, and procedure properly administered).

A minority of jurisdictions require the state to provide additional foundation at trial pertaining to the correlation between HGN test results and alcohol impairment before the HGN evidence is admitted. See, *State v. Helms*, 348 N.C. 578, 504 S.E.2d 293 (1998) (holding officer may not testify to HGN test result without sufficient scientifically reliable evidence as to correlation between intoxication and nystagmus); *State v. Murphy*, 953 S.W.2d 200 (Tenn. 1997) (holding explanation of underlying scientific basis of HGN test by expert is foundational requirement); *State v. Ruthardt*, 680 A.2d 349, 361 (Del. Super. 1996) (holding in addition to testimony of arresting officer, foundational requirements include testimony of expert having "more indepth experience in the underlying scientific principles of HGN and the use of the test in DUI prosecutions").

[14] We conclude that the majority view is sound, and adopt the view that a police officer may testify to the results of HGN testing if it is shown that the officer has been adequately trained in the administration and assessment of the HGN test and has conducted the testing and assessment in accordance with that training. In this case, Lammers testified that he was trained on HGN testing at the Nebraska State Patrol Academy as part of a 40-hour training course on DUI. He further testified at trial that he performed the HGN test on Baue the night of the arrest and demonstrated how he did so. He testified that Baue scored 6 points, thus failing the test. Lammers specifically explained that

the HGN test is a measurement of the eyes that detects involuntary movement or jerking. He testified that nystagmus is an involuntary twitching of the eyes caused by alcohol or drugs, so that when a subject is under the influence, the eye will involuntarily move. Based upon this foundational evidence, the results of the HGN test administered to Baue were admissible for the purposes we have outlined above.

5. Failure to Appoint Expert

Baue contends that the county court abused its discretion when it refused to appoint an expert witness to testify for him at the *Frye* hearing regarding the reliability and scientific acceptance of the HGN test. Baue argues he was denied the right to a fair trial because he could not afford an HGN expert. As authority for this assignment of error, he relies on *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), in which the Supreme Court addressed the issue of whether the Constitution requires that an indigent defendant have access to a psychiatric expert when his sanity at the time of the offense is in question. In its analysis, the Court noted "when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." 470 U.S. at 76. It further noted that fundamental fairness required the state to ensure that an indigent defendant has the "raw materials integral to the building of an effective defense." 470 U.S. at 77.

[15] We have repeatedly held that the right of an indigent defendant to the appointment of an expert witness at the State's expense generally rests in the discretion of the trial court. *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998); *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). In support of his application for appointment of an expert, Baue presented evidence that while he had full-time employment, he owed his attorney approximately $3,000 and had exhausted his available funds in retaining Vasiliades to testify with respect to the Intoxilyzer results. The record does not disclose that Baue was indigent. When asked his reason for seeking a court-appointed expert, Baue stated: "I just don't make enough money

to pay for one. I got other bills to pay for and attorney fees now and I just can't afford it." In denying Baue's motion, the trial court concluded that no constitutional issue was presented and that Baue had not shown that he had exhausted his own financial means to retain an expert. We cannot conclude that the county court abused its discretion in declining to appoint an expert for Baue under those circumstances.

6. Rulings on Motion for Directed Verdict and Motion to Dismiss

[16] Although Baue assigns as error the overruling of both his motion for directed verdict and his motion to dismiss made at the conclusion of the State's case in chief, his brief discusses only the latter. Errors that are assigned but not argued will not be addressed by an appellate court. *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999). Thus, we need only address his assignment relating to the motion to dismiss for insufficiency of the evidence.

[17] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Sims, ante* p. 357, 603 N.W.2d 431 (1999).

Baue's contention that the State failed to present evidence sufficient to constitute a prima facie case is without merit. The result of the second breath test established that Baue had a concentration of .10 of 1 gram or more by weight of alcohol per 210 liters of his breath. As we have noted, the trial court was not required as a matter of law to adjust this test result downward on the basis of any alleged margin of error of the testing device. This evidence, if believed by the jury, was alone sufficient to

convict Baue of DUI. See § 60-6,196(1)(b). The trial court therefore did not err in overruling his motion to dismiss.

IV. CONCLUSION

In summary, we conclude that the trial court, and the district court in its appellate review, did not err in determining (1) that there was probable cause for Baue's arrest, (2) that evidence relating to the HGN test administered prior to arrest was properly admitted at trial, and (3) that the result of the second breath test administered following Baue's arrest was not subject to downward adjustment as a matter of law. We also conclude, as did the district court, that the trial court did not err in denying Baue's motion for appointment of an expert and his motion to dismiss at the close of the State's case in chief. However, we hold that the trial court committed prejudicial error in receiving testimony over objection regarding the digital readout generated by the first breath test administered to Baue after his arrest. Because we conclude the evidence was sufficient to sustain Baue's conviction, but that part of the evidence should not have been admitted, we reverse the judgment of conviction and remand the cause to the district court with instructions to reverse the judgment of the county court and remand the matter for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

ASH GROVE CEMENT COMPANY, APPELLANT, V. CASS COUNTY BOARD OF EQUALIZATION, APPELLEE.

607 N.W.2d 810

Filed March 10, 2000. Nos. S-99-287 through S-99-294.

1. **Taxation: Appeal and Error.** Appellate review of decisions by the Tax Equalization and Review Commission is limited to error on the record.
2. **Judgments: Appeal and Error.** When reviewing an order for errors appearing on the record, the appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

3. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.
4. **Constitutional Law: Taxation: Valuation: Mines and Minerals.** A classification scheme created in which only those minerals contained in lands owned by or under the control of mining companies were given value for tax purposes, whereas other mineral interests in other lands were ignored, violates the uniformity provisions of article VIII, § 1, of the Nebraska Constitution.

Appeal from the Nebraska Tax Equalization and Review Commission. Judgments in Nos. S-99-287, S-99-289, S-99-291, and S-99-293 reversed. Judgments in Nos. S-99-288, S-99-290, S-99-292, and S-99-294 affirmed.

Ronald L. Comes, of McGrath, North, Mullin & Kratz, P.C., for appellant.

Charles E. Dorwart, of James R. Brown, P.C., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Ash Grove Cement Company (Ash Grove) appeals the orders of the Nebraska Tax Equalization and Review Commission (Commission), which affirmed the decisions of the Cass County Board of Equalization (Board) regarding the valuation of certain real property in Cass County owned by Ash Grove and dismissed Ash Grove's appeals. These cases were consolidated for hearing before the Commission and have been consolidated on appeal before this court. For the reason recited below, we affirm the orders of the Commission in cases Nos. S-99-288, S-99-290, S-99-292, and S-99-294, and we reverse the Commission's orders in cases Nos. S-99-287, S-99-289, S-99-291, and S-99-293.

STATEMENT OF FACTS

In connection with its 1998 real property tax assessment, Cass County hired an outside appraiser, Patrick Schulte, to appraise the mineral interests of certain real property in Cass County. Veda Copenhaver, the Cass County assessor, gave

Schulte a list of approximately 85 parcels of land on which he was to appraise the mineral interests, together with copies of the assessment records for each of the parcels. All of the properties identified by the assessor, including those of Ash Grove, were either owned by or under lease to mining companies. During the appraisal process, Schulte identified certain additional properties on which he appraised the value of the mineral interests. These properties, like those identified by the assessor, were either owned by or under lease to mining companies.

Upon completion of the appraisal process, Schulte prepared a "Project Data Book" (report), containing, inter alia, his estimates of the market value as of January 1, 1998, of the mineral reserves on the subject properties. In the report, Schulte reported that in order to complete the appraisal assignment, he "interviewed each of the owners of mining operations in Cass County and owners of farmlands under lease to mineral companies." Schulte's cover letter to Copenhaver, transmitting the report, indicated that he had completed the "appraisal for assessment of all the mineral interest values for the assigned properties in Cass County, Nebraska."

Following receipt of Schulte's report, Cass County mailed out its 1998 real property tax assessments. For those properties appraised by Schulte as having a mineral interest value, Cass County sent out two separate tax billing statements. As to each taxed parcel at issue, the statements each bore a legal description of the real property and an identification number. The first statement bore an identification number corresponding to the surface component of the parcel and assessed the value of this component. The second statement bore a second identification number which corresponded to the mineral interest component of the parcel and assessed the value of the mineral interest component. Thus, the assessed value for each parcel at issue was a total of the two assessments assigned to each of the tax parcels.

Ash Grove owns four parcels of real property in Cass County which were assessed values on both their mineral and surface components. These properties, together with their parcel identification numbers, valuations, and appellate case numbers, are summarized as follows:

Appeal Number	Parcel	Tax Number/Surface Valuation or Mineral Valuation
S-99-287	3253-13-0-00000-000-0030	130302074/$175,500 - mineral
S-99-288	3253-13-0-00000-000-0030	130128120/$468,236 - surface
S-99-289	3255-18-0-00000-000-0033	130302082/$312,000 - mineral
S-99-290	3255-18-0-00000-000-0033	130140686/$534,416 - surface
S-99-291	3477-03-0-00000-000-0030	130302899/$307,000 - mineral
S-99-292	3477-03-0-00000-000-0030	130118990/$257,476 - surface
S-99-293	3271-34-0-00000-000-0006	130380695/$32,000 - mineral
S-99-294	3271-34-0-00000-000-0006	130127116/$507,832 - surface

We recognize that our table, as prepared above, differs from the table set forth by Ash Grove in its brief, but we believe it comports with and accurately reflects the record.

Ash Grove timely filed a protest as to each valuation. Because of the two separate billings sent for each of the four properties, Ash Grove filed two separate protests for each property, resulting in eight actions. Ash Grove did not dispute the valuation of the surface component standing alone, but did challenge the mineral interest valuation and the mineral interest valuation when combined with the surface valuation for each parcel. Ash Grove's eight protests were consolidated and came on for hearing before the Board, which adopted the assessor's valuation on July 21, 1998.

Thereafter, Ash Grove appealed the Board's decision to the Commission. The appeal was heard on February 18, 1999. During its hearing on Ash Grove's appeals, the Commission received into evidence the depositions of Schulte and the assessor, Copenhaver. In Schulte's deposition, he admitted that there were properties in Cass County containing mineral interests that were not included in his appraisal report. Furthermore, Schulte indicated that his appraisal report excluded properties neighboring the appraised properties, if those neighboring properties were not owned or leased by mining companies. Schulte admitted that it was likely the mineral reserves under the appraised properties did not stop at the property lines but continued into adjacent lands, the latter of which were not appraised for mineral interests.

In Copenhaver's deposition, she confirmed that Cass County had assessed the mineral interests only of properties owned or under lease to mining companies. Copenhaver justified this dis-

parate treatment on the basis that there had been no indication in the sale prices of properties not owned or under lease to mining companies that such other properties had a greater value than that assessed. Copenhaver admitted, however, that mineral interests do not stop at fence lines or county roads and that it was possible that properties adjacent to properties whose mineral rights had been assessed also contained minerals. Copenhaver further conceded that there were parcels in Cass County with mineral interests other than those lands owned or under lease to mining companies.

Raymond Burchett, a research geologist and professor at the University of Nebraska-Lincoln, also testified before the Commission. Through his work with the Nebraska Geological Survey, Burchett was familiar with mineral reserves and their locations in Cass County, as well as throughout the state. In his testimony, Burchett identified a parcel of property possessing a mineral reserve that was not owned by or under lease to a mining company and, accordingly, had been excluded from the assessor's 1998 separate property tax assessment on mineral interests.

On March 18, 1999, the Commission dismissed Ash Grove's appeals of the Board's decisions, and adopted the assessor's valuations. In its decisions, the Commission ruled that Ash Grove had failed to present evidence establishing that the Board's decision was unreasonable or arbitrary.

Ash Grove appeals the Commission's decisions. As it did in the proceedings below, on appeal to this court, Ash Grove does not challenge the values assessed by the assessor on the surface components of the real property at issue, but does challenge the mineral interest and combined valuation for each parcel.

ASSIGNMENTS OF ERROR

On appeal, Ash Grove has assigned six errors. For purposes of these appeals, we need address only one error, as it is dispositive. Ash Grove claims, restated, that Cass County violated the Nebraska Constitution's uniformity clause, art. VIII, § 1, by its selective imposition of an increased value and assessment of its property containing mineral interests based solely on the ownership or control of the property.

STANDARDS OF REVIEW

[1-3] Appellate review of decisions by the Commission is limited to error on the record. Neb. Rev. Stat. § 77-5019 (Supp. 1999). When reviewing an order for errors appearing on the record, the appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Constructors, Inc. v. Cass Cty. Bd. of Equal., ante* p. 866, 606 N.W.2d 786 (2000); *Harrison Square v. Sarpy Cty. Bd. of Equal.*, 6 Neb. App. 454, 574 N.W.2d 180 (1998). Questions of law, however, are reviewed de novo on the record. *Constructors, Inc., supra.*

ANALYSIS

Ash Grove claims that the Cass County 1998 real property tax mineral assessment violated Ash Grove's rights under the Nebraska Constitution's uniformity clause, which provides that "[t]axes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution . . . ." Neb. Const. art. VIII, § 1. We agree with Ash Grove that by virtue of its separate assessment of the mineral component based on ownership or control, Cass County's treatment of Ash Grove's real property at issue for tax year 1998 violated this constitutional provision.

[4] We recently addressed the uniformity issue presented in these cases in *Constructors, Inc., supra.* We adopt the reasoning and holding of *Constructors, Inc.* in the instant cases. In *Constructors, Inc.*, we held that "the classification scheme created in which only those minerals contained in lands owned by the appellants were given value for tax purposes, whereas other mineral interests were ignored, violates the uniformity provisions of article VIII, § 1, of the Nebraska Constitution." *Ante* at 875, 606 N.W.2d at 793.

For the reasons set forth fully in *Constructors, Inc., supra*, we conclude that Ash Grove's assignment of error, as restated above, has merit. Accordingly, we reverse the decisions of the Commission with respect to the valuation of Ash Grove's mineral interests. Because Ash Grove has not challenged the Commission's decisions with regard to the surface component

assessed values, we affirm the Commission's decisions with respect to those valuations.

This court has thoroughly reviewed each of the records in these cases as prepared and transmitted, and we have noted some confusion with respect to which files control the various mineral and surface interests. Based upon our review of these records, we determine cases Nos. S-99-287, S-99-289, S-99-291, and S-99-293 to be the appeals from the Commission's decisions concerning the valuation of Ash Grove's mineral interests, and cases Nos. S-99-288, S-99-290, S-99-292, and S-99-294 to be the appeals from the Commission's decisions concerning Ash Grove's surface valuations. Accordingly, we reverse the Commission's decisions in cases Nos. S-99-287, S-99-289, S-99-291, and S-99-293. The tax assessments on the mineral interests in these cases are therefore void. We affirm the Commission's decisions in cases Nos. S-99-288, S-99-290, S-99-292, and S-99-294.

JUDGMENTS IN NOS. S-99-287, S-99-289, S-99-291, AND S-99-293 REVERSED.
JUDGMENTS IN NOS. S-99-288, S-99-290, S-99-292, AND S-99-294 AFFIRMED.

STEPHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. JACK LARA, APPELLANT.

607 N.W.2d 487

Filed March 10, 2000. No. S-99-614.

1. **Motions to Suppress: Warrantless Searches: Probable Cause: Appeal and Error.** In reviewing a district court's ruling on a motion to suppress evidence obtained through a warrantless search or seizure, an appellate court conducts a de novo review of reasonable suspicion and probable cause determinations, and reviews factual findings for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
2. **Convictions: Appeal and Error.** A trial court's findings in a criminal case have the effect of a jury verdict, and a conviction in a bench trial will be sustained if the properly admitted trial evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
3. **Constitutional Law: Search and Seizure.** To determine whether an individual has an interest protected by the Fourth Amendment to the U.S. Constitution and Neb.

Const. art. I, § 7, one must determine whether an individual has a legitimate or justifiable expectation of privacy in the invaded place. Ordinarily, two inquiries are required. First, the individual must have exhibited an actual (subjective) expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable.

4. ___: ___. An individual's status as an overnight guest is enough alone to show that he or she has a legitimate expectation of privacy in the premises which is protected by the Fourth Amendment to the U.S. Constitution.
5. ___: ___. An overnight guest has an expectation of privacy in his or her host's home, which society is willing to recognize as reasonable, and, therefore, the overnight guest has standing to assert Fourth Amendment violations.
6. **Criminal Law: Appeal and Error.** Not all trial errors, even trial errors of constitutional magnitude, entitle a criminal defendant to the reversal of an adverse trial result.
7. **Judgments: Trial: Evidence: Proof: Appeal and Error.** In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence in a case tried without a jury. The appellant must show that the trial court made a finding of guilt based exclusively on the erroneously admitted evidence.

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

Edouardo Zendejas for appellant.

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

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

HENDRY, C.J.

INTRODUCTION

Jack Lara was convicted of assault in the first degree and use of a weapon to commit a felony in relation to the August 2, 1998, shooting of Martin Bernard Logan. Lara appeals, claiming that the district court erred in denying his motion to suppress certain evidence. We moved this case to our docket pursuant to our power to regulate the Nebraska Court of Appeals' caseload and that of this court. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

BACKGROUND

On August 2, 1998, Logan attended a party at the home of Kathleen Wortman in Grand Island, Nebraska. Estimates of the number in attendance ranged from 20 up to 100 people. Lara, a friend of Kathleen Wortman's son, Mark Wortman, was an overnight guest at the Wortman residence at the time.

During the course of the party, a fight ensued involving Logan, Mark Wortman, and several other people, including Lara. During the fight, Logan was shot three times. The shooter was described as being a Hispanic male, 5 feet 6 inches tall, with buzz-cut, black hair; weighing 150 pounds; and wearing a striped shirt. Logan sustained serious injuries as a result of the shooting.

Police officers initially searched the Wortman residence with the permission of Kathleen Wortman, but did not find the weapon involved in the shooting. Officers then questioned Lara, who matched the description of the shooter. Lara was given his *Miranda* warnings and signed a waiver form indicating that he understood his rights and that he agreed to speak to the police without consulting with or having a lawyer present. During questioning, Lara initially denied any involvement in the shooting, but later indicated that he had shot Logan because Logan had hit Mark Wortman. Lara told the officers that the gun used in the shooting was located in the northwest basement bedroom of the Wortman residence.

Officers then returned to the Wortman residence and spoke with Kathleen Wortman. She stated that Lara was an overnight guest in the home. Officers did not have a search warrant, but obtained permission from Kathleen Wortman to search the entire residence. Officers found a gun inside a zippered "day planner" in the northwest basement bedroom. Ballistics testing determined that shell casings found outside the Wortman residence where the shooting occurred had been fired from the gun retrieved from the Wortmans' basement.

Lara was arrested and charged in an amended information with attempted first degree murder (count I), two counts of use of a deadly weapon to commit a felony (counts II and IV), and assault in the first degree (count III). Lara filed a motion to sup-

press evidence, including the gun found at the Wortman residence.

On December 14, 1998, a hearing was held on the motion to suppress. At the hearing, Lara testified that he was an overnight guest at the Wortman residence on August 2, 1998. Lara stated he stayed in the basement of the Wortman residence. Lara's luggage was kept upstairs in another bedroom when he first arrived, was then moved to the basement room in which he was staying, and was later moved back upstairs. The day planner which contained the gun involved in the shooting was found in another bedroom in the basement, not the room in which Lara was staying. Officer Timothy Meguire also testified at the hearing. He testified that a gun was found in the northwest bedroom in the basement of the Wortman residence inside a zippered day planner. Meguire testified that he had obtained consent from Kathleen Wortman to search the entire residence.

The court denied Lara's motion to suppress the gun, finding that Lara had no standing to object to the search. The court noted that the gun was found in a room other than the one in which Lara was staying and that none of Lara's other belongings were located in that room. The court determined that under these facts, Lara had no reasonable expectation of privacy and, thus, no standing to object to the search. The court also overruled Lara's motion to suppress statements made while in custody, finding that the statements were voluntarily made by Lara after being properly given his *Miranda* warnings.

Pursuant to an agreement between Lara and the State, Lara waived his right to a jury trial in return for the State's dismissal of the attempted first degree murder charge and use of a weapon associated with that charge. The case was submitted to the court on a variety of police reports regarding the shooting, including a photographic lineup "fact sheet," in which Logan identified Lara as the person who shot him. The police reports were admitted into evidence over Lara's objections to certain portions of the reports which contained statements Lara made while in custody and references to the gun which Lara claimed was seized in violation of his Fourth Amendment rights.

Lara was found guilty of first degree assault and use of a weapon to commit a felony. Lara was sentenced to 13 to 16

years' imprisonment on the assault conviction and 2 to 4 years' imprisonment on the use of a weapon conviction, with the sentences to be served consecutively.

ASSIGNMENTS OF ERROR

Lara claims, rephrased and summarized, that the district court erred in (1) denying his motion to suppress by finding that Lara had no standing to object to the seizure of the gun found at the Wortman residence, where he was an overnight guest, and (2) finding him guilty based on evidence that should have been suppressed.

STANDARD OF REVIEW

[1,2] In reviewing a district court's ruling on a motion to suppress evidence obtained through a warrantless search or seizure, an appellate court conducts a de novo review of reasonable suspicion and probable cause determinations, and reviews factual findings for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Bartholomew, ante* p. 174, 602 N.W.2d 510 (1999). A trial court's findings in a criminal case have the effect of a jury verdict, and a conviction in a bench trial will be sustained if the properly admitted trial evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Meers*, 257 Neb. 398, 598 N.W.2d 435 (1999).

ANALYSIS

Lara claims the trial court erred in denying his motion to suppress, finding that he had no standing to object to the search of the Wortman home. The trial court determined that Lara had no reasonable expectation of privacy in the area from which the gun was seized because the gun was seized from a room other than the one in which Lara was staying.

[3] To determine whether an individual has an interest protected by the Fourth Amendment and Neb. Const. art. I, § 7, one must determine whether an individual has a legitimate or justifiable expectation of privacy in the invaded place. Ordinarily, two inquiries are required. First, the individual must have exhibited an actual (subjective) expectation of privacy, and second, the expectation must be one that society is prepared to recognize

as reasonable. *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999).

[4,5] The U.S. Supreme Court has held that an individual's status as an overnight guest is enough alone to show that he or she has a legitimate expectation of privacy in the premises which is protected by the Fourth Amendment. *Minnesota v. Olson*, 495 U.S. 91, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990). Likewise, this court has recognized that an overnight guest has an expectation of privacy in his or her host's home, which society is willing to recognize as reasonable, and, therefore, the overnight guest has standing to assert Fourth Amendment violations. *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996); *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995); *State v. Cortis*, 237 Neb. 97, 465 N.W.2d 132 (1991); *State v. Walker*, 236 Neb. 155, 459 N.W.2d 527 (1990).

In the present case, Lara was an overnight guest in the Wortman home at the time of the search. Lara's status as an overnight guest is enough alone to show that he had a legitimate expectation of privacy "in the premises" which is protected by the Fourth Amendment. *Walker*, 236 Neb. at 160, 459 N.W.2d at 531. The district court found that Lara had no standing because the gun was found in a room other than the one in which he was sleeping. This fact, however, is insufficient to deny Lara standing to challenge the search. An overnight guest has a legitimate expectation of privacy in his or her host's "home" or in the "premises." See, *Olson, supra*; *Conklin, supra*; *Cody, supra*; *Cortis, supra*; *Walker, supra*. Cases discussing an overnight guest's legitimate expectation of privacy do not limit this expectation of privacy to only the room in which the guest actually stayed. *Id.* The record in the present case indicates that Lara slept in a basement bedroom next to the room in which the gun was found but that his belongings had been moved around to various places in the house. While an overnight guest's legitimate expectation of privacy does not extend to areas of the host's home which are off limits to the guest or of which the guest has no knowledge, *U.S. v. Osorio*, 949 F.2d 38 (2d Cir. 1991), there is no evidence that Lara was confined to a restricted area of the residence or that any area of the home was off limits.

[6] Lara's status as an overnight guest in the Wortman home gives him standing to contest the search. The district court erred in finding that Lara had no standing. However, this does not end our inquiry. Not all trial errors, even trial errors of constitutional magnitude, entitle a criminal defendant to the reversal of an adverse trial result. *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997).

[7] In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence in a case tried without a jury. *State v. Lujano*, 251 Neb. 256, 557 N.W.2d 217 (1996). See, also, *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991) (explaining that burden rests on appellant because of "presumption" that trial court, sitting as fact finder, disregards inadmissible evidence). The appellant must show that the trial court made a finding of guilt based exclusively on the erroneously admitted evidence. *State v. Emrich*, 251 Neb. 540, 557 N.W.2d 674 (1997); *Lujano, supra*; *Lomack, supra*. If there is other sufficient evidence to support the finding of guilt, the conviction will not be reversed. *Lujano, supra*.

We conclude that even without the gun or any related ballistics testing, there was overwhelming evidence to convict Lara. Lara was present at the party when the shooting occurred. He matched the description of the shooter. Logan identified Lara in a photographic lineup as the person who shot him. Lara admitted that he committed the shooting. Although Lara objected to the portions of the police reports containing this admission, he has not assigned or argued any error in relation to the admission of this evidence. The properly admitted evidence overwhelmingly supports Lara's conviction, even if the gun evidence would have been suppressed. Lara has not shown that the trial court based its finding of guilt exclusively on the erroneously admitted evidence.

Lara claims he was prejudiced by the incorrect ruling on the motion to suppress because he waived his right to a jury trial after the court overruled his motion to suppress. He claims he waived his right to a jury in order to avoid having the gun displayed to the jury at trial. However, the record indicates that this was not the reason Lara waived his right to a jury. The record establishes that Lara waived his right to a jury trial as part of an agreement whereby the State dismissed counts I and II, and in exchange, trial would be to the court on counts III and IV, based upon police reports. The agreement further required the State, upon conviction, to stand silent at the time of sentencing and to make no objection to a request by Lara for an appeal bond of 10 percent of $50,000. On this record, Lara has not shown that he was prejudiced by the trial court's error regarding the motion to suppress.

In his second assignment of error, Lara claims that without the gun, there was insufficient evidence to convict him. However, as we have previously stated, there was overwhelming evidence to convict Lara, even without the gun. This assignment of error is without merit.

CONCLUSION

The trial court erred in finding that Lara had no standing to challenge the search of the Wortman residence. However, we determine that on the facts of this case, such error was harmless beyond a reasonable doubt. The conviction is affirmed.

AFFIRMED.

LYMAN-RICHEY CORPORATION AND LYMAN-RICHEY SAND & GRAVEL CORPORATION, APPELLANTS, V. CASS COUNTY BOARD OF EQUALIZATION, APPELLEE.

607 N.W.2d 806

Filed March 10, 2000. Nos. S-99-961 through S-99-966.

1. **Taxation: Appeal and Error.** Appellate review of decisions by the Tax Equalization and Review Commission is limited to error on the record.
2. **Judgments: Appeal and Error.** When reviewing an order for errors appearing on the record, the appellate court's inquiry is whether the decision conforms to the law, is

supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

3. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.
4. **Constitutional Law: Taxation: Valuation: Mines and Minerals.** A classification scheme created in which only those minerals contained in lands owned by or under the control of mining companies were given value for tax purposes, whereas other mineral interests in other lands were ignored, violates the uniformity provisions of article VIII, § 1, of the Nebraska Constitution.

Appeal from the Nebraska Tax Equalization and Review Commission. Judgments in Nos. S-99-961, S-99-964, and S-99-966 reversed. Judgments in Nos. S-99-962, S-99-963, and S-99-965 affirmed.

Ronald L. Comes, of McGrath, North, Mullin & Kratz, P.C., for appellants.

Charles E. Dorwart, of James R. Brown, P.C., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Lyman-Richey Corporation and Lyman-Richey Sand & Gravel Corporation (collectively Lyman-Richey) appeal the orders of the Nebraska Tax Equalization and Review Commission (Commission) which affirmed the decisions of the Cass County Board of Equalization (Board) regarding the valuation of certain real property in Cass County owned by Lyman-Richey. These cases were consolidated for hearing before the Commission and have been consolidated on appeal before this court. For the reason recited below, we affirm the orders of the Commission in cases Nos. S-99-962, S-99-963, and S-99-965, and we reverse the Commission's orders in cases Nos. S-99-961, S-99-964, and S-99-966.

STATEMENT OF FACTS

In connection with its 1998 real property tax assessment, Cass County hired an outside appraiser, Patrick Schulte, to

appraise the mineral interests of certain real property in Cass County. Veda Copenhaver, the Cass County assessor, gave Schulte a list of approximately 85 parcels of land on which he was to appraise the mineral interests, together with copies of the assessment records for each of the parcels. All of the properties identified by the assessor, including those of Lyman-Richey, were either owned by or under lease to mining companies. During the appraisal process, Schulte identified certain additional properties on which he appraised the value of the mineral interests. These properties, like those identified by the assessor, were either owned by or under lease to mining companies.

Upon completion of the appraisal process, Schulte prepared a "Project Data Book" (report), containing, inter alia, his estimates of the market value as of January 1, 1998, of the mineral reserves on the subject properties. In the report, Schulte reported that in order to complete the appraisal assignment, he "interviewed each of the owners of mining operations in Cass County and owners of farmlands under lease to mineral companies." Schulte's cover letter to Copenhaver, transmitting the report, indicated that he had completed the "appraisal for assessment of all the mineral interest values for the assigned properties in Cass County, Nebraska."

Following receipt of Schulte's report, Cass County mailed out its 1998 real property tax assessments. For those properties appraised by Schulte as having a mineral interest value, Cass County sent out two separate tax billing statements. As to each taxed parcel at issue, the statements each bore a legal description of the real property and an identification number. The first statement bore an identification number corresponding to the surface component of the parcel and assessed the value of this component. The second statement bore a second identification number which corresponded to the mineral interest component of the parcel and assessed the value of the mineral interest component. Thus, the assessed value for each parcel at issue was a total of the two assessments assigned to each of the tax parcels.

Lyman-Richey owns three parcels of real property in Cass County which were assessed values on both their mineral and surface components. These properties, together with their parcel

identification numbers, valuations, and appellate case numbers, are summarized as follows:

Appeal Number	Parcel	Tax Number/Surface Valuation or Mineral Valuation
S-99-961	2971-36-0-00000-000-0021	130302791/$128,616 - mineral
S-99-962	2971-36-0-00000-000-0021	130167460/$238,663 - surface
S-99-963	2971-35-0-00000-000-0088	130301272/$ 19,926 - surface
S-99-964	2971-35-0-00000-000-0088	130302872/$ 28,800 - mineral
S-99-965	2971-35-0-00000-000-0090	130167487/$ 64,478 - surface
S-99-966	2971-35-0-00000-000-0090	130302805/$ 84,012 - mineral

We recognize that our table, as prepared above, differs from the table set forth by Lyman-Richey in its brief, but we believe it comports with and accurately reflects the record.

Lyman-Richey timely filed a protest as to each valuation. Because of the two separate billings sent for each of the three properties, Lyman-Richey filed two separate protests for each property, resulting in six actions. Lyman-Richey did not dispute the valuation of the surface component standing alone, but did challenge the mineral interest valuation and the mineral interest valuation when combined with the surface valuation for each parcel. Lyman-Richey's six protests were consolidated and came on for hearing before the Board, which adopted the assessor's valuation on July 24, 1998.

Thereafter, Lyman-Richey appealed the Board's decision to the Commission. The appeal was heard on February 18, 1999. During its hearing on Lyman-Richey's appeals, the Commission received into evidence the depositions of Schulte and the assessor, Copenhaver. In Schulte's deposition, he admitted that there were properties in Cass County containing mineral interests that were not included in his appraisal report. Furthermore, Schulte indicated that his appraisal report excluded properties neighboring the appraised properties, if those neighboring properties were not owned or leased by mining companies. Schulte admitted that it was likely the mineral reserves under the appraised properties did not stop at the property lines but continued into adjacent lands, the latter of which were not appraised for mineral interests.

In Copenhaver's deposition, she confirmed that Cass County had assessed the mineral interests only of properties owned or

under lease to mining companies. Copenhaver justified this disparate treatment on the basis that there had been no indication in the sale prices of properties not owned or under lease to mining companies that such other properties had a greater value than that assessed. Copenhaver admitted, however, that mineral interests do not stop at fence lines or county roads and that it was possible that properties adjacent to properties whose mineral rights had been assessed also contained minerals. Copenhaver further conceded that there were parcels in Cass County with mineral interests other than those lands owned or under lease to mining companies.

Raymond Burchett, a research geologist and professor at the University of Nebraska-Lincoln, also testified before the Commission. Through his work with the Nebraska Geological Survey, Burchett was familiar with mineral reserves and their locations in Cass County, as well as throughout the state. In his testimony, Burchett identified a parcel of property possessing a mineral reserve that was not owned by or under lease to a mining company and, accordingly, had been excluded from the assessor's 1998 separate property tax assessment on mineral interests.

On August 3, 1999, the Commission affirmed the Board's decisions and, with minor adjustments to the valuations of certain surface components, adopted the assessor's valuations. In its decisions, the Commission ruled that Lyman-Richey had failed to satisfy its burden of proof of demonstrating that the assessed values were unreasonable.

Lyman-Richey appeals the Commission's decisions. On appeal to this court, Lyman-Richey does not challenge the values assessed by the assessor on the surface components of the real property at issue as adjusted, but does challenge the mineral interest and combined valuation for each parcel.

ASSIGNMENTS OF ERROR

On appeal, Lyman-Richey has assigned five errors. For purposes of these appeals, we need address only one error, as it is dispositive. Lyman-Richey claims, restated, that Cass County violated the Nebraska Constitution's uniformity clause, art. VIII, § 1, by its selective imposition of an increased value and

assessment of its property containing mineral interests based solely on the ownership or control of the property.

STANDARDS OF REVIEW

[1-3] Appellate review of decisions by the Commission is limited to error on the record. Neb. Rev. Stat. § 77-5019 (Supp. 1999). When reviewing an order for errors appearing on the record, the appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Constructors, Inc. v. Cass Cty. Bd. of Equal., ante* p. 866, 606 N.W.2d 786 (2000); *Harrison Square v. Sarpy Cty. Bd. of Equal.*, 6 Neb. App. 454, 574 N.W.2d 180 (1998). Questions of law, however, are reviewed de novo on the record. *Constructors, Inc., supra.*

ANALYSIS

Lyman-Richey claims that the Cass County 1998 real property tax mineral assessment violated Lyman-Richey's rights under the Nebraska Constitution's uniformity clause, which provides that "[t]axes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution . . . ." Neb. Const. art. VIII, § 1. We agree with Lyman-Richey that by virtue of its separate assessment of the mineral component based on ownership or control, Cass County's treatment of Lyman-Richey's real property at issue for tax year 1998 violated this constitutional provision.

[4] We recently addressed the uniformity issue presented in these cases in *Constructors, Inc., supra.* We adopt the reasoning and holding of *Constructors, Inc.* in the instant cases. In *Constructors, Inc.*, we held that "the classification scheme created in which only those minerals contained in lands owned by the appellants were given value for tax purposes, whereas other mineral interests were ignored, violates the uniformity provisions of article VIII, § 1, of the Nebraska Constitution." *Ante* at 875, 606 N.W.2d at 793.

For the reasons set forth fully in *Constructors, Inc., supra*, we conclude that Lyman-Richey's assignment of error, as restated above, has merit. Accordingly, we reverse the decisions of the Commission with respect to the valuation of Lyman-Richey's

mineral interests. Because Lyman-Richey has not challenged the Commission's decisions with regard to the surface component assessed values, we affirm the Commission's decisions with respect to those valuations.

This court has thoroughly reviewed each of the records in these cases as prepared and transmitted, and we have noted numerous inconsistencies with respect to which files control the various mineral and surface interests. Based upon our review of these records, we determine cases Nos. S-99-961, S-99-964, and S-99-966 to be the appeals from the Commission's decisions concerning the valuation of Lyman-Richey's mineral interests, and cases Nos. S-99-962, S-99-963, and S-99-965 to be the appeals from the Commission's decisions concerning Lyman-Richey's surface valuations. Accordingly, we reverse the Commission's decisions in cases Nos. S-99-961, S-99-964, and S-99-966. The tax assessments on the mineral interests in these cases are therefore void. We affirm the Commission's decisions in cases Nos. S-99-962, S-99-963, and S-99-965.

JUDGMENTS IN NOS. S-99-961, S-99-964, AND S-99-966 REVERSED.
JUDGMENTS IN NOS. S-99-962, S-99-963, AND S-99-965 AFFIRMED.

STEPHAN, J., not participating.

ROBERT J. PROKOP, M.D., APPELLANT, V.
NANCY HOCH ET AL., APPELLEES.

607 N.W.2d 535

Filed March 17, 2000. No. S-97-1104.

1. **Pleadings: Demurrer: Appeal and Error.** In reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept conclusions of the pleader.
2. **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.
3. **Demurrer: Pleadings.** If, upon the sustainment of a demurrer, it is clear that no reasonable possibility exists that an amendment will correct a pleading defect, leave to amend need not be granted.

4. **Demurrer: Pleadings: Limitations of Actions.** If a petition alleges a cause of action ostensibly barred by the statute of limitations and fails to allege some excuse tolling the operation and bar of the statute, the petition fails to allege sufficient facts to constitute a cause of action and is subject to a demurrer.
5. **Limitations of Actions: Libel and Slander.** Under Neb. Rev. Stat. § 25-208 (Reissue 1995), actions for libel, slander, and malicious prosecution are required to have been filed within 1 year from accrual of the cause of action.
6. ___: ___. A cause of action for slander or libel accrues on the date of publication of the defamatory matter.
7. **Limitations of Actions.** The statute of limitations for malicious prosecution does not begin running until the underlying case is terminated.
8. **Actions: Proof.** In a malicious prosecution case, the necessary elements for the plaintiff to establish are (1) the commencement or prosecution of the proceeding against him or her; (2) its legal causation by the present defendant; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damage, conforming to legal standards, resulting to the plaintiff.
9. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, a petition is to be construed liberally; if as so construed the petition states a cause of action, the demurrer is to be overruled.
10. **Actions: Pleadings.** A court can sanction a party for filing a frivolous pleading in a case pending before that court, but the statutes governing the availability of such a sanction do not provide for an independent cause of action for filing frivolous pleadings.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

Robert J. Prokop, M.D., pro se.

Richard H. Hoch, of Hoch, Funke & Kelch, for appellees.

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

GERRARD, J.

Unlike fine wine, most lengthy and acrimonious lawsuits do not age well. This dispute between Robert J. Prokop and Nancy Hoch is no exception. Prokop seeks recovery from Hoch, Richard Hoch, and the law firm of Hoch & Steinheider (hereinafter collectively the appellees) for libel or slander, malicious prosecution, and for filing a frivolous pleading. The appellees demurred to Prokop's fourth amended petition on the bases that any causes of action arising from a previous lawsuit filed by

Hoch against Prokop were barred by the statute of limitations and that the remainder of Prokop's petition failed to state a cause of action. Agreeing with the appellees, the district court sustained their demurrers, dismissed the action, and denied Prokop further opportunity to amend his petition. Prokop appealed. For the reasons stated herein, we conclude that the district court properly dismissed Prokop's action and denied him leave to amend his petition.

FACTUAL BACKGROUND

Hoch and Prokop opposed each other politically in 1988 as candidates for the elected position of University of Nebraska regent. During the campaign, Prokop authored a campaign flier criticizing Hoch's political record and mailed it to approximately 40,000 households. See *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626 (1993). Hoch demanded a retraction, insisting that Prokop's flier was libelous. After the demand was refused, Hoch filed a libel lawsuit against Prokop on November 1, 1988 (the November 1988 lawsuit). After voluntarily dismissing that action, Hoch refiled it on December 5 (the December 1988 lawsuit). Exhibits attached to Prokop's petition in the instant case show that both lawsuits drew moderate media attention.

After Prokop's motion for summary judgment was granted by the district court in the December 1988 lawsuit, Hoch appealed to this court. We explained in *Hoch v. Prokop* that Prokop's motion for summary judgment should have been treated as a motion for judgment on the pleadings since it asserted that Hoch had failed to state a cause of action, and we concluded that the district court committed plain error insofar as it failed to (1) treat Prokop's summary judgment motion as a demurrer, (2) find that Hoch failed to state a cause of action, and (3) grant Hoch leave to amend her petition. The case was then remanded for further proceedings. On remand, Hoch's motion to dismiss the lawsuit with prejudice was granted by the trial court on October 12, 1995.

On October 10, 1996, Prokop filed the instant action in the district court for Saline County, alleging a cause of action for malicious prosecution. Notwithstanding several attempts by the district court to advise Prokop on how he might cure the defects

in the petition, Prokop filed his fourth amended petition pro se, which petition is the operative petition in the instant case. Prokop seeks recovery for libel or slander, malicious prosecution, and filing frivolous pleadings. Hoch filed a motion for partial summary judgment alleging that all of Prokop's claims arising from the November 1988 lawsuit were barred by the statute of limitations. Hoch's motion was treated as a demurrer by the district court. Each of the appellees also demurred to Prokop's petition on the grounds that it failed to state a cause of action.

The district court sustained the appellees' demurrers, finding that the statute of limitations had expired with respect to certain causes of action and that the remainder of Prokop's petition failed to state a cause of action and failed to separate respective causes of action against any of the appellees. The district court thereafter determined that further amendments to the petition could not lead to a different result and dismissed the case, denying Prokop further opportunity to amend his petition. Prokop timely appealed to the Nebraska Court of Appeals, and we moved the case to our own docket pursuant to our authority to regulate the caseloads of the appellate courts of this state.

ASSIGNMENTS OF ERROR

Prokop alleges, restated and summarized, that the district court erred in (1) finding some of Prokop's causes of action barred by the applicable statute of limitations, (2) finding that the balance of Prokop's petition failed to state a cause of action, and (3) dismissing Prokop's petition without granting leave to amend.

STANDARD OF REVIEW

[1,2] In reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept conclusions of the pleader. *Twin Towers Dev. v. Butternut Apartments*, 257 Neb. 511, 599 N.W.2d 839 (1999). An order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken. *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998).

[3] If, upon the sustainment of a demurrer, it is clear that no reasonable possibility exists that an amendment will correct a pleading defect, leave to amend need not be granted. *Neb. Against Exp. Gmblg. v. Neb. Horsemen's Assn., ante* p. 690, 605 N.W.2d 803 (2000).

ANALYSIS

Prokop first assigns that the district court erred by finding some of his claims barred by the statute of limitations. Because we determine that the statute of limitations has expired in regard to Prokop's claims of libel or slander and malicious prosecution of Hoch's November 1988 lawsuit, we conclude that Prokop's first assignment of error is without merit.

[4-6] If a petition alleges a cause of action ostensibly barred by the statute of limitations and fails to allege some excuse tolling the operation and bar of the statute, the petition fails to allege sufficient facts to constitute a cause of action and is subject to a demurrer. *LaPan v. Myers*, 241 Neb. 790, 491 N.W.2d 46 (1992). Under Neb. Rev. Stat. § 25-208 (Reissue 1995), actions for libel, slander, and malicious prosecution are required to have been filed within 1 year from accrual of the cause of action. This court has stated that a cause of action for slander or libel accrues on the date of publication of the defamatory matter. *LaPan v. Myers, supra*. Prokop's petition does not clarify whether his claim is one for libel or for slander; however, such a distinction is irrelevant to our analysis because Prokop's claim was not filed within 1 year from the date of publication of the matter which Prokop claims was defamatory.

Prokop alleges that Hoch's filing of the December 1988 lawsuit, as well as the media attention garnered by the lawsuit, was defamatory. The record reveals that Hoch filed her petition in the December 1988 lawsuit on December 5, 1988. Further, various newspaper articles are attached to Prokop's petition, the most recent of which was published in December 1988. Consequently, any cause of action for libel or slander that was to be filed by Prokop must have been filed by December 1989. The instant lawsuit was filed on October 10, 1996, well after the 1-year statute of limitations had expired. It is evident from the face of Prokop's petition that any claim he may have had for libel or slander is barred by the statute of limitations.

[7] Likewise, to successfully plead that any of the appellees maliciously prosecuted the November 1988 lawsuit, Prokop must allege facts which suggest the instant lawsuit was filed within 1 year of the dismissal of the November 1988 lawsuit, which dismissal Prokop claims occurred on November 2, 1988. See *Hackler v. Miller*, 79 Neb. 209, 114 N.W. 274 (1907) (on rehearing) (stating that statute of limitations for malicious prosecution does not begin running until underlying case is terminated). Prokop's initial petition in the instant case was filed October 10, 1996, nearly 7 years after the November 1988 lawsuit had been dismissed. Thus, Prokop's petition also shows that his claim for malicious prosecution of Hoch's November 1988 lawsuit is barred by the statute of limitations. We therefore determine that the district court properly granted the appellees' demurrers on the basis that certain claims were barred by the statute of limitations and conclude that Prokop's first assignment of error is without merit.

Prokop next alleges that the district court erred in finding that the remainder of his petition failed to state a cause of action. The remainder of Prokop's petition consists of a cause of action for malicious prosecution of the December 1988 lawsuit and for filing a frivolous petition. We conclude that the district court properly sustained the appellees' demurrers, as the balance of Prokop's petition fails to state a cause of action.

[8] Prokop's fourth amended petition alleges that because the December 1988 lawsuit was ultimately dismissed after numerous amendments to Hoch's pleadings, "the criteria . . . for malicious prosecution" have been established. In a malicious prosecution case, the necessary elements for the plaintiff to establish are (1) the commencement or prosecution of the proceeding against him or her; (2) its legal causation by the present defendant; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damage, conforming to legal standards, resulting to the plaintiff. *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998). Prokop's petition falls far short of alleging a valid cause of action for malicious prosecution.

[9] In determining whether a cause of action has been stated, a petition is to be construed liberally; if as so construed the petition states a cause of action, the demurrer is to be overruled. *Professional Bus. Servs. v. Rosno*, 256 Neb. 217, 589 N.W.2d 826 (1999). Even under the most liberal construction of Prokop's fourth amended petition, we conclude that the petition does not state sufficient facts to state a cause of action for malicious prosecution.

Prokop alleges that the appellees filed a libel cause of action against him which was dismissed with prejudice and without any sort of settlement on October 12, 1995. Such facts could support a conclusion that the appellees initiated a legal proceeding against him and that the proceeding reached a bona fide termination in Prokop's favor. Prokop, however, does not state any facts that would demonstrate malice on the part of the appellees, a lack of probable cause for the December 1988 lawsuit, or damages incurred as a result of the lawsuit. The operative petition merely states conclusions that the appellees acted maliciously and without probable cause and includes a prayer for damages in the sum of $9.1 million.

When asked at oral argument to narrate facts which might support a conclusion that the appellees acted with malice and lack of probable cause for the December 1988 lawsuit, Prokop merely pointed to our opinion *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626 (1993), and offered nothing else. There is no factual basis for granting Prokop any further opportunities to amend his petition. Prokop's reliance upon *Hoch v. Prokop* for a finding of malice or lack of probable cause is misplaced. In *Hoch v. Prokop*, we concluded that Hoch's petition failed to state a cause of action for libel because the petition failed to allege either falsity or malice as required for public officials under *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). However, in remanding the cause, we instructed the trial court to grant Hoch an opportunity to amend her petition because the defects in the pleading appeared to be amendable. *Hoch v. Prokop, supra*. There is no construction of that set of circumstances, standing alone, that would support a conclusion of lack of probable cause or malice on the part of Hoch. Based upon Prokop's five prior attempts to plead a

cause of action for malicious prosecution and his representations at oral argument, we determine that any further opportunity to amend his petition regarding this cause of action would prove futile.

[10] Prokop's fourth amended petition also contains a cause of action for filing a frivolous petition, a cause of action which does not exist in Nebraska. Although a court can sanction a party for filing a frivolous pleading in a case pending before that court, the statutes governing the availability of such a sanction do not provide for an independent cause of action for filing frivolous pleadings. See Neb. Rev. Stat. §§ 25-824 through 25-824.02 (Reissue 1995). Thus, the district court properly determined that the balance of Prokop's petition failed to state a cause of action. We therefore conclude that Prokop's second assignment of error is without merit.

In Prokop's final assignment of error, he contends that the district court erred by not granting him leave to amend his petition before his action was dismissed. The ultimate inquiry in a case such as this is whether leave to amend might have cured the defects in Prokop's petition. As previously explained, Nebraska does not recognize an independent cause of action for filing a frivolous petition, and it would be impossible for Prokop to amend his petition to state such a cause of action. Similarly, since the statute of limitations has expired on Prokop's claims for libel and slander, as well as on any claim of malicious prosecution deriving from the November 1988 lawsuit, leave to amend his petition would be of no avail in regard to such causes of action.

Moreover, the district court granted Prokop numerous opportunities to amend his petition so that it might state a cause of action for malicious prosecution of the December 1988 lawsuit. The district court went so far as to explain the problems with Prokop's petition and encouraged him to obtain legal assistance in drafting it. In spite of this, Prokop's amended petitions became more truncated and conclusory, and at oral argument, Prokop was unable to state any facts which suggested he might be able to cure the defects in the petition. In light of these circumstances, we conclude that no reasonable possibility exists that Prokop will be able to cure those defects were he granted

leave to once again amend. Consequently, we cannot conclude that the district court abused its discretion by denying Prokop leave to amend the fourth amended petition. Prokop's third assignment of error is therefore without merit.

CONCLUSION

The district court was correct in sustaining the appellees' demurrers as to each of Prokop's causes of action. Moreover, there is no reasonable possibility that granting Prokop leave to amend his petition will cure any of the defects therein. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

KATHRYN E. MEINTS, APPELLEE, V.
DONALD F. MEINTS, APPELLANT.

608 N.W.2d 564

Filed March 17, 2000. No. S-98-278.

1. **Divorce: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.
2. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
4. **Property Division.** The purpose of a property division is to distribute the marital assets equitably between the parties.
5. ___. The ultimate test for determining the appropriateness of the division of property is reasonableness as determined by the facts of each case.
6. ___. The division of property is not subject to a precise mathematical formula, but the general rule is to award a spouse one-third to one-half of the marital estate.
7. **Divorce: Property Division.** In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party, the polestar being fairness and reasonableness as determined by the facts of each case.

8. ___: ___. The debts of the parties should be considered in making a property division pursuant to a divorce.
9. **Property Division.** Equitable property division under Neb. Rev. Stat. § 42-365 (Reissue 1998) is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
10. ___. In computing the value of any net asset, the indebtedness owed against that asset is ordinarily deducted from its fair market value. If a court fails to consider liabilities when conducting its valuation, it has not determined the net value of the marital property.
11. **Property Division: Taxes.** Income tax liability incurred during the marriage is one of the accepted costs of producing marital income, and thus, income tax liability should generally be treated as a marital debt.
12. ___: ___. An innocent spouse who has filed separate tax returns, and paid his or her taxes in a timely fashion, should not be forced to share in any statutory penalties for the late filings of a dilatory spouse.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed in part as modified, and in part reversed and remanded with directions.

Lynne R. Fritz, of Butler, Galter & O'Brien Law Firm, for appellant.

William J. Panec for appellee.

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

GERRARD, J.

Donald F. Meints (husband) appeals from the dissolution decree rendered by the district court, which dissolved his marriage with Kathryn E. Meints (wife). The husband contends that the district court abused its discretion in dividing the marital estate, arguing that the distribution was not fair and equitable. The primary issue on appeal is whether an income tax liability incurred by one of the parties, when both parties filed separate tax returns during the marriage, should be treated as a marital debt. The district court did not treat the tax liability incurred by the husband as a marital debt and proceeded to divide the remaining marital estate accordingly. Because we hold that income tax liabilities incurred during the marriage are one of the costs of producing marital income, and thus should be treated as

a marital debt, we reverse in part the judgment of the district court and remand the cause with directions.

FACTUAL AND PROCEDURAL BACKGROUND

The Meintses were married on May 13, 1972. The evidence relevant to this appeal reveals that at the time of trial, the wife had been employed by the State of Nebraska for over 10 years, working at the Beatrice State Developmental Center, where she earned an estimated gross monthly income of $1,427.79. Over her 10 years of employment, she had accumulated $27,208.94 of retirement benefits in the Nebraska Public Employees Retirement System. The husband worked at Stan's Electronics, earning approximately $1,760 per month and had no retirement savings. The husband supplemented his income by painting and had earned between $400 and $2,000 annually for the 3 years prior to trial.

During their marriage, the couple purchased a home in 1973 for $12,500, as joint tenants. The home was valued at $23,675 and had an outstanding mortgage of approximately $1,475 at the time of the trial.

The husband testified that he was self-employed in 1990 and that from 1991 through May 1995, he worked for Tieman Construction. Between 1990 and 1996, the husband incurred a federal income tax liability of $19,162.31, plus an additional $11,235.36 in statutory penalties for late filing, for a total Internal Revenue Service (IRS) liability amounting to $30,397.67. During those years, the husband and the wife filed separate income tax returns. The husband testified that he spent the funds that he failed to withhold from his income for IRS tax purposes on family expenses, and the wife did not dispute this claim. As a result of the IRS liability, the husband's wages were garnished in the amount of $650 a month. The wife also incurred debt during the marriage, and in 1997, she filed a chapter 7 bankruptcy, which discharged some of her debts.

The district court entered a decree of dissolution on February 4, 1998, which was later modified by a nunc pro tunc order dated February 27. As modified, the decree awarded the wife custody of the minor child of the parties and divided the marital estate as follows:

Assets	Wife	Husband
Real estate	$20,000.00	
Marital property	753.00	
Wife's retirement benefits	27,208.94	
Other marital property		$ 4,650.00
Total value of assets awarded	$47,961.94	$ 4,650.00
Liabilities		
GMAC debt	3,578.00	
Bank of America debt	1,475.00	
Attorney fees (bankruptcy)	350.00	
IRS past taxes (wife)	120.00	
IRS liability (husband)		30,398.00
Spady-Runcie debt		1,600.00
MBNA credit card debt		3,000.00
Total liabilities	$ 5,523.00	$34,998.00
Net value of property received	$42,438.94	($30,348.00)

The district court calculated the marital estate by subtracting the husband's total of $30,348 from the wife's total of $42,438.94 and rounded the $12,090.94 result to $12,091. The court determined that the husband was entitled to one-half thereof, or $6,046, and entered a Qualified Domestic Relations Order (QDRO). Pursuant to the QDRO, the wife was required to pay $6,046 of her retirement benefits to the husband. Thus, the final disposition of the marital estate was as follows:

Wife		Husband	
House	$20,000.00	Personal property	$ 4,650.00
Personal property	753.00	QDRO, retirement benefits	6,046.00
Retirement benefits	21,162.94		
Total	$41,915.94		$10,696.00

The wife received $41,915.94 in assets and was responsible for $5,523 of debt, whereas the husband received $10,696 in assets and was responsible for $34,998 of debt. Neither party was awarded alimony.

The husband filed a motion for new trial on February 13, 1998. At the hearing on the motion for new trial, the husband's counsel questioned the court's division of the property and

debts. The court explained its rationale in dividing the marital estate as follows:

> You have to start with the basic proposition that if you add up all of the assets of both parties and you subtract all of the debts of both parties, you have a marital estate of something over $12,000. Now, that's your starting point. Now, the main question now comes, "How should assets and debts be allocated?"
>
> Now, it is suggested here that if Mr. Meints is going to have to pay all of that IRS debt, that he ought get a big share of the petitioner's QDRO, namely, almost twice as much as he suggests she ought to get. That isn't how you make these divisions. Debts are assigned basically to the person who incurred them and who has the responsibility of paying them. Of course, the big item here is the IRS indebtedness that he incurred on his separate return over some six years when he didn't pay any income tax.
>
> Now, the record reflects that during those years each party was filing a separate return. So these are attributable to him and him alone. It is his responsibility and his failure to pay any tax when he knew or should have been [sic] known that he had it owed; that results in this deficiency. I don't see any equitable basis to say that she has to pay any portion of that.

The husband's motion for new trial was overruled, and this appeal followed.

ASSIGNMENT OF ERROR

The husband alleges, restated, that the district court erred in failing to make a fair and equitable distribution of the marital estate.

STANDARD OF REVIEW

[1,2] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees. *Parde v. Parde, ante* p. 101, 602 N.W.2d 657 (1999). In a review de

novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. *Id.*; *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W.2d 528 (1999).

[3] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Parde v. Parde, supra.*

ANALYSIS

General Principles

[4-8] The purpose of a property division is to distribute the marital assets equitably between the parties. Neb. Rev. Stat. § 42-365 (Reissue 1998). The ultimate test for determining the appropriateness of the division of property is reasonableness as determined by the facts of each case. *Hajenga v. Hajenga, supra.* The division of property is not subject to a precise mathematical formula, but the general rule is to award a spouse one-third to one-half of the marital estate. *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995). In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party, the polestar being fairness and reasonableness as determined by the facts of each case. See § 42-365. See, also, *Hajenga v. Hajenga, supra.* Further, the debts of the parties should be considered in making a property division pursuant to a divorce. *Black v. Black*, 221 Neb. 533, 378 N.W.2d 849 (1985). We have consistently spoken of dividing the *net* marital estate. *Id.*

Income Tax Liability

Before we address the division of property in a broader context, it is imperative that we first resolve the narrower issue regarding the allocation of the husband's income tax liability. In the district court, the wife argued that during the marriage, the parties filed separate tax returns, and the wife paid her taxes in

a timely fashion, unlike the husband. The wife further claimed that it would be unfair to require her to pay $15,198.83, or one-half, of the outstanding income tax liability which was the direct result of the husband's failure to timely pay his share of the taxes. The husband claimed that the fact the parties filed separate tax returns during their marriage is irrelevant because the tax liability incurred was a marital debt. The husband further asserted that he spent the funds that he failed to withhold from his income for tax purposes on family expenses. The wife did not dispute this assertion.

The district court's calculation of the net marital estate suggests that it characterized the IRS liability as marital debt, but did not allocate it as such. The husband claims that the district court erred in not allocating the IRS liability between the parties. The husband is only partially correct.

[9,10] Equitable property division under § 42-365 is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and determine the marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. In the instant case, we are primarily concerned with steps two and three. For purposes of equitable distribution, a determination must be made of the net value of the marital property of the parties. In computing the value of any net asset, the indebtedness owed against that asset is ordinarily deducted from its fair market value. If a court fails to consider liabilities when conducting its valuation, it has not determined the net value of the marital property. See Brett R. Turner, Equitable Distribution of Property § 7.03 (2d ed. 1994 & Supp. 1999). See, also, 24 Am. Jur. 2d *Divorce and Separation* § 574 (1998).

[11,12] Income tax liability incurred during the marriage is one of the accepted costs of producing marital income, and thus, we hold that income tax liability should generally be treated as a marital debt. See, e.g., *Barner v. Barner*, 716 So. 2d 795 (Fla. App. 1998); *In re Marriage of Charles*, 284 Ill. App. 3d 339, 672 N.E.2d 57, 219 Ill. Dec. 742 (1996); *Downey v. Kamka*, 189 W. Va. 141, 428 S.E.2d 769 (1993). See, also, Turner, *supra*. Even if the taxes are overdue, the principle behind the rule is the

same, and the underlying tax liability would ordinarily be a marital debt. We do note that equity may not demand the same result if credible evidence establishes that the delinquent taxpaying spouse spent significant funds on nonmarital pursuits. Based on the same equitable principle, however, we conclude that an innocent spouse who has filed separate tax returns, and paid his or her taxes in a timely fashion, should not be forced to share in any statutory penalties for the late filings of a dilatory spouse. See *Capasso v. Capasso*, 129 A.D. 2d 267, 517 N.Y.S.2d 952 (1987). See, also, Turner, *supra*.

Applying these principles to the instant case, we determine that the district court erred when it attributed the past-due $19,162.31 IRS liability solely to the husband. The $19,162.31 tax liability should have been treated as a marital debt. On the other hand, the statutory penalty assessed in the amount of $11,235.36, plus the accruing interest, is properly treated as a nonmarital debt, solely attributable to the husband's late filings. We now proceed to our de novo review of the division of property.

Property Division

Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case. See *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995). We note that in the instant case, the wife received $41,915.54 in total assets and was responsible for $5,523 of debt; by contrast, the husband was awarded $10,696 in total assets and was responsible for $34,998 of debt. Such a property division is untenable, and we therefore find that the district court abused its discretion.

The district court found that the net value of the family home was $20,000, but the record does not support this finding. Rather, the evidence reveals that the value of the home was $23,675, subject to a mortgage of $1,475. The evidence supports the district court's valuations of all other items of personal property and liabilities; thus, the net marital estate would be calculated as follows:

Assets	Wife	Husband
Real estate—family home	$23,675.00	
Marital personal property	753.00	$ 4,650.00
Wife's retirement benefits	27,208.94	
Total marital assets	$51,636.94	$ 4,650.00
Liabilities		
GMAC debt	$ 3,578.00	
Bank of America debt	1,475.00	
Attorney fees (bankruptcy)	350.00	
IRS past taxes (wife)	120.00	
IRS liability (husband)		$19,162.31
Spady-Runcie debt		1,600.00
MBNA credit card debt		3,000.00
Total marital liabilities	$ 5,523.00	$23,762.31
Total marital assets	$56,286.94	
Total marital liabilities	(29,285.31)	
Net marital estate	$27,001.63	

For clarification, the statutory penalty assessed by the IRS in the amount of $11,235.36, plus accruing interest, has been treated as a nonmarital debt, and the husband is solely responsible for payment of that sum.

Assuming that the marital assets and liabilities remain as divided by the district court, there is a significant disparity in the property distribution that must be addressed. The district court was concerned that in order to equitably distribute the property, the husband would potentially be awarded a large share of the wife's retirement account. The difficulty with this case, as is true with many cases, is that there are two large, nonliquid assets which are not easily divisible and one large debt that must be distributed between the parties.

In determining an equitable distribution, our de novo review focuses on the problematical IRS liability and how the circumstances of the parties have been affected by the husband's failure to file his separate tax returns or pay taxes on a timely basis. There is no question that the parties filed separate tax returns between 1990 and 1996 and that except for 1996, the wife filed her tax returns and paid her taxes in a timely fashion. In 1996,

the wife was unable to pay approximately $120 in taxes and was making payments at the time of the trial. During 1990 through 1996, the family paid bills and budgeted for expenses based on the expendable income of the parties. Even though the husband spent some of the funds that would have gone toward taxes on family expenses, the effect of not paying taxes for nearly 7 years is devastating in determining a meaningful family budget. We conclude that the husband is substantially responsible for creating the circumstances that the parties find themselves in as a result of the IRS liability.

Consequently, we determine that an equitable division of the $27,001.63 net marital estate should result in awarding $18,010 to the wife and $8,991 to the husband. In doing so, we do not change the award of any real or personal property or debts made in the district court as set forth above. It is, however, necessary to recompute the payment from the wife to the husband in order to arrive at the amount we have determined as an equitable property division in the instant case.

Computation of Payment Necessary
for Equitable Distribution

Net value of property received by wife ($51,636.94 - 5,523)	$46,113.94
Less, net marital estate awarded to wife	-18,010.00
Total amount owed by wife to husband for equitable distribution	$28,103.94

The district court had determined that the wife should pay to the husband $6,046 to equalize the property division and entered a QDRO with respect to the wife's retirement benefits. Because we determine that the wife owes to the husband an additional $22,058 in order to equitably divide the property, we find it necessary to remand this cause to the district court for a determination of the method of payment. While we could modify the QDRO or redistribute the property in our de novo review, we conclude that the district court is in the best position, with input from the parties, to determine the method of payment, given the nature of the two major assets and the limited liquid resources of the wife.

CONCLUSION

For all of the foregoing reasons, we affirm in part the decree of dissolution but modify the division of property to require the wife to pay to the husband an additional $22,058 in order to equitably distribute the property in this cause. Because we conclude that the district court is in the best position to determine the method of payment from the wife to the husband, we reverse the judgment in part and remand this cause to the district court for the sole purpose of making such a determination. In all respects other than the division of property, the decree of dissolution is affirmed.

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

LEE P. CAO AND LOUANN P. CAO, HUSBAND AND WIFE, APPELLANTS, V. HUAN NGUYEN AND NEGA PHAM, HUSBAND AND WIFE, APPELLEES.

607 N.W.2d 528

Filed March 17, 2000. No. S-98-975.

1. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court. Where credible evidence is in conflict on a material issue of fact, the appellate court will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Jurisdiction: Appeal and Error.** Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
3. **Judgments: Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
4. **Actions: Rescission: Equity.** An action for rescission sounds in equity.
5. **Fraud: Rescission: Proof.** The party alleging fraud as the basis for rescission must prove all the elements of the fraudulent conduct by clear and convincing evidence.
6. **Actions: Fraud: Proof.** In order to maintain an action for fraudulent misrepresentation, a plaintiff must allege and prove the following elements: (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should

rely upon it; (5) that the plaintiff reasonably did so rely; and (6) that the plaintiff suffered damage as a result.

7. **Fraud.** Whether a party's reliance upon a misrepresentation was reasonable is a question of fact.
8. ___. A party is justified in relying upon a representation made to the party as a positive statement of fact when an investigation would be required to ascertain its falsity.
9. **Fraud: Records.** Generally, fraud may be predicated on false representations although the truth could have been ascertained by an examination of public records.
10. **Election of Remedies.** A party may not plead inconsistent theories of recovery, and a party pleading inconsistent theories of recovery may be required to elect between them.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Reversed and remanded for further proceedings.

Stephen D. Mossman and Jacqueline M. Schaneman, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellants.

Douglas D. DeLair, of DeLair and DeLair, for appellees.

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

WRIGHT, J.

NATURE OF CASE

Lee P. Cao and Louann P. Cao (buyers) brought this action seeking rescission of a purchase agreement they entered into with Huan Nguyen and Nega Pham (sellers). The buyers alleged that the sellers negligently and fraudulently misrepresented that the property at 2223 R Street in Lincoln, Nebraska, was a duplex and could be rented to two separate families when in fact the property did not conform to the municipal code so as to be rented as a duplex or two-family dwelling. The district court found that the buyers had not proved the elements of fraudulent misrepresentation and dismissed their petition. The buyers timely appealed.

SCOPE OF REVIEW

[1] In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court. Where credible evidence is in conflict on a material issue of fact, the appellate

court will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147, 589 N.W.2d 137 (1999).

FACTS

In May 1997, the buyers responded to an advertisement for the sale of a duplex and arranged to see the property. The buyers inspected the property on several occasions and observed that the property consisted of two units. The buyers informed the sellers that they intended to rent both units and to operate the property as a two-family dwelling. The sellers had rented both units in the past and at trial acknowledged that when they first purchased the house, it had been divided into two units in which two separate families resided.

The buyers decided to purchase the house, and the initial purchase agreement executed by the parties described the property as a "duplex house." The closing was set for May 29, 1997, and on that date, the parties signed a new purchase agreement which did not describe the property as a duplex.

The buyers subsequently applied for a building permit to make improvements to the property and were informed by the city building and safety department that the property could not be used as a duplex or two-family dwelling because the lot was not sufficiently wide to comply with the municipal code. The buyers then sought rescission of the purchase agreement, claiming that the sellers had fraudulently or negligently misrepresented to them that the property could be rented as a duplex.

After a bench trial, the district court dismissed the action, finding that the buyers had not proved the elements of fraudulent misrepresentation. The court did not address the buyers' claim of negligent misrepresentation or the allegation that the sellers had not provided a copy of the property disclosure statement as required by Neb. Rev. Stat. § 76-2,120 (Reissue 1996).

ASSIGNMENTS OF ERROR

The buyers claim, summarized and restated, that the district court erred (1) in failing to rule on their claim of negligent misrepresentation, (2) in concluding that the sellers' representations

that the house was a duplex were representations of law and not representations of fact, (3) in finding that their reliance on the sellers' representations was unreasonable, (4) in failing to rescind the purchase agreement, and (5) in failing to find a violation of § 76-2,120.

ANALYSIS

[2,3] We first consider whether the district court's dismissal of the buyers' claim of fraudulent misrepresentation is a final, appealable order. Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue sua sponte. *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999). The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court. *Dvorak v. Bunge Corp.*, 256 Neb. 341, 590 N.W.2d 682 (1999).

In its memorandum and order of dismissal, the district court found that the sellers had made misrepresentations to the buyers upon which the sellers intended that the buyers rely. However, the court found that the buyers had not acted reasonably in relying upon these misrepresentations because the buyers ignored several warning signs and failed to investigate whether the property could be rented as a duplex or two-family dwelling. The court did not address the theory of negligent misrepresentation. However, since reasonable reliance is an element of both negligent misrepresentation and fraudulent misrepresentation, the dismissal of the buyers' petition for lack of reasonable reliance is a determination as to both theories of recovery, and we conclude that the order of dismissal was a final, appealable order which affected a substantial right and prevented a judgment.

[4,5] An action for rescission sounds in equity. *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998). In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court. Where credible evidence is in conflict on a material issue of fact, the appellate court will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147, 589

N.W.2d 137 (1999). The party alleging fraud as the basis for rescission must prove all the elements of the fraudulent conduct by clear and convincing evidence. *Schuelke v. Wilson, supra.*

[6] In order to maintain an action for fraudulent misrepresentation, a plaintiff must allege and prove the following elements: (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff reasonably did so rely; and (6) that the plaintif suffered damage as a result. *Four R Cattle Co. v. Mullins*, 253 Neb. 133, 570 N.W.2d 813 (1997).

In dismissing the buyers' petition, the district court concluded that the sellers' representations that the home was a duplex were representations of law and not representations of fact. The court also concluded that the buyers' reliance upon such representations was not reasonable. The court found that the buyers should have questioned the sellers' assurances that the property could be rented as a duplex because only one unit was actually rented; the purchase price was about half the expected price, given the predicted rentals; and one of the units was in need of repair. The court concluded that ordinary prudence under these circumstances would have required the buyers to contact the city building and safety department. We disagree with both of these conclusions.

The representations made by the sellers were representations of fact, not law. In *Nat. Conv. Corp. v. Cedar Bldg. Corp.*, 23 N.Y.2d 621, 246 N.E.2d 351, 298 N.Y.S.2d 499 (1969), the court stated that the landlord's misrepresentation as to the legality of use of the premises would not, as to the tenant, be treated as an opinion of law and that the tenant might rely upon the representation. In *Homes, Inc. v. Gaither*, 31 N.C. App. 118, 228 S.E.2d 525 (1976), the court held that the use of real property permissible under a zoning ordinance is a statement of fact, and a mutual mistake with respect thereto entitles a party to avoidance of a contract when such fact goes to the essence of the agreement.

Here, the district court incorrectly characterized the misrepresentations as misrepresentations of law. The buyers informed the sellers that they intended to use the house as rental property, and upon inspection, the buyers saw that the property consisted of two separate apartments and had two front doors, two mailboxes, and two gas meters. The buyers were told by the sellers that the house was divided into two units, and the sellers admitted that the house had been rented to two separate families in the past. The statement that the home could be rented to two families is a representation of fact, and not a representation of law.

We next address whether the district court erred in finding that the buyers' reliance upon the sellers' representations that the property could be used as a duplex or two-family dwelling was unreasonable. The court concluded that ordinary prudence would have required the buyers to contact the city building and safety department to ascertain whether the property could be rented as a duplex or two-family dwelling.

[7,8] Whether a party's reliance upon a misrepresentation was reasonable is a question of fact. *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994). In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court. *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147, 589 N.W.2d 137 (1999). A party is justified in relying upon a representation made to the party as a positive statement of fact when an investigation would be required to ascertain its falsity. *Foiles v. Midwest Street Rod Assn. of Omaha*, 254 Neb. 552, 578 N.W.2d 418 (1998).

[9] The district court's findings suggest it concluded that the buyers' reliance on the representation was unreasonable, since a search of public records would have revealed the falsity of the representations. Standing alone, this fact is insufficient to constitute unreasonable reliance. In *Foxley Cattle Co. v. Bank of Mead*, 196 Neb. 1, 241 N.W.2d 495 (1976), we stated that generally, fraud may be predicated on false representations although the truth could have been ascertained by an examination of public records.

We also conclude that the buyers' reliance was not unreasonable. The problem is not that the property is located in an area

which is not zoned for duplexes, but, instead, that the lot is not sufficiently wide to meet the municipal code requirement for the property to be rented as a duplex or two-family dwelling. An employee of the city building and safety department testified that in the zoning district where the property is located, a lot containing a two-family dwelling must be 50 feet wide. The lot at 2223 R Street is 40 feet wide, and therefore, the property does not comply with the minimum width requirement for a two-family dwelling.

In *Gamble et ux. v. Beahm*, 198 Ore. 537, 257 P.2d 882 (1953), the court found that information regarding the zoning and building code was not furnished by the seller, nor was it open or at hand, and that to obtain this information would have required an investigation of city records and a study and interpretation of the building codes. Therefore, the buyers were allowed to rely upon the representation made by the seller. See, also, *Kannavos v. Annino*, 356 Mass. 42, 247 N.E.2d 708 (1969) (buyers of certain property were entitled to rescind when sellers had converted single-family house to multifamily apartment in violation of building and zoning ordinances of city even though zoning and building ordinances could have been discovered by buyers through diligence).

In *Schuelke v. Wilson*, 250 Neb. 334, 549 N.W.2d 176 (1996), we concluded that the buyer had not acted in an ordinary and prudent manner. The buyer sought rescission of a purchase agreement based on fraud. The buyer had met with the seller to discuss buying a paint and body shop, and various matters were discussed at these meetings, including profitability. The seller represented that the shop generated approximately $400,000 per year in gross sales and produced a profit margin of 25 percent. The seller provided the buyer with documents containing the shop's statement of profit for the years 1986 and 1987. Each statement contained a footnote which stated that the above figures had been adjusted to reflect an owner-operated franchise. Several of the expense figures had been adjusted by the seller to correspond with tax returns for the seller's corporation, and the seller provided the buyer with copies of the tax returns. The adjustments were approximations, and the seller gave the buyer the name and telephone number of the shop's accountant.

The buyer did not make any attempt to verify the numbers, and 1 month after closing, the buyer wrote to the seller, asking that the agreement be rescinded, claiming, among other things, misrepresentation regarding the business' expenses and weekly sales. We found that the buyer was not justified in relying upon the representation set forth in the seller's statements of profit or expenses because the buyer had all the documents necessary to have the expenses reviewed to ascertain their accuracy, but took no action.

Unlike the situation in *Schuelke*, here, the means of discovering the truth were not in the buyers' hands. The buyers were not provided with any information which would have placed them on notice that the home did not meet the municipal code requirement for a two-family dwelling. The sellers informed the buyers that the house had been rented to two families in the past. The physical layout of the property suggested that it was divided into two units. The buyers were told by the sellers that the property had been divided into two units, the advertisement for the property described it as a duplex, and the initial contract signed by the parties described the property as a duplex. Although one unit was not rented at the time of inspection, there was no indication that it could not be rented in the future.

In order to prove the sellers' representations were false, the buyers would have had to contact the city, research the public records, and compare the building code to the actual structure of the home. Therefore, the buyers' reliance was reasonable.

We conclude from our de novo review that the sellers made representations that the property could be used as a two-family dwelling, that such representations were false, and that when such representations were made, they were known to be false or were made recklessly without knowledge of the truth and as positive assertions. We also find that the sellers intended for the buyers to rely upon such representations, the buyers did in fact so rely upon the representations, and the buyers were damaged as a result. Thus, the buyers have proved each of the elements of fraudulent misrepresentation.

[10] Additionally, the buyers claimed that the sellers failed to provide them with a property disclosure statement as required by § 76-2,120. This is a separate cause of action. We note that

the remedies provided for in § 76-2,120 presuppose that the contract is to be enforced. Such relief is inconsistent with seeking to rescind the contract. A party may not plead inconsistent theories of recovery, and a party pleading inconsistent theories of recovery may be required to elect between them. See *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 369 N.W.2d 96 (1985).

CONCLUSION

Since we conclude that the buyers have proved the elements of fraudulent misrepresentation, the judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

KELLY J. KALKOWSKI, APPELLANT AND CROSS-APPELLEE, V. TERESA R. KALKOWSKI, APPELLEE AND CROSS-APPELLANT.

607 N.W.2d 517

Filed March 17, 2000. No. S-99-311.

1. **Divorce: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
2. **Divorce: Property Division.** The division of property in a dissolution proceeding is not subject to a precise mathematical formula and the ultimate test for determining the appropriateness of such division is reasonableness as determined by the facts of each case.
3. **Child Support: Rules of the Supreme Court.** In general, child support payments should be set according to the Nebraska Child Support Guidelines established pursuant to Neb. Rev. Stat. § 42-364.16 (Reissue 1998).
4. **Child Support: Rules of the Supreme Court: Presumptions.** All orders for child support shall be established in accordance with the Nebraska Child Support Guidelines, unless a court finds that one or both parties have produced sufficient evidence to rebut the presumption that the application of the guidelines will result in a fair and equitable child support order.
5. ____: ____: ____. A parent who believes that the inclusion of certain income would be unjust or inappropriate may rebut the presumption by offering evidence in support of his or her position that a deviation from the guidelines is warranted for that reason.

6. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.
7. **Alimony.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
8. ____. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate. Alimony should not be used to equalize the incomes of the parties or to punish one of the parties.
9. ____. Factors which should be considered by a court in determining alimony include: (1) the circumstances of the parties; (2) the duration of the marriage; (3) the history of contributions to the marriage, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities; and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party.
10. **Child Custody.** To prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. If a legitimate reason is shown, the custodial parent must next demonstrate that removal is within the child's best interests. Whether a proposed move is in the best interests of the child is the paramount consideration.
11. ____. In determining whether a proposed relocation is in the child's best interests, trial courts should consider each parent's motives for seeking or opposing the move; the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and the impact such a move will have on contact between the child and the noncustodial parent, viewed in the light of reasonable visitation arrangements.
12. ____. In determining the legitimacy of a custodial parent's motives for petitioning to move out of the jurisdiction with the minor children, Nebraska courts have never required a custodial parent to exhaust all possible job leads locally before securing a better position in another state.
13. **Child Custody: Visitation.** Absent some aggravating circumstance, such as an ulterior motive to frustrate the noncustodial parent's visitation rights, significant career enrichment is a legitimate reason for relocation in and of itself.
14. **Divorce: Courts: Taxation.** Under Nebraska law, a state court having jurisdiction in a dissolution action has the power to allocate tax dependency exemptions as part of the dissolution decree.
15. **Child Support: Taxation.** A tax dependency exemption is nearly identical in nature to an award of child support.
16. **Taxation.** The dependency exemption for income tax returns is an economic benefit.
17. **Divorce: Attorney Fees.** Customarily in dissolution cases, attorney fees and costs are awarded only to prevailing parties or assessed against those who file frivolous suits.

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

R. Bradley Dawson, of Clough, Dawson, Piccolo & Jones, for appellant.

Katherine R. Hall, of McCarthy, Gale, Moore & Hall, for appellee.

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

STEPHAN, J.

Kelly J. Kalkowski has appealed, and Teresa R. Kalkowski has cross-appealed, from an order of the district court for Keith County which dissolved their marriage and adjudicated issues of property division, alimony, child support, and custody. We find no error and affirm the judgment of the district court.

I. BACKGROUND

Kelly and Teresa were married April 19, 1985, in Ogallala, Nebraska. Their four children were born between November 22, 1987, and July 4, 1995. At the time of the dissolution proceeding, Kelly was 37 and Teresa was 36.

Teresa is a Canadian citizen. She resided in Canada until the age of 14, when she moved to Denver, Colorado, with her mother. After graduating from high school in Denver, Teresa lived in Canada for approximately 2 years and then returned to Denver, where she was working as a secretary when she met Kelly in 1984. She has resided in Ogallala since her marriage to Kelly in 1985. During the marriage, Kelly was engaged in farming and Teresa was the primary caregiver for the children. In accordance with Kelly's wishes, Teresa did not work outside the home after their first child was born. The break-up of the marriage was predicated in part upon Kelly's belief that Teresa was involved with another man, a relationship which Teresa insists was platonic. Kelly initiated the dissolution proceedings.

Teresa testified that the children did not spend much time with Kelly's family except during major holiday gatherings, which Teresa often hosted. Teresa testified that since the commencement of the dissolution proceedings, Kelly's family members have refused to acknowledge her even if the children are present.

Other than her children, Teresa has no family in the United States. Most members of her extended family, which includes parents, siblings, cousins, aunts, and uncles, reside in or near Camrose, Alberta, Canada. She testified that these family members are quite close and gather often. Camrose is a community

of approximately 14,000, located approximately 1,200 miles away, which is a 23-hour drive from Ogallala. Teresa investigated the educational and housing opportunities available in Camrose and found that all of the activities in which the children are involved in Ogallala were also available in Camrose. Additionally, tuition for the children to attend Catholic schools in Camrose is free, while she is paying $80 a month in Ogallala.

Teresa also found that she could purchase a suitable home in Camrose and believes that because of the depressed Canadian economy, her American dollars would be worth more there and she would be left with only a small mortgage. Teresa testified that she wishes to relocate to Canada because she needs to begin a career to ensure financial security for herself and the children. She made arrangements to work at a family business in Camrose where she will have a flexible schedule of a minimum of 24 hours per week and will earn $8.50 per hour in Canadian dollars, or approximately $5.40 per hour in American dollars. She also testified that Camrose has a university which she could attend part time to obtain a degree. Because of the alleged extramarital relationship, she is concerned that her children will be hurt by gossip in Ogallala. Teresa admitted that she has not looked into educational opportunities for herself in other Nebraska communities. She testified that she looked at classified advertisements for jobs in the Ogallala area and determined that the pay was approximately the same as the job she would have in Canada but that the working schedules were not flexible.

Teresa testified that if she were permitted to take the children to Canada, they would be out of school during the months of July and August, and could visit Kelly for 6 weeks during this period. She was also willing to give Kelly visitation at Christmas and over spring break and to set up designated times for telephone visits between the children and Kelly. She testified that while Camrose has an airport, the most economical method of transporting the children for visitation would be to meet Kelly at a location in Montana which is approximately equidistant from Camrose and Ogallala. Teresa further stated that she would be willing to drive the children all the way to Nebraska for visitation with Kelly and would pay either all or half of the cost of transportation. Teresa testified that she would encourage the children to maintain contact with Kelly, including the use of e-mail.

Kelly testified that he had concerns about his children moving to Canada because Teresa does not get along with her mother and her father has a significant health problem. He stated that the children were once in Canada for a month and were anxious to return home. He testified that he enjoys a good relationship with his children, which would be difficult to maintain if they resided in Canada. Kelly testified that he is busy farming during the summer months but could use his mobile telephone to take calls from his children once or twice a week. He expressed a willingness to assume and carry out any and all parental duties.

Shari Shore, a licensed counselor and mental health professional practicing in North Platte, Nebraska, also testified at the hearing. She began seeing the children in June 1998 because Teresa was concerned about how they were adjusting to the dissolution. Shore noticed that when the older children talked about being at Kelly's residence, they primarily talked about having fun. Shore stated that one of the girls was excited about moving to Canada and wanted to give it a try and that her brother was also realistic about the situation and was willing to move. On cross-examination, Shore stated that under optimal conditions, children should have equal access to both parents and that a child's relationship with the father is equally as important as the relationship with the mother. On redirect, however, Shore stated that it was not a realistic goal in this case for both parents to have equal access to the children.

In its decree, the district court awarded custody of all four children to Teresa, but concluded that she had failed to establish that relocation to Canada would be in the best interests of the children and therefore denied her request to remove them from the State of Nebraska. The court further ordered that Kelly should pay child support in the sum of $1,904 per month until the first child reached the age of majority and that Kelly would be entitled to the annual state and federal income tax exemptions for all four minor children provided that he is current on all child support payments as of the last day of each calendar year. The court also ordered that Kelly pay alimony in the sum of $1,000 per month for 60 months. With respect to the division of marital property, the court found that the net marital estate had a value of approximately $196,000 and awarded each party assets valued at approximately one-half of that amount. The

property awarded to Kelly included farm machinery and equipment, growing crops valued at $8,800, and harvested crops in storage valued at $118,171, subject to the indebtedness associated with the farming operation. The property awarded to Teresa included the family home in Ogallala in which she and the children lived, valued at $141,000, subject to the lien of a home loan having a balance of $47,610.02 which was assigned to her. She was also awarded a vehicle, household furnishings and equipment, and a life insurance policy.

Both parties filed motions for new trial which were overruled by the district court. The ensuing appeal and cross-appeal were transferred to our docket on our own motion pursuant to our statutory obligation to regulate the caseloads of the appellate courts. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

II. ASSIGNMENTS OF ERROR

Kelly contends, restated, that the trial court erred in (1) treating the stored and growing crops both as marital assets subject to division and income upon which his child support and alimony obligations are based, (2) determining the amount of his child support obligation, and (3) determining the amount and duration of his alimony obligation. Teresa contends in her cross-appeal, restated, that the trial court erred in (1) not permitting her to relocate to Canada with the parties' children, (2) granting alimony for only 60 months, and (3) awarding Kelly the dependent exemption for all four children.

III. STANDARD OF REVIEW

[1] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W.2d 528 (1999).

IV. ANALYSIS

1. Kelly's Appeal

(a) Property Division

[2] We initially address Kelly's contention that the trial court erred in treating the growing and stored crops both as marital assets subject to division upon dissolution of the marriage and

as income upon which his child support and alimony obligations are based. We are guided by the principles that the division of property is not subject to a precise mathematical formula and that the ultimate test for determining the appropriateness of such division of property is reasonableness as determined by the facts of each case. *Hajenga v. Hajenga, supra.*

Kelly testified that his harvested crops in storage secure a line of credit which he utilizes in his farming operation and that when the crops are sold, the proceeds are used to reduce the amount of his debt. Based upon these facts, he argues that the trial court should not have treated the crops as a marital asset subject to division and credited to his share of the marital estate, but, rather, should have treated the crops as a "stream of income more equivalent to inventory than to other traditional assets." Brief for appellant at 9. Kelly contends that "[t]he crop asset represents nothing more than a stream of income available to [him] because of his labors." *Id.*

This argument, however, is inconsistent with Kelly's position at trial. Prior to trial, the parties filed a property statement which consisted of a detailed listing of assets and liabilities, the fair market value that each party assigned to each asset, and an indication of those assets which each party asked to be awarded. This list includes property described as "CROPS IN STORAGE (TYPE/QUANTITY X 4) (Petitioner's gross income from crop production during 1998)" and "GROWING CROPS (TYPE/QUANTITY X 4) 296 acres growing wheat." Kelly assigned a value of $118,171 to the stored crops and $8,880 to the growing crops. Teresa assigned the same value to the growing crops, but a value of $214,718.68 to the stored crops. The property statement indicated that Kelly asked to be awarded these assets. On direct examination at trial, Kelly testified at length regarding the various assets listed on the property statement. He was then asked if he wished to make any proposal to the court "respecting the division of assets and assumption of debt." He responded,

> Basically, I would like the — I would like all of the farm assets, basically the equipment, all the growing crops, all the crops in storage, the balance in the checking account, money owed to me by Ron Kalkowski in respect to that.

> I would be willing to let Teresa have the house. I would be willing to let Teresa also have the van pursuant to her paying the remainder of the balance due on it . . . .

Kelly further indicated that he had no objection to Teresa receiving the "lion's share" of the household furnishings. The trial court's distribution of property was generally consistent with Kelly's proposal. In addition, Kelly was awarded Teresa's one-quarter equity interest in Kalkowski, Inc., a family corporation, in addition to the one-quarter interest in the corporation which he had previously held. The record therefore reveals that Kelly requested the district court to treat the crops as a marital asset, which the court did. Generally, a party cannot complain of error which the party has invited the court to commit. *Gustafson v. Burlington Northern RR. Co.*, 252 Neb. 226, 561 N.W.2d 212 (1997); *Hoover v. Burlington Northern RR. Co.*, 251 Neb. 689, 559 N.W.2d 729 (1997).

Moreover, Kelly's argument is inconsistent with our decision in *Venter v. Venter*, 249 Neb. 712, 545 N.W.2d 431 (1996). At issue in that case was whether the trial court erred in treating the husband's business accounts receivable as marital assets, given the fact that upon payment of the accounts, the proceeds were reported as income. The husband argued that his accounts receivable had continued in the same cycle of billing and collection for 11 years and that the trial court therefore erred in treating the receivables as an asset while assuming their eventual payment and resulting realization of income in determining his child support and alimony obligations. In affirming the judgment of the trial court, this court specifically declined "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." *Venter v. Venter*, 249 Neb. at 716, 545 N.W.2d at 433. Instead, we determined that under the "ultimate test" of reasonableness, there was no error in the trial court's distribution of property. *Id.*

Likewise, in this case, we decline to adopt any bright-line rule as to whether or not crops which will eventually generate income may be treated as divisible marital property in a dissolution proceeding. Based upon our de novo review, it is apparent that the principal marital assets were the family home and

furnishings, two personal vehicles, and the assets relating to the farming operation including equipment, crops, and capital stock of Kalkowski, Inc. The district court awarded one vehicle to each party, the home and most of the furnishings to Teresa, and the assets relating to the farming operation to Kelly in accordance with Kelly's wishes. Applying a reasonableness test to these particular facts, we find no abuse of discretion in this division of property.

(b) Child Support

[3-5] In general, child support payments should be set according to the Nebraska Child Support Guidelines established pursuant to Neb. Rev. Stat. § 42-364.16 (Reissue 1998). *Rhoades v. Rhoades, ante* p. 721, 605 N.W.2d 454 (2000); *Dueling v. Dueling*, 257 Neb. 862, 601 N.W.2d 516 (1999). The guidelines provide that in calculating the amount of support to be paid, the court must consider the "Total Monthly Income," defined as the "income of both parties derived from all sources, except all means-tested public assistance benefits and payments received for children of prior marriages." Nebraska Child Support Guidelines, paragraph D. All orders for child support shall be established in accordance with the Nebraska Child Support Guidelines, unless a court finds that one or both parties have produced sufficient evidence to rebut the presumption that the application of the guidelines will result in a fair and equitable child support order. § 42-364.16; *Dueling v. Dueling, supra.* A parent who believes that the inclusion of certain income would be unjust or inappropriate may rebut the presumption by offering evidence in support of his or her position that a deviation from the guidelines is warranted for that reason. *Id.*

In this case, the trial court determined, on the basis of tax returns for the years 1996 through 1998, that Kelly had an average monthly income of $4,973, and calculated his child support obligation in accordance with the child support guidelines. Based upon our de novo review, we conclude that Kelly did not meet his burden of proving any portion of his actual income should not have been considered for purposes of calculating child support or that any other deviation from the child support guidelines was warranted.

(c) Alimony

[6-9] In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997); *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994). In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Priest v. Priest*, 251 Neb. 76, 554 N.W.2d 792 (1996); *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995). The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate. Alimony should not be used to equalize the incomes of the parties or to punish one of the parties. *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994). Factors which should be considered by a court in determining alimony include: (1) the circumstances of the parties; (2) the duration of the marriage; (3) the history of contributions to the marriage, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities; and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party. *Reichert v. Reichert, supra.*

This was a marriage of almost 14 years' duration which produced four children ranging in age from 3 to 11 at the time of dissolution. The evidence established that much of Kelly's time was occupied with farming and that as a result, Teresa was the primary caregiver of the children. It is apparent from the record that Teresa will have a period of adjustment during which she will need to find a means of generating an income in addition to caring for the children on a daily basis. Based upon our de novo review, we find no abuse of discretion in the award of alimony in the amount of $1,000 per month for 60 months.

2. TERESA'S CROSS-APPEAL

(a) Denial of Leave to Relocate Children

[10,11] To prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the

court that he or she has a legitimate reason for leaving the state. *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999); *Harder v. Harder*, 246 Neb. 945, 524 N.W.2d 325 (1994). If a legitimate reason is shown, the custodial parent must next demonstrate that removal is within the child's best interests. *Id.* Whether a proposed move is in the best interests of the child is the paramount consideration. *Farnsworth v. Farnsworth, supra*; *Evenson v. Evenson*, 248 Neb. 719, 538 N.W.2d 746 (1995). In determining whether a proposed relocation is in the child's best interests, trial courts should consider each parent's motives for seeking or opposing the move; the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and the impact such a move will have on contact between the child and the noncustodial parent, viewed in the light of reasonable visitation arrangements. See *Farnsworth v. Farnsworth, supra.*

The trial court's determination in this case was made prior to the release of our opinion in *Farnsworth*. The trial judge determined that Teresa had not established that "the best interests of the minor children would be achieved by moving them to a location in Canada approximately 1200 miles from Keith County, Nebraska." Noting that Teresa had resided in the United States on a nearly continuous basis since she was 14 years of age, except for a period of 1½ to 2 years immediately following her graduation from high school, the court determined that she had made no investigation as to educational or employment opportunities either in Keith County or elsewhere in Nebraska as an alternative to relocation. The court further determined that the relationship between Kelly and his family and the children would be "seriously jeopardized" if Kelly were able to see the children on only two or three occasions per year, and noted that the expert called by Teresa testified that it would be best if both parents can coparent and remain active in the children's lives.

[12,13] The trial court did not make a specific finding as to whether Teresa had established a legitimate reason for her proposed relocation. In reviewing this question de novo, it appears her principal reasons for wishing to relocate to Canada are her desire to be near her extended family and her plan to pursue edu-

cational and employment opportunities there. While it is true that she did not investigate educational opportunities in Nebraska and conducted only a limited investigation of employment opportunities in this state, we have never required a custodial parent to exhaust all possible job leads locally before securing a better position in another state. *Farnsworth v. Farnsworth, supra.* We have also stated that absent some aggravating circumstance, such as an ulterior motive to frustrate the noncustodial parent's visitation rights, significant career enrichment is a legitimate reason for relocation in and of itself. *Id.* We conclude that Teresa's firm offer of employment with a flexible schedule in close proximity to her extended family constitutes a legitimate reason for her proposed relocation to Canada. We therefore focus our de novo review on whether she has established that such relocation would be in the best interests of the children, a question which the trial court resolved in the negative.

In assessing each parent's motives, we conclude that both Teresa and Kelly have valid motives for taking their respective positions on the issue of relocation. Teresa's reasons for relocating are as stated above, and there is no indication that she seeks to frustrate Kelly's visitation rights. Kelly, on the other hand, has legitimate concerns about the effect relocation across an international boundary and 1,200 miles from his home would have on his relationship with his children and, in particular, his ability to maintain regular and frequent contact with them. The motives of each party are thus equally balanced.

As to the potential which the relocation holds for enhancing the quality of life of Teresa and her children, pertinent factors include: (1) the emotional, physical, and developmental needs of the children; (2) the children's opinions or preferences as to where to live; (3) the extent to which the custodial parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the children and each parent; (7) the strength of the children's ties to the present community and extended family there; (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parents; and (9) the living conditions and employment opportunities for the

custodial parent because the best interests of the children are interwoven with the well-being of the custodial parent. See *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). Although there is evidence that the move could potentially enhance the children's standard of living, it is not overwhelming. Moreover, any potential enhancement would be dependent to a great extent upon the children's ability to adapt to new surroundings, new friends, and an extended family with whom they have never had a relationship other than periodic visits. The likelihood of a successful adaptation by all of the children is difficult to predict.

We conclude that the question turns on the third *Farnsworth* consideration, i.e., the impact of relocation upon the ability of Kelly to maintain a meaningful relationship with his children. In *Farnsworth*, we noted that while a move from Omaha to Denver would necessarily lessen the frequency of visits with the child, the distance between the two cities was not one which would prevent the noncustodial parent from seeing his child on a regular basis. The same cannot be said of the distance between Ogallala, Nebraska, and Camrose, Alberta, Canada. The greater distance, less direct travel connections, and the significant expense and time involved in traveling between the two locations are significant factors which the trial court properly considered. As we stated in *Farnsworth v. Farnsworth*, 257 Neb. at 255, 597 N.W.2d at 601:

> Parental relocation issues are among the most difficult issues that trial courts face in postdivorce proceedings. Once broken by divorce, a family cannot be put back together in precisely the same way. Among other things, the relationships between the child and each of the parents and the parents to each other are necessarily different. As such, it is often difficult for courts to balance the noncustodial parent's accustomed close involvement in a child's everyday life with the custodial parent's chance to embark on a new or better life or to form a new family unit. It is for this reason that such determinations are matters initially entrusted to the discretion of the trial judge, and the trial judge's determination is to be given great deference absent an abuse of discretion.

Based upon our de novo review of the record, we conclude that the district court did not abuse its discretion in concluding that the relocation would not be in the best interests of the children because of its potential negative impact upon their relationship with Kelly.

(b) Alimony

While Teresa does not challenge the amount of monthly alimony awarded by the trial court, she argues that its duration is insufficient and should have extended to at least September 2005, which is 4 years past the date the youngest of the four children would enter the first grade. Applying the factors mentioned above in connection with our review of Kelly's assignment of error with respect to alimony, we conclude upon de novo review that the trial court did not abuse its discretion in awarding alimony for a period of 60 months.

(c) Dependency Exemptions

[14] Under Nebraska law, a state court having jurisdiction in a dissolution action has the power to allocate tax dependency exemptions as part of the dissolution decree. *Hall v. Hall*, 238 Neb. 686, 472 N.W.2d 217 (1991). In the present case, the district court awarded all dependency exemptions to Kelly, provided that he is current on his child support payments as of December 31 of each year.

[15,16] A tax dependency exemption is nearly identical in nature to an award of child support. *Hall v. Hall, supra*. The dependency exemption for income tax returns is an economic benefit. *Prochaska v. Prochaska*, 6 Neb. App. 302, 573 N.W.2d 777 (1998). Based on these propositions, Teresa argues that there is nothing in the record which would support the award of exemptions to Kelly and that the district court therefore abused its discretion in making the award.

Teresa's argument fails to correctly consider the mathematical computations involved with dependency exemptions and calculations of child support income. The district court's child support calculations indicate that in arriving at the amount of Kelly's income available for support, it first considered his adjusted gross income as reflected on his tax returns and then,

pursuant to the child support guidelines, added back the amounts of depreciation claimed in each return. It then subtracted the amount of state and federal income tax paid by Kelly in arriving at his net income for child support purposes, averaging the net amount over a 3-year period. The taxes deducted were computed by taking into account the exemptions for all four children.

This mathematical analysis reveals that awarding Kelly the dependency exemptions results in increasing the amount of his income for the purposes of calculating child support. The dependency exemptions decrease the amount of federal and state income tax Kelly pays, resulting in an increase in his net income for purposes of calculating child support and a concomitant increase in the amount of tax-free child support income that Teresa receives each month. See *Kriesel v. Gustafson*, 513 N.W.2d 9 (Minn. App. 1994). In addition, the district court's child support calculation reflects that Kelly will be providing 91 percent of the children's monthly support. We therefore conclude that the district court did not abuse its discretion in awarding the exemptions to Kelly.

3. Attorney Fees on Appeal

[17] Both parties have filed motions pursuant to Neb. Ct. R. of Prac. 9F (rev. 1999) requesting an award of attorney fees on appeal. Customarily in dissolution cases, attorney fees and costs are awarded only to prevailing parties or assessed against those who file frivolous suits. *Ryan v. Ryan*, 257 Neb. 682, 600 N.W.2d 739 (1999). In the present case, neither party prevailed with respect to the issues on which they sought appellate review, and neither the appeal nor the cross-appeal was frivolous. Accordingly, we conclude that each party should be responsible for paying his or her own attorney fees on appeal and deny both motions.

V. CONCLUSION

For the reasons discussed above, we conclude on the basis of our de novo review that the district court did not abuse its discretion in dividing the parties' marital property; in denying Teresa's request to relocate to Canada with the parties' children;

or in awarding child support, alimony, and tax exemptions. Accordingly, we affirm the judgment of the district court and deny each party's motion for attorney fees on appeal.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JEFFREY BURKHARDT, APPELLANT.

607 N.W.2d 512

Filed March 17, 2000. No. S-99-727.

1. **Sentences: Appeal and Error.** Sentences within statutory limits will only be disturbed by an appellate court if the sentence complained of was an abuse of judicial discretion.
2. **Pleas.** To support a finding that a plea of guilty has been entered freely, intelligently, voluntarily, and understandingly, a court must inform a defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. The record must also establish a factual basis for the plea and that the defendant knew the range of penalties for the crime charged.
3. **Pleas: Waiver.** All defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue.
4. ___: ___. The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional.
5. **Judges: Words and Phrases.** A judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition.

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

James R. Mowbray and Kelly S. Breen, of the Nebraska Commission on Public Advocacy, for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Pursuant to a plea agreement, Jeffrey Burkhardt pled guilty to one count of manslaughter (count I) and one count of use of a

firearm to commit a felony (count II). Burkhardt was convicted and sentenced to 15 to 20 years' imprisonment on count I and 12 to 30 years' imprisonment on count II, the sentences to be served consecutively. Burkhardt appeals his conviction on count II and asserts that the sentences he received are excessive.

SCOPE OF REVIEW

[1] Sentences within statutory limits will only be disturbed by an appellate court if the sentence complained of was an abuse of judicial discretion. *State v. Bartholomew, ante* p. 174, 602 N.W.2d 510 (1999).

FACTS

As a result of plea negotiations, an agreement was entered into between the State and Burkhardt which provided that in exchange for pleas of guilty on both counts, the State would amend its charge of first degree murder to manslaughter and would file no further charges. Thus, the third amended information charged Burkhardt in count I with manslaughter, in violation of Neb. Rev. Stat. § 28-305(1) (Reissue 1995), and in count II with use of a firearm to commit a felony, in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1995).

On April 22, 1999, while represented by counsel, Burkhardt pled guilty to the third amended information. The trial court determined that a factual basis had been established; the plea agreement had been explained; and the plea was knowingly, intelligently, and voluntarily made. A presentence investigation was ordered, and on May 27, Burkhardt appeared with counsel for sentencing.

On June 3, 1999, Burkhardt filed a motion for new trial on count II (use of a firearm to commit a felony). The motion requested that the trial court vacate the conviction and sentence imposed on count II. On June 4, the State filed a motion to enforce the plea agreement which alleged, inter alia, that as a result of negotiations with Burkhardt's counsel, a plea agreement was entered into by the parties which provided that in exchange for pleas of guilty on both counts, the State would amend count I from first degree murder to manslaughter and would file no further charges. The State alleged that by Burkhardt's seeking to vacate his conviction on count II, he was in default of the plea agreement.

The State also filed a motion to quash Burkhardt's motion for new trial on the basis that Burkhardt had waived any complaints regarding the information by pleading guilty to the charges, thereby waiving any defect which was not jurisdictional and which could be raised by a motion to quash or a plea in abatement. In addition, the State moved to quash Burkhardt's motion for new trial because it was not filed within 10 days after the trial court accepted Burkhardt's plea and entered a judgment of conviction, as required by Neb. Rev. Stat. § 29-2103 (Reissue 1995).

On June 9, 1999, the trial court overruled the State's motions to quash, declared moot the State's motion to enforce the plea agreement, and overruled Burkhardt's motion for new trial as to count II. On June 15, Burkhardt gave notice of his intention to appeal from the judgments of conviction and sentences and the order overruling his motion for new trial as to count II.

ASSIGNMENTS OF ERROR

On appeal, Burkhardt assigns as error (1) that the trial court erred in refusing to vacate the conviction and sentence on count II of the information, since the underlying felony in count I is an unintentional crime, and therefore, there was no proof beyond a reasonable doubt that Burkhardt knowingly and purposely used a weapon for the purpose of committing manslaughter and (2) that the court erred in imposing excessive sentences despite substantial mitigating circumstances.

ANALYSIS

Burkhardt argues that the trial court erred in refusing to vacate the conviction and sentence on count II. He argues that since the underlying felony in count I is an unintentional crime (manslaughter), there is no proof that he used a weapon for the purpose of committing manslaughter. We do not reach this assignment of error, because Burkhardt pled guilty to both counts and has waived any such argument or defect.

[2] In order to accept a defendant's plea of guilty, the trial court must determine that the plea is voluntarily and intelligently made by the defendant. To make this determination, the court must question the defendant about certain facts and must also advise the defendant of certain rights to which the defend-

ant is entitled. To support a finding that a plea of guilty has been entered freely, intelligently, voluntarily, and understandingly, a court must inform a defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. The record must also establish a factual basis for the plea and that the defendant knew the range of penalties for the crime charged. *State v. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999). See, also, *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999). When this information has been disseminated, the court may accept the defendant's plea of guilty.

[3,4] Once a plea of guilty has been accepted, the defendant waives every defense to the charge. All defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue. *State v. Roucka*, 253 Neb. 885, 573 N.W.2d 417 (1998). The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional. *State v. Trackwell*, 250 Neb. 46, 547 N.W.2d 471 (1996).

The record shows that when Burkhardt entered his plea to the third amended information, he was present with counsel, and that before the trial court accepted Burkhardt's plea of guilty, he was advised by the court of the nature of the charges and that manslaughter is a Class III felony punishable by 1 to 20 years' imprisonment, a $25,000 fine, or both. As to the charge of use of a firearm to commit a felony, Burkhardt was advised that it is a Class II felony punishable by 1 to 50 years' imprisonment and that the sentence for use of a firearm to commit a felony must be served consecutively to any sentence that he would receive regarding the manslaughter charge. Burkhardt was advised of his right to assistance of counsel, the right to confront adverse witnesses, the right to a jury trial, and the privilege against self-incrimination. The court then examined Burkhardt to determine whether he understood the information that was given to him by the court.

Regarding count I, the trial court asked Burkhardt how he wished to plead to the charge that he had killed Adrian Garcia on April 25, 1998, without malice upon a sudden quarrel.

Burkhardt then entered a plea of guilty. As to count II, Burkhardt was asked how he wished to plead to the charge that he had used a firearm to kill Garcia, and Burkhardt also pled guilty. The court then inquired whether Burkhardt understood that by pleading guilty to these charges, he was giving up all the rights that had previously been explained to him, and that by pleading guilty to these charges, he was admitting to the court that the charges were true. Burkhardt responded, "Yes, Your Honor." The court inquired of Burkhardt's counsel whether counsel felt that the pleas of guilty to counts I and II were consistent with the facts and information of which counsel had been made aware. Counsel responded, "Yes." The court then inquired of Burkhardt whether he understood the possible sentences and whether anyone had threatened, coerced, or forced him in any way to make these guilty pleas. Burkhardt responded, "No, Your Honor."

When Burkhardt was asked to state in his own words what occurred on April 25, 1998, he responded, "Shot and killed Adrian Garcia. . . . Self-defense." The court then inquired, "When you say, Mr. Burkhardt, you did it in self-defense, I want to make sure you understand by pleading guilty to the charges in the third-amended information, you are waiving any right to proceed on any self-defense theory, do you understand that?" Burkhardt responded, "Yes, Your Honor." The court next inquired, "And you make that waiver of any plea to any self-defense argument freely and voluntarily?" Burkhardt responded, "Yes, Your Honor."

The trial court then inquired whether the pleas of guilty to the third amended information were the result of plea negotiations and asked the State to recite the plea agreement. The State then recited that in exchange for a plea of guilty to both counts, the State had agreed to amend the information and to file no further charges arising out of this set of facts. The court recited the terms of the plea agreement to Burkhardt and asked if he understood the terms. Burkhardt responded, "Yes, Your Honor." The court then asked Burkhardt if he wished to withdraw his pleas of guilty to these charges or wished the court to accept them. Burkhardt responded that he wished the court to accept them. The court found that the guilty pleas to counts I and II were

knowingly, intelligently, and voluntarily made. The court then asked the State whether it had any other facts which it wished to present, other than the fact that Burkhardt shot Garcia with a handgun. The State proceeded with a narrative of what took place prior to, during, and after the shooting.

The record affirmatively shows that intelligent pleas were made and entered into, and the record discloses that Burkhardt knew the rights he waived when he entered such pleas. See *State v. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999). It is apparent from the record that the trial court carefully examined Burkhardt as to the consequences of his pleas. Burkhardt was represented by counsel, and the court found that the pleas were knowingly, intelligently, and voluntarily made. The record adequately supports a factual basis for the pleas of guilty to the charges of manslaughter and use of a weapon to commit a felony. Since the record adequately supports the fact that Burkhardt knowingly, intelligently, and voluntarily entered his pleas of guilty, we conclude that Burkhardt has waived any arguments concerning the first assignment of error.

Burkhardt's second assignment of error is that the trial court erred in imposing excessive sentences. Manslaughter is a Class III felony punishable by 1 to 20 years' imprisonment, a $25,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 1995) and § 28-305(2). Use of a firearm to commit a felony is a Class II felony punishable by 1 to 50 years' imprisonment. §§ 28-105 and 28-1205(2)(b). Burkhardt was sentenced to 15 to 20 years' imprisonment for manslaughter and 12 to 30 years' imprisonment for use of a firearm to commit a felony, the sentences to be served consecutively.

[5] Sentences within statutory limits will only be disturbed by an appellate court if the sentence complained of was an abuse of judicial discretion. *State v. Bartholomew, ante* p. 174, 602 N.W.2d 510 (1999). A judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition. *State v. Myers, ante* p. 272, 603 N.W.2d 390 (1999).

The presentence investigation shows that Burkhardt has a significant criminal record, including convictions for distribution

of a controlled substance and possession of a controlled substance with intent to distribute. The sentences imposed herein were well within the statutory limits. Thus, we conclude the trial court did not abuse its discretion in sentencing Burkhardt.

CONCLUSION

The judgments of conviction and sentences imposed by the district court are affirmed.

AFFIRMED.

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