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# STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. ANDREI G. HOWZE, RESPONDENT.

618 N.W.2d 663

Filed October 20, 2000. No. S-00-074.

1. **Disciplinary Proceedings: Rules of the Supreme Court.** Pursuant to Neb. Ct. R. of Discipline 10(I) (rev. 2000), if a respondent's answer raises no issue of fact or of law, the matter may be disposed of by the Nebraska Supreme Court on its own motion or on a motion for judgment on the pleadings.
2. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
3. ___. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
4. ___. Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is disbarment.
5. ___. The fact that the client did not suffer any financial loss does not excuse an attorney's misappropriation of client funds and does not provide a reason for imposing a less severe sanction.
6. **Disciplinary Proceedings: Presumptions.** Mitigating factors overcome the presumption of disbarment in misappropriation and commingling cases only if they are extraordinary.
7. **Disciplinary Proceedings.** The propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.

Original action. Judgment of disbarment.

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

PER CURIAM.

## NATURE OF CASE

Formal charges were filed by the Committee on Inquiry of the Second Disciplinary District of relator Nebraska State Bar Association (NSBA), alleging two counts of attorney misconduct against respondent, Andrei G. Howze, who was admitted to the practice of law in the State of Nebraska on March 20, 1989. On September 11, 2000, Howze entered his appearance and acknowledged receipt of the summons and formal charges in the above-captioned matter. On September 14, Howze filed his

answer, admitting each and every allegation contained in the formal charges. On that same date, the NSBA filed a motion for judgment on the pleadings. We grant the motion for judgment on the pleadings and now enter a judgment of disbarment.

## STATEMENT OF FACTS

Count I of the formal charges states, inter alia, that Howze settled a personal injury case for his client Rosalie Williams and that following the settlement, Howze retained funds for the purpose of paying $309.50 to Ihle Chiropractic for services rendered to Williams. The formal charges further allege that Howze failed to pay Ihle Chiropractic the funds he was holding for payment of Williams' account. Upon receipt of a complaint filed by Susan Ihle of Ihle Chiropractic with the office of the Counsel for Discipline, Howze sent a cashier's check, and not an attorney trust account check, to Ihle in the amount of $329.50. Count I further states that Howze failed to maintain sufficient funds in his attorney trust account to pay the claim of Ihle Chiropractic for the benefit of Williams. Finally, count I states that despite repeated requests, Howze failed to provide to the office of the Counsel for Discipline an explanation regarding Williams' funds or any trust account records.

As a result of these actions, the formal charges state that Howze violated his oath of office as an attorney and the following provisions of the Code of Professional Responsibility:

> DR 1-102 Misconduct.
> (A) A lawyer shall not:
> (1) Violate a Disciplinary Rule.
> . . . .
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
> . . . .
> DR 6-101 Failing to Act Competently.
> (A) A lawyer shall not:
> . . . .
> (3) Neglect a legal matter entrusted to him or her.
> . . . .
> DR 9-102 Preserving Identity of Funds and Property of a Client.

(A) All funds of clients paid to a lawyer or law firm shall be deposited in one or more identifiable bank or savings and loan association accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay account charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

. . . .

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them.

(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.

Count II of the formal charges states, inter alia, that Howze was hired by Stephen Neal to represent Neal in a personal injury matter. The formal charges state that Howze obtained a settlement for Neal and retained settlement proceeds in the amount of $2,074.34 to pay two medical providers who had filed liens. Howze failed to pay the medical providers and did not repay Neal or Neal's medical providers until December 1999, after Neal filed a complaint with the office of the Counsel for Discipline on June 10, 1999.

As a result of these actions, the formal charges state that Howze violated his oath of office as an attorney and the following provisions of the Code of Professional Responsibility as set forth above: Canon 1, DR 1-102(A)(1) and (4); Canon 6, DR 6-101(A)(3); Canon 9, DR 9-102(A)(1) and (2) and (B)(3) and (4). The formal charges relating to count II also allege a vio-

lation of DR 1-102(A)(6), which provides that a lawyer shall not "[e]ngage in any other conduct that adversely reflects on his or her fitness to practice law."

## ANALYSIS

[1] Pursuant to Neb. Ct. R. of Discipline 10(I) (rev. 2000), "if the answer raises no issue of fact or of law, the matter may be disposed of by the Court on its own motion or on a motion for judgment on the pleadings." We find that the requirements of rule 10(I) have been satisfied and see no reason why a judgment on the pleadings should not be granted.

[2,3] 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. Mefferd*, 258 Neb. 616, 604 N.W.2d 839 (2000). Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case. *Id.*

[4-6] This case presents the misappropriation or commingling of client funds. "Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is disbarment." *State ex rel. NSBA v. Malcom*, 252 Neb. 263, 272, 561 N.W.2d 237, 243 (1997). The fact that the client did not suffer any financial loss does not excuse an attorney's misappropriation of client funds and does not provide a reason for imposing a less severe sanction. *State ex rel. NSBA v. Gridley*, 249 Neb. 804, 545 N.W.2d 737 (1996). Mitigating factors overcome the presumption of disbarment in misappropriation and commingling cases only if they are extraordinary. *Id.*

[7] In considering the appropriate sanction for Howze's actions, we note that the propriety of a sanction must be considered with reference to the sanctions we have imposed in prior similar cases. See *State ex rel. NSBA v. Mefferd, supra*. In *State ex rel. NSBA v. Malcom, supra*, we disbarred an attorney who was out of trust with his clients several times and who offered

insufficient evidence of mitigating circumstances. Similarly, in *State ex rel. NSBA v. Gridley, supra*, we disbarred an attorney who, on several occasions, misappropriated client funds and, when charged with violating attorney disciplinary rules, offered no evidence of mitigating circumstances. But see *State ex rel. NSBA v. Bruckner*, 249 Neb. 361, 543 N.W.2d 451 (1996) (1-year suspension ordered based on isolated nature of incident, attorney's longstanding participation in bar association matters, affidavits which attested to attorney's good reputation in community and competence to practice law, and attorney's full and complete cooperation with office of Counsel for Discipline). In the present case, we are unable to find any mitigating circumstances which would overcome the presumption of disbarment. Howze was out of trust with his clients, failed to remit client funds when asked, and failed to cooperate with the office of the Counsel for Discipline. He has admitted violating numerous disciplinary rules as well as his oath of office as an attorney. The record in this matter contains no evidence of a mitigating circumstance, much less a mitigating circumstance of an extraordinary nature sufficient to overcome the presumption of disbarment.

When we balance the nature of Howze's actions with the need to protect the public, the need to deter others from similar conduct, the reputation of the bar as a whole, and Howze's privilege to practice law, we can only conclude that the appropriate judgment is to disbar Howze. Accordingly, we grant the motion for judgment on the pleadings and enter a judgment of disbarment.

The Clerk of the Supreme Court is directed to cause a copy of this opinion and judgment of disbarment to be served upon Howze by certified U.S. mail.

JUDGMENT OF DISBARMENT.

# AIMEE FREEMAN, APPELLANT, V. HOFFMAN-LA ROCHE, INC., A CORPORATION, APPELLEE.

618 N.W.2d 827

Filed October 27, 2000. No. S-98-1095.

1. **Demurrer: Pleadings: Appeal and Error.** In reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept conclusions of the pleader.
2. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled.
3. ___: ___. If from the facts stated in the petition it appears that the plaintiff is entitled to any relief, a general demurrer will not lie.
4. **Products Liability: Words and Phrases.** A manufacturing defect is one in which the product differs from the specifications and plan of the manufacturer.
5. ___: ___. A design defect is one in which the product meets the specifications of the manufacturer but the product nonetheless poses an unreasonable risk of danger.
6. **Products Liability: Negligence.** A manufacturer may be liable for a failure to warn.
7. **Products Liability: Actions: Negligence.** In a cause of action based on negligence, the question involves the manufacturer's conduct, that is, whether the manufacturer's conduct was reasonable in view of the foreseeable risk of injury; whereas in a cause of action based on strict liability in tort, the question involves the quality of the product, that is, whether the product was unreasonably dangerous.
8. **Torts: Negligence: Sales: Strict Liability.** Liability arises when an article a manufacturer has placed in the market, knowing that it is to be used without inspection for defects, proves to have a defect which causes an injury to a human being rightfully using the product.
9. **Products Liability: Case Overruled.** *McDaniel v. McNeil Laboratories, Inc.*, 196 Neb. 190, 241 N.W.2d 822 (1976), is overruled to the extent that it applies the Restatement (Second) of Torts § 402 A (1965), comment *k.*, to provide a blanket immunity from strict liability for prescription drugs.
10. **Products Liability.** Restatement (Third) of Torts: Products Liability § 6(c) (1997) is not adopted as the test to be applied when determining whether a manufacturer is liable for a design defect in a prescription drug.
11. ___. Restatement (Second) of Torts § 402 A (1965), comment *k.*, applies as an affirmative defense to except prescription drug products from strict liability when it is shown that (1) the product is properly manufactured and contains adequate warnings, (2) its benefits justify its risks, and (3) the product was at the time of manufacture and distribution incapable of being made more safe.
12. **Products Liability: Negligence.** A manufacturer or other seller is subject to liability for failing either to warn or adequately to warn about a risk or hazard inherent in the way a product is designed that is related to the intended uses as well as the reasonably foreseeable uses that may be made of the products it sells.

13. **Products Liability.** The learned intermediary doctrine, reflected in Restatement (Third) of Torts: Products Liability § 6(d) (1997) is adopted as the test for a warning defect in a prescription drug.
14. **Products Liability: Warranty.** Theories of breach of implied warranty are merged with theories of design and manufacturing defects.
15. **Uniform Commercial Code: Warranty.** Pursuant to Neb. U.C.C. § 2-313 (Reissue 1992), in order to create an express warranty, the seller must make an affirmation of fact or promise to the buyer which relates to the goods and becomes part of the basis of the bargain.
16. **Actions: Fraud: Proof.** The elements of a cause of action for fraudulent misrepresentation are (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 did so rely; and (6) that he or she suffered damage as a result.
17. **Products Liability.** Restatement (Third) of Torts: Products Liability § 9 (1997) is not adopted.
18. ___. Nebraska does not recognize a cause of action for fear of future product failure.
19. **Strict Liability: Actions: Negligence: Pleadings.** Aside from pleading theories of recovery under strict liability for specific product defects, a plaintiff may assert a theory of recovery based on negligence.

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

Jeffrey A. Silver for appellant.

Jill Vinjamuri and Michael G. Connery, of Kutak Rock, for appellee.

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

CONNOLLY, J.

In this appeal, we reconsider our approach to products liability for defects in prescription drugs in light of changes in the law and the release of Restatement (Third) of Torts: Products Liability §§ 1 to 21 (1997) (Third Restatement). The appellant, Aimee Freeman, filed a petition alleging seven theories of recovery against the appellee pharmaceutical company, Hoffman-La Roche, Inc. (Hoffman). She seeks damages for injuries she sustained following her use of the prescription drug Accutane. Hoffman demurred on the basis that the petition failed to state a cause of action. Based on our decision in

*McDaniel v. McNeil Laboratories, Inc.*, 196 Neb. 190, 241 N.W.2d 822 (1976), the district court dismissed with leave to amend in order to allow Freeman to plead facts that at the time Accutane was approved by the U.S. Food and Drug Administration (FDA), Hoffman committed fraud as part of the approval process. Freeman stood on her petition, and the action was dismissed with prejudice.

## I. BACKGROUND

Freeman's operative petition alleged the following facts: On or about September 23, 1995, Freeman presented herself to her physician for treatment of chronic acne. After examination, her physician prescribed 20 milligrams daily of Accutane. Hoffman is the designer, manufacturer, wholesaler, retailer, fabricator, and supplier of Accutane.

Freeman took the Accutane daily from September 27 through October 2, 1995, and from October 4 through November 20, 1995. Hoffman alleged that as a result of taking the Accutane, she developed multiple health problems. These problems included ulcerative colitis, inflammatory polyarthritis, nodular episcleritis OS, and optic nerve head drusen. As a result, Freeman alleged that she sustained various damages. Freeman alleged that the Accutane she took was defective, misbranded, and mislabeled. She alleged that Hoffman knew that Accutane was dangerous and/or posed significant health risks and that despite this knowledge, Hoffman misled the medical community and their patients with incomplete information regarding its safety by failing to disclose the side effects that Freeman suffered. She also alleged that Hoffman made misrepresentations regarding the safety and effectiveness of Accutane in order to induce medical providers to select Accutane instead of other available drug options. According to Freeman, she and her physician relied upon these misrepresentations.

Freeman alleged seven theories of recovery, the details of which are set out further in the analysis sections of this opinion: (1) strict liability on the bases that Hoffman distributed Accutane when it was not fit for its intended purpose and when the inherent risks outweighed the benefits of its use, and because it was unreasonably dangerous; (2) negligence on the bases that

Hoffman performed negligent and careless research, testing, design, manufacture, and inspection of the product and failed to give adequate warnings of the risks of its use; (3) misrepresentation on the basis that Hoffman falsely represented to Freeman that Accutane was safe to use, thus inducing her to use the product; (4) failure to warn; (5) breach of implied warranty; (6) breach of express warranty; and (7) fear of future product failure on the basis that the actions of Hoffman caused Freeman to suffer mental distress and anxiety.

## II. ASSIGNMENTS OF ERROR

Freeman assigns that the district court erred in sustaining Hoffman's demurrer and in dismissing the petition with prejudice.

## III. STANDARD OF REVIEW

[1] In reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept conclusions of the pleader. *Prokop v. Hoch*, 258 Neb. 1009, 607 N.W.2d 535 (2000).

[2] In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled. *Danler v. Rosen Auto Leasing*, 259 Neb. 130, 609 N.W.2d 27 (2000); *Cobb v. Sure Crop Chem. Co.*, 255 Neb. 625, 587 N.W.2d 355 (1998).

[3] If from the facts stated in the petition it appears that the plaintiff is entitled to any relief, a general demurrer will not lie. *Fox v. Metromail of Delaware*, 249 Neb. 610, 544 N.W.2d 833 (1996).

## IV. ANALYSIS

Freeman contends that she has stated a cause of action for products liability under a variety of theories of recovery. Before proceeding, we believe it helpful to set forth a brief history of the general principles of products liability law and its development since the adoption of Restatement (Second) of Torts § 402 A (1965) (Second Restatement).

[4-6] In products liability litigation, the notion of a defective product embraces two separate concepts. The first, commonly labeled as a manufacturing defect, is one in which the product differs from the specifications and plan of the manufacturer. The second concept of a defective product is one in which the product meets the specifications of the manufacturer but the product nonetheless poses an unreasonable risk of danger. This condition is generally characterized as a design defect. See *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987). A manufacturer may also be liable for a failure to warn. *Id.*

[7] In products liability cases, there is a significant distinction between a manufacturer's liability as the result of negligent manufacture and its liability for the manufactured product on account of strict liability in tort. In a cause of action based on negligence, the question involves the manufacturer's conduct, that is, whether the manufacturer's conduct was reasonable in view of the foreseeable risk of injury; whereas in a cause of action based on strict liability in tort, the question involves the quality of the product, that is, whether the product was unreasonably dangerous. *Id.* See, also, *Ortho Pharmaceutical Corp. v. Heath*, 722 P.2d 410 (Colo. 1986), *overruled on other grounds, Armentrout v. FMC Corp.*, 842 P.2d 175 (Colo. 1992) (describing types of defective product claims).

For organizational purposes, we address Freeman's allegations of product defects in terms of the defects which she attempts to allege: design, manufacturing, and warning.

### 1. Design Defect

In her operative petition, Freeman alleges that Hoffman is strictly liable for her injuries on the bases that Accutane was not fit for its intended purpose, that the risks inherent in the design outweighed the benefits of its use, and that Accutane was more dangerous to Freeman than was anticipated due to undisclosed side effects. As facts supporting her allegations, Freeman alleges that Accutane is sold as an acne medication and that the side effects of Accutane present life-threatening conditions. Thus, Freeman's petition asserts that Hoffman is liable on the basis of a design defect. Hoffman, however, alleges that because Accutane was approved by the FDA, it is exempted from liability for a

design defect pursuant to our decision in *McDaniel v. McNeil Laboratories, Inc.*, 196 Neb. 190, 241 N.W.2d 822 (1976).

(a) Second Restatement § 402 A

[8] In dealing with products other than prescription drugs, this court has recognized a manufacturer's liability in tort for design defects. Liability arises when an article a manufacturer has placed in the market, knowing that it is to be used without inspection for defects, proves to have a defect which causes an injury to a human being rightfully using the product. *Rahmig, supra*. We have also adopted and applied the test set out in the Second Restatement § 402 A. See *Rahmig, supra*.

Section 402 A at 347-48 provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Comment *i.* at 352 provides that the rule stated in § 402 A

> applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. . . . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

This is commonly referred to as the "consumer expectations test." See Annot., 73 A.L.R.5th 75 (1999).

In *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987), we discussed criticisms of the consumer expectations test as embodied in § 402 A and the application in other jurisdictions of a risk-utility test in determining whether a product is unreasonably dangerous. We noted, however, that the issue of whether to adopt a risk-utility test was not before us. We then specifically overruled cases indicating that a plaintiff must present evidence of a reasonable alternative design in cases involving design defects.

Since *Rahmig*, we have applied the consumer expectations test for strict liability. See, e.g., *Haag v. Bongers*, 256 Neb. 170, 589 N.W.2d 318 (1999). Under this test, " '[u]nreasonably dangerous' means that a product has the propensity for causing physical harm beyond that which would be contemplated by the ordinary user or consumer who purchases it, with ordinary knowledge common to the foreseeable class of users as to its characteristics." *Id.* at 184, 589 N.W.2d at 329. Thus, in regard to nonprescription drug products, we have generally followed the rule as set out in § 402 A of the Second Restatement. Prescription drugs, however, have been treated differently both by this court and by the Second Restatement.

*(i) Comment* k. *Exception for Unavoidably Unsafe Products*

Under the Second Restatement, prescription drugs are treated specially under § 402 A, comment *k*. Comment *k*. at 353-54 provides an exception from strict liability when a product is deemed to be "unavoidably unsafe" and states:

> There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unrea-*

> *sonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

Application of comment *k.* has been justified under the law in some jurisdictions as a way to strike a balance between a manufacturer's responsibility and the encouragement of research and development of new products. Under certain instances, it is in the public interest to allow products to be marketed which are unsafe, because the benefits of the product justify its risks. See, *Hill v. Searle Laboratories*, 884 F.2d 1064 (8th Cir. 1989) (describing policy considerations); *Tansy v. Dacomed Corp.*, 890 P.2d 881 (Okla. 1994).

We applied § 402 A, comment *k.*, to a products liability action involving a prescription drug in *McDaniel v. McNeil Laboratories, Inc.*, 196 Neb. 190, 241 N.W.2d 822 (1976). In *McDaniel*, a woman was rendered permanently comatose after being given doses of a prescription drug, Innovar, during surgery. At the time of her surgery, Innovar and the warnings and information contained in the package inserts had been approved for use by the FDA. At trial, it was contended that the manufacturer was negligent in failing to warn, strictly liable under § 402 A of the Second Restatement, and liable under a theory of either express or implied warranty. The trial court submitted the issue of negligence to the jury but did not submit the issue of strict liability or warranty to the jury. On appeal, we

placed emphasis on FDA approval of the drug, and citing to § 402 A, comment *k.*, we held:

> An unavoidably unsafe drug which has been approved for marketing by the United States Food and Drug Administration, properly prepared, compounded, packaged, and distributed, and accompanied by proper approved directions and warnings, as a matter of law, is not defective nor unreasonably dangerous, in the absence of proof of inaccurate, incomplete, misleading, or fraudulent information furnished by the manufacturer in connection with such federal approval or later revisions thereof.

*McDaniel*, 196 Neb. at 201, 241 N.W.2d at 828. Under the evidence presented, we determined that it was not error for the trial court to refuse to submit the issue of strict liability or warranty, either express or implied, to the jury.

*(ii) Interpretation of Comment* k. *in Other Jurisdictions*

Comment *k.*, however, has been interpreted in a variety of ways in other jurisdictions, and there has been a wide range of disagreement regarding its application. See, e.g., Jeffrey D. Winchester, Note, *Section 8(c) of the Proposed Restatement (Third) of Torts: Is It Really What the Doctor Ordered?*, 82 Cornell L. Rev. 644 (1997) (§ 8(c) now § 6(c) of Third Restatement; describing differences of opinion regarding comment *k.*); Annot., 70 A.L.R.4th 16 (1989) (collecting cases).

Only a few jurisdictions have interpreted comment *k.* in a manner that strictly excepts all prescription drugs from strict liability. Under the minority view, a drug that is properly manufactured and accompanied by an adequate warning of the risks known to the manufacturer at the time of sale is not defectively designed as a matter of law. *Brown v. Superior Court (Abbott Laboratories)*, 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988); *Grundberg v. Upjohn Co.*, 813 P.2d 89 (Utah 1991); *Young v. Key Pharmaceuticals*, 130 Wash. 2d 160, 922 P.2d 59 (1996) (en banc). These jurisdictions are commonly described by legal commentators as providing manufacturers with a "blanket immunity" from strict liability for design defects in prescription drugs. See, e.g., Winchester, *supra*. Our decision in *McDaniel, supra*, generally falls under this category of interpretation of comment *k.*

*(iii) Cases Applying Risk-Utility Analysis Under Comment* k.

An application of comment *k.* to provide a blanket immunity from strict liability is widely criticized. Comment *k.* has proved to be difficult to interpret and apply, thus, supporting the argument that it should not be applied so strictly. See, Richard L. Cupp, Jr., *Rethinking Conscious Design Liability for Prescription Drugs: The* Restatement (Third) *Standard Versus a Negligence Approach*, 63 Geo. Wash. L. Rev. 76 (1994); Winchester, *supra*. Further, it is said that an approach that entirely excepts manufacturers from immunity limits the discretionary powers of the courts. *Id.* Also, it is argued that a blanket immunity leads to patently unjust results. *Id.* One court has stated:

> We believe that a more selective application [of comment *k.*] will encourage, rather than discourage, improvements in prescription products. Comment k was designed in part to protect new and experimental drugs. . . . "Comment k states: 'There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use.' Obviously, for this to be true, the design must be as safe as the best available testing and research permits." . . . Thus, a product which is as safe as current testing and research permits should be protected. The reverse is also true; a product which is not as safe as current technology can make it should not be protected.

(Citation omitted.) *Adams v. G.D. Searle & Co., Inc.*, 576 So. 2d 728, 732 (Fla. App. 1991).

The majority of jurisdictions that have adopted comment *k.* apply it on a case-by-case basis, believing that societal interests in ensuring the marketing and development of prescription drugs will be adequately served without the need to resort to a rule of blanket immunity. See, e.g., *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528 (6th Cir. 1993); *Hill v. Searle Laboratories*, 884 F.2d 1064 (8th Cir. 1989); *Castrignano v. E.R. Squibb & Sons, Inc.*, 546 A.2d 775 (R.I. 1988); *Toner v. Lederle Laboratories*, 112 Idaho 328, 732 P.2d 297 (1987); *Ortho Pharmaceutical Corp. v. Heath*, 722 P.2d 410

(Colo. 1986), *overruled on other grounds, Armentrout v. FMC Corp.*, 842 P.2d 175 (Colo. 1992); *Feldman v. Lederle Laboratories*, 97 N.J. 429, 479 A.2d 374 (1984); *Belle Bonfils Memorial Blood Bank v. Hansen*, 665 P.2d 118 (Colo. 1983) (superseded by statute in regard to blood banks, as recognized in *United Blood Services v. Quintana*, 827 P.2d 509 (Colo. 1992). A few courts have not specifically adopted comment *k.* and have instead either fashioned their own rules or treated prescription drugs in the same manner as that of all other products. See, e.g., *Shanks v. Upjohn Co.*, 835 P.2d 1189 (Alaska 1992); *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 342 N.W.2d 37 (1984); Thomas V. Van Flein, *Prospective Application of the Restatement (Third) of Torts: Products Liability in Alaska*, 17 Alaska L. Rev. 1 (2000) (citing cases).

Although a variety of tests are employed among jurisdictions that apply comment *k.* on a case-by-case basis, the majority apply the comment as an affirmative defense, with the trend toward the use of a risk-utility test in order to determine whether the defense applies. See Annot., 96 A.L.R.3d 22 (1979). See, e.g., *Tansy v. Dacomed Corp.*, 890 P.2d 881 (Okla. 1994); *Castrignano, supra*; *Toner, supra*; *Belle Bonfils Memorial Blood Bank, supra.* When a risk-utility test is applied, the existence of a reasonable alternative design is generally the central factor. See, e.g., *Tansy, supra*; *Toner, supra*; *Belle Bonfils Memorial Blood Bank, supra.* Because the application of comment *k.* is traditionally viewed as an exception and a defense to strict liability, courts generally place the initial burden of proving the various risk utility factors on the defendant. See, e.g., *Tansy, supra*; *Belle Bonfils Memorial Blood Bank, supra.* Thus, under these cases, the plaintiff's burden of proof for his or her prima facie case remains the same as it is in any products liability case in the given jurisdiction.

[9] At the time *McDaniel v. McNeil Laboratories, Inc.*, 196 Neb. 190, 241 N.W.2d 822 (1976), was decided, it reflected a minority view. Since that time, a clear majority of courts have decided on a case-by-case basis, through the application of a comment *k.* defense, the issue of liability of a manufacturer for a design defect in a prescription drug. On further reflection, we conclude that the rule of law expressed in *McDaniel* has not

held up over time. We now believe that societal interests in ensuring the marketing and development of prescription drugs can be served without resorting to a rule which in effect amounts to a blanket immunity from strict liability for manufacturers. Accordingly, we overrule *McDaniel* to the extent it applies comment *k.* to provide a blanket immunity from strict liability for prescription drugs. Accordingly, we must address how, or if, comment *k.* should be applied, or whether we should consider adopting provisions of the Third Restatement. We next address those provisions in considering what test should be applied.

(b) Third Restatement

The provisions of the Second Restatement regarding products liability were changed dramatically in the Third Restatement, published by the American Law Institute in 1997. As stated in the introduction to the Third Restatement, the institute was required to answer questions that were not part of the products liability landscape when the Second Restatement was completed. Thus, the Third Restatement is a complete overhaul of the Second Restatement in the area of products liability.

Section 6 of the Third Restatement pertains specifically to prescription drugs, with § 6(c) applying to design defects. Section 6 at 144-45 states in part:

> (a) A manufacturer of a prescription drug or medical device who sells or otherwise distributes a defective drug or medical device is subject to liability for harm to persons caused by the defect. A prescription drug or medical device is one that may be legally sold or otherwise distributed only pursuant to a health-care provider's prescription.
>
> (b) For purposes of liability under Subsection (a), a prescription drug or medical device is defective if at the time of sale or other distribution the drug or medical device:
>
> (1) contains a manufacturing defect as defined in § 2(a); or
>
> (2) is not reasonably safe due to defective design as defined in Subsection (c); or
>
> (3) is not reasonably safe due to inadequate instructions or warnings as defined in Subsection (d).

> (c) A prescription drug or medical device is not reasonably safe due to defective design if the foreseeable risks of harm posed by the drug or medical device are sufficiently great in relation to its foreseeable therapeutic benefits that reasonable health-care providers, knowing of such foreseeable risks and therapeutic benefits, would not prescribe the drug or medical device for any class of patients.

In addition, § 6, comment *b.* at 146-47, states in part:

> The traditional refusal by courts to impose tort liability for defective designs of prescription drugs and medical devices is based on the fact that a prescription drug or medical device entails a unique set of risks and benefits. What may be harmful to one patient may be beneficial to another. Under Subsection (c) a drug is defectively designed only when it provides no net benefit to any class of patients. Courts have concluded that as long as a drug or medical device provides net benefits to some persons under some circumstances, the drug or device manufacturer should be required to instruct and warn health-care providers of the foreseeable risks and benefits. Courts have also recognized that the regulatory system governing prescription drugs is a legitimate mechanism for setting the standards for drug design. In part, this deference reflects concerns over the possible negative effects of judicially imposed liability on the cost and availability of valuable medical technology. This deference also rests on two further assumptions: first, that prescribing health-care providers, when adequately informed by drug manufacturers, are able to assure that the right drugs and medical devices reach the right patients; and second, that governmental regulatory agencies adequately review new prescription drugs and devices, keeping unreasonably dangerous designs off the market.
>
> Nevertheless, unqualified deference to these regulatory mechanisms is considered by a growing number of courts to be unjustified. An approved prescription drug or medical device can present significant risks without corresponding advantages. At the same time, manufacturers must have ample discretion to develop useful drugs and

> devices without subjecting their design decisions to the ordinary test applicable to products generally under § 2(b). Accordingly, Subsection (c) imposes a more rigorous test for defect than does § 2(b), which does not apply to prescription drugs and medical devices. . . .
>
> . . . .
>
> . . . Subsections (c) and (d) recognize common-law causes of action for defective drug design and for failure to provide reasonable instructions or warnings, even though the manufacturer complied with governmental standards.

Section 6, comment *f.* at 149, states in part:

> A prescription drug or device manufacturer defeats a plaintiff's design claim by establishing one or more contexts in which its product would be prescribed by reasonable, informed health-care providers. That some individual providers do, in fact, prescribe defendant's product does not in itself suffice to defeat the plaintiff's claim. Evidence regarding the actual conduct of health-care providers, while relevant and admissible, is not necessarily controlling. The issue is whether, objectively viewed, reasonable providers, knowing of the foreseeable risks and benefits of the drug or medical device, would prescribe it for any class of patients. Given this very demanding objective standard, liability is likely to be imposed only under unusual circumstances. The court has the responsibility to determine when the plaintiff has introduced sufficient evidence so that reasonable persons could conclude that plaintiff has met this demanding standard.

As of this writing, no state court has faced the issue of whether to adopt § 6(c). A few federal courts have discussed this section, but only to the extent of either predicting whether the applicable state court would adopt § 6(c) or declining to apply it in the absence of state precedent. See, *Wheat v. Sofamor, S.N.C.*, 46 F. Supp. 2d 1351 (N.D. Ga. 1999); *Sita v. Danek Medical, Inc.*, 43 F. Supp. 2d 245 (E.D.N.Y. 1999); *Gebhardt v. Mentor Corp.*, 191 F.R.D. 180 (D. Ariz. 1999); *Taylor v. Danek Medical, Inc.*, No. CIV.A. 95-7232, 1998 WL 962062 (E.D. Pa. Dec. 29, 1998).

There are several criticisms of § 6(c), which will be briefly summarized. First, it does not accurately restate the law. It has

been repeatedly stated that there is no support in the case law for the application of a reasonable physician standard in which strict liability for a design defect will apply only when a product is not useful for any class of persons. Rather, as illustrated by the discussion of the treatment of comment *k.* under the Second Restatement in other jurisdictions, the majority of courts apply some form of risk-utility balancing that focuses on a variety of factors, including the existence of a reasonable alternative design. The few cases that the Third Restatement cites to as support for the reasonable physician test also apply a risk-utility test. Thus, § 6(c) does not restate the law and instead seeks to formulate new law with no precedential support. See, e.g., George W. Conk, *Is There a Design Defect in the* Restatement (Third) of Torts: Products Liability? 109 Yale L.J. 1087 (2000); Richard L. Cupp, Jr., *The Continuing Search for Proper Perspective: Whose Reasonableness Should Be At Issue in a Product Design Defect Analysis? Seventh Annual Health Law Symposium Proving Product Defect After the Restatement (Third) of Torts: Product Liability*, 30 Seton Hall L. Rev. 233 (1999); Richard L. Cupp, Jr., *Rethinking Conscious Design Liability for Prescription Drugs: The* Restatement (Third) *Standard Versus a Negligence Approach*, 63 Geo. Wash. L. Rev. 76 (1994); Teresa Moran Schwartz, *Prescription Products and the Proposed* Restatement (Third), 61 Tenn. L. Rev. 1357 (1994); Michael J. Wagner and Laura L. Peterson, *The New Restatement (Third) of Torts—Shelter From the Product Liability Storm for Pharmaceutical Companies and Medical Device Manufacturers?* 53 Food & Drug L.J. 225 (1998).

Second, the reasonable physician test is criticized as being artificial and difficult to apply. The test requires fact finders to presume that physicians have as much or more of an awareness about a prescription drug product as the manufacturer. See, e.g., Conk, *supra*. The test also ignores concerns of commentators that physicians tend to prescribe drugs they are familiar with or for which they have received advertising material, even when studies indicate that better alternatives are available. *Id.*

A third criticism of particular applicability to Freeman's case is that the test lacks flexibility and treats drugs of unequal utility equally. For example, a drug used for cosmetic purposes but

which causes serious side effects has less utility than a drug which treats a deadly disease, yet also has serious side effects. In each case, the drugs would likely be useful to a class of patients under the reasonable physician standard for some class of persons. Consequently, each would be exempted from design defect liability. But under a standard that considers reasonable alternative design, the cosmetic drug could be subject to liability if a safer yet equally effective design was available. As a result, the reasonable physician standard of § 6(c) of the Third Restatement has been described as a standard that in effect will never allow liability. However, a standard applying a risk-utility test that focuses on the presence or absence of a reasonable alternative design, although also rarely allowing liability, at least allows the flexibility for liability to attach in an appropriate case. See, Cupp, 30 Seton Hall L. Rev. 233, *supra*; Cupp, 63 Geo. Wash. L. Rev. 76, *supra*; Conk, *supra*. See, also, Schwartz, *supra* (stating that § 6 arguably comes close to eliminating design claims altogether).

Fourth, the test allows a consumer's claim to be defeated simply by a statement from the defense's expert witness that the drug at issue had some benefit for any single class of people. Thus, it is argued that application of § 6(c) will likely shield pharmaceutical companies from a wide variety of suits that could have been brought under comment *k.* of the Second Restatement. See Wagner and Peterson, *supra*. As the Third Restatement, § 6(c), comment *f.* at 149, states in part: "Given this very demanding objective standard, liability is likely to be imposed only under unusual circumstances." Thus, even though the rule is reformulated, any application of § 6(c) will essentially provide the same blanket immunity from liability for design defects in prescription drugs as did the application of comment *k.* in the few states that interpreted it as such.

[10] We conclude that § 6(c) has no basis in the case law. We view § 6(c) as too strict of a rule, under which recovery would be nearly impossible. Accordingly, we do not adopt § 6(c) of the Third Restatement.

It has also been suggested by at least one commentator that rather than apply either § 6(c) of the Third Restatement or a defense under comment *k.* of the Second Restatement for

unavoidably unsafe products, prescription drugs should be treated under the reasonable alternative design test in § 2(b) of the Third Restatement. See George W. Conk, *Is There a Design Defect in the* Restatement (Third) of Torts: Products Liability? 109 Yale L.J. 1087 (2000). Section 2(b) applies to products in general, rejects the consumer expectations test in favor of a risk-utility test, and requires the plaintiff to show the existence of a reasonable alternative design. However, because § 2(b) was written to apply to products in general and the parties in this case have not addressed whether it should be applied to prescription drugs, we decline to address § 2(b) as the test for prescription drugs, or any product, at this time.

[11] We conclude that § 402 A, comment *k.*, of the Second Restatement should be applied on a case-by-case basis and as an affirmative defense in cases involving prescription drug products. Under this rule, an application of the comment does not provide a blanket immunity from strict liability for prescription drugs. Rather, the plaintiff is required to plead the consumer expectations test, as he or she would be required to do in any products liability case. The defendant may then raise comment *k.* as an affirmative defense. The comment will apply to except the prescription drug product from strict liability when it is shown that (1) the product is properly manufactured and contains adequate warnings, (2) its benefits justify its risks, and (3) the product was at the time of manufacture and distribution incapable of being made more safe. *Tansy v. Dacomed Corp.*, 890 P.2d 881 (Okla. 1994). See, also, *Toner v. Lederle Laboratories*, 112 Idaho 328, 732 P.2d 297 (1987); *Belle Bonfils Memorial Blood Bank v. Hansen*, 665 P.2d 118 (Colo. 1983).

In this case, because the application of comment *k.* is an affirmative defense, Freeman was only required to plead that the Accutane she took was unreasonably dangerous under a consumer expectations test. Freeman alleged that Accutane was unreasonably dangerous for use, that it was not fit for its intended purpose, that the risks inherent in the design outweighed the benefits of its use, and that Accutane was more dangerous to Freeman than was anticipated due to undisclosed side effects. As facts supporting her allegations, Freeman alleged that Accutane is sold as an acne medication and that the side effects

of Accutane present life-threatening conditions. Thus, Freeman alleged facts that the Accutane was dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Accordingly, we conclude that Freeman has stated a theory of recovery based on a design defect.

### 2. Manufacturing Defect

Freeman also attempts to allege strict liability on the basis of a manufacturing defect. A manufacturing defect exists when the product differs from the plan and specifications of the manufacturer. See *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987); Third Restatement § 2(a).

Freeman alleges that Hoffman was aware that if not properly manufactured, Accutane could become contaminated and would be likely to cause injury. Freeman further alleges that Hoffman acted carelessly in its manufacture and inspection of the Accutane. Freeman also alleges that the Accutane she took was improperly manufactured and inspected. She, however, does not allege facts to support these allegations. In reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept the conclusions of the pleader. *Wilkinson v. Methodist, Richard Young Hosp.*, 259 Neb. 745, 612 N.W.2d 213 (2000). We conclude that Freeman has stated only conclusions instead of factual allegations. Accordingly, we determine that she has failed to state a theory of recovery for a manufacturing defect.

### 3. Failure to Warn

Freeman alleges that Hoffman was negligent in failing to warn of dangers associated with the use of Accutane. Freeman also alleges that Hoffman failed to warn that Accutane was not adequately tested.

[12] Under the Third Restatement § 2(c) at 14,

> [a product] is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the pro-

> vision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

The Third Restatement reflects the same rule this court has applied in regard to a failure to warn. We have stated:

> In a products liability case based on negligence and the duty to warn: "A manufacturer or other seller is subject to liability for failing either to warn or adequately to warn about a risk or hazard inherent in the way a product is designed that is related to the intended uses as well as the reasonably foreseeable uses that may be made of the products it sells." . . . "[A] manufacturer's duty to produce a safe product, with appropriate warnings and instructions when necessary, is no different from the responsibility each of us bears to exercise due care to avoid unreasonable risks of harm to others. . . ."

*Rahmig*, 226 Neb. at 446, 412 N.W.2d at 72.

Pharmaceutical products have historically been treated differently in regard to a duty to warn. Although in ordinary product cases, a manufacturer's duty to warn runs directly to the consumer of the product, in cases involving prescription drugs, it is widely held that the duty to warn extends only to members of the medical profession and not to the consumer. Annot., 57 A.L.R.5th 1 (1998) (collecting cases). See, e.g., *Perez v. Wyeth Laboratories, Inc.*, 161 N.J. 1, 734 A.2d 1245 (1999); *Tansy v. Dacomed Corp.*, 890 P.2d 881 (Okla. 1994). This concept, known as the learned intermediary doctrine,

> is based upon the premise that, as a medical expert, a patient's prescribing or treating physician is in the best position to evaluate the often complex information provided by the manufacturer concerning the risks and benefits of its drug or product and to make an individualized medical judgment, based on the patient's particular needs and susceptibilities, as to whether the patient should use the product.

57 A.L.R.5th at 26.

The learned intermediary doctrine is provided for in § 6(d) of the Third Restatement. Section 6(d) at 145 states:

> A prescription drug or medical device is not reasonably safe due to inadequate instructions or warnings if reasonable instructions or warnings regarding foreseeable risks of harm are not provided to:
>
> (1) prescribing and other health-care providers who are in a position to reduce the risks of harm in accordance with the instructions or warnings; or
>
> (2) the patient when the manufacturer knows or has reason to know that health-care providers will not be in a position to reduce the risks of harm in accordance with the instructions or warnings.

[13] We have not specifically adopted the learned intermediary doctrine as the applicable test for determining whether a manufacturer may be liable for a warning defect in prescription drug cases. However, with a few exceptions for instances where special facts require a direct warning to the consumer, the doctrine is followed in virtually all jurisdictions that have considered whether to adopt it. See Annot., 57 A.L.R.5th 1, *supra*. The doctrine as stated in the Third Restatement has also been adopted in other jurisdictions. See, *Perez, supra*; *Tenuto v. Lederle Laboratories*, 181 Misc. 2d 367, 695 N.Y.S.2d 259 (1999). We adopt § 6(d) of the Third Restatement. Accordingly, we apply the learned intermediary doctrine to Freeman's case.

The section of Freeman's petition devoted to factual allegations alleges that Hoffman failed to warn of Accutane's dangers in the package insert provided to physicians, including Freeman's physician. Freeman makes further allegations regarding Hoffman's failure to provide her with warnings under the section specifically devoted to her theory of recovery for a failure to warn. Thus, we conclude that Freeman has stated a theory of recovery for liability based on a warning defect.

### 4. Implied and Express Warranty

Freeman also alleges in her petition theories of recovery for breach of implied warranty on the basis that Accutane was not fit for its intended purpose and for breach of express warranty on the basis that Hoffman expressly warranted that Accutane was of merchantable quality.

(a) Implied Warranty

Applying the Second Restatement, many courts have merged theories of recovery for breach of implied warranty and strict liability on the basis that each theory states the same strict liability claim. See *Gebhardt v. Mentor Corp.*, 191 F.R.D. 180 (D. Ariz. 1999), citing *Scheller v. Wilson Certified Foods, Inc.*, 114 Ariz. 159, 559 P.2d 1074 (Ariz. App. 1976) (breach of implied warranty claims merged with strict liability claims). In addition, a majority of jurisdictions have merged theories of recovery for negligence based on design defects and for negligent failure to warn with implied warranty theories. See, *Vassallo v. Baxter Healthcare Corporation*, 428 Mass. 1, 696 N.E.2d 909 (1998) (adopting § 2(c) of Third Restatement); *Gebhardt, supra*, citing *Scheller, supra*; David R. Geiger and Stephanie Copp Martinez, *Design and Warning Defect Claims Under Massachusetts Product Liability Law: Completing the Merger of Negligence and Warranty*, 43 Boston Bar J. 12 (1999).

In merging theories of recovery, courts have reasoned that strict liability and implied warranty of merchantability are parallel theories of recovery—one in contract and the other in tort. See, e.g., *Castrignano v. E.R. Squibb & Sons, Inc.*, 546 A.2d 775 (R.I. 1988). As the court in *Castrignano* explained: "[W]hen an implied-warranty action cannot be distinguished from a strict-liability action under § 402A, a comment-k defense operates as a defense to implied-warranty claims because these two theories of liability express a single basic public policy." *Castrignano*, 546 A.2d at 783, citing *Belle Bonfils Memorial Blood Bank v. Hansen*, 665 P.2d 118 (Colo. 1983). Our decision in *McDaniel v. McNeil Laboratories, Inc.*, 196 Neb. 190, 202, 241 N.W.2d 822, 829 (1976), indicated similar reasoning: " 'Where there is a proper warning, a manufacturer of a prescription drug cannot be held liable either on a breach of warranty or strict liability in tort theory.' "

We have stated that in order to recover for breach of an implied warranty of merchantability, there must be proof that there was a deviation from the standard of merchantability at the time of sale and that such deviation caused the injury. See *Delgado v. Inryco, Inc.*, 230 Neb. 662, 433 N.W.2d 179 (1988). A breach of warranty has been found to exist where the item

sold failed to perform adequately because of a lack of quality inherent in the item itself. *Id.* However, a plaintiff cannot rely solely on the fact that an accident occurred as proof that the product was not merchantable. *Id.* Thus, under our law, a plaintiff seeking to recover under a breach of implied warranty theory is seeking to recover for what is essentially an alleged manufacturing defect or design defect.

The Third Restatement recognizes the merger of doctrines by adopting a single theory approach. Instead of focusing on doctrinal tort categories such as negligence or strict liability, the Third Restatement functionally defines each of the three basic types of product defect claims: design, manufacturing, and warning defect claims. The Third Restatement adopts the position that the definition of "defect" is the important issue and should remain the same regardless of the doctrinal tort category under which it is brought. Geiger and Copp Martinez, *supra*. Thus, the Third Restatement § 2, comment *n*. at 35-36, states:

> This Restatement contemplates that a well-coordinated body of law governing liability for harm to persons or property arising out of the sale of defective products requires a consistent definition of defect, and that the definition properly should come from tort law, whether the claim carries a tort label or one of implied warranty of merchantability.
>
> . . . .
>
> A separate and more difficult question arises as to whether a case should be submitted to a jury on multiple theories of recovery. Design and failure-to-warn claims may be combined in the same case because they rest on different factual allegations and distinct legal concepts. However, two or more factually identical defective-design claims or two or more factually identical failure-to-warn claims should not be submitted to the trier of fact in the same case under different doctrinal labels. Regardless of the doctrinal label attached to a particular claim, design and warning claims rest on a risk-utility assessment. To allow two or more factually identical risk-utility claims to go to a jury under different labels, whether "strict liability," "negligence," or "implied warranty of merchantability,"

would generate confusion and may well result in inconsistent verdicts.

Commentators have generally recommended adoption of § 2(b) of the Third Restatement approach, which in effect merges warranty liability theories of recovery with design and warning defect theories. See, e.g., David R. Geiger and Stephanie Copp Martinez, *Design and Warning Defect Claims Under Massachusetts Product Liability Law: Completing the Merger of Negligence and Warranty*, 43 Boston Bar J., 12, 26 (1999) ("[t]riers of fact should not have to decide identical causes of action twice merely because the theories have evolved under different tort labels").

[14] We find this reasoning persuasive. Thus, instead of deciding whether Freeman stated a theory of recovery for breach of implied warranty, we simply recognize that her allegations regarding breach of implied warranty fall under her allegations of design and manufacturing defects.

(b) Express Warranty

We treat Freeman's express warranty claim differently. Express warranty is grounded in terms of an express promise made as part of a pending purchase. Thus, unlike implied warranties, there is a clearer contractual difference between a theory of recovery based on express warranty and a tort theory of recovery based on a product defect. Thus, we are not convinced that we should endeavor to merge those theories of recovery. Accordingly, we address whether Freeman has stated a theory of recovery for breach of express warranty.

[15] Neb. U.C.C. § 2-313 (Reissue 1992) requires that in order to create an express warranty, the seller must make an affirmation of fact or promise to the buyer which relates to the goods and becomes part of the basis of the bargain. The comments indicate that express warranties rest on "dickered" aspects of the individual bargain. See *id.*, comment 1.

The only allegation Freeman made regarding express warranty was that Hoffman expressly warranted to her that Accutane was of marketable condition and that she relied on this warranty. Freeman did not allege any factual basis for this assertion. Further, Hoffman did not allege that any such warranty was

the basis of a bargain between herself and Hoffman. Thus, Freeman did not allege a theory of recovery for breach of express warranty.

### 5. Misrepresentation

Freeman alleges a theory of recovery labeled simply "Misrepresentation" in her petition. In her general factual allegations, Freeman alleges that Hoffman knew of the danger of Accutane, but misled the medical community with incomplete and inaccurate information regarding the safety of the drug. In the section devoted to misrepresentation, Freeman alleges that Hoffman falsely represented to her that Accutane was safe to use as instructed and labeled, when in fact it was not safe. Freeman then alleges that she relied on the misrepresentation and that the misrepresentation induced her to use Accutane.

Section 9 of the Third Restatement pertains to liability of a commercial product seller or producer for harm caused by misrepresentation and provides: "One engaged in the business of selling or otherwise distributing products who, in connection with the sale of a product, makes a fraudulent, negligent, or innocent misrepresentation of material fact concerning the product is subject to liability for harm to persons or property caused by the misrepresentation."

Comment *b.* indicates that § 9 is derived from the Second Restatement § 402 B and that the provision regarding liability for innocent product misrepresentations is generally applied only to public misrepresentations, if applied at all. Comment *e.*, § 9, of the Third Restatement notes that separate causes of action available under the Uniform Commercial Code, such as breach of warranty, can be combined in the same case with a claim for misrepresentation. Comment *d.* notes that a plaintiff is not required to show that the product was defective at the time of sale or distribution within the meaning of other sections of the Third Restatement.

[16,17] We have recognized fraudulent misrepresentation as a cause of action with 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 did so rely; and (6) that he or she suffered damage as a result.

*Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 360, 518 N.W.2d 910, 916 (1994). We decline to adopt § 9 of the Third Restatement, and we instead apply the principles stated in *Gibb*.

In *Adams v. G.D. Searle & Co., Inc.*, 576 So. 2d 728 (Fla. App. 1991), the plaintiff alleged that she was injured by the use of a defective intrauterine device (IUD). The plaintiff then alleged that the pharmaceutical company had misrepresented and omitted specific material facts about the IUD to her and the prescribing physician with the intention to induce them to rely on the misrepresentations and omissions and that they did so to the plaintiff's detriment. The court concluded that such an allegation stated a cause of action for fraud.

Freeman's allegations are substantially the same as those in *Adams* and allege the elements set forth in *Gibb*. When the sections of Freeman's petition pertaining to general factual allegations and misrepresentation are read together, she has stated a cause of action for fraudulent misrepresentation.

### 6. Fear of Future Product Failure

Freeman contends that we have recognized a cause of action for fear of future product failure based on her interpretation of our opinion in *Hartwig v. Oregon Trail Eye Clinic*, 254 Neb. 777, 580 N.W.2d 86 (1998).

[18] In *Hartwig*, we allowed a plaintiff to prove as an element of damages the mental suffering and anxiety she suffered due to her fear of contracting AIDS after she was inadvertently stuck with a hypodermic needle. We did not establish in *Hartwig* a separate cause of action or theory of recovery for fear of future product failure. A search of case law in other jurisdictions has also not revealed support for adopting such a cause of action. Accordingly, Freeman's assignment of error on this issue is without merit.

### 7. Negligence

Freeman alleges, rephrased, that Hoffman had a duty to exercise reasonable care throughout a variety of stages of the manu-

facturing process such as testing, inspection, and packaging. Freeman further alleges that each stage was negligently and carelessly performed, resulting in her injury.

[19] Aside from pleading theories of recovery under strict liability for specific product defects, a plaintiff may assert a theory of recovery based on negligence. See, generally, *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997). See, also, *Insolia v. Philip Morris Inc.*, 216 F.3d 596 (7th Cir. 2000) (failure of strict liability claim does not preclude claim for negligence); *Toner v. Lederle Laboratories*, 112 Idaho 328, 732 P.2d 297 (1987) (if plaintiff cannot produce evidence of design, manufacturing, or warning defect, he or she should not be precluded in essaying cause of action in negligence). Thus, even if a comment *k.* defense is determined to apply to exempt the defendant from strict liability, the plaintiff can always attempt to show that the defendant acted negligently. See *Toner, supra*. In this case, however, Freeman did not assert any specific factual allegations of negligence and alleged only conclusions. Thus, Freeman has not stated a theory of recovery for negligence.

## V. CONCLUSION

We overrule *McDaniel v. McNeil Laboratories, Inc.*, 196 Neb. 190, 241 N.W.2d 822 (1976), to the extent it applies § 402 A, comment *k.*, of the Second Restatement to provide a blanket immunity from strict liability for prescription drugs. Instead, we require a plaintiff to plead that the drug was unreasonably dangerous under a consumer expectations test and apply comment *k.* as an affirmative defense on a case-by-case basis. We also adopt the learned intermediary doctrine as reflected in § 6(d) of the Third Restatement as the test to be applied when considering whether a warning defect exists in a prescription drug. Further, in this case, we merge the theories of breach of implied warranty with the theories of design and manufacturing defects. We decline to adopt § 9 of the Third Restatement as the test for misrepresentation, and we do not recognize a cause of action for fear of future product failure.

Applying the allegations in Freeman's petition to the legal tests, we conclude that Freeman failed to state a theory of recovery for liability based on a manufacturing defect, express war-

ranty, or negligence. Freeman did, however, state theories of recovery for liability based on a design defect, warning defect, and misrepresentation. Accordingly, the district court erred in sustaining Hoffman's demurrer. We reverse, and remand for further proceedings to allow Freeman to amend her petition.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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## CITY STATE BANK, A BANKING CORPORATION, APPELLEE, V. RONALD R. HOLSTINE, APPELLANT.

618 N.W.2d 704

Filed October 27, 2000. No. S-99-855.

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: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
3. ___: ___. A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to judgment in its favor if the evidence were uncontroverted at trial.
4. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
5. **Summary Judgment.** The primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled, and thus resolve, without the expense and delay of trial, those cases where there exists no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom, and where the moving party is entitled to judgment as a matter of law.
6. **Summary Judgment: Proof.** Since the party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists, that party must therefore produce enough evidence to demonstrate his or her entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion.
7. **Summary Judgment.** If a genuine issue of fact exists, summary judgment may not properly be entered.
8. **Pleadings.** The issues in a case are framed by the pleadings.

Appeal from the District Court for Clay County: BERNARD SPRAGUE, Judge. Reversed and remanded for further proceedings.

O. William VonSeggern, of Grimminger & VonSeggern, and William R. Rapson for appellant.

David A. Jarecke and William R. Kutilek, of Crosby, Guenzel, Davis, Kessner & Kuester, and Ted S. Griess, of Baird & Griess, for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

In this appeal, Ronald R. Holstine claims that the district court for Clay County erred in granting summary judgment in favor of City State Bank (the Bank) on the Bank's petition for judgment on a promissory note cosigned by Holstine. As Holstine's assignment of error, he asserts that summary judgment was improper because there remain genuine issues of material fact raised by the various affirmative defenses that he alleged in his amended answer. We reverse, and remand for further proceedings.

## STATEMENT OF FACTS

On November 13, 1995, Holstine cosigned a promissory note made by William B. Gorman in favor of the Bank. Gorman was engaged in a partnership with Rodney Glantz. The note showed the amount financed was $113,543.21, with monthly payments of $2,000.45, beginning January 15, 1996, and a maturity date of July 15, 2002. The amount financed consisted of a loan of $100,000 plus $13,543.21 of premiums for credit life insurance and credit disability insurance which were requested by Gorman. The note was secured by two 1985 Peterbilt trucks.

On May 21, 1996, the Bank filed a petition in the district court for Clay County against Holstine alleging that no payments had been made by Holstine or any other party on the note and that therefore the note was in default and the entire indebt-

edness was due and payable. A copy of the note was attached to the Bank's petition. The Bank prayed for judgment against Holstine in the amount of $114,485.69, which it alleged was the amount then due on the note plus statutory interest from May 4, 1996.

Holstine filed an amended answer on July 7, 1997, in which he admitted that he had cosigned the note on November 13, 1995. Holstine, however, alleged various "affirmative defenses." He alleged (1) that the note was without consideration; (2) that the obligation was materially changed or altered by the Bank because the Bank failed to obtain the required amounts of credit life insurance and credit disability insurance on Gorman or any credit life or disability insurance on Holstine; (3) that the Bank failed to give Holstine notice that the required insurance was not obtained; (4) that the note indicated the existence of a purchase money security interest, the Bank failed to obtain a purchase money security interest, and such indication on the note represented a material misrepresentation to Holstine; (5) that the Bank made fraudulent misrepresentations in order to fraudulently induce Holstine to cosign the note; and (6) that the Bank fraudulently conspired with Glantz in making the misrepresentations that fraudulently induced Holstine to cosign the note.

As part of the affirmative defense of fraudulent misrepresentation, Holstine alleged generally that the Bank made false representations to induce him into cosigning the note and that he believed the representations to be true and relied on such representations. Holstine specifically alleged that the Bank made the following misrepresentations: (1) stated the proceeds of the loan would be paid to creditors of the Gorman-Glantz partnership when the Bank knew the proceeds would go to Glantz, who would in turn pay the proceeds to the Bank; (2) stated the purpose of the loan was to assist the Gorman-Glantz partnership when the loan was in fact designed to minimize the Bank's problems with state bank examiners resulting from its level of loans to Glantz; (3) failed to disclose the deterioration of the relationship between Gorman and Glantz while representing the purpose of the loan was to assist their partnership; (4) failed to disclose that the sole purpose of the note was to make Holstine liable for the Gorman-Glantz partnership's debt to the Bank; (5)

failed to disclose that the Gorman-Glantz partnership was unable to borrow additional money from the Bank; and (6) stated to Holstine that he would never be held liable on the note and that his cosigning would merely assist the Bank and the Gorman-Glantz partnership.

The Bank replied to Holstine's amended answer by generally denying his allegations and specifically denying, inter alia, that there were any material misrepresentations made to Holstine. We note, however, that the Bank did not demur to, move to strike, or otherwise reduce or eliminate Holstine's purported affirmative defenses. See, generally, *Southwest Bank of Omaha v. Herting*, 208 Neb. 347, 303 N.W.2d 504 (1981).

On September 18, 1998, the Bank moved for summary judgment. A hearing on the Bank's motion for summary judgment was held September 28. According to the bill of exceptions, the Bank offered seven exhibits which were marked and received into evidence at the hearing. The Bank's exhibits are numbered 8 to 14. Holstine stated that he intended to offer certain affidavits and depositions in opposition to the Bank's motion for summary judgment and asked the district court for additional time in which to submit such exhibits. The court granted Holstine 15 days to submit his evidence. The parties have stipulated that Holstine mailed one exhibit to the district court on October 14 and mailed three additional exhibits to the district court between October 23, 1998, and January 13, 1999.

On December 1, 1998, the district court signed an order in which it found there was no genuine issue as to any material fact and concluded that the Bank was entitled to judgment as a matter of law. The district court determined that Holstine owed the Bank $144,242.56 plus interest from August 20, 1998, until entry of judgment. The original order was mistakenly mailed to the Bank's counsel, and the order was not entered on the court's docket until January 15, 1999.

Holstine moved for new trial on January 25, 1999. A hearing on the motion for new trial was held April 15. This hearing was conducted before a different judge than the judge who had ruled on the motion for summary judgment. Holstine's exhibits in opposition to the Bank's motion for summary judgment were marked by the district court clerk at the hearing on Holstine's

motion for new trial. The district court overruled Holstine's motion for new trial on July 7. Holstine appeals.

## ASSIGNMENT OF ERROR

Holstine asserts that the district court erred in granting summary judgment in favor of the Bank because genuine issues of material fact remained regarding Holstine's affirmative defenses.

## STANDARDS 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. *Keller v. Bones*, 260 Neb. 202, 615 N.W.2d 883 (2000).

[2,3] 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. *Huff v. Swartz*, 258 Neb. 820, 606 N.W.2d 461 (2000). A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to judgment in its favor if the evidence were uncontroverted at trial. *Nebraska Popcorn v. Wing*, 258 Neb. 60, 602 N.W.2d 18 (1999).

[4] 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. *O'Connor v. Kaufman*, 260 Neb. 219, 616 N.W.2d 301 (2000).

## ANALYSIS

We have reviewed the record on appeal and note in general that the bill of exceptions on appeal is deficient in certain respects. The bill of exceptions originally filed with this court contained no record of the proceedings of either the hearing on the motion for summary judgment held September 28, 1998, or the hearing on the motion for new trial held April 15, 1999. During the pendency of this appeal, the parties agreed to supplement the bill of exceptions by submitting a transcription of

the dialog of the proceedings from the September 28, 1998, hearing. No transcription of the dialog of the April 15, 1999, hearing was submitted. The parties also filed a stipulation in this court stating that Holstine had mailed his exhibits to the court on various dates from October 14, 1998, to January 13, 1999.

From the dialog contained in the bill of exceptions of the September 28, 1998, hearing, it is clear that at the hearing the district court received in evidence only exhibits 8 through 14 offered by the Bank in support of its motion for summary judgment. It is also clear that Holstine did not timely offer evidence in opposition to the motion for summary judgment. Our review therefore is confined to a determination of whether the Bank's exhibits 8 through 14, together with the pleadings, support the district court's grant of summary judgment in the Bank's favor.

On appeal, the Bank argues that its evidence received at the hearing on its motion for summary judgment established its entitlement to judgment as a matter of law. We disagree.

At the hearing on summary judgment, the district court received seven exhibits offered by the Bank in support of its motion. The Bank's exhibits consisted of a copy of the note, a copy of the security agreement, a copy of Gorman's application for credit life and credit disability insurance, a copy of correspondence from the insurance company to the Bank regarding the insurance company's disposition of Gorman's application, a copy of correspondence from the Bank to Gorman regarding the insurance company's disposition of Gorman's insurance application, and the affidavits of the Bank's president and vice president.

The Bank's evidence demonstrated the existence of the promissory note, that Holstine had cosigned the note, and that no payments had been made on the note. In addition, the Bank's evidence tended to refute Holstine's allegations that the Bank failed to take steps to obtain credit life and credit disability insurance on Gorman. The Bank's exhibits, however, contained no evidence regarding Holstine's remaining allegations denominated as "affirmative defenses."

[5-7] We have held:

> [T]he primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and

> show conclusively that the controlling facts are other than as pled, and thus resolve, without the expense and delay of trial, those cases where there exists no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom, and where the moving party is entitled to judgment as a matter of law. . . . Since the party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists, that party must therefore produce enough evidence to demonstrate his entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion. . . . If a genuine issue of fact exists, summary judgment may not properly be entered.

(Citations omitted.) *Moore v. American Charter Fed. Sav. & Loan Assn.*, 219 Neb. 793, 794, 366 N.W.2d 436, 437 (1985). See, also, *Cass Constr. Co. v. Brennan*, 222 Neb. 69, 382 N.W.2d 313 (1986).

[8] In this case, the petition sought judgment on a promissory note, and the amended answer raised numerous purported affirmative defenses which were denied by the Bank. The issues in this case were thus framed by those pleadings. See *Sherrets, Smith v. MJ Optical, Inc.*, 259 Neb. 424, 610 N.W.2d 413 (2000). In order for the Bank to succeed on its motion for summary judgment, it was required to produce evidence of the promissory note on which Holstine was a cosigner and a default thereon. Given the posture of the case, it was also required to produce evidence which demonstrated that there were no genuine issues of material fact regarding Holstine's cognizable affirmative defenses and that it was entitled to judgment as a matter of law. *Moore v. American Charter Fed. Sav. & Loan Assn., supra.*

Because the Bank produced no evidence regarding the material factual allegations set forth in certain of Holstine's purported affirmative defenses, it failed to meet its initial burden as the party moving for summary judgment to produce evidence which, if uncontroverted, would entitle it to judgment as a matter of law. See, generally, *Nebraska Popcorn v. Wing*, 258 Neb. 60, 602 N.W.2d 18 (1999); *Cass Constr. Co. v. Brennan, supra.*

Because the Bank failed to produce enough evidence to demonstrate its entitlement to a judgment, the burden did not shift to Holstine to produce contrary evidence. See *Moore v. American Charter Fed. Sav. & Loan Assn., supra.*

Given the pleadings and viewing the evidence in a light most favorable to Holstine, the party against whom summary judgment was granted, we conclude that there remain genuine issues of material fact with respect to the cognizable affirmative defenses raised by Holstine and that the Bank did not demonstrate it was entitled to judgment as a matter of law. Accordingly, we conclude that the district court erred in granting summary judgment in the Bank's favor.

## CONCLUSION

We conclude that the Bank failed to show that no genuine issues of material fact existed regarding the affirmative defenses pled by Holstine and that therefore, the district court erred in granting summary judgment in favor of the Bank. We reverse the judgment of the district court granting summary judgment in favor of the Bank and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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LINCOLN LUMBER COMPANY, APPELLEE, V.
LEE W. LANCASTER AND ANGELA L. LANCASTER,
HUSBAND AND WIFE, AND NATIONSBANC MORTAGE CORPORATION,
APPELLANTS, AND KASER PAINTING, INC., APPELLEE.
618 N.W.2d 676

Filed October 27, 2000. No. S-99-1048.

1. **Equity: Mechanics' Liens: Foreclosure.** An action to foreclose a construction lien is one grounded in equity.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **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.

4. **Construction Contracts: Mechanics' Liens: Liability.** "Protected party" and "contracting owner" are defined separately under the Nebraska Construction Lien Act, and a party must satisfy the requirements of each protected status in order to limit its liability under Neb. Rev. Stat. § 52-136(5) (Reissue 1998).
5. **Construction Contracts: Words and Phrases.** Under Neb. Rev. Stat. § 52-127(3) (Reissue 1998), a contracting owner is "a person who owns real estate and who, personally or through an agent, enters into a contract, express or implied, for the improvement of the real estate."
6. **Construction Contracts: Mechanics' Liens: Liability.** A potential purchaser's interest in a property does not satisfy the requirements of "contracting owner" under Neb. Rev. Stat. § 52-127(3) (Reissue 1998), and, therefore, potential purchasers cannot limit their liability under Neb. Rev. Stat. § 52-136(5) (Reissue 1998) for construction liens properly recorded before the filing of their own title document.
7. **Security Interests: Mechanics' Liens.** Under Neb. Rev. Stat. § 52-139(4) (Reissue 1998), a subsequent security interest is given priority over a construction lien to the extent the funds are used to pay a debt secured by a security interest having priority over the construction lien.
8. **Stipulations: Parties.** The general rule is that parties are bound by stipulations voluntarily made.
9. **Stipulations.** In Nebraska, parties are free to make stipulations that govern their rights, and such stipulations will be respected and enforced by courts so long as the agreement is not contrary to public policy or good morals.
10. ___. Stipulations are not binding on the rights of a person who is not a party to a proceeding and who does not assent to the stipulations.

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

R. Kent Radke for appellants.

Douglas D. DeLair, of DeLair and DeLair Law Office, for appellee Lincoln Lumber Company.

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

CONNOLLY, J.

This is an appeal from a foreclosure action on construction liens filed under the Nebraska Construction Lien Act, Neb. Rev. Stat. §§ 52-125 through 52-159 (Reissue 1998). Appellees, Lincoln Lumber Company and Kaser Painting, Inc. (Kaser), petitioned the district court for foreclosure of their construction liens filed on property purchased by appellants Lee W. Lancaster and Angela L. Lancaster.

Union Bank and Trust Company (Union Bank) provided the funds for the Lancasters' permanent financing, which were secured by a deed of trust that Union Bank concurrently assigned to appellant NationsBanc Mortgage Corporation (NationsBanc).

The district court entered judgment for both Kaser and Lincoln Lumber and determined that NationsBanc's security interest had priority over Kaser and Lincoln Lumber only to the extent the funds had been used to pay for the disbursements made under the prior construction security interest. NationsBanc and the Lancasters appeal from that order, which was made final by the court on July 30, 1999.

Under our de novo review, we determine that the district court erred by not giving effect to a stipulation between Lincoln Lumber and NationsBanc that NationsBanc's security interest had priority over Lincoln Lumber's construction lien. Therefore, NationsBanc is entitled to have full priority for its security interest over the construction lien of Lincoln Lumber, and we modify the judgment accordingly.

## BACKGROUND

On October 21, 1994, the Lancasters entered into a purchase agreement with Daugherty Construction, Inc. (Daugherty), for the construction of a new home at 801 Mary Court in Lincoln, Nebraska. The contract price was for $92,479. On April 7, 1995, Daugherty took out a blanket construction loan for several properties from Union Bank. Union Bank filed its security interest for the loan with the register of deeds on the same day, and the amount of the security interest for 801 Mary Court was $74,800. State Title Services, Inc. (State Title), served as Union Bank's disbursement agent for the construction improvement on the property.

Daugherty was the legal titleholder during the entire construction period until the closing with the Lancasters, and the company filed a notice of commencement on April 6, 1995, listing Daugherty as the contracting owner and titleholder. Around September 21, 1995, Daugherty filed for bankruptcy. On September 20, 1995, Kaser filed a construction lien against the property for $2,032, and on September 21, Lincoln Lumber filed a construction lien on the property for $21,498.

For a time, work on the property came to a stop after the filing of the liens. The house was 75 percent complete at the time of the filings, around the end of September, and the record shows that $66,094.69 of Union's security interest had been disbursed as of August 4, 1995.

Approximately 3 months before the Lancasters' closing on February 22, 1996, State Title authorized subcontractors to come in and complete the home for the Lancasters.

At closing, the Lancasters paid $17,888.52, in addition to $1,934 in overages the Lancasters paid directly to subcontractors, for a total of $19,822.52. The Lancasters also obtained financing from Union Bank for $75,500, which was secured by a deed of trust and assigned to NationsBanc on the same day. Because State Title had disbursed $66,094.69 on the construction loan before the liens were filed, $9,405.31 of the permanent financing funds were paid over and above the $66,094.69.

At trial, Lincoln Lumber stipulated that NationsBanc's security interest had priority over its construction lien. Kaser filed an answer and cross-petition to Lincoln Lumber's petition in district court, asking that its lien be given first priority, but did not appear at trial and was not party to this stipulation.

The Lancasters argued at trial that their lien liability was limited by their status as "protected party contracting owners." The district court found that the Lancasters were protected parties, but not contracting owners, and that NationsBanc's lien was superior to the construction liens only to the extent that its security interest had been used to pay for the actual disbursements made under the original construction loan before the liens were filed. The district court therefore entered judgment for both Lincoln Lumber and Kaser for the full amount of their liens plus interest and ordered the property sold if the judgments were not paid. The Lancasters and NationsBanc timely appeal from that order.

## ASSIGNMENTS OF ERROR

The Lancasters and NationsBanc assign that the district court erred in finding that the Lancasters were not protected party contracting owners and thereby not entitled to the protections of § 52-136(5). NationsBanc assigns that the district court erred in

limiting its security interest to the amount of disbursements made under the original construction loan.

## STANDARD OF REVIEW

[1,2] An action to foreclose a construction lien is one grounded in equity. In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Tilt-Up Concrete v. Star City/Federal*, 255 Neb. 138, 582 N.W.2d 604 (1998); *Midlands Rental & Mach. v. Christensen Ltd.*, 252 Neb. 806, 566 N.W.2d 115 (1997).

[3] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Philpot v. Aguglia*, 259 Neb. 573, 611 N.W.2d 93 (2000); *Ferguson v. Union Pacific RR. Co.*, 258 Neb. 78, 601 N.W.2d 907 (1999).

## ANALYSIS

The Lancasters argue that they have no lien liability because they are protected party contracting owners and the funds they paid at closing were used to satisfy their obligation under their purchase agreement with Daugherty.

NationsBanc argues that the full amount of its deed of trust is superior to Lincoln Lumber's lien because the funds for its subsequent security interest were used to pay off the construction security interest, which had priority over the construction liens.

Lincoln Lumber, a supplier of building materials, counters that the Lancasters do not have protected party contracting owner status and that its construction lien is secondary to NationsBanc's security interest only to the extent the

NationsBanc funds were used to pay for disbursements made under the prior construction security interest.

### Protected Party Contracting Owner

The Lancasters contend that their lien liability under the Nebraska Construction Lien Act, §§ 52-125 through 52-159, is limited to the amount of their purchase agreement with Daugherty, minus payments made thereon. Specifically, they cite § 52-136(5), which states: "A protected party contracting owner's lien liability under a particular prime contract is the prime contract price less payments properly made thereon." Accordingly, if the Lancasters are protected party contracting owners, their purchase agreement with Daugherty would be the prime contract, and their satisfaction of that agreement at closing would constitute the limit of their liability.

[4] The threshold issue of the Lancasters' defense is whether they satisfy the statutory definition of a protected party contracting owner. "Protected party" and "contracting owner" are defined separately under the act, and a party must satisfy the requirements of each protected status in order to assert this defense. See *Midlands Rental & Mach. v. Christensen Ltd., supra.*

Under § 52-129(1)(a), a protected party is "[a]n individual who contracts to give a real estate security interest in, or to buy or to have improved, residential real estate all or a part of which he or she occupies or intends to occupy as a residence." The Lancasters satisfied the requirements of a protected party by contracting to have improvements made to property they intended to purchase as their own residence.

Protected parties under the act are allowed to take free of "all construction liens that are not of record at the time his or her title document is recorded." § 52-139(5). The construction liens of Lincoln Lumber and Kaser, however, were both recorded before the filing of the Lancasters' title document, so protected party status does not avoid liability for the Lancasters.

[5] Next, we must determine whether the Lancasters are contracting owners. Section 52-127(3) defines contracting owner as "a person who owns real estate and who, personally or through an agent, enters into a contract, express or implied, for the improvement of the real estate."

The Lancasters argue that the purchase agreement they signed to buy improved real estate from Daugherty "carried a sufficient ownership interest in the subject property to qualify them as contracting owners." Brief for appellants at 13. In support of this contention, the Lancasters cite *May Plumbing Co. v. Shaver*, 182 Neb. 251, 256, 153 N.W.2d 911, 915 (1967): " '[O]wner' as used in our mechanic's lien law is not limited in its meaning to an owner of the fee, but means the owner of any interest in the lands and includes every character of title, whether legal or equitable, fee simple, or leasehold." *May Plumbing Co.*, however, does not support the Lancasters' position that they are contracting owners.

*May Plumbing Co.* stands for the proposition that a husband or wife can be an agent of their spouse for purposes of having lien liability imposed. While the definition of "owner" in *May Plumbing Co.* was expanded, it was done so in order to ensure that the mechanic's lien would be valid, not to limit liability for the purchaser. See, also, *Bohn Mfg. Co. v. Kountze*, 30 Neb. 719, 725-26, 46 N.W. 1123, 1125 (1890) ("[w]here a vendee, owning the equitable title, contracts for the erection of a building upon the express authority of the owner of the legal title, it is but just that the lien of the mechanic should attach to the interest of both vendor and vendee in the premises, and be paramount to the lien of the vendor").

The expansion of the term "owner" in Nebraska cases has been in keeping with this court's consistent holdings that " '[t]he object of the mechanic's lien being to secure the claims of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions.' " *Midlands Rental & Mach. v. Christensen Ltd.*, 252 Neb. 806, 810, 566 N.W.2d 115, 118 (1997), quoting *Blue Tee Corp. v. CDI Contractors, Inc.*, 247 Neb. 397, 529 N.W.2d 16 (1995). Here, the Lancasters ask us to expand the definition of owner in order that they may avoid their lien liability. We decline to do so.

This court recently addressed the issue of defining a contracting owner in *Midlands Rental & Mach. v. Christensen Ltd., supra*. The record owner of the property, Christensen Ltd., contracted to give a builder the right to construct homes for indi-

viduals who contracted with the builder to purchase the homes. Christensen did not transfer title for the lots to the builder until the construction was completed. The builder would then transfer title to the purchaser. One of the builder's contractors failed to pay a supplier, which, in turn, filed a construction lien against Christensen, as the property owner.

Christensen contended that the amount of the subcontractor's lien should be determined under § 52-136(2). Like § 52-136(5) at issue in this case, § 52-136(2) gives special protection to protected party contracting owners. Christensen argued that because the houses were subject to purchase agreements with third-party buyers who intended to occupy the houses as their residences, the buyers were protected party contracting owners and, thus, § 52-136(2) was invoked.

We noted that the parties had stipulated that Christensen was the record titleholder of the properties and stated, "There can be little doubt, therefore, that Christensen is a contracting owner . . . . Moreover, despite the fact that the properties and houses are subject to purchase agreements, the interest in the real estate a vendor retains is subject to a construction lien." *Midlands Rental & Mach. v. Christensen Ltd.*, 252 Neb. at 814, 566 N.W.2d at 121, citing *Bohn Mfg. Co. v. Kountze, supra.*

[6] Likewise, in this case, Daugherty was the vendor and record titleholder of the property at the time the liens were filed. Daugherty's ownership interest was sufficient to charge the property with a construction lien, and the Lancasters were put on notice of the construction liens before closing with Daugherty. We conclude that the Lancasters' interest in the property as potential purchasers does not make them contracting owners. Thus, the Lancasters do not qualify as protected party contracting owners and cannot limit their liability for the construction liens of Lincoln Lumber and Kaser under § 52-136(5).

### Priority Between Security Interests and Construction Liens

NationsBanc contends that the full amount of its deed of trust has priority over Lincoln Lumber's construction lien because the funds for its subsequent security interest were used to pay off

the construction loan, which had priority over the construction liens.

[7] Section 52-139 provides the framework for determining priorities between construction liens as against other claims. In general, construction liens have priority over adverse claims of which the contractor is unaware. See § 52-139(1). However, subsection (4) provides that "[t]o the extent that a subsequent security interest is given to secure funds used to pay a debt secured by a security interest having priority over a construction lien under this section, the subsequent security interest is also prior to the construction lien."

In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Philpot v. Aguglia*, 259 Neb. 573, 611 N.W.2d 93 (2000); *Ferguson v. Union Pacific RR. Co.*, 258 Neb. 78, 601 N.W.2d 907 (1999).

NationsBanc argues that subsection (4) provides that its subsequent security interest has priority over the construction liens for the full amount required to pay off a prior construction loan. However, if the Legislature had intended that a subsequent security interest would have priority for the full payoff amount of a prior construction loan, it would not have limited that priority *to the extent* of the prior construction security interest's priority over any construction lien.

This reading is consistent with the comments to the Uniform Simplification of Land Transfers Act, upon which the Nebraska Construction Lien Act is based. See *Action Heating & Air Cond. v. Petersen*, 229 Neb. 796, 429 N.W.2d 1 (1988). "This statutory subrogation of the latter to the prior interest recognizes that the lien claimant is not prejudiced by having one creditor substituted for another so long as the total amount having priority over his interest is not increased." Unif. Simplification of Land Transfers Act § 5-209, comment 1, 14 U.L.A. 339 (1990).

Union Bank, pursuant to its security interest in the construction loan to Daugherty, could have asserted a first priority lien against the property to the extent it had made disbursements. The last disbursement record before the filing of the construction liens showed that $66,094.69 had been disbursed on

Daugherty's construction loan. Therefore, no other contractors or suppliers would have been prejudiced by giving NationsBanc's subsequent deed of trust priority for that same amount. However, to give NationsBanc priority for the $9,405.34 paid over and above the construction loan's priority does prejudice the interests of those filing construction liens ahead of the deed of trust.

Therefore, the district court's determination that NationsBanc's deed of trust for $75,500 had priority over the construction liens only to the extent of the $66,094.69 disbursements was correct with respect to the interests of Kaser. The district court erred, however, in coming to this same conclusion as to the interests of Lincoln Lumber.

Both Kaser and Lincoln Lumber were entitled to the unpaid part of their contract price under § 52-136(1). Because Daugherty's notice of commencement was in effect at the time they filed their liens, both liens attached on the date the notice of commencement was filed pursuant to § 52-137(2), and the claimants therefore had equal priority under § 52-138(1).

[8,9] At trial, however, Lincoln Lumber stipulated on the record that NationsBanc's security interest had priority over its construction lien. The general rule is that parties are bound by stipulations voluntarily made. *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997). In Nebraska, parties are free to make stipulations that govern their rights, and such stipulations will be respected and enforced by courts so long as the agreement is not contrary to public policy or good morals. *Mischke v. Mischke, supra* (concluding estate was bound by stipulation made in earlier trial as to value of rents and profits notwithstanding intervening Nebraska Supreme Court decision determining that estate was entitled to profits made by appellees on constructive trust principles); *In re Estate of Mithofer*, 243 Neb. 722, 502 N.W.2d 454 (1993) (affirming district court's rejection of party's request to withdraw from stipulation made on record that fixed parties' interests in estate property where court record satisfied statutory requirement that such agreements be in writing); *Kuhlman v. Platte Valley Irr. Dist.*, 166 Neb. 493, 89 N.W.2d 768 (1958) (concluding it was error for district court to dismiss cause of action for damages for insufficient evidence when parties had

stipulated on record, with court approval, that issue of damages would be continued until later date); *St. Joseph Dev. Corp. v. Sequenzia*, 7 Neb. App. 759, 766, 585 N.W.2d 511, 516 (1998) (concluding that judgment debtor had "stipulated away" her right to assert trial court lacked personal jurisdiction due to insufficient service—required under Uniform Enforcement of Foreign Judgments Act—by agreeing at trial that filing of foreign judgment created judgment lien on property in question), *overruled on other grounds, Breeden v. Nebraska Methodist Hosp.*, 257 Neb. 371, 598 N.W.2d 441 (1999); *In re Estate of Watson*, 5 Neb. App. 184, 557 N.W.2d 38 (1996) (giving effect to stipulation that estate would pay for legal fees up to certain date despite clear evidence of attorney's conflict of interest in case that would otherwise prohibit payment of fees).

Because the stipulation was binding on Lincoln Lumber, it was error for the district court to determine that NationsBanc's security interest had priority over Lincoln Lumber's construction lien only to the extent disbursements had been made on the construction loan. We conclude that pursuant to the parties' stipulation, NationsBanc's deed of trust for $75,500 has full priority over Lincoln Lumber's construction lien.

[10] The stipulation, however, is not binding on the rights of Kaser, since Kaser was not a party to a proceeding and did not assent to the stipulation. See, *Torrison v. Overman*, 250 Neb. 164, 549 N.W.2d 124 (1996) (concluding collateral estoppel could not be asserted against insurance company that was not party to consent judgment); *Bryant Heating v. United States Nat. Bank*, 216 Neb. 107, 114, 342 N.W.2d 191, 196 (1983) (dismissing appellee's argument that it was prejudiced by stipulation between other parties when it "was not a party to the stipulation in question and therefore cannot be bound by it"); *Walker v. Collins Construction Co.*, 121 Neb. 157, 236 N.W. 334 (1931) (holding subcontractors are not deprived of right to lien by contract stipulation between general contractor and owner unless they assent to its terms).

Because the stipulation was not binding on Kaser, NationsBanc's subsequent deed of trust has priority over Kaser's lien for only $66,094.69, which was the extent that disbursements were made under the original construction loan.

## CONCLUSION

We affirm the district court's determination that Kaser and Lincoln Lumber had valid liens that may be enforced against the Lancasters. The district court correctly found that NationsBanc's deed of trust has priority over Kaser for only $66,094.69, the extent the funds were used to pay for disbursements made under the prior construction security interest. Upon our de novo review, however, we conclude that the district court erred in not upholding the stipulation between NationsBanc and Lincoln Lumber at trial. Therefore, we modify the judgment to reflect that NationsBanc's deed of trust has full priority over Lincoln Lumber's construction lien.

AFFIRMED AS MODIFIED.

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## STATE OF NEBRASKA EX REL. AMISUB, INC. (SAINT JOSEPH HOSPITAL), RELATOR, V. HONORABLE JAMES A. BUCKLEY, JUDGE, RETIRED, DISTRICT COURT FOR DOUGLAS COUNTY, NEBRASKA, RESPONDENT.

618 N.W.2d 684

Filed October 27, 2000. No. S-99-1058.

1. **Statutes: Presumptions: Legislature: Intent.** When construing statutes, a court is guided by the presumption that the Legislature intended a sensible, rather than an absurd, result in enacting the statutes.
2. **Statutes.** As a further aid to statutory interpretation, a court must look to the statutes' purpose and give to the statutes a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
3. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
4. **Mandamus: Words and Phrases.** Mandamus is an action at law and is an extraordinary remedy issued to compel performance of a purely ministerial act or duty imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law.

5. **Mandamus.** To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act, (1) the duty must be imposed by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty must be clear.
6. ___. Mandamus is not available to control judicial discretion and will be issued only if there is an absolute duty to perform in a specified manner upon the existence of certain facts.
7. **Mandamus: Proof.** In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that it is entitled to the particular thing the relator asks and that the respondent is legally obligated to act.
8. **Mandamus: Supreme Court.** The Nebraska Supreme Court will issue a writ of mandamus upon a proper showing by a relator.
9. **Health Care Providers: Pretrial Procedure: Records: Proof.** The party claiming the privilege under Neb. Rev. Stat. §§ 71-2047 and 71-2048 (Reissue 1996) has the burden of proving that its documents are protected documents under one of those statutes.
10. **Statutes: Judicial Construction.** A statutorily created privilege will be narrowly construed.
11. **Health Care Providers: Pretrial Procedure: Records.** Documents not specifically requested by a hospital-wide medical staff committee or a hospital-wide utilization review committee are not subject to the privilege outlined in Neb. Rev. Stat. § 71-2047 (Reissue 1996).
12. ___: ___: ___. Matters occurring outside and documents found outside the deliberative process of a hospital-wide medical staff committee or a hospital-wide utilization review committee are neither proceedings, minutes, records, and reports of the committees nor communications originating in such committees, and pursuant to Neb. Rev. Stat. § 71-2048 (Reissue 1996), are not protected from discovery.
13. **Health Care Providers: Records.** Pursuant to Neb. Rev. Stat. § 71-2046 et seq. (Reissue 1996), the proceedings, minutes, records, and reports which are privileged communications under § 71-2048 are those communications which are part of the deliberations or communications of a hospital-wide medical staff committee or a hospital-wide utilization review committee or such communications which originate in such committees, as those committees are defined under § 71-2046 when those committees are conducting the business authorized under § 71-2046 et seq.
14. **Mandamus: Courts.** A request for relief first presented in a mandamus action will be disregarded inasmuch as the district court cannot have failed to perform an act which was not submitted to it for disposition.

Original action. Peremptory writ denied.

Patrick G. Vipond, Raymond E. Walden, and Kyle Wallor, of Lamson, Dugan & Murray, for relator.

William J. Brennan, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., for amicus curiae George R. Collins.

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

MILLER-LERMAN, J.

## I. NATURE OF CASE

AMISUB, Inc., relator, also known as St. Joseph Hospital (AMISUB or the hospital) sought leave to file this original action seeking a writ of mandamus compelling the district court judge for Douglas County, the Honorable Lawrence J. Corrigan, respondent, since retired, to set aside certain orders compelling discovery, to quash certain discovery requests, and to enter a protective order prohibiting the discovery of certain documents in an action brought against AMISUB by George R. Collins, conservator of Elizabeth Collins (Elizabeth), a minor. During the course of these proceedings, Judge Corrigan retired and the Honorable James A. Buckley appeared and was substituted as respondent. The respondent is referred to as the "district court" in this opinion. We granted leave to file this original action.

Primarily at issue in this action is whether the documents in question are protected from discovery under the peer review privilege embodied in Neb. Rev. Stat. § 71-2048 (Reissue 1996). Related Neb. Rev. Stat. §§ 71-2046 and 71-2047 (Reissue 1996) are also involved in this action. Because we conclude that the documents at issue in the action are not privileged under § 71-2046 et seq., we now deny a peremptory writ of mandamus.

## II. STATEMENT OF FACTS

Following the grant of leave to file this original action, this court appointed, on October 14, 1999, the Honorable William D. Blue, a retired district court judge, as special master for the purpose of taking evidence and for making findings of fact. The factual statement of this case is taken largely from the findings of fact made by Judge Blue. Additional facts are taken from the pleadings and various exhibits.

AMISUB is the defendant in the case Collins v. AMISUB (Saint Joseph Hospital), Inc., docket 963, page 355, currently pending in Douglas County District Court (the underlying case). The underlying case was initiated by Collins as the conservator of Elizabeth to recover for injuries Elizabeth allegedly sustained when she fell as she was exiting her bed while a patient in the hospital's pediatric unit. Elizabeth's date of birth is April 3, 1978.

Elizabeth was involved in an automobile accident on July 24, 1995, and was brought to the hospital on that same date to receive treatment for injuries she sustained in the accident. She was initially treated in the hospital's intensive care unit (ICU), but on August 4, she was transferred from ICU to the hospital's pediatric ward. At the time she was transferred, Elizabeth's neurosurgeon, Dr. Charles Taylon, found Elizabeth to be alert and oriented. Dr. Raymond Heller, a medical resident who transferred Elizabeth from ICU to the pediatric ward, directed that Elizabeth could get out of bed and perform activities with "one assistant with her." He gave the order for assistance in order to "minimize the possibility of an accident happening."

On August 4, 1995, at 6 p.m., Elizabeth was taken by Susan Beaton, a registered nurse, to the restroom and then returned to her bed. The side rails on Elizabeth's bed were placed in the "up" position, and Elizabeth was given the nurse call light. Beaton testified that she informed Elizabeth she should not get out of bed without assistance.

Shortly after being returned to her bed, and while unattended, Elizabeth fell while exiting her bed. Beaton recorded the fall in Elizabeth's medical records as follows: "Afebrile. Unsteady on feet. [Patient fell] at 1800, climbed [out of bed] even [with] 4 siderails [up]. Report made. Dr. Heller called CT done, PT taken to surgery." The CT scan taken after she fell showed Elizabeth had a significant large right hemispheric subdural hematoma which was not present on a CT scan taken the day prior to her fall. The "report" to which reference is made by Beaton in Elizabeth's medical records quoted above is an incident or occurrence report prepared by Beaton on August 4, 1995 (incident report). This incident report is one of the documents for which AMISUB seeks a protective order.

At the time of her fall, Elizabeth was a minor. Collins filed the underlying case against AMISUB in his capacity as Elizabeth's conservator. In the second amended petition filed in the underlying case, Collins alleged that AMISUB's negligence was the proximate cause of Elizabeth's fall and subsequent injuries. In support of this allegation, Collins alleged that AMISUB was negligent as follows:

a. In failing to use the T.V. monitoring system when no one was in [Elizabeth's] hospital room.

b. In failing to provide adequate staffing to cover [Elizabeth's] needs.

c. In allowing [Elizabeth] to leave her bed without "one assist" in violation of the doctor's orders.

d. In leaving [Elizabeth] unattended both before and after the fall.

e. In failing to use appropriate equipment and/or alarm systems to warn [AMISUB] and its employees [that Elizabeth] was leaving her bed or prevent [Elizabeth] from leaving her bed.

f. In failing to monitor [Elizabeth's] medical chart on the day in question to determine that [Elizabeth] had a problem with memory.

Collins alleges in the second amended petition that as a result of Elizabeth's fall and the injuries she sustained from the fall, Elizabeth was forced to undergo the placement of a tracheostomy tube and laparoscopic gastrostomy tube, and suffered from elevated temperatures, swollen joints, and pneumonia. Collins further claims that at the time of Elizabeth's discharge from the hospital on August 31, 1995, she was in a semiconscious condition, unable to respond to verbal commands and unable to move her limbs. Collins alleges that Elizabeth required extensive rehabilitation as a result of the fall, is permanently disabled and unable to work, and has little or no future earning capacity. In the underlying case, Collins seeks from AMISUB, on behalf of Elizabeth, special damages in the amount of $85,000, together with general damages to compensate Elizabeth for her pain and suffering, loss of life's cares and joys, and lost income.

### 1. Incident Report

On December 23, 1997, as part of the underlying case, Collins served AMISUB with certain requests for production of documents. Request No. 2 sought copies of all incident reports that had been referred to by Beaton in Elizabeth's August 4, 1995, medical records. AMISUB responded to Collins' discovery request by objecting to request No. 2, asserting that "any

incident reports or investigation made as part of any hospital utilization review or quality assurance assessment is privileged under Nebraska law." Thereafter, on April 9, 1998, and again on June 2, Collins filed a motion to compel production of the requested incident report. On June 8, AMISUB filed a motion for a protective order, requesting that the district court issue a protective order stating that this requested discovery would not be permitted.

AMISUB based its motion upon a claim of privilege pursuant to § 71-2046 et seq. These statutes were part of 1971 Neb. Laws, L.B. 148. The statutory provisions relate to the hospital-wide medical staff committee and hospital-wide utilization review committee and require all hospitals to establish such committees. See *Oviatt v. Archbishop Bergan Mercy Hospital*, 191 Neb. 224, 214 N.W.2d 490 (1974). Specifically, § 71-2046 provides as follows:

> Each hospital licensed in the State of Nebraska shall cause a medical staff committee and a utilization review committee to be formed and operated for the purpose of reviewing, from time to time, the medical and hospital care provided in such hospital and the use of such hospital facilities and for assisting individual physicians and surgeons practicing in such hospital and the administrators and nurses employed in the operation of such hospital in maintaining and providing a high standard of medical and hospital care and promoting the most efficient use of such hospital facilities.

Section 71-2047, part of L.B. 148, provides as follows:

> Any physician, surgeon, hospital administrator, nurse, technologist, and any other person engaged in work in or about a licensed hospital and having any information or knowledge relating to the medical and hospital care provided in such hospital or the efficient use of such hospital facilities shall be obligated, when requested by a hospital medical staff committee or a utilization review committee, to provide such committee with all of the facts or information possessed by such individual with reference to such care or use. Any person making a report or providing information to a hospital medical staff committee or a utiliza-

> tion review committee of a hospital upon request of such committee has a privilege to refuse to disclose and to prevent any other person from disclosing the report or information so provided, except as provided in section 71-2048.

Section 71-2048, also part of L.B. 148, provides for a peer review privilege as follows:

> The proceedings, minutes, records, and reports of any medical staff committee or utilization review committee as defined in section 71-2046, together with all communications originating in such committees are privileged communications which may not be disclosed or obtained by legal discovery proceedings unless (1) the privilege is waived by the patient and (2) a court of record, after a hearing and for good cause arising from extraordinary circumstances being shown, orders the disclosure of such proceedings, minutes, records, reports, or communications. Nothing in sections 71-2046 to 71-2048 shall be construed as providing any privilege to hospital medical records kept with respect to any patient in the ordinary course of business of operating a hospital nor to any facts or information contained in such records nor shall sections 71-2046 to 71-2048 preclude or affect discovery of or production of evidence relating to hospitalization or treatment of any patient in the ordinary course of hospitalization of such patient.

The July 1, 1998, deposition of Dena Belfiore, the hospital's director of quality, was submitted by AMISUB in support of its motion for a protective order. According to Belfiore, the hospital did not have a committee known as the "utilization review committee." Belfiore testified, however, that the hospital had an analogous hospital-wide committee, the "quality committee," which committee was made up of 50 percent physicians and 50 percent hospital administrative staff. As the director of quality, Belfiore was a member of the hospital's "quality committee."

The incident report sought by Collins was prepared by Beaton the evening of August 4, 1995, following Elizabeth's fall. The incident report was filled out on a four-page form entitled "Patient Quality Assessment Report Quality Assessment & Improvement Review." The form includes spaces for the date

and time of the incident; the date of the report; the patient's status and gender; the hospital unit involved; a description of the incident and the medical equipment involved; a notation as to whether a physician was called as a result of the incident; the patient's medical condition before and after the incident; whether the incident involved a fall, medication, or blood; and the "Manager's" findings and recommendations. The incident report form has signature lines for the person providing the information on the form, the manager, the director, the person contacted, and a vice president, "when applicable." The specific incident report completed by Beaton was not signed by a "Person Contacted" or a vice president. There is a checkmark opposite an entry entitled "Standard of Care Met."

The last page of the form is captioned "To Be Completed by Review Committee." The last page has boxes to be checked for an "Analysis of Variances," as well as an evaluation of responsibility. The last page also has several lines which can be completed regarding recommendations and actions, along with boxes to be marked for followup. On the form completed by Beaton, these lines for recommendations and actions as well as the followup boxes are all blank. It is undisputed that the hospital's quality committee made no notations on the incident report.

According to Belfiore, as standard operating procedure, hospital nursing personnel were required to report "unusual and unexpected" events in incident reports. New employees are advised that this reporting practice is the structure under which nursing personnel are to operate. Belfiore further testified that the incident report prepared by Beaton was created and utilized for quality assurance purposes. Nevertheless, Belfiore testified that Beaton's incident report on Elizabeth's fall was not reviewed by the hospital's quality committee. According to Belfiore, incident reports were completed by hospital personnel, locked in a quality assurance file, and "never" reviewed by the hospital-wide quality committee. Instead, Belfiore testified that an "assessment" of an incident report might be made by the quality committee, and following such an assessment, an action plan might be developed to respond to the assessment. It is undisputed that no such assessment was made based on the incident report completed by Beaton with regard to Elizabeth's fall.

One of the exhibits entered into evidence before the special master is the deposition of Anita Larsen, the hospital's director of nursing, which deposition was taken on January 18, 1999. In her deposition, Larsen testified that an incident report, such as the one completed by Beaton, was an "internal communication tool" used to inform the "people in authority" of "what has happened." She further testified that Connie Mimick, the hospital's former risk manager, verbally explained to hospital employees that in completing incident reports, they should include "[t]he facts, just fill out the facts."

The parties also included in their exhibits before the special master the deposition of Beaton, also taken on January 18, 1999. Beaton testified, inter alia, that she noted in the incident report the results of a neurological examination she conducted on Elizabeth after the fall, which information was not included in Elizabeth's separate medical records.

In the underlying case, a hearing was held on June 15, 1998, and continued on August 19 on Collins' motion to compel and AMISUB's motion for a protective order. Thereafter, on November 19, the district court sustained Collins' motion to compel and ordered AMISUB to produce the requested incident report. AMISUB has complied with the district court's order and produced the incident report.

### 2. Fall Lists

During the course of additional discovery in the underlying case, Collins learned that two registered nurses at the hospital, Dolores Gaeta and Sandra Slodkoski, had prepared lists of patient falls that had occurred in their respective departments. On March 22, 1999, Collins served upon AMISUB notices to take the depositions of these nurses. Included in the notices were requests that Gaeta and Slodkoski produce all records relating to falls at the hospital authored by them between 1990 and 1995.

Gaeta and Slodkoski were each deposed by Collins on March 30, 1999. At the start of the depositions, AMISUB's counsel stated that neither deponent would produce the documents requested by Collins. AMISUB's counsel claimed that the documents were privileged pursuant to § 71-2046 et seq.

On April 9, 1999, Collins filed a motion to compel seeking a court order compelling AMISUB to produce the two lists compiled by Gaeta and Slodkoski. On April 23, AMISUB responded to Collins' motion by filing a motion to quash and motion for a protective order, arguing that the lists were privileged pursuant to § 71-2046 et seq. In support of its motion, AMISUB offered the affidavit of Belfiore, dated May 12, 1999, which stated, inter alia, that the hospital "formed a number of quality improvement committees . . . in compliance with NEB. REV. STAT. § 71-2046." In Belfiore's affidavit, she further stated as follows:

> 4. The Quality and Utilization Review Department performs the review required by NEB. REV. STAT. § 71-2046. Pursuant to the standing policy directive of the Quality and Utilization Review Department, nurse managers and unit based quality assurance committees are required to identify those areas of patient care with potential for improvement.
>
> 5. The quality assurance information compiled by Sandra Slodkoski and Dolores Gaeta was performed in compliance with the standing directive of the Quality and Utilization Review Committee.

Belfiore did not attach to her affidavit a copy of the "standing policy directive" or the "standing directive" to which she refers in her affidavit. Belfiore did not further identify or explain either the "Quality and Utilization Review Department" or the "Quality and Utilization Review Committee" to which she referred in her affidavit.

In her deposition, Slodkoski testified that she was the hospital's nurse manager for the 4600 step-down telemetry unit. She testified that beginning in approximately 1992 and continuing into 1994, she compiled a list of information relating to patient falls in her unit. Her handwritten list consisted of the patient's name, the patient's room number, the time and date of the fall, and a description of the fall. Slodkoski testified that she derived the information for her list from hospital incident reports reciting factual events prior to their filing and that she compiled the information as part of her duty to oversee the quality of nursing in the 4600 unit. There is no evidence that Slodkoski is or is not a member of the hospital's quality committee.

Slodkoski testified that no one at the hospital requested that she prepare the list, that she kept the list in her own quality assurance book, and that no one at the hospital reviewed her list. She did state, however, that she would periodically review the information contained in the list with her own unit's quality committee, a unit-based quality committee consisting of Slodkoski, two or three staff nurses, and the hospital's director of nursing. Specifically, AMISUB produced no evidence that any hospital-wide committee, such as the hospital's quality committee identified by Belfiore in her July 1, 1998, deposition, requested, reviewed, or utilized the information in Slodkoski's fall list.

Gaeta testified in her deposition that she was the hospital's nurse manager for the 5100 step-down medical surgery unit. She stated that beginning in 1994 and continuing into 1996, she compiled a list of information relating to patient falls in her unit. There is no evidence that she was requested to prepare the list by the quality committee. Included in her list was the patient's name, the date and time of the fall, and a description of the fall. Gaeta further testified she might have included in her list a medical record number, so that she could index the information to a medical file. Like Slodkoski, Gaeta testified that she obtained the information for her fall list from hospital incident reports reciting factual events. She also testified that she prepared the list as part of her quality assurance duties and that she kept the list in her own personal quality assurance notebook. There is no evidence that Gaeta is or is not a member of the hospital's quality committee. Further, AMISUB produced no evidence that any hospital-wide medical staff or quality committee requested, reviewed, or utilized the information in Gaeta's fall list.

In the underlying case, on May 13, 1999, an evidentiary hearing was held on Collins' motion to compel and AMISUB's motion to quash and motion for a protective order, all relating to the discovery of the fall lists compiled by Gaeta and Slodkoski. By docket entry entered on June 3, 1999, the district court denied AMISUB's motion for a protective order and ordered that the fall lists be produced. According to AMISUB's brief, the fall lists have not yet been produced, and we note that no copy of either of the fall lists appears in the record.

On August 9, 1999, AMISUB filed with this court an application for leave to file an original action for a peremptory writ of mandamus, compelling the district court judge to vacate his orders entered on November 19, 1998, and June 3, 1999. On September 15, we granted AMISUB an alternative writ of mandamus, ordering the district court judge to vacate and set aside his order of November 19, 1998, which had sustained Collins' motion to compel discovery of the incident report and had overruled AMISUB's motion for a protective order, and his order of June 3, 1999, which had sustained Collins' motion to compel discovery of the fall lists and had overruled AMISUB's motion to quash and motion for a protective order, or to appear and show cause why a peremptory writ commanding the district court to do so should not issue.

Because Judge Corrigan retired from the bench, Judge Buckley, who was appointed to replace Judge Corrigan as the district court judge in the underlying case, responded to this court's September 15, 1999, order to show cause on September 22, stating that he had "again considered the issues raised by the motions resulting in [the] orders of November 19, 1998 and June 3, 1999 and reache[d] the same conclusion [as Judge Corrigan]." Thereafter, on October 14, this court appointed a special master to conduct an evidentiary hearing for the purpose of making findings of fact. The evidentiary hearing was held on November 29, and the special master received into evidence 39 exhibits. Thereafter, on January 11, 2000, the special master filed his findings of fact.

AMISUB, as the relator, has filed briefs in this mandamus action. Collins was granted leave by this court to file an amicus brief in this mandamus action. Judge Buckley waived notice or appearance at the evidentiary hearing before the special master and has not filed a brief with regard to the mandamus action before this court.

## III. ASSIGNMENTS OF ERROR

AMISUB claims the incident report and the fall lists are privileged records pursuant to § 71-2046 et seq. AMISUB thus contends that the district court erred in granting Collins' motions to compel the production of the incident report and the fall lists

and in not granting AMISUB's motions for protective orders with regard to the same documents and that this court should issue a peremptory writ of mandamus ordering the district court to set aside the orders of November 19, 1998, and June 3, 1999. AMISUB further argues that the district court erred in ordering the production of the fall lists because those lists contain personal information regarding hospital patients, none of whom are parties to the underlying case.

## IV. STANDARDS OF REVIEW

[1-3] When construing the privileges set forth in § 71-2046 et seq., we are guided by the presumption that the Legislature intended a sensible, rather than an absurd, result in enacting the statutes. *Sheldon-Zimbelman v. Bryan Memorial Hosp.*, 258 Neb. 568, 604 N.W.2d 396 (2000); *Battle Creek State Bank v. Haake*, 255 Neb. 666, 587 N.W.2d 83 (1998). As a further aid to statutory interpretation, we must look to the statutes' purpose and give to the statutes a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Id.* It is well established that the components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *Sack v. State*, 259 Neb. 463, 610 N.W.2d 385 (2000).

## V. REQUIREMENTS FOR ISSUANCE OF WRIT OF MANDAMUS

[4] Mandamus is an action at law and is an extraordinary remedy issued to compel performance of a purely ministerial act or duty imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law. *State ex rel. Cherry v. Burns*, 258 Neb. 216, 602 N.W.2d 477 (1999); *State ex rel. City of Alma v. Furnas Cty. Farms*, 257 Neb. 189, 595 N.W.2d 551 (1999).

[5,6] To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act, (1) the

duty must be imposed by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty must be clear. *State ex rel. Cherry v. Burns, supra*; *State ex rel. Tyler v. Douglas Cty. Dist. Ct.*, 254 Neb. 852, 580 N.W.2d 95 (1998). Mandamus is not available to control judicial discretion and will be issued only if there is an absolute duty to perform in a specified manner upon the existence of certain facts. *Id.*

[7] In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that it is entitled to the particular thing the relator asks and that the respondent is legally obligated to act. *State ex rel. Cherry v. Burns, supra*; *State ex rel. Acme Rug Cleaner v. Likes*, 256 Neb. 34, 588 N.W.2d 783 (1999).

## VI. ANALYSIS

### 1. MANDAMUS

[8] Leave to file this original action seeking a writ of mandamus was granted on September 15, 1999. Leave was granted to permit this court to examine the scope of the privilege afforded under § 71-2046 et seq. This action involves primarily a statutory interpretation of § 71-2046 et seq. in the context of a discovery dispute. This court will issue a writ of mandamus upon a proper showing by the relator. *State ex rel. Acme Rug Cleaner v. Likes, supra.*

### 2. PRIVILEGED DOCUMENTS UNDER §§ 71-2047 AND 71-2048

In its briefs, AMISUB argues that the incident report and fall lists were prepared for quality review purposes generally and that in the case of the fall lists in particular, the information contained in the lists was actually reviewed by unit-based quality committees, as part of the unit committee's quality review process. AMISUB argues that because the incident report and the fall lists have been identified by the hospital as documents relating generally to quality review, the records are privileged under § 71-2048. AMISUB also suggests that the standing order to memorialize incidents extends a privilege under § 71-2047 to the documents at issue. On the basis of the undisputed record before us, however, we decline AMISUB's invitation to extend the privileges created under §§ 71-2047 and 71-2048 to either the incident report or the fall lists at issue in this action.

(a) Burden of Proof and Scope of Privilege

In addressing AMISUB's claim in this mandamus action, we must determine which party bears the burden of proof with regard to a claim of privilege under § 71-2047 or § 71-2048. We have not previously decided this issue. In other cases involving a party's claim of a privilege, we have stated that the party asserting the existence of the privilege has the burden of proving that the documents sought are protected. See, generally, *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997) (attorney-client privilege); *Branch v. Wilkinson*, 198 Neb. 649, 256 N.W.2d 307 (1977) (physician-patient privilege); *Castle v. Richards*, 169 Neb. 339, 99 N.W.2d 473 (1959) (attorney-client privilege).

[9,10] In the instant action, AMISUB claims that it is entitled to a protective order denying Collins copies of the incident report and fall lists by virtue of the privileges set forth in § 71-2046 et seq. As in other instances involving the assertion of a privilege, we hold that AMISUB, the party claiming the privileges under §§ 71-2047 and 71-2048, has the burden of proving that the incident report and fall lists are protected documents under one of those statutes. We further observe that the privileges which AMISUB seeks to invoke are statutorily created under §§ 71-2047 and 71-2048, and we have held, and repeat as applicable here, that a statutorily created privilege will be narrowly construed. See, similarly, *Branch v. Wilkinson, supra* (statutory physician-patient privilege being in derogation of common law should be strictly construed).

With respect to the scope of the privileges at issue, we note that by its terms, § 71-2046 provides for the establishment of "a," or one, medical staff committee and "a," or one, utilization review committee, each of which reviews, inter alia, the care and facilities provided by the hospital. Nothing in the language of § 71-2046 contemplates the creation of multiple committees at a hospital department or unit level or the extension of the statutory privileges of §§ 71-2047 and 71-2048 to such departmental or unit-based committees. See, generally, 82 C.J.S. *Statutes* § 330 at 434 (1999) (words in statute "importing the singular only" will be applied to plural "only when it is necessary to do so in order to carry out the obvious intent of the legislature").

Thus, § 71-2046 provides that Nebraska hospitals will create one of each of the committees set forth in the statute to perform their functions on a hospital-wide basis. Reading § 71-2046 et seq. together, we determine that the privileges set forth in §§ 71-2047 and 71-2048 with respect to documents extend only to documents requested by such hospital-wide committees and further extend to the proceedings, minutes, records, and reports of such committees and to the communications originating in the hospital-wide medical staff committee and hospital-wide utilization review committee as defined in § 71-2046.

(b) Statutory Interpretation of § 71-2047 and Application to This Case

AMISUB suggests that the documents sought to be protected are privileged because they were prepared pursuant to a "standing directive" to memorialize incidents and were, therefore, "requested" under § 71-2047. We do not agree.

There is essentially no factual dispute in this case. The testimony is uncontradicted that the incident report was prepared as a result of a "standing directive" to memorialize the factual account of an unexpected occurrence and not upon the discrete request of a hospital-wide medical staff committee or hospital-wide utilization review committee. Further, there is no dispute that the fall lists were based on the factual accounts contained in various incident reports and were not requested by a hospital-wide committee.

[11] Because the documents were not specifically requested by a hospital-wide medical staff committee or a hospital-wide utilization review committee, we conclude that the documents sought to be protected by AMISUB are not subject to the privilege outlined in § 71-2047. We further note, however, that even if the incident report and fall lists had been specifically requested by a hospital-wide committee, such documents would not have been privileged under § 71-2047, because reading §§ 71-2047 and 71-2048 together, these documents consist of merely "facts or information" which is not privileged from discovery under § 71-2048, which provides, inter alia:

> Nothing in sections 71-2046 to 71-2048 shall be construed as providing any privilege to hospital medical records kept

> with respect to any patient in the ordinary course of business of operating a hospital nor to any facts or information contained in such records nor shall sections 71-2046 to 71-2048 preclude or affect discovery of or production of evidence relating to hospitalization or treatment of any patient in the ordinary course of hospitalization of such patient.

See, also, *Columbia/HCA Healthcare v. Dist. Ct.*, 113 Nev. 521, 531, 936 P.2d 844, 850 (1997) (construing Nevada peer review privilege statute to exclude "[o]ccurrence reports," which hospital admitted were "nothing more than factual narratives," as such reports "contain the very type of information that will most likely be uncovered through traditional discovery procedures anyway"). We, thus, reject the suggestion of AMISUB that the documents sought to be protected are privileged under § 71-2047.

(c) Statutory Interpretation of § 71-2048 and Application to This Case

Although the incident report and fall lists were not requested under § 71-2047 by a hospital-wide committee formed pursuant to § 71-2046, AMISUB contends nevertheless that these documents are privileged documents pursuant to § 71-2048 and, by virtue of that privilege, protected from discovery in the underlying case. AMISUB does not claim in its briefs that the incident report and the fall lists were actually reviewed by the hospital-wide quality committee, as that committee was identified by Belfiore in her deposition testimony. Indeed, there is no evidence that any hospital-wide committee, established pursuant to § 71-2046, requested, reviewed, or considered either the incident report or the fall lists. Nevertheless, AMISUB urges us to conclude that the privilege set forth in § 71-2048 extends to these documents because the documents are part of the hospital's overall quality review process. The issue thus presented is whether, under § 71-2048, the incident report and fall lists which are claimed to be generally related to the overall quality review process, should be deemed protected by the peer review privilege set forth in § 71-2048, which extends such protection to the "proceedings, minutes, records, and reports of any medi-

cal staff committee or utilization review committee as defined in section 71-2046" or communications which originate in such committees. For the reasons recited below, we conclude that the documents in question are not privileged under § 71-2048.

Although § 71-2048 was enacted in 1971, this court has only once previously considered the extent of the privilege set forth in the statute. In *Oviatt v. Archbishop Bergan Mercy Hospital*, 191 Neb. 224, 214 N.W.2d 490 (1974), a medical malpractice action, this court was asked to determine whether the proceedings, minutes, records, or reports of a medical staff committee were protected from discovery by virtue of § 71-2048. In concluding that the proceedings and records thereof were privileged in *Oviatt*, we discussed the policy behind the peer review privilege set forth in § 71-2048.

In *Oviatt*, we stated:

> The basis for the privilege extended to medical staff committees and utilization review committees is the public interest in the improvement of the care and treatment of hospital patients. . . . The importance of communication of information to the committees and full and open discussion in the committees during the review of clinical work can be easily seen.
>
> ". . . Candid and conscientious evaluation of clinical practices is a sine qua non of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations."

191 Neb. at 226, 214 N.W.2d at 492 (quoting *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970)).

In construing the breadth of the privilege created by § 71-2048 in *Oviatt*, we focused our attention on protecting the discussions and deliberations that occurred in the committees created under § 71-2046 and further noted the "importance of communication of information to the committees" for purposes of the committees' discussions and deliberations. 191 Neb. at 226, 214 N.W.2d at 492. With this focus in mind, we concluded that under § 71-2048, "the proceedings and records of the medical staff committee" at issue in *Oviatt* were privileged. 191 Neb. at 227, 214 N.W.2d at 492. Our decision in *Oviatt* is in

accord with the plain language of § 71-2048 which extends the privilege to "[t]he proceedings, minutes, records, and reports of any medical staff committee or utilizing revenue committee as defined in § 71-2046," together with all "communications originating in such committees."

[12] Section 71-2048 was passed to protect deliberations within a hospital-wide committee which was required to be formed under § 71-2046. *Oviatt v. Archbishop Bergan Mercy Hospital, supra.* Section 71-2048 affords protection to the communications originating in and resulting from such a committee. However, as the plain language of § 71-2048 demonstrates, the purpose of § 71-2048 was not to preclude discovery of all hospital records. Section 71-2048 specifically provides that the peer review privilege found in § 71-2048 shall not be "construed as providing any privilege to hospital medical records kept with respect to any patient in the ordinary course of business of operating a hospital nor to any facts or information contained in such records . . . ." Reports which are merely factual accounts or fact compilations relating to the care of a specific patient are not privileged under § 71-2048. Such reports consist of "facts or information" and are not privileged under the plain language of § 71-2048. The language of § 71-2048 does not protect antecedent reports relating to the care of a specific patient which memorialize bare facts and which were written by or collected from percipient witnesses notwithstanding the fact that such documents may have been forwarded to a hospital-wide committee, nor does § 71-2048 protect an assembly of such facts outside the committees identified in § 71-2046. Matters occurring outside and documents found outside the deliberative process of a hospital-wide medical staff committee or a hospital-wide utilization review committee are neither "proceedings, minutes, records, and reports of" the committees nor "communications originating in such committees," § 71-2048, and are not protected from discovery.

[13] Based upon the plain language of § 71-2048 and reading § 71-2048 sensibly in conjunction with § 71-2046, which requires the creation of hospital-wide committees, and further noting our decision in *Oviatt v. Archbishop Bergan Mercy Hospital*, 191 Neb. 224, 214 N.W.2d 490 (1974), it is clear that

the proceedings, minutes, records, and reports which are privileged communications under § 71-2048 are those communications which are part of the deliberations or communications of a hospital-wide medical staff committee or a hospital-wide utilization review committee or such communications which originate in such committees, as those committees are defined under § 71-2046, and when those hospital-wide committees are conducting the business authorized under § 71-2046 et seq. We conclude in this case that because the incident report and the fall lists were neither utilized by such hospital-wide committees nor originated in such hospital-wide committees created pursuant to § 71-2046, and because such documents contained merely "facts and information" relating to underlying incidents involving the care of specific hospitalized patients, the documents sought to be protected are not privileged under § 71-2048.

In concluding that the documents in question are not privileged under § 71-2048, we note that our reasoning is in accord with the rationale expressed in *Columbia/HCA Healthcare v. Dist. Ct.*, 113 Nev. 521, 936 P.2d 844 (1997), in which the Nevada Supreme Court examined the scope of Nevada's similar peer review privilege statute and refused to extend the privilege to cover occurrence reports. The Nevada court concluded such reports "are nothing more than factual narratives, contain[ing] the very type of information that will most likely be uncovered through traditional discovery procedures anyway." *Id.* at 531, 936 P.2d at 850. Comparable to the documents under consideration in *Columbia/HCA Healthcare*, in the instant case, the records which Collins seeks through discovery are records which contain facts and information regarding specific incidents involving the care of specific hospitalized patients. Although the fall lists are a compilation of information, the underlying information is derived from specific incident reports containing factual accounts of incidents recited therein. As the hospital's director of nursing, Larsen, testified, incident reports are made up of "just . . . the facts."

We recognized in *Oviatt* that the purpose behind § 71-2048 is to protect the discussions and deliberations of the committees required to be created under § 71-2046 which are involved in the quality review process. Construing § 71-2046 et seq. conjunc-

tively and giving these statutes a consistent, harmonious, and sensible construction, see *State v. Sack*, 259 Neb. 463, 610 N.W.2d 385 (2000), it is apparent that the improvement of the quality of patient care and treatment is to be achieved through the "review of clinical work," *Oviatt v. Archbishop Bergan Mercy Hospital, supra*, by hospital-wide committees situated to perform such review. The incident report and the fall lists are documents that relate to factually specific incidents involving the care of specific hospitalized patients, and none of the documents sought by Collins are purported to contain any information with regard to the hospital-wide quality review deliberative process to which the protection under § 71-2048 is directed.

Finally, we agree with the rationale expressed by the Illinois Supreme Court in *Roach v. Springfield Clinic*, 157 Ill. 2d 29, 623 N.E.2d 246, 191 Ill. Dec. 1 (1993), in which the court looked to the purpose behind the Illinois peer review privilege and determined that the Illinois privilege was not intended to shield hospitals from all potential liability. The Illinois Supreme Court reasoned that if such an interpretation were adopted, "it would be substantially more difficult for patients to hold hospitals responsible for their wrongdoing through medical malpractice litigation. So protected, those institutions would have scant incentive for advancing the goal of improved patient care." *Id.* at 41-42, 623 N.E.2d at 251, 191 Ill. Dec. at 6. In other words, an overly broad interpretation of the privilege statute would defeat the very purpose of the privilege, the improvement of patient care. A statutorily created privilege is narrowly construed. See *Branch v. Wilkinson*, 198 Neb. 649, 256 N.W.2d 307 (1977). In the instant case, if we were to adopt AMISUB's proposal that all records and information, wherever generated and however utilized, which are characterized by a hospital as part of its overall generalized quality review process, are privileged under § 71-2048 and protected from discovery, such a statutory interpretation would effectively permit a hospital to insulate itself from the discovery of virtually all adverse documents and information other than the information immediately and actually contained in a patient's medical chart and records. Such a broad interpretation would defeat the Legislature's purpose in enacting § 71-2046 et seq., which is the improvement of patient care and

treatment. See *Oviatt v. Archbishop Bergan Mercy Hospital*, 191 Neb. 224, 214 N.W.2d 490 (1974).

AMISUB has presented no evidence that the incident report or the fall lists—all of which reflect factual accounts—were discussed or presented to either a hospital-wide medical staff committee or a hospital-wide utilization review committee as defined under § 71-2046. As noted in our analysis under § 71-2047, it is uncontroverted that the documents sought to be protected by AMISUB contain facts and information relating to underlying incidents involving the care of specific hospitalized patients and were not requested by a hospital-wide medical staff committee or a hospital-wide utilization review committee as defined under § 71-2046 and are not subject to a privilege under § 71-2047. Based upon this record, we decline to conclude under § 71-2048 that the incident report or the fall lists constituted either the "proceedings, minutes, records," or "reports of any medical staff committee or utilization review committee as defined in section 71-2046" nor, obviously, did the documents sought originate in such hospital-wide committees. Further, the documents in question contain "facts and information" relating to the care of specific hospitalized patients which are not privileged under § 71-2048. Accordingly, we conclude that AMISUB has failed to carry its burden of proving that the statutory privilege set forth in § 71-2048 protects the incident report prepared by Beaton or the fall lists compiled by Gaeta and Slodkoski from discovery. The district court did not err in refusing to grant AMISUB its requested protective orders and also did not err in ordering AMISUB to produce the incident report and the fall lists.

Because we conclude that AMISUB does not have a clear right to the relief it seeks and that the district court does not have a clear duty to perform the act AMISUB requests, mandamus is not appropriate.

### 3. Redacting Personal Patient Information From Fall Lists

[14] As an additional assignment of error, AMISUB contends the district court erred in requiring production of the fall lists because those lists contain personal information regarding hos-

pital patients, none of whom are parties to the underlying case. Presumably, by this assignment of error, AMISUB seeks some sort of a court order requiring that personal patient information be redacted from the fall lists before the lists are produced. We note, however, that outside an allusion to this issue in the briefs, there is nothing in the record to suggest that this request was first properly presented to the district court. This request first presented in this mandamus action will be disregarded inasmuch as the district court cannot have failed to perform an act which was not submitted to it for disposition. See, similarly, *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999); *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999). Although we do not address this issue in this mandamus action, we note that AMISUB is free to request such a protective order from the district court, which has discretion, pursuant to Neb. Ct. R. of Discovery 26(c) (rev. 2000), to structure a protective order to restrict the discovery of personal information belonging to hospital patients not parties to the underlying case.

## VII. CONCLUSION

For the reasons stated above, we conclude that the documents at issue in this action are not privileged under § 71-2046 et seq. and that a peremptory writ of mandamus directing the district court to enter an order protecting such documents is not an appropriate remedy. We, therefore, decline to issue a peremptory writ of mandamus.

PEREMPTORY WRIT DENIED.

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STATE OF NEBRASKA, APPELLEE, V.
MARK A. SCHNABEL, APPELLANT.
618 N.W.2d 699

Filed October 27, 2000. No. S-99-1426.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Sentences: Probation and Parole.** When a flat sentence of life imprisonment is imposed and no minimum sentence is stated, by operation of law, the minimum sentence is the minimum imposed by law under the statute.

3. **Sentences: Legislature: Presumptions.** The Legislature is presumed to be aware of existing Supreme Court precedent, including the law surrounding determinate sentences, when passing new legislation.
4. **Statutes: Legislature: Presumptions: Judicial Construction.** When legislation is enacted which makes related preexisting law applicable thereto, it is presumed that the Legislature acted with full knowledge of the preexisting law and judicial decisions of the Supreme Court construing and applying it.
5. **Sentences: Time.** A sentence validly imposed takes effect from the time it is pronounced.
6. **Sentences.** When a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed. Any attempt to do so is of no effect, and the original sentence remains in force.
7. **Sentences: Judges: Records.** The circumstances under which a judge may correct an inadvertent mispronouncement of a sentence are limited to those instances in which it is clear that the defendant has not yet left the courtroom; it is obvious that the judge, in correcting his or her language, did not change in any manner the sentence originally intended; and no written notation of the inadvertently mispronounced sentence was made in the records of the court.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Order vacated, and cause remanded with directions.

Charles O. Forrest, of Dwyer, Smith, Gardner, Lazer, Pohren, Rogers & Forrest, and John J. Kohl, of Raynor, Rensch & Pfeiffer, for appellant.

Don Stenberg, Attorney General, and Scott G. Gunem for appellee.

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

GERRARD, J.

## NATURE OF CASE

Pursuant to a plea agreement, Mark A. Schnabel entered a plea of no contest to a charge of murder in the second degree. Schnabel was convicted and sentenced to life imprisonment. Schnabel now appeals from the district court's order of commitment to the Department of Correctional Services, claiming that the terms of the order of commitment are inconsistent with the sentence imposed.

## PROCEDURAL BACKGROUND

Schnabel was initially charged by information with the first degree murder of his wife, Sandra Schnabel. The murder took place on or about May 21, 1999. On October 13, pursuant to a plea agreement, the State filed an amended information charging Schnabel with murder in the second degree. Schnabel entered a plea of no contest to the charge, and the district court found Schnabel guilty of murder in the second degree.

The matter came on for sentencing on November 30, 1999. The district court sentenced Schnabel as follows:

> The court having found the defendant guilty of one count of murder in the second degree and being fully advised in the premises, finds that the defendant should be and hereby is sentenced to a term of life imprisonment.
>
> The defendant is not entitled to nor is he given credit for any time served in custodial detention awaiting trial and sentence.
>
> It is, therefore, the judgment, order, and sentence of this court that the Defendant Mark Schnabel be committed to a facility under the jurisdiction of the Department of Corrections to serve a term of life imprisonment for the murder of Sandra Schnabel.

On the same date, the district court entered a journal entry, which also stated that "the Defendant should be, and is, sentenced to life imprisonment on the charge of Murder in the Second Degree" and that "IT IS THEREFORE THE JUDGMENT, ORDER AND SENTENCE OF THE COURT, that the defendant, Mark Schnabel, be committed to a facility under the jurisdiction of the Department of Correctional Services to serve a term of life imprisonment."

On December 1, 1999, the district court entered an order of commitment to the Department of Correctional Services, stating:

> The Defendant, having been convicted of the crime of Murder in the Second Degree, in violation of Neb. Rev. Stat. §28-304, and having been given his rights of allocution in a sentencing hearing held on November 30, 1999, now stands committed to a facility under the jurisdiction of the Department of Correction [sic] Services to serve the following sentence:

Minimum Sentence: Life Imprisonment;
Maximum Sentence: Life Imprisonment;
Credit for time served: None.

Schnabel timely appealed on December 15.

## ASSIGNMENT OF ERROR

Schnabel assigns, restated, that the district court erred in entering the December 1, 1999, order of commitment to the Department of Correctional Services containing sentencing terms inconsistent with the sentence imposed on November 30.

## STANDARD OF REVIEW

[1] This appeal presents a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *State v. Hansen*, 259 Neb. 764, 612 N.W.2d 477 (2000).

## ANALYSIS

In order to determine whether the order of commitment is inconsistent with the sentence initially imposed, we must first determine the effect of the November 30, 1999, sentence. Neb. Rev. Stat. § 29-2204(1) (Cum. Supp. 1998) provides, in relevant part:

> [I]n imposing an indeterminate sentence upon an offender the court shall:
>
> . . . .
>
> (A) Fix the minimum and maximum limits of the sentence to be served within the limits provided by law for any class of felony other than a Class IV felony, except that when a maximum limit of life is imposed by the court for a Class IB felony, the minimum limit may be any term of years not less than the statutory mandatory minimum. . . . ; or
>
> (B) Impose a definite term of years, in which event the maximum term of the sentence shall be the term imposed by the court and the minimum term shall be the minimum sentence provided by law.

Accord Neb. Rev. Stat. § 83-1,105.01(1) and (2) (Reissue 1999).

Murder in the second degree is a Class IB felony. Neb. Rev. Stat. § 28-304 (Reissue 1995). For a Class IB felony, the maximum sentence is life imprisonment and the minimum sentence is 20 years' imprisonment. Neb. Rev. Stat. § 28-105 (Cum. Supp. 1998).

[2] The sentence imposed by the district court on November 30, 1999, was clearly a flat sentence of life imprisonment, as no minimum sentence was stated. Since no minimum limit to the sentence was set forth pursuant to § 29-2204(1)(a)(ii)(A), the sentence was subject to the terms of § 29-2204(1)(a)(ii)(B). When a flat sentence of "life imprisonment" is imposed and no minimum sentence is stated, by operation of law, the minimum sentence is the minimum imposed by law under the statute. See *State v. Gray*, 259 Neb. 897, 612 N.W.2d 507 (2000). See, also, *State v. Barnett*, 204 Neb. 655, 284 N.W.2d 573 (1979); *State v. Blankenship*, 195 Neb. 329, 237 N.W.2d 868 (1976); *State v. Thompson*, 189 Neb. 115, 201 N.W.2d 204 (1972).

The State asserted, at oral argument, that *State v. Gray, supra*, was wrongly decided and should be overruled. The State's argument, as we understand it, is that § 29-2204(1)(a)(ii)(A), as amended in 1998, contains an "exception" for murder in the second degree. The language relied upon by the State, however, simply provides that the sentencing court "may" impose a minimum limit of a term of years not less than the statutory mandatory minimum. See *id.* This language does not address our long-settled holdings that the imposition of an indeterminate sentence, even where the maximum limit is life imprisonment, requires that the minimum term be affirmatively stated. See *State v. Thompson, supra.*

[3,4] The Legislature is presumed to be aware of existing Supreme Court precedent, including the law surrounding determinate sentences, when passing new legislation. See, *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999); *White v. State*, 248 Neb. 977, 540 N.W.2d 354 (1995). When legislation is enacted which makes related preexisting law applicable thereto, it is presumed that the Legislature acted with full knowledge of the preexisting law and judicial decisions of the Supreme Court construing and applying it. *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999). In construing § 29-2204(1)(a)(ii)(A), we

presume that the Legislature was aware of our holdings in *State v. Thompson, supra*, and successive cases, and the language of the statute, even as amended, does not affect our settled precedent. We conclude that *State v. Gray, supra*, was properly decided based on longstanding principles, and we decline the State's invitation to overrule *Gray*.

Accordingly, while § 29-2204 does not require that a minimum term be different from a maximum term, it does require that a minimum term be affirmatively stated if it is to be imposed, and if a minimum term is not set forth, an indeterminate sentence will be imposed by operation of law. See *Johnson v. Clarke*, 258 Neb. 316, 603 N.W.2d 373 (1999). Thus, pursuant to § 29-2204(1)(a)(ii)(B), the district court's November 30, 1999, sentencing order effectively imposed a maximum term of life imprisonment and a minimum term (for parole eligibility purposes), as defined by §§ 28-105 and 28-304, of 20 years' imprisonment. The order of commitment entered on December 1, however, states that the minimum term of Schnabel's sentence is life imprisonment.

[5-7] A sentence validly imposed takes effect from the time it is pronounced. *State v. Carlson*, 227 Neb. 503, 418 N.W.2d 561 (1988); *State v. Cousins*, 208 Neb. 245, 302 N.W.2d 731 (1981). When a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999), *cert. denied* 526 U.S. 1162, 119 S. Ct. 2056, 144 L. Ed. 2d 222; *State v. Brewer*, 190 Neb. 667, 212 N.W.2d 90 (1973). Any attempt to do so is of no effect, and the original sentence remains in force. *Id.* The circumstances under which a judge may correct an inadvertent mispronouncement of a sentence are limited to those instances in which it is clear that the defendant has not yet left the courtroom; it is obvious that the judge, in correcting his or her language, did not change in any manner the sentence originally intended; and no written notation of the inadvertently mispronounced sentence was made in the records of the court. *State v. Foster*, 239 Neb. 598, 476 N.W.2d 923 (1991).

The district court's November 30, 1999, order was a validly imposed sentence, the terms of which are a maximum of life imprisonment and a minimum (for parole eligibility purposes) of 20 years' imprisonment. Even if that sentence was pronounced inadvertently, the order of commitment setting forth different terms was not issued until well after Schnabel had left the courtroom and a written notation had been made in the records of the court. Compare *State v. Foster, supra*. Under such circumstances, the district court erred in entering an order of commitment containing terms of Schnabel's sentence that were inconsistent with the terms of the November 30 sentencing order. Schnabel's assignment of error has merit, and the district court's order of commitment must be vacated.

## CONCLUSION

The district court erred by entering its December 1, 1999, order of commitment to the Department of Correctional Services, as the sentencing terms set forth in that order were inconsistent with the November 30 sentence imposed by the district court. The district court's December 1 order of commitment is vacated, and the cause is remanded to the district court with directions to enter an order of commitment that is consistent with this opinion.

ORDER VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

HENDRY, C.J., not participating.

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# JAMES LOGSDON, APPELLANT, V. ISCO COMPANY AND AMERICAN MOTORIST INSURANCE COMPANY, APPELLEES.

618 N.W.2d 667

Filed October 27, 2000. No. S-00-035.

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 did not support the order or award.

2. ___: ___. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong.
3. ___: ___. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation.** 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.
5. **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.
6. ___: ___. The two phrases "arising out of" and "in the course of" in Neb. Rev. Stat. § 48-101 (Reissue 1998) are conjunctive; in order to recover, a claimant must establish by a preponderance of the evidence that both conditions exist.
7. **Workers' Compensation: Proof: Words and Phrases.** The phrase "arising out of," as used in Neb. Rev. Stat. § 48-101 (Reissue 1998), describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope of the employee's job; the phrase "in the course of," as used in § 48-101, refers to the time, place, and circumstances surrounding the accident.
8. **Workers' Compensation.** The terms of the Nebraska Workers' Compensation Act are to be broadly construed to accomplish the beneficent purpose of the act.
9. ___. All risks causing injury to an employee can be placed within three categories: (1) employment related—risks distinctly associated with the employment; (2) personal—risks personal to the claimant, e.g., idiopathic causes; and (3) neutral—a risk that is neither distinctly associated with the employment nor personal to the claimant.
10. ___. Under the positional risk doctrine, an employee's injuries are compensable as long as employment duties put the employee in a position that the employee might not otherwise be in which exposes the employee to a risk, even though the risk is not greater than that of the general public.
11. ___. When an employee, in the course of his or her employment, is reasonably required to be at a particular place at a particular time and there meets with an accident, although one which any other person then and there present would have met with irrespective of his or her employment, that accident is one "arising out of" the employment of the person so injured.
12. ___. The positional risk doctrine proceeds on the rationale that the particular source of injury is neutral because the nature of a known risk is associated with neither the employment nor the employee personally.
13. ___. Because the cause of an unexplained fall is unknown, the fall must be attributed to a neutral risk, i.e., one neither distinctly personal to a claimant nor associated with the claimant's employment.
14. **Workers' Compensation: Presumptions.** When the "in the course of" employment test is met in a purely unexplained-fall case, the injury will be presumed to "arise out of" the employment and is compensable within the meaning of Neb. Rev. Stat. § 48-101 (Reissue 1998).
15. **Workers' Compensation.** Unexplained-fall cases begin with a completely neutral origin of a mishap, while idiopathic-fall cases begin with an origin which is admit-

tedly personal and which therefore requires some affirmative employment contribution to offset the prima facie issue of personal origin.

16. ___. When there is at least some evidence of a possibility of a personal or idiopathic factor contributing to the fall, the fall is not properly categorized as a purely unexplained fall.
17. **Workers' Compensation: Case Overruled.** To the extent that *Cochran v. Bellevue Bridge Commission*, 174 Neb. 761, 119 N.W.2d 292 (1963), can be read to infer that purely unexplained-fall cases are not compensable in Nebraska, it is overruled.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded with directions.

Elizabeth A. Govaerts, of Vincent M. Powers & Associates, for appellant.

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

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

GERRARD, J.

## NATURE OF CASE

James Logsdon, the appellant, was injured at his workplace when he fell while walking during a morning break. The cause of Logsdon's fall is unknown. This case presents the question whether unexplained falls in the course of employment are compensable under the Nebraska Workers' Compensation Act.

## FACTUAL AND PROCEDURAL BACKGROUND

At the time of his accident, Logsdon had been employed by ISCO Company (ISCO), the appellee, for 14 years as a prototype machinist. On the morning of June 20, 1997, Logsdon was walking around the periphery of the ISCO building during his morning break. ISCO encouraged its employees to walk to keep them healthy and alert.

While Logsdon was walking, there were some people walking behind him with whom Logsdon was acquainted. Logsdon testified, "I turned around to talk to them; next thing I knew, I was in the ambulance. I don't even remember falling. It's not even in my memory." The record contains no other evidence indicating how or why Logsdon fell. Logsdon suffered a frac-

tured skull and associated complications. He has completely recovered from those injuries except for a degree of permanent hearing loss.

Logsdon filed a petition in the Workers' Compensation Court seeking a determination of benefits. The single judge found that Logsdon's injury was compensable and awarded him benefits. The review panel reversed the judgment of the single judge and ordered that Logsdon's petition be dismissed, determining, based upon this court's decision in *Cochran v. Bellevue Bridge Commission*, 174 Neb. 761, 119 N.W.2d 292 (1963), that unexplained falls were purportedly not compensable in Nebraska. Logsdon perfected this appeal, and we subsequently granted Logsdon's petition to bypass the Nebraska Court of Appeals.

## ASSIGNMENT OF ERROR

Logsdon assigns that the review panel erred in holding that injuries sustained in an unexplained fall occurring within the scope and course of employment were not compensable under the Nebraska Workers' Compensation Act.

## STANDARD OF REVIEW

[1-3] 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 did not support the order or award. *Ramsey v. State*, 259 Neb. 176, 609 N.W.2d 18 (2000); *Owen v. American Hydraulics*, 258 Neb. 881, 606 N.W.2d 470 (2000). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong. See, *Bottolfson v. Bag 'N Save*, 259 Neb. 124, 608 N.W.2d 171 (2000); *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 558 N.W.2d 564 (1997). An appellate court is obligated in workers' compensation cases to make its own deter-

minations as to questions of law. *Bottolfson v. Bag 'N Save, supra.*

## ANALYSIS

[4,5] 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. *Torres v. Aulick Leasing*, 258 Neb. 859, 606 N.W.2d 98 (2000). 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. *Owen v. American Hydraulics, supra*; *Frank v. A & L Insulation*, 256 Neb. 898, 594 N.W.2d 586 (1999).

[6,7] The two phrases "arising out of" and "in the course of" in § 48-101 are conjunctive; in order to recover, a claimant must establish by a preponderance of the evidence that both conditions exist. *Cox v. Fagen Inc.*, 249 Neb. 677, 545 N.W.2d 80 (1996). The phrase "arising out of," as used in § 48-101, describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope of the employee's job; the phrase "in the course of," as used in § 48-101, refers to the time, place, and circumstances surrounding the accident. *Cox v. Fagen Inc., supra.*

[8] There is no factual dispute in the instant case; the single judge found, and the parties agree, that the cause of Logsdon's fall is unexplained. Similarly, ISCO does not contest that Logsdon was "in the course of" his employment, within the meaning of § 48-101, at the time of his accident. Thus, the question for this court is whether an unexplained fall, in the course of employment, is "arising out of" the employment within the meaning of § 48-101. In making this determination, we note that the terms of the Nebraska Workers' Compensation Act are to be broadly construed to accomplish the beneficent purpose of the act. See *Miller v. E.M.C. Ins. Cos.*, 259 Neb. 433, 610 N.W.2d 398 (2000).

[9] All risks causing injury to an employee can be placed within three categories: (1) *employment related*—risks distinctly associated with the employment; (2) *personal*—risks personal to the claimant, e.g., idiopathic causes; and (3) *neutral*—a risk that

is neither distinctly associated with the employment nor personal to the claimant. See, *Monahan v. United States Check Book Co.*, 4 Neb. App. 227, 540 N.W.2d 380 (1995); 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 4.00 (2000). Harm that arises from risks distinctly associated with the employment is universally compensable. See *id.* Harm that can be attributed to personal or idiopathic causes is universally noncompensable. See *id.* It is within the neutral category that most controversy in modern compensation law occurs. 1 Larson & Larson, *supra*. In Nebraska, harm that arises from neutral risks (a risk having no particular employment or personal character) is generally compensable. See *Monahan v. United States Check Book Co., supra*, citing *Nippert v. Shinn Farm Constr. Co.*, 223 Neb. 236, 388 N.W.2d 820 (1986). See, also, *Nunn v. Texaco Trading & Transp.*, 3 Neb. App. 101, 523 N.W.2d 705 (1994).

The main issue presented here is whether an injury without an explanation is a compensable neutral injury. Courts have taken three approaches in addressing the "arising out of" element in unexplained-fall cases. One approach requires the worker to rule out idiopathic causes for the fall, and if he or she carries that burden, an inference arises that the fall arose out of the employment. See, e.g., *Phil A. Livesley Co. v. Russ*, 296 Or. 25, 672 P.2d 337 (1983).

A second approach places the burden on the employee to show a causal connection between the injury and the employment. This is the most difficult burden of causation for an employee to meet, and benefits will be denied where a causal connection is not established. See, e.g., *Brickson v. ILHR Department*, 40 Wis. 2d 694, 162 N.W.2d 600 (1968).

[10] A third approach, which appears to be the majority approach in unexplained-fall cases, employs the positional risk doctrine. See, e.g., *Circle K Store No. 1131 v. Indus. Com'n*, 165 Ariz. 91, 796 P.2d 893 (1990). Under this doctrine, an employee's injuries are compensable as long as employment duties put the employee in a position that the employee might not otherwise be in which exposes the employee to a risk, even though the risk is not greater than that of the general public. *Id.*

We have, in fact, adopted the positional risk doctrine in the context of injuries arising from neutral risks. In *Nippert v. Shinn*

*Farm Constr. Co., supra*, the plaintiff was injured when the construction site at which he was employed was struck by a tornado. In determining that the plaintiff's injuries were compensable, this court overruled *McGinn v. Douglas County Social Services Admin.*, 211 Neb. 72, 317 N.W.2d 764 (1982), and adopted the positional risk doctrine. See *Nippert v. Shinn Farm Constr. Co., supra*. Prior to *Nippert*, Nebraska courts used the "increased risk" test to determine when an injury arose out of the employment. See *McGinn v. Douglas County Social Services Admin., supra*. The "increased risk" test focuses on whether a claimant's work increased the risk of injury. It is a quantitative determination that asks whether the claimant was more exposed to the risk than was the general public. See *Crow v. The Americana Crop Hail Pool, Inc.*, 176 Neb. 260, 125 N.W.2d 691 (1964), *overruled, Nippert v. Shinn Farm Constr. Co., supra*.

[11] In rejecting the "increased risk" test, we reasoned:

> " '[W]hen one in the course of his [or her] employment is reasonably required to be at a particular place at a particular time and there meets with an accident, although one which any other person then and there present would have met with irrespective of his [or her] employment, that accident is one "arising out of" the employment of the person so injured.' "

*Nippert v. Shinn Farm Constr. Co.*, 223 Neb. 236, 238-39, 388 N.W.2d 820, 822 (1986). This but-for reasoning is the foundation of the positional risk doctrine. Under this doctrine, a claimant is not required to rule out idiopathic causes, i.e., preexisting infirmities. The positional risk doctrine has been adopted by many jurisdictions based on the principle that employees who are on the job and performing duties for their employers should be compensated for injuries occurring in the course thereof.

[12] The positional risk doctrine further proceeds on the rationale that the particular source of injury is neutral because the nature of a known risk is associated with neither the employment nor the employee personally. *Svehla v. Beverly Enterprises*, 5 Neb. App. 765, 567 N.W.2d 582 (1997). Similarly, a risk may be classified as neutral because the nature of the cause of harm may be unknown. 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 7.04[1][a]

(2000). Fault concepts have no bearing in this analysis. Professor Larson correctly observes that "where the neutral-risk concept has been accepted for other purposes, a lot of confusion, circumlocutions, and fictions could be avoided in the unexplained-fall cases by merely accepting the proposition that what is unexplained is neutral." 1 Larson & Larson, *supra*, § 7.04[1][c] at 7-21 to 7-22.

> The commonest example of [a neutral risk where the nature of the cause of harm is unknown] is the unexplained fall in the course of employment. If an employee falls while walking down the sidewalk or across a level factory floor for no discoverable reason, the injury resembles that from . . . positional risks in this respect: The particular injury would not have happened if the employee had not been engaged upon an employment errand at the time. In a pure unexplained-fall case, there is no way in which an award can be justified as a matter of causation theory except by a recognition that this but-for reasoning satisfies the "arising" requirement. In appraising the extent to which courts are willing to accept this general but-for theory, then, it is significant to note that most courts confronted with the unexplained-fall problem have seen fit to award compensation.

1 Larson & Larson, *supra*, § 7.04[1][a] at 7-15. See, e.g., *Circle K Store No. 1131 v. Indus. Com'n*, 165 Ariz. 91, 796 P.2d 893 (1990); *Waller v. Mayfield*, 37 Ohio St. 3d 118, 524 N.E.2d 458 (1988); *Moore v. Darling Store Fixtures*, 22 Ark. App. 21, 732 S.W.2d 496 (1987); *Taylor v. Twin City Club*, 260 N.C. 435, 132 S.E.2d 865 (1963).

Similarly, Professor Larson maintains "the only rule that is consistent with the positional-risk doctrine" is

> the rule that an unexplained fall, being attributable neither to the employment nor to the claimant personally, is a neutral risk. It is no answer to this to say that the burden is on the claimant to prove his [or her] case. He [or she] has proved his [or her] case when he [or she] proves an injury by accident in the course of employment from a neutral risk—as much so when the neutral risk is an unexplained event as when it is an arrow out of nowhere.

1 Larson & Larson, *supra*, § 7.04[1][b] at 7-20. We agree.

[13,14] As noted above, this court adopted the positional risk doctrine, and accepted the theory of neutral risks, in *Nippert v. Shinn Farm Constr. Co.*, 223 Neb. 236, 388 N.W.2d 820 (1986). We conclude that because the cause of an unexplained fall is unknown, the fall must be attributed to a neutral risk, i.e., one neither distinctly personal to a claimant nor associated with the claimant's employment. We reaffirm our prior holding that in the case of an injury arising from a neutral risk, the positional risk doctrine applies. Thus, it logically follows that if the "in the course of" employment test is met in a purely unexplained-fall case, the injury will be presumed to "arise out of" the employment. In the instant case, for example, Logsdon would not have been at the place of injury *but for* the duties of his employment. Consequently, a presumption arises that his injuries "arose out of" his employment, and this presumption was not rebutted by evidence of any idiopathic cause or other risk personal to the claimant.

In urging this court to reach a contrary conclusion, ISCO relies, as did the review panel, on *Cochran v. Bellevue Bridge Commission*, 174 Neb. 761, 119 N.W.2d 292 (1963). In that case, the plaintiff was the widow of an employee with a history of heart disease and dizzy spells. The plaintiff's husband was making a deposit at a local bank, in the course of employment, when he fell to the ground and fractured his skull. *Id.* The autopsy revealed that the skull fracture was the cause of death. *Id.* In affirming the trial court's denial of benefits, this court stated:

> This record discloses no evidence on behalf of the plaintiff that the cause of the fall was industry-related. While the plaintiff's evidence attempted to establish an unexplained fall, that would not be sufficient under the law in this jurisdiction. The record shows that [the plaintiff's husband] during his lifetime did suffer from a type of heart disease as heretofore mentioned, and in the absence of any other explanation for the fall, [the plaintiff's husband] could have fainted or blacked out, and fallen and hit his head on the cement sidewalk. The same thing could have happened at home or any other place he happened to be at the time he sustained an attack. There was no causal con-

> nection between the fall and the employment in which [the plaintiff's husband] was engaged in behalf of [his employer].

*Id.* at 770, 119 N.W.2d at 298.

ISCO relies on the above-quoted language for the proposition that unexplained falls are noncompensable. An examination of *Cochran v. Bellevue Bridge Commission, supra*, however, reveals that this court did not use an unexplained-fall analysis, but, instead, the court reached its conclusion by relying on evidence of a possible idiopathic origin to the fall.

[15,16] Professor Larson is quick to distinguish between unexplained falls and "idiopathic" falls. Unexplained-fall cases begin with a completely neutral origin of a mishap, while idiopathic-fall cases begin with an origin which is admittedly personal and which therefore requires some affirmative employment contribution to offset the prima facie issue of personal origin. *Svehla v. Beverly Enterprises*, 5 Neb. App. 765, 567 N.W.2d 582 (1997). See, *Chicago Tribune Co. v. Industrial Com.*, 136 Ill. App. 3d 260, 483 N.E.2d 327, 91 Ill. Dec. 45 (1985) (explaining confusion between unexplained-fall and idiopathic-fall cases); 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 7.04[1][b] (2000). See, also, e.g., *Waller v. Mayfield*, 37 Ohio St. 3d 118, 524 N.E.2d 458 (1988); *Moore v. Darling Store Fixtures*, 22 Ark. App. 21, 732 S.W.2d 496 (1987) (distinguishing between unexplained and idiopathic falls). When there is at least some evidence of a possibility of a personal or idiopathic factor contributing to the fall, the fall is not properly categorized as a purely unexplained fall. *Svehla v. Beverly Enterprises, supra*. See, also, 1 Larson & Larson, *supra*.

[17] *Cochran v. Bellevue Bridge Commission, supra*, is distinguishable from the instant case in that, in *Cochran*, there was evidence of an idiopathic factor causing or contributing to the fall. Therefore, *Cochran* was not a purely unexplained-fall case and does not support the construction placed upon it by ISCO and by the review panel. Compare *Scott v. Young Men's Christian Assn.*, 195 Neb. 746, 240 N.W.2d 587 (1976) (award of benefits affirmed where evidence of idiopathic condition was insufficient to support inference that condition caused otherwise

unexplained fall). Nonetheless, to the extent that *Cochran v. Bellevue Bridge Commission*, 174 Neb. 761, 119 N.W.2d 292 (1963), can be read to infer that purely unexplained-fall cases are not compensable in Nebraska, it is overruled.

In the instant case, we are presented with a purely unexplained fall, which can be attributed only to a neutral risk. Consistent with our adoption of the positional risk doctrine, we conclude that Logsdon's injuries resulted from a neutral risk and that his injuries are presumed to "arise out of" his employment at ISCO. This presumption was not rebutted by evidence of any idiopathic cause or other risk personal to Logsdon. Therefore, Logsdon's injuries are compensable under the Nebraska Workers' Compensation Act. There was not sufficient evidence in the record to warrant the judgment of reversal by the review panel. See Neb. Rev. Stat. § 48-185 (Reissue 1998). To the contrary, the single judge's award was warranted by the evidence, and the review panel erred in reversing that judgment.

## CONCLUSION

Logsdon suffered an unexplained fall in the course of his employment which was compensable under the Nebraska Workers' Compensation Act. The judgment of the Workers' Compensation Court review panel is reversed, and the cause is remanded with directions to affirm the award entered by the single judge and to determine any statutory interest and fees to which Logsdon may be entitled.

REVERSED AND REMANDED WITH DIRECTIONS.

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## MORRISON ENTERPRISES, APPELLANT, V. AETNA CASUALTY AND SURETY COMPANY ET AL., APPELLEES.

619 N.W.2d 432

Filed November 3, 2000. No. S-99-621.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom

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

3. ___: ___. 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: 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.
5. ___: ___. A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.
6. **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.
7. **Summary Judgment: Records: Appeal and Error.** Affidavits, depositions, and other evidence considered at a hearing on a motion for summary judgment must be preserved in a bill of exceptions filed in the trial court before such evidence can be considered during appellate review of the motion.
8. **Records: Appeal and Error.** Rulings of the trial court which do not appear in the record are not considered on appeal.

Appeal from the District Court for Adams County: STEPHEN ILLINGWORTH, Judge. Reversed and remanded.

William T. Session and Darwin E. Johnson, of The Session Law Firm, and Gary J. Nedved, of Keating, O'Gara, Davis & Nedved, P.C., for appellant.

Robert T. Grimit and Darin J. Lang, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Union Insurance Company.

WRIGHT, GERRARD, STEPHAN, and MCCORMACK, JJ., and HANNON, Judge.

STEPHAN, J.

Morrison Enterprises (Morrison) appeals from an order of the district court for Adams County granting summary judgment in favor of Union Insurance Company (Union). We conclude that the entry of summary judgment is not supported by the record and therefore reverse, and remand.

## BACKGROUND

On March 21, 1994, Morrison filed this action against Union and several other insurance carriers seeking declaratory relief,

damages for breach of contract, and attorney fees pursuant to Neb. Rev. Stat. § 44-359 (Reissue 1998). Morrison sought a declaration of rights and obligations under multiple insurance policies issued to Morrison and Morrison-Quirk Grain Corporation (Morrison-Quirk), its predecessor in interest, from 1954 through 1980. Morrison alleged that the insurers were obligated to indemnify it for property damage caused by the release or threatened release of hazardous substances occurring at a grain elevator and grain storage facility in Hastings, Nebraska, which was owned and operated by Morrison-Quirk from 1955 through 1975. Union filed an answer in which it denied most of Morrison's material allegations and asserted several affirmative defenses.

Union filed a motion for summary judgment on December 1, 1994, which was overruled by the district court on January 24, 1995, based upon a finding that "material questions of fact do exist." Union filed another motion for summary judgment on March 10, 1998, accompanied by a notice of hearing to be held on April 7. On March 10, Union also filed a document entitled "Defendant Union Insurance Company's Designation of Evidence in Support of Motion for Summary Judgment" listing eight specifically described exhibits and, as item No. 9, "All affidavits, depositions and other exhibits designated by Aetna (The Travelers Casualty & Surety Company) in support of its separate Motion for Summary Judgment."

The record on appeal consists of the following: a transcript; a bill of exceptions consisting of two boxes containing documents bearing exhibits 1 through 9, 11 through 48, 50 through 63, and 65 through 190; and a supplemental bill of exceptions consisting of proceedings transcribed before the district court on April 7, 1998. The index to the supplemental bill of exceptions states "Exhibits 1 through 10 were marked at previous hearings," but those exhibits are not specifically described in the index and neither the bill of exceptions nor the supplemental bill of exceptions includes a verbatim record of any "previous hearings" at which such exhibits were marked, offered, or received.

Counsel for all parties appeared at the April 7, 1998, hearing. The record includes references to pending motions for summary judgment in addition to that filed by Union, but such motions do

not appear in the transcript. During the hearing, counsel for one of the parties noted his understanding that "there have been no exhibits offered at this point." After discussing another subject, the judge invited counsel to "[g]o ahead and offer whatever you want marked and received and the reporter can mark them. If there is no objection, we will receive them all." At that point, the record reflects "Exhibits 11 through 63 marked for identification," but it is unclear which party requested that this be done. The discussion on the record then shifted to possible trial dates, after which one of the attorneys inquired, "One other thing. Were we going to make a record on our exhibits or is that something . . . ." The hearing concluded with the following colloquy:

> THE COURT: I will reserve receiving any of [the exhibits] until you have an opportunity to object. If they are not objected to we will receive them all.
>
> [Counsel for Morrison]: If we have objections we are to notify you by letter and set a telephone hearing, your Honor?
>
> [Counsel for a codefendant]: I am not sure the record reflects my Affidavit was marked as an exhibit or submitted to the Court, filed, I believe, on March 7, 1998, captioned Affidavit of Robert V. P. Waterman, Jr. in support of supplemental motion for summary judgment. It has been marked as Exhibit 57 and this is in the court file. Additionally, at the Court's request we will be submitting the deposition of Richard Bornemeier as an exhibit which will be marked as Exhibit 61. Thank you, Your Honor.
>
> [Counsel for other codefendants]: [Codefendants] tender now their exhibits numbered 11 through 56, Your Honor, and I understand counsel for Morrison Enterprises will have an opportunity to look at those and doesn't have an objection.
>
> Just so the Court knows, on behalf of those two companies we would object and would have an objection to what I believe is going to be Morrison Enterprises Exhibit 62, (sic) which is Anna Stehlik's Affidavit which is dated today, April 7, 1998. It was not filed with us in advance of the hearing or provided to us in advance of the summary judgment hearing and we first heard about it and first had

> a chance to even peruse it just a few minutes ago, Your Honor.
>
> THE COURT: I'll give you an opportunity to peruse it and you can register your specific objections when we have this trial.
>
> [Counsel for Morrison]: Just for the record it - - -
>
> [Counsel for other codefendants]: The number was misstated. I apologize. 63, the Affidavit dated April 7, 1998.
>
> [Counsel for a codefendant]: We join in [counsel]'s objection and will also review it and file any appropriate objections at that time.
>
> THE COURT: Noted. All right, thank you, gentlemen.
>
> (End of proceedings)

The case was then reassigned to another district judge after the hearing but before a ruling on Union's motion for summary judgment. On December 4, 1998, the district court entered an order which included that ruling as well as rulings on other motions. That order recites "[t]he Court has reviewed the exhibits, Motions and briefs of the parties." With respect to Union's motion for summary judgment, the court stated:

> The Court is persuaded by Union's argument that Liability may not attach to an excess or umbrella policy until the limits of the underlying policy or policies have been reached. It is the payment of the limits of the underlying policy or policies which trigger liability under an excess policy. [Citation omitted.] At this time Travelers has not paid the limits of its policies. The trial in this case will determine what if any amount must be paid on the primary policies.

After concluding that the interests of judicial economy would not be served by requiring Union to remain a party in the litigation, the district court sustained Union's motion for summary judgment and dismissed Morrison's claim against Union without prejudice. However, the district court did not direct entry of final judgment pursuant to Neb. Rev. Stat. § 25-705(6) (Cum. Supp. 1998). During the ensuing trial, Morrison reached a settlement agreement with the remaining defendants, and the district court dismissed the action pursuant to stipulation on May 3, 1999. Morrison then perfected this appeal from the order granting Union's motion for summary judgment.

## ASSIGNMENTS OF ERROR

Morrison asserts, summarized and restated, that the district court erred in granting Union's motion for summary judgment because there was no dispute of fact that the liability limits of the underlying insurance policies would be exhausted. Further, Morrison maintains that the district court erred in declaring that Nebraska law requires that before an insured can be indemnified under an excess liability insurance policy, it must first exhaust all underlying primary insurance liability limits.

## STANDARD OF REVIEW

[1-3] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Sack Bros. v. Great Plains Co-op, ante* p. 292, 616 N.W.2d 796 (2000). 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. *Sack Bros. v. Tri-Valley Co-op, ante* p. 312, 616 N.W.2d 786 (2000); *Sack Bros. v. Great Plains Co-op, supra.* 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. *Sack Bros. v. Great Plains Co-op, supra.*

## ANALYSIS

[4-6] Well-established principles govern the shifting of the evidentiary burden with respect to summary judgment. 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. *City State Bank v. Holstine, ante* p. 578, 618 N.W.2d 704 (2000); *Nebraska Popcorn v. Wing*, 258 Neb. 60, 602 N.W.2d 18 (1999). A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial. *Id.* 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*; *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999).

[7,8] Affidavits, depositions, and other evidence considered at a hearing on a motion for summary judgment must be preserved in a bill of exceptions filed in the trial court before such evidence can be considered during appellate review of the motion. *Durkan v. Vaughn*, 259 Neb. 288, 609 N.W.2d 358 (2000); *Sindelar v. Hanel Oil, Inc.*, 254 Neb. 975, 581 N.W.2d 405 (1998). Rulings of the trial court which do not appear in the record are not considered on appeal. *Durkan v. Vaughn, supra*; *Dairyland Power Co-op v. State Bd. of Equal.*, 238 Neb. 696, 472 N.W.2d 363 (1991).

In *Durkan*, the appellant contended that the trial court erred in entering summary judgment against him because an affidavit which he had offered demonstrated the existence of a genuine issue of material fact. We noted that although the record reflected that the affidavit was offered, it did not appear in the bill of exceptions, and the record was silent regarding whether it was actually received and considered by the trial court. For these reasons, we did not consider the affidavit in our review of the summary judgment.

In this case, some, but not all, of the documents contained in the bill of exceptions were marked as exhibits during the summary judgment hearing, but none were formally and specifically offered by Union in support of its motion for summary judgment or by Morrison in opposition thereto. The judge who presided at the hearing specifically reserved ruling on the exhibits which were marked for identification, and the bill of exceptions reflects no subsequent proceedings at which any exhibits were received with respect to Union's motion. Thus, while the judge to whom the case was subsequently reassigned recited in his order that he had reviewed "the exhibits," the record is silent as to which exhibits were actually received and considered by the district court. For these reasons, we do not consider any of the exhibits on appeal, including the insurance policies which are the subject of this action.

The party moving for summary judgment has the burden of demonstrating that there is no genuine issue of material fact. This means that the moving party must produce enough evidence to demonstrate his or her entitlement to a judgment if the evidence remains uncontroverted. *City State Bank v. Holstine, ante* p. 578, 618 N.W.2d 704 (2000). Because the record does not reflect that any exhibit was received and considered by the district court, our review is limited to the pleadings. Union, in its answer, denied virtually all of the material allegations of the petition except those relating to its corporate existence and that of a codefendant, the fact that it "issued certain policies to Morrison-Quirk" which "speak for themselves," and the fact that it did not file an action for declaratory relief with respect to Morrison's claims. The insurance policies at issue are not appended to the pleadings, nor is the language of the policies admitted therein. The pleadings, when viewed in a light most favorable to Morrison, do not demonstrate an absence of genuine issues of material fact.

## CONCLUSION

Based upon the record before us, we conclude that Union did not meet its burden of producing evidence that, if uncontroverted, would have entitled it to judgment as a matter of law, and the district court therefore erred in granting its motion for summary judgment. The judgment is therefore reversed, and the cause is remanded to the district court.

REVERSED AND REMANDED.

HENDRY, C.J., and CONNOLLY and MILLER-LERMAN, JJ., not participating.

# JANE H. PROCHASKA, APPELLANT, V. DOUGLAS COUNTY, NEBRASKA, A MUNICIPAL CORPORATION, AND STATE OF NEBRASKA, APPELLEES.

619 N.W.2d 437

Filed November 3, 2000. No. S-99-759.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **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.
3. **Summary Judgment.** Summary judgment is proper where the facts are uncontroverted and the moving party is entitled to judgment as a matter of law.
4. **Invitor-Invitee.** A business possessor's duty to use reasonable care for invitees on the premises is a nondelegable duty.
5. ___. A business possessor of real estate cannot shift the duty of reasonable care for the premises to an agent or independent contractor employed to maintain all or part of the premises under the possessor's control.
6. **Negligence: Contractors and Subcontractors: Liability.** Liability for breach of a nondelegable duty is an exception to the general rule that one who employs an independent contractor is not liable for the independent contractor's negligence.
7. **Actions: Pleadings: Parties: Notice: Limitations of Actions.** The relation of an amended pleading back to the original filing is dependent upon four factors, all of which must be satisfied: (1) The basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.
8. **Pleadings: Parties: Notice: Limitations of Actions.** The keystone determining whether a change in party defendant relates back to the original pleading is whether the substituted party had notice of the suit within the period of limitations.

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

Gregory R. Coffey, of Friedman Law Offices, for appellant.

James S. Jansen, Douglas County Attorney, Bernard J. Monbouquette, and, on brief, Karl von Oldenburg, for appellee Douglas County.

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

WRIGHT, J.

## NATURE OF CASE

Jane H. Prochaska brought this action against Douglas County, Nebraska, seeking damages for an injury she allegedly sustained when she slipped and fell in the rotunda of the Hall of Justice in Omaha. The trial court entered summary judgment in favor of Douglas County, finding that the Omaha-Douglas Public Building Commission (Commission) was responsible for maintaining the rotunda in the Hall of Justice. The court found that the duty to maintain the building was specifically designated under a lease agreement and was by statutory mandate within the province of the Commission. The court denied Prochaska's oral request for leave to amend her petition by adding FBG Service Corporation as a party defendant and dismissed Prochaska's petition. The court subsequently denied Prochaska's motion for new trial and her oral motion to substitute the Commission as a party defendant in place of Douglas County. Prochaska timely appealed.

## SCOPE OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *O'Connor v. Kaufman, ante* p. 219, 616 N.W.2d 301 (2000).

[2] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Smith v. Paoli Popcorn Co., ante* p. 460, 618 N.W.2d 452 (2000).

## FACTS

On April 21, 1997, Prochaska slipped and fell in the rotunda of the Hall of Justice in Omaha. Prochaska subsequently served notice on Douglas County of a claim under the Political Subdivisions Tort Claims Act. On January 22, 1999, she notified the board of commissioners that since no action had been taken on her claim, she was withdrawing the claim from consideration.

Prochaska then filed suit in Douglas County District Court, alleging that the injury she sustained was due to the negligence

of Douglas County in failing to properly warn of a dangerous condition and in failing to properly supervise, maintain, safeguard, and inspect the rotunda floor to prevent members of the public from slipping on its surface. The State of Nebraska was joined for subrogation purposes only.

Douglas County generally denied the allegations of the petition except for the fact that Prochaska was acting in her official capacity as a county judge when the injury occurred. Douglas County further alleged that it was not in charge of or responsible for maintenance of the Hall of Justice.

On April 7, 1999, Douglas County moved for summary judgment. At the hearing on the motion, Douglas County offered several exhibits that are summarized as follows: Exhibit 1 is a lease agreement dated May 9, 1972, between the Commission as lessor and Douglas County as lessee. The lease provided that the Commission would operate and maintain the Hall of Justice for use by both Douglas County and the city of Omaha. Exhibit 2 is a similar lease agreement between the Commission and the city of Omaha. Exhibit 3 is a fifth supplemental agreement to the leases described in exhibits 1 and 2. This agreement, dated August 23, 1995, allocates responsibility for Hall of Justice security to the Commission. Exhibit 4 is a contract dated September 23, 1996, for custodial services between the Commission and FBG Service Corporation, which contract provides that FBG Service Corporation has the obligation to clean and maintain all floors in the Hall of Justice, including the hallways and rotunda. Exhibit 6 is the affidavit of Eric Pehrson, the administrator of the Commission, which recites that the Commission administers and maintains the Hall of Justice; that the rotunda of the Hall of Justice is under the control of the Commission; that as of April 21, 1997, Floor Brite Services had been hired by the Commission to maintain the waxing and polishing of the rotunda floor; and that the Commission is responsible for the safe condition of the floor.

In opposition, Prochaska offered two exhibits, which in summary provided as follows: Exhibit 7, Prochaska's affidavit, recites that her office is located in a building that is commonly referred to as the "Douglas County Hall of Justice" and that the Hall of Justice houses at least 12 "Douglas County" entities

(probation, conciliation court, court administrator, judges, sheriff, county attorney, public defender, election commissioner, law library, et cetera). The affidavit further states that there is no office in the Hall of Justice that is designated as the "Omaha-Douglas Public Building Commission" and that the Hall of Justice directory contains no such listing. Exhibit 8 is Douglas County's answers to interrogatories and requests for production.

The trial court sustained Douglas County's motion for summary judgment, finding that the duty to maintain the Hall of Justice was within the province of the Commission. The court also denied Prochaska's oral request for leave to amend her petition by adding FBG Service Corporation as a party defendant.

Prochaska subsequently filed a motion to reconsider or, in the alternative, for new trial. At the hearing on this motion, Prochaska's attorney orally requested permission to substitute the Commission as the party defendant. The trial court rejected Prochaska's motion to substitute parties and overruled her motion to reconsider. Prochaska timely appealed.

## ASSIGNMENTS OF ERROR

Prochaska asserts that the trial court erred (1) in granting summary judgment, (2) in finding that Douglas County had no premises liability and owed no duty to her with regard to a personal injury arising from a condition within the Hall of Justice, and (3) in refusing to grant her motion to substitute the Commission as the party defendant.

## ANALYSIS

[3] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *O'Connor v. Kaufman, ante* p. 219, 616 N.W.2d 301 (2000). Summary judgment is proper where the facts are uncontroverted and the moving party is entitled to judgment as a matter of law. *Alegent Health Bergan Mercy Med. Ctr. v. Haworth, ante* p. 63, 615 N.W.2d 460 (2000).

The first issue is whether there is any legal basis to impose liability upon Douglas County. Prochaska argues that Douglas

County, as the owner and occupant of the Hall of Justice, is a proper party and owes a duty of reasonable care to nontrespassers, which duty is nondelegable.

Prochaska relies on *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992). In *Anderson*, a retail store customer was injured when an overhead light fixture in the store fell and struck her. Anderson sued Service Merchandise Company, Inc. (Service Merchandise), which had leased the premises from Jewel Companies, Inc. Service Merchandise argued that it lacked exclusive control of the premises because it had hired Sylvania Lighting Services Corporation (Sylvania), an independent contractor, to take care of the overhead light fixtures. After Sylvania had been added as a codefendant, the trial court granted the defendants' motions for summary judgment. We reversed the summary judgment in favor of Service Merchandise and concluded that Service Merchandise was in exclusive control of the premises. Because Service Merchandise possessed and therefore controlled the site of the accident, it had a nondelegable duty to exercise reasonable care for the protection of the plaintiff, a business invitee.

Prochaska argues that *Anderson* is analogous because Douglas County possesses the Hall of Justice and therefore has a nondelegable duty of reasonable care in maintaining the premises for business invitees. Prochaska claims Douglas County was in possession or control of the rotunda because her office is located in a building that is commonly referred to as the "Douglas County Hall of Justice," which houses at least 12 "Douglas County" entities, and because there is no office located in the Hall of Justice that is designated as the "Omaha-Douglas Public Building Commission."

[4-6] We first consider whether Douglas County could delegate to the Commission the duty of reasonable care with regard to maintenance of the building. A business possessor's duty to use reasonable care for invitees on the premises is a nondelegable duty. *Id.* A business possessor of real estate cannot shift the duty of reasonable care for the premises to an agent or independent contractor employed to maintain all or part of the premises under the possessor's control. *Id.* Liability for breach of a nondelegable duty is an exception to the general rule that

one who employs an independent contractor is not liable for the independent contractor's negligence. *Id.*

In granting summary judgment in favor of Douglas County, the trial court relied upon Neb. Rev. Stat. § 13-1301 et seq. (Reissue 1997). Section 13-1301 states that the purpose of these sections is "to provide a means whereby buildings, structures, and facilities can be acquired, constructed, remodeled, or renovated and financed for use jointly by such cities and the respective counties in which they are located." Pursuant to § 13-1304:

> Any commission established . . . shall have power to:
> (1) Sue and be sued;
> . . . .
> (4) Acquire in the name of the city and county, by gift, grant, bequest, purchase, or condemnation, real property . . . ;
> . . . .
> (11) Make all other contracts, leases, and instruments necessary or convenient to the carrying out of the corporate purposes or powers of the commission.

Section 13-1311 states:

> [T]he city and the county may each:
> . . . .
> (3) Convey or transfer to the commission any property . . . for use in connection with a project . . . . [T]he title thereto shall remain in the city or the county . . . but the commission shall have the use and occupancy thereof so long as its corporate existence continues.

An agreement between Douglas County, the city of Omaha, and the Commission allocated responsibility for the security of the Hall of Justice to the Commission. By contract, the Commission hired FBG Service Corporation to clean and maintain the floors in the Hall of Justice, including the hallways and rotunda. The affidavit from the administrator of the Commission stated that the Commission administered and maintained the Hall of Justice; that the Hall of Justice, including the rotunda, was under the control of the Commission; and that on or about April 21, 1997, the Commission was responsible for the rotunda and the safe condition of its floor. Based on the above-mentioned statutes and the evidence presented, the trial court

concluded that there was no legal basis for liability to Prochaska on the part of Douglas County. The court determined that maintenance of the premises was the legal duty of the Commission at the time of Prochaska's injury.

Our determination of whether Douglas County was a business possessor of the Hall of Justice is a question of law. On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Smith v. Paoli Popcorn Co., ante* p. 460, 618 N.W.2d 452 (2000).

Section 13-1311(3) permitted Douglas County to convey to the Commission the use and occupancy of the Hall of Justice for so long as the Commission's corporate existence continued. Section 13-1304(4) permitted the Commission to acquire in the name of the city and the county real property for its corporate purposes and use. The record establishes that maintenance of the Hall of Justice, including the rotunda, remains the responsibility of the Commission and not Douglas County. Thus, we conclude that Douglas County was not a business possessor of the Hall of Justice and that it owed no duty to Prochaska.

We next consider Prochaska's argument that under the relation-back doctrine, if the Commission was the proper party defendant, she should have been permitted to substitute the Commission as a defendant. Prochaska claims the trial court erred by not allowing her to so amend her petition. In support, she relies upon *Zyburo v. Board of Education*, 239 Neb. 162, 474 N.W.2d 671 (1991), and *New Light Co. v. Wells Fargo Alarm Servs.*, 252 Neb. 958, 567 N.W.2d 777 (1997).

In *Zyburo*, a school guidance counselor sought judicial review of an administrative decision that discharged him from his permanent employment. He filed a petition against the board of education within 30 days after the board's order discharging him, but his amended petition against the school district was not filed within 30 days. Zyburo argued that the substitution of parties did not render the amended petition untimely, since the original petition naming the board of education gave the school district notice of the suit within the 30-day limitations period.

[7,8] We stated that relation back is dependent upon four factors, all of which must be satisfied: (1) The basic claim must

have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period. *Zyburo v. Board of Education, supra.* The keystone determining whether a change in party defendant relates back to the original pleading is whether the substituted party had notice of the suit within the period of limitations. *Id.*

In denying Prochaska's motion to substitute the Commission, the trial court found that neither the second nor the third factor was present in the case. The court found that Douglas County was not an alter ego of the Commission. Although the court noted that some members of the governing board of the Commission were also members of the governing board of Douglas County, the court concluded it was beyond the "wildest imagination" those members would immediately recognize that the litigation naming Douglas County as a defendant was in error and that the Commission should have been named as the defendant.

Prochaska asserts that the trial court should have permitted the substitution of the Commission as a party defendant because Douglas County and the Commission are inextricably intertwined. We disagree. The Commission is a separate political subdivision. Although there may be mutual members on the governing boards of both entities, it is not reasonable to conclude either that such members would recognize that litigation naming Douglas County as the defendant should have been brought against the Commission or that the Commission was the alter ego of Douglas County.

*Zyburo* is factually distinguishable because there we concluded that for purposes of notice, the board of education and the school district were one and the same. Service upon the board of education gave the school district notice within the limitations period that the district was a party to the action, and the district was not prejudiced by the substitution of its name for that of the board.

Prochaska's reliance on *New Light Co. v. Wells Fargo Alarm Servs.*, 252 Neb. 958, 567 N.W.2d 777 (1997), is also misplaced. In *New Light Co.*, we allowed the substitution of a party plaintiff as the real party in interest. That factual situation is completely different from one allowing the substitution of a party defendant which has not been served or which did not have notice of the action within the time required by law.

Thus, we agree with the trial court's refusal to permit Prochaska to substitute the Commission as a party defendant. Douglas County and the Commission are separate entities, neither of which is the alter ego of the other. Allowing Prochaska to substitute the Commission for Douglas County would prejudice the Commission in its defense of the litigation.

## CONCLUSION

For the reasons set forth herein, the judgment of the trial court is affirmed.

AFFIRMED.

HENDRY, C.J., not participating.

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## ENTERPRISE PARTNERS, A NEBRASKA GENERAL PARTNERSHIP, APPELLANT, V. THE COUNTY OF PERKINS, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

619 N.W.2d 464

Filed November 3, 2000. No. S-99-1096.

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. **Political Subdivisions: Counties.** A county is a political subdivision of the state having subordinate powers of sovereignty conferred by the Legislature.
3. **Political Subdivisions: Legislature.** A political subdivision has only that power delegated to it by the Legislature; a grant of power to a political subdivision is to be strictly construed.
4. **Zoning: Words and Phrases.** Zoning is the process that a community employs to legally control the use which may be made of property and the physical configuration of development upon tracts of land located within its jurisdiction.
5. **Zoning: Comprehensive Development Plans.** Zoning regulations are invalid where a county board adopts zoning regulations before a comprehensive development plan is adopted.

Appeal from the District Court for Perkins County: JOHN P. MURPHY, Judge. Reversed.

Richard A. Dudden, of Padley & Dudden, P.C., for appellant.

Richard H. Roberts, Perkins County Attorney, for appellee.

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

MCCORMACK, J.

## NATURE OF CASE

Enterprise Partners (Enterprise) brought a declaratory judgment action seeking the declaration of the trial court as to whether two ordinances passed by the Perkins County Board of Commissioners (the Board) were valid. These ordinances attempt to locally regulate livestock confinement facilities by regulating odor and flies emanating from the facilities (Ordinance 98-1) and by preventing the escape of animal waste onto land within the county (Ordinance 98-2). The trial court found generally for the Board and found that both ordinances were valid and enforceable. Enterprise appeals this ruling. This court removed this case from the Nebraska Court of Appeals under the power to regulate the caseloads of this court and the Court of Appeals.

## BACKGROUND

In April 1998, the Board became aware of proposals to build hog confinement facilities in Perkins County. At subsequent meetings of the Board, individuals and public groups expressed concerns about the effect these types of facilities would have on the environment, on the health of the citizens of Perkins County, and the need to prevent these facilities from being built. The Board sent a letter to the Nebraska Department of Environmental Quality (DEQ) voicing its concerns and going on record as opposing the approval of a permit to allow Enterprise to construct a hog confinement facility in Perkins County.

DEQ responded in a letter addressing the Board's concerns and explaining evaluation procedures and the requirements that needed to be met in order for a permit to be issued. DEQ also

pointed out that two of the Board's concerns could not be addressed by DEQ as it did not have the authority to regulate those issues. These issues were the odor and insects and the impact on county roads. DEQ stated that "[t]he Legislature has given counties the authority to implement land use planning and adopt zoning regulations which could govern the location of livestock facilities. Odors, dust and insects are considered to be nuisances and are not regulated by the DEQ." With regard to the impact on county roads, DEQ stated that "[t]his is not an issue which DEQ can address, but as a local issue it may possibly be addressed through load limit restrictions."

Proposed ordinances were submitted to the Board, and discussion was held on December 21, 1998. Ordinance 98-1 attempts to locally regulate livestock confinement facilities by regulating odor emanating from the facility by requiring that certain parts of the facility be covered. By controlling odor, other problems with flies would be avoided. Ordinance 98-2 requires large-scale livestock operations to demonstrate that no livestock waste, liquid or solid, would be carried or washed onto or into county roads, ditches, or properties adjacent to the facility during or following a 25-year storm. This demonstration must also be updated on a yearly basis through inspections by the county. The Board passed both ordinances and increased the civil penalty contained in them from $200 to $5,000 per day for each violation.

Enterprise filed a petition for declaratory judgment arguing that the ordinances are zoning ordinances and were passed in violation of Neb. Rev. Stat. § 23-114.03 (Reissue 1997) which requires the Board to have a county comprehensive development plan before the adoption of zoning regulations. The Board stipulated that it had not adopted a comprehensive zoning plan pursuant to § 23-114.03. Enterprise also asserted that Ordinances 98-1 and 98-2 contain environmental requirements that are specifically reserved for the state. Enterprise also argued that these ordinances deprived it of property without due process of law and that the Board lacked the authority to impose civil penalties.

The trial court ruled that the ordinances were not zoning ordinances but fell within the exercise of police powers granted to

the counties by the Legislature, that no preemption or conflict existed between the ordinances and state statutes, and that the ordinances were not arbitrary or unreasonable and did not violate the constitution. The trial court found generally for the Board and found that both ordinances were valid and enforceable.

## ASSIGNMENTS OF ERROR

Enterprise assigns as error the trial court's finding that (1) Ordinances 98-1 and 98-2 fall within the exercise of police power granted to the counties by the Legislature, (2) the ordinances were not zoning ordinances, (3) the Board did not have to comply with § 23-114.03 when it adopted the ordinances and that they are valid, (4) Neb. Rev. Stat. § 54-2401 et seq. (Reissue 1998) and Neb. Rev. Stat. § 81-1501 et seq. (Reissue 1994 & Cum. Supp. 1996) did not preempt the field in the areas covered by the ordinances, (5) the ordinances were additional to and complimentary to or in aid of the furtherance of § 54-2401 et seq. and § 81-1501 et seq., and (6) the ordinances were not arbitrary and vague.

## 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. *Dunn v. Daub*, 259 Neb. 559, 611 N.W.2d 97 (2000); *Callahan v. Washington Nat. Ins. Co.*, 259 Neb. 145, 608 N.W.2d 592 (2000).

## ANALYSIS

Enterprise assigns that the trial court erred in not finding that Ordinances 98-1 and 98-2 were zoning ordinances. Enterprise asserts that the ordinances are zoning ordinances and were passed by the Board in violation of § 23-114.03. Section 23-114.03 provides that "[z]oning regulations shall be adopted or amended by the county board only after the adoption of the county comprehensive development plan by the county board . . . ." Both Enterprise and the Board stipulated that "Perkins County, Nebraska, has not adopted a comprehensive zoning plan pursuant to Neb. Rev. Stat. §23-114, et. seq."

Therefore, Enterprise concludes that Ordinances 98-1 and 98-2 are invalid because the Board does not have a comprehensive development plan. We agree.

[2,3] A county is a political subdivision of the state having subordinate powers of sovereignty conferred by the Legislature. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994). A political subdivision has only that power delegated to it by the Legislature; a grant of power to a political subdivision is to be strictly construed. *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996).

Counties have the statutory authority to regulate the use of lands within their jurisdiction to promote the public health, safety, and welfare pursuant to § 23-114.03 and Neb. Rev. Stat. § 23-174.10 (Reissue 1997). Section 23-114.03 states:

> Zoning regulations shall be adopted or amended by the county board only after the adoption of the county comprehensive development plan by the county board and the receipt of the planning commission's specific recommendations. Such zoning regulations shall be consistent with the comprehensive development plan and designed for the purpose of promoting the health, safety, morals, convenience, order, prosperity, and welfare of the present and future inhabitants of Nebraska, including, among others, such specific purposes as:
>
> (1) Developing both urban and nonurban areas;
>
> (2) Lessening congestion in the streets or roads;
>
> (3) Reducing the waste of excessive amounts of roads;
>
> (4) Securing safety from fire and other dangers;
>
> (5) Lessening or avoiding the hazards to persons and damage to property resulting from the accumulation or runoff of storm or flood waters;
>
> (6) Providing adequate light and air;
>
> (7) Preventing excessive concentration of population and excessive and wasteful scattering of population or settlement;
>
> (8) Promoting such distribution of population, such classification of land uses, and such distribution of land development as will assure adequate provisions for transportation, water flowage, water supply, drainage, sanita-

tion, recreation, soil fertility, food supply, and other public requirements;

(9) Protecting the tax base;

(10) Protecting property against blight and depreciation;

(11) Securing economy in governmental expenditures;

(12) Fostering the state's agriculture, recreation, and other industries;

(13) Encouraging the most appropriate use of land in the county; and

(14) Preserving, protecting, and enhancing historic buildings, places, and districts.

Within the area of jurisdiction and powers established by section 23-114, the county board may divide the county into districts of such number, shape, and area as may be best suited to carry out the purposes of this section and regulate, restrict, or prohibit the erection, construction, reconstruction, alteration, or use of nonfarm buildings or structures and the use, conditions of use, or occupancy of land. All such regulations shall be uniform for each class or kind of land or buildings throughout each district, but the regulations in one district may differ from those in other districts. An official map or maps indicating the districts and regulations shall be adopted, and within fifteen days after adoption of such regulations or maps, they shall be published in book or pamphlet form or once in a legal newspaper published in and of general circulation in the county or, if none is published in the county, in a legal newspaper of general circulation in the county. Such regulations shall also be spread in the minutes of the proceedings of the county board and such map or maps filed with the county clerk. Nonfarm buildings are all buildings except those buildings utilized for agricultural purposes on a farmstead of twenty acres or more which produces one thousand dollars or more of farm products each year.

Section 23-174.10 states:

In any county which has adopted county zoning regulations, the county board, by resolution, may make regulations as may be necessary or expedient to promote the public health, safety, and welfare, including regulations to

> prevent the introduction or spread of contagious, infectious, or malignant diseases; to provide rules for the prevention, abatement, and removal of nuisances, including the pollution of air and water; and make and prescribe regulations for the construction, location, and keeping in order of all slaughterhouses, stockyards, warehouses, sheds, stables, barns, commercial feedlots, dairies, junk and salvage yards, or other places where offensive matter is kept, or is likely to accumulate. Such regulations shall be not inconsistent with the general laws of the state and shall apply to all of the county except within the limits of any incorporated city or village, and except within the unincorporated area where a city or village has been granted zoning jurisdiction and is exercising such jurisdiction.

The statutory language in these sections grants extensive powers to counties to regulate their lands. These powers, however, are rooted in zoning, and zoning regulations can be enacted only after adoption of a county comprehensive development plan by a county board. § 23-114.03.

[4] Zoning is "the process that a community employs to legally control the use which may be made of property and the physical configuration of development upon the tracts of land located within its jurisdiction." *Ford v. Bd. of Cty. Com'rs of Converse*, 924 P.2d 91, 94 (Wyo. 1996). According to this definition, Ordinances 98-1 and 98-2 are zoning regulations.

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. *Dunn v. Daub*, 259 Neb. 559, 611 N.W.2d 97 (2000); *Callahan v. Washington Nat. Ins. Co.*, 259 Neb. 145, 608 N.W.2d 592 (2000).

Ordinance 98-1, regarding fly and odor control, states in pertinent part:

> The Commissioners of Perkins County find that large livestock confinement facilities use lagoons to store and treat waste produced by animals in confinement. These lagoons produce odor. The odor is made up of many different kinds of volatile compounds including ammonia, phenol, cresol, volatile fatty acids, aldehydes, bezene,

xylene and hydrogen sulfide. The Commissioners find that there has [sic] been reports of adverse health effects to citizens of other jurisdictions from exposure to the odor. By controlling odors, other problems such as flies can also be avoided.

. . . .

SECTION 2: COVERS REQUIRED

2.01 An owner or operator of a large livestock confinement facility shall not operate a facility in Perkins County unless the following are covered: livestock waste storage containment structures that receives [sic] livestock waste on a regular basis and permanent livestock waste containment structures in which an anaerobic pool is maintained. Facilities that have structures that receive livestock waste only on an [sic] sporadic baisis [sic] due to storm runoff are not required to have covers on their livestock waste containment structures.

SECTION 3: INSPECTIONS

3.01 The County shall have the right to inspect the site to insure [sic] compliance with the provisions of this regulation.

Ordinance 98-1 attempts to legally control the use and development of property by requiring covers to be used for certain land uses and by restricting land use until inspection by the county. Ordinance 98-1 is therefore a zoning regulation.

The Board has been given the power by the Legislature to regulate through the use of zoning but, pursuant to § 23-114.03, zoning regulations shall be adopted only *after* the adoption by the Board of a comprehensive development plan. Why the Board has never adopted a comprehensive development plan is not apparent from the record. Because of the failure of the Board to adopt such a plan, these ordinances are not valid as to Enterprise's hog confinement facilities.

In *Deans v. West*, 189 Neb. 518, 203 N.W.2d 504 (1973), this court concluded that zoning regulations were invalid where the county board adopted zoning regulations before a comprehensive development plan was adopted. In this case, the Board has stipulated that it has not adopted a comprehensive zoning plan pursuant to § 23-114.03. Therefore, we find Ordinance 98-1 to

be invalid and in violation of § 23-114.03 which provides "[z]oning regulations shall be adopted or amended by the county board only after the adoption of the county comprehensive development plan by the county board."

Ordinance 98-2, regarding the prevention of wastes being spilled on county roads, ditches, and property, states in pertinent part:

> The Commissioners find that large scale livestock confinement facilities may present a threat of contamination and destruction of county roads, ditches, and property due to overflow of lagoon and impoundments during and following storms, during operation, and during transport of livestock and livestock waste. To protect the County from such an occurrence.
>
> . . . .
>
> SECTION 2: PREVENTION OF APPLICATION OF LIVESTOCK WASTE ON COUNTY PROPERTY BY LARGE SCALE LIVESTOCK OPERATIONS
>
> 2.01 Prior to construction or operation, an owner or operator of a large livestock confinement facility must demonstrate that the livestock waste, liquid or solid, will not be carried or washed onto or into county roads or ditches or properties adjacent to a facility during or following a 25 year storm.
>
> 2.02 The demonstration will include detailed elevation drawings, a description of the volume and physical characterization of the stored waste, and a hydrogeologic characterization of the facility site. This demonstration will be updated yearly.
>
> 2.03 An owner or operator of a large livestock confinement facility must not allow livestock waste, liquid or solid to be washed, placed, or spilled onto county roads, ditches, or property from the facility or from a truck carrying livestock or livestock waste, or from a pipe carrying liquid livestock waste.
>
> SECTION 3: INSPECTIONS
>
> 3.01 The County shall have the right to inspect the site to insure [sic] compliance with the provisions of this regulation.

[5] Ordinance 98-2 attempts to legally control the use and development of property by requiring owners to pass a "demonstration" before any construction or operation of a facility for certain land uses and by restricting land use until inspection by the county. Ordinance 98-2 is also a zoning regulation. According to *Deans v. West, supra*, zoning regulations are invalid where a county board adopts zoning regulations before a comprehensive development plan is adopted. The Board stipulated that it has not adopted a comprehensive zoning plan pursuant to § 23-114.03. The ordinance goes beyond protection of the county's roads and ditches; it also applies to "or properties adjacent to a facility." This language means that if the overflow of the lagoon ran onto a neighbor's property, not owned by the county, Enterprise would be in violation. As previously stated in this opinion, zoning is the process to control the physical configuration of development of tracts of land within its jurisdiction. Ordinance 98-2 is a zoning ordinance and, for the reasons previously stated, is invalid because the Board has never adopted a comprehensive zoning plan as required by § 23-114.03. Therefore, we also find Ordinance 98-2 to be invalid and in violation of § 23-114.03.

## CONCLUSION

Counties in Nebraska have been delegated the power to regulate the use of lands within their jurisdiction to promote the public health, safety, and welfare pursuant to §§ 23-114.03 and 23-174.10 since 1967. A county board may by resolution make regulations as may be necessary to promote the health, safety, and welfare of its public if it has adopted a comprehensive development plan as required by § 23-114.03. Since the Board has failed to adopt a comprehensive development plan, the Board does not have the authority to pass Ordinances 98-1 and 98-2, as they are clearly zoning-related regulations. We therefore conclude that Ordinances 98-1 and 98-2 are invalid.

REVERSED.

# DENTON W. BRUNGES, APPELLEE, V. MARY E. BRUNGES, APPELLANT.

619 N.W.2d 456

Filed November 3, 2000. No. S-99-1115.

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. **Judgments: Evidence: 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.** 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.
4. **Divorce: Appeal and Error.** Because appeals in domestic relations matters are heard de novo on the record, an appellate court is empowered to enter the order which should have been made as reflected by the record.
5. **Property Division.** A marital estate includes property accumulated and acquired during the marriage through the joint efforts of the parties.
6. ___. The date upon which a marital estate is valued should be rationally related to the property composing the marital estate.
7. **Property Division: Proof.** Without substantiation by receipts, canceled checks, or other evidence, the testimony of a party that he or she spent or otherwise disposed of marital assets is not sufficient to support such allegation.
8. **Alimony.** The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and other enumerated criteria make it appropriate.
9. **Divorce: Property Division: Pensions.** A court shall include as part of the marital estate, for purposes of the division of property at the time of dissolution, any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, whether vested or not vested.
10. **Divorce.** In an action for dissolution of marriage, specific findings of fact must be made as to various contested issues, and it is a trial court's duty to make those findings independently.
11. **Divorce: Attorney Fees: Appeal and Error.** In a dissolution of marriage case, an award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.

Appeal from the District Court for Johnson County: ROBERT T. FINN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Sally A. Rasmussen, of Mousel, Garner & Rasmussen, for appellant.

Timothy W. Nelsen, of Fankhauser, Nelsen & Werts, P.C., for appellee.

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

WRIGHT, J.

## NATURE OF CASE

Mary E. Brunges appeals from a decree of dissolution entered by the district court for Johnson County on August 24, 1999. This was the second decree of dissolution entered in this action, as the judgment of the trial court was reversed by this court in *Brunges v. Brunges*, 255 Neb. 837, 587 N.W.2d 554 (1998), because the trial court relied solely on the pleadings to find that the marriage between Mary and Denton W. Brunges was irretrievably broken. Following retrial, the trial court entered a decree which dissolved the marriage, awarded custody of the minor children to Mary, provided for child support, and divided the marital estate. Mary appeals.

## SCOPE 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. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000).

[2] 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.*

## FACTS

Mary and Denton were married in Michigan on July 12, 1986, and four children were born to the marriage. Until April 1994, the parties lived together in Michigan, where they owned a home and Denton worked for Gerber Products Company (Gerber). During this time, Mary did not work outside the home.

In April 1994, the parties separated and Mary and the children moved to Nebraska. In late summer or early fall, Denton quit his

job, sold the family home, and relocated to Nebraska, where the parties attempted a reconciliation that lasted until April 1995.

Mary enrolled in college in the spring of 1995, and she anticipated graduating in December 1999. She was taking out student loans to pay for her education. She claimed to have no special training or skills that would otherwise allow her to find employment to support her children. Federal income tax returns indicate that Mary had a total income of $5,201 in 1995 and $2,292 in 1996.

From September 1994 until September 1996, Denton worked for Excel Corp. and Cargill Processed Meats (Cargill). During 1997, Denton worked for Maverick Media, Inc., Action Pig Co., and Larson Motors, Inc., where he was employed until August 1998. From August 1998 to the time of retrial in May 1999, Denton worked at Auburn Ford, Inc., as a parts manager. Denton's W-2 from Gerber indicated that he earned $25,558.49 in 1992. The parties' joint federal income tax returns indicated a total income of $30,605 in 1993 and $25,775 in 1994. Denton's federal income tax returns indicate that he had a total income of $16,941.17 in 1996; $12,465 in 1997; and $15,906 in 1998. Auburn Ford's payroll records indicate that he grossed $5,950 in the first quarter of 1999. At the time of retrial, Denton also had a 401K plan with Auburn Ford.

Denton received $2,000 from the sale of the family home in Michigan on August 12, 1994, and Mary denied receiving any of the proceeds. Denton filed for immediate full distribution of his retirement account with Gerber on March 20, 1995. He received approximately $7,000 that he claims to have "put towards [sic] bills." When the parties separated for the second time in 1995, Denton took with him a 1974 Chevrolet pickup truck, which he traded in on another car that was eventually wrecked. An affidavit filed by Denton stated a value of $2,500 for the pickup in 1996. By the time of the last hearing on this matter, the only marital assets remaining in the possession of Mary were some household personal belongings with a stated value of less than $400.

Denton filed the dissolution action at issue in this case in Johnson County, Nebraska, on July 1, 1996. Mary entered a voluntary appearance on July 16 and submitted her responsive

pleading on August 16. An order for temporary custody and support was filed on September 9, giving custody of the children to Mary and ordering Denton to pay $452 per month for support.

A hearing on the dissolution was held on December 18, 1996, at which time no witnesses testified and no depositions, exhibits, or written stipulations were offered or admitted into evidence. Both parties were present at the hearing, but neither party testified. The trial court ordered the marriage dissolved, and a decree of dissolution was filed on February 11, 1997. Mary subsequently appealed to the Nebraska Court of Appeals.

In a memorandum opinion filed May 7, 1998, the Court of Appeals affirmed the judgment with regard to the issues of dissolution and alimony, but reversed the judgment and remanded the cause for an evidentiary hearing on the issues of child support, visitation, and custody. Upon further review, we reversed the decision of the Court of Appeals and remanded the cause with directions to reverse the trial court's dissolution of the marriage and remand the cause for an evidentiary hearing pursuant to Neb. Rev. Stat. § 42-356 (Reissue 1998). See *Brunges v. Brunges*, 255 Neb. 837, 587 N.W.2d 554 (1998). Temporary custody of the children remained with Mary pending completion of the matters remanded to the trial court.

On remand, the case came on for retrial on May 26, 1999. After receiving the testimony of both parties and one witness, as well as a number of exhibits, the trial court took the matter under advisement and asked the parties' attorneys to submit briefs. After receiving the briefs, the trial court sent the attorneys an e-mail that read: "After a review of the evidence and briefs, the Court finds generally in favor of Mr. Brunges and against Mrs. Brunges. [Denton's attorney] to submit journal entry after approval as to form by [Mary's attorney]."

The trial court dissolved the marriage and awarded the care, custody, and control of the parties' children to Mary, subject to Denton's visitation. The trial court determined that Denton should pay child support in the amount of $295 per month and should carry health insurance on the minor children and that the parties would each pay 50 percent of any health care expenses not covered by insurance or medicaid. The trial court found that Denton's retroactive child support for the period beginning

January 1, 1997, and ending May 1, 1999, would be calculated at $50 per month and that each party would receive two dependency exemptions for income tax purposes.

The trial court awarded each party the personal property in his or her possession and directed Mary to provide Denton with certain personal effects which she might have in her possession. The trial court ordered that all debts incurred prior to April 30, 1994, should be paid one-half by Denton and one-half by Mary and that debts incurred thereafter were to be paid by the party incurring the debt. The trial court declined to award Mary alimony, finding that she had a greater earning capacity than Denton and that Denton had no ability to pay alimony. The trial court declined to order Denton to reimburse Mary for half of his retirement account disbursement or the proceeds received from the sale of their home in Michigan. The trial court also declined to award Mary attorney fees or costs. Mary timely appealed.

## ASSIGNMENTS OF ERROR

Mary assigns as error that the trial court erred (1) in failing to compensate her for marital assets that were liquidated by Denton following the parties' separation, (2) in failing to award her alimony, (3) in ruling that Denton's current 401K plan was not relevant, (4) in failing to read the decree of dissolution before signing it, (5) in not receiving into evidence certain exhibits, and (6) in failing to award her attorney fees or costs.

## ANALYSIS

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. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000).

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. However, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See *id.*

[3] 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. *Sharkey v. Board of Regents, ante* p. 166, 615 N.W.2d 889 (2000).

[4] Because appeals in domestic relations matters are heard de novo on the record, an appellate court is empowered to enter the order which should have been made as reflected by the record. *Shockley v. Shockley*, 251 Neb. 896, 560 N.W.2d 777 (1997).

[5] Mary first argues that she was entitled to compensation for marital assets that were liquidated by Denton following the parties' separation. The marital estate includes property accumulated and acquired during the marriage through the joint efforts of the parties. *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998). The issue is whether the trial court abused its discretion in not including previously liquidated assets as part of the marital estate.

At the time of trial, the only assets remaining were those in Mary's possession. These assets had a stated value of $336.50. They were awarded to Mary and are not in dispute. The dispute concerns assets that the parties acquired during their marriage which Denton claimed he spent or otherwise disposed of following the parties' separation. Those assets included Denton's Gerber retirement account, $2,000 received from the sale of the family home in Michigan, and a 1974 Chevrolet pickup truck.

During Denton's employment with Gerber in Michigan, he accumulated a retirement account. Exhibit 4 shows that Denton applied for distribution of these funds on March 20, 1995, and that his application was received by Gerber on March 24. The gross distribution was $8,802.88, of which $1,760.58 went to the Internal Revenue Service for federal taxes and $7,042.30 went to Denton as the net distribution. Denton testified that these funds were "put towards [sic] bills," but did not offer any testimony or documentation as to the specific bills that were paid. Mary did not receive any of these retirement funds.

During discovery, Denton was requested to produce documentation concerning retirement accounts from the date of the parties' marriage, including the Gerber retirement account; a

Cargill retirement account; and a 401K account that Denton and his employer, Auburn Ford, were contributing to in 1999. Denton's response to this discovery request stated: "Not applicable." Denton was further asked in interrogatories to identify any and all debts in his, Mary's, or the children's names that were outstanding at the time of the separation and the amounts paid. He identified one payment of $30 made to Gerber Federal Credit Union.

Mary also asserts that Denton did not account for $2,000 received from the sale of the family home in Michigan. When the real estate was sold, Mary and Denton were to receive $2,000 from the buyer. Denton testified that the parties each received $2,000 from the buyer. However, Mary testified that she did not receive any money from the sale of the real estate. The documents involving the sale of the real estate show that only Denton's signature was notarized. Mary's signature was apparently added after the document had been notarized. Denton testified that he had opened two accounts at American National Bank on September 19, 1994. One was a savings account in which he deposited $1,480.22 of the proceeds from the sale of the real estate, and the other was a checking account in which he deposited $400. There was no explanation by Denton as to what he did with the funds deposited into these two accounts.

The final item of property at issue was the 1974 Chevrolet pickup truck. At trial, Mary attempted to offer an affidavit Denton had filed in a prior action which showed the value of the pickup at $2,500. The trial court sustained Denton's objection as to relevance. Mary requests that we consider this affidavit as evidence of the value of the pickup in determining distribution of the property.

Mary argues that Denton did not adequately account for the proceeds of the Gerber retirement account or the real estate sale. We agree. In *Halouska v. Halouska*, 7 Neb. App. 730, 585 N.W.2d 490 (1998), the husband liquidated two marital brokerage service accounts during the pendency of the divorce. He testified at trial that he had used these funds to pay marital debts. The trial court ruled that without documentation, it could not determine whether those debts had been paid. The Court of Appeals affirmed on this issue, holding that without substantia-

tion of receipts, canceled checks, or statements, the trial court could not have taken the word of one party over another when it came to a determination of liquidated marital assets.

In *Choat v. Choat*, 218 Neb. 875, 359 N.W.2d 810 (1984), we concluded that the husband's failure to account for proceeds received from the sale of livestock as a marital asset was a circumstance which would be considered when assessing responsibility for payment of the marital debt. We held the husband accountable for the amount of proceeds received from the sale of the livestock and ordered him to pay the marital debts that could have been paid with those proceeds.

[6,7] Here, the trial court ruled that the marital assets liquidated by Denton following the parties' separation did not have to be accounted for because of the lapse of time between the parties' separation and the retrial. We disagree. The date upon which the marital estate is valued should be rationally related to the property composing the marital estate. *Halouska v. Halouska, supra*. Here, the proceeds from the retirement account and the real estate were assets of the marriage. Without substantiation by receipts, canceled checks, or other evidence, the testimony of that party that he or she spent or otherwise disposed of the assets is not sufficient to support such allegation. See *id*. We conclude that Denton has not properly accounted for the retirement account funds or the proceeds from the sale of the real estate and that the trial court abused its discretion in not including them in determining the marital estate.

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. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000). From our de novo review of the record, we conclude that Mary should have been awarded a judgment of $4,500 as her share of the retirement account and the sale of the real estate. The trial court made no findings with regard to the 1974 Chevrolet pickup truck. The evidence establishes that the pickup was used to purchase another vehicle, which Denton testified had been wrecked at the time of the decree. We therefore conclude that the trial court did not abuse its discretion in failing to consider this as an asset of the marital estate.

[8] Next, Mary argues that the trial court abused its discretion in not awarding her alimony. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other enumerated criteria make it appropriate. See Neb. Rev. Stat. § 42-365 (Reissue 1998).

The question presented is whether the trial court abused its discretion in not awarding alimony under the circumstances of this case. The trial court found that Mary had been attending college for the past 4 years and that although she testified that she had no idea what kind of a job she would obtain, she had an earning capacity greater than Denton's. The trial court found that Denton did not have the funds available to pay alimony because the majority of his salary would be used to support his children and pay insurance. We conclude, under the circumstances set forth herein, that the trial court did not abuse its discretion in failing to award alimony to Mary.

At the time of retrial, Denton had a 401K plan with Auburn Ford. The trial court concluded the plan was not relevant apparently on the basis that Denton had begun working for this employer following the parties' separation. Mary argues that the trial court erred in ruling that Denton's current 401K plan was not relevant to the dissolution action and in failing to allow her to adduce evidence of the plan.

[9] During the entire pendency of a dissolution of marriage decree, the marital relation continues. *Choat v. Choat*, 218 Neb. 875, 359 N.W.2d 810 (1984). "The court shall include as part of the marital estate, for purposes of the division of property at the time of dissolution, any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, whether vested or not vested." Neb. Rev. Stat. § 42-366(8) (Reissue 1998). Thus, any pension plan, retirement plan, annuity, and other deferred compensation plan Denton had at the time of trial was relevant to the dissolution action, and the trial court erred in excluding the Auburn Ford 401K plan. We therefore conclude that Denton should pay to Mary one-half of the value of the 401K plan with Auburn Ford computed to August 24, 1999, the date of the decree of dissolution. Denton is ordered

to pay this sum at the rate of $50 per month with interest until the sum has been paid in full.

Mary next argues that the trial court erred in signing the dissolution decree without reading it or determining whether it accurately set forth the findings and orders of the court. In an e-mail the trial court sent to the parties, the court found generally in favor of Denton and against Mary, but made no specific findings or orders. The trial court then requested that counsel for Denton prepare a decree and forward it to the court after it had been approved as to form by Mary's attorney.

[10] We comment on this assignment of error to point out and express our disapproval of such practice. First, the trial court did not make any independent findings of fact. In an action for dissolution of marriage, specific findings of fact must be made as to various contested issues, and it is a trial court's duty to make those findings independently. In the case at bar, the trial court's actions did not conform to the legal standard required.

Next, Mary argues that the trial court erred by not receiving certain exhibits into evidence. We dispose of this assignment of error by noting that the trial court did in fact abuse its discretion and that we have in our de novo review considered such evidence in determining the distribution of property and the award made herein.

Mary next argues that the trial court abused its discretion in not awarding her a reasonable attorney fee and costs incurred in the divorce action. The trial court directed each party to pay any witness fees and costs of service they had incurred. From our de novo review, we conclude that Denton was not forthright in producing certain information with regard to his income. He failed to respond to discovery requests in good faith and in general increased the costs of litigation and impeded the judicial process. The record sets forth that Mary incurred costs for witnesses and sheriff's fees. We award $144.52 of such costs to Mary and tax them against Denton.

[11] In a dissolution of marriage case, an award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Shockley v. Shockley*, 251 Neb. 896, 560 N.W.2d 777 (1997). At trial, Mary asked for an award of reasonable attorney fees and costs. Exhibit

31 is a statement for attorney services rendered between January and March 1999, totaling $2,632.11. Mary testified that in addition to the $2,632.11, she owed a relative $2,500 to repay a loan for attorney fees relating to the appeal. The trial court concluded that it would not be appropriate to award attorney fees based on the financial situation of the parties and the award of assets to Mary. Under the circumstances of this case, since we have now adjusted the distribution of assets, we decline to modify the trial court's order as to attorney fees.

## CONCLUSION

The trial court abused its discretion in not considering the liquidated Gerber retirement account, the Auburn Ford 401K plan, and the proceeds from the sale of the real estate in determining the value of the marital estate. The trial court also abused its discretion in not awarding certain costs to Mary that were incurred during the trial. We decline to modify the trial court's order as to alimony or attorney fees. We award Mary $500 for the services of her attorney in this court.

We therefore affirm in part, and in part reverse the judgment and remand the cause with directions that the trial court enter an order in accordance with this opinion.

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

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STATE OF NEBRASKA, APPELLEE, V.
DEBRA BEYER, APPELLANT.
619 N.W.2d 213

Filed November 9, 2000. No. S-99-698.

1. **Judgments: Jurisdiction: Appeal and Error.** Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.
2. **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.
3. **Trial: Convictions: Appeal and Error.** A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. In making this determination, an appellate court

does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition.

4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Courts: Jurisdiction: Appeal and Error.** After an appeal has been perfected to an appellate court, the lower courts are divested of subject matter jurisdiction over that case.
6. ___: ___: ___. As a general rule, a lower court is not reinvested with jurisdiction over a case until the appellate court's mandate, or the functional equivalent thereof, is filed in the lower court.
7. ___: ___: ___. In order for an inferior court to reacquire jurisdiction, it must take action on the appellate court's mandate.
8. **Final Orders: Time: Appeal and Error.** An order of a district court becomes final for the purpose of issuing a mandate under Neb. Rev. Stat. § 25-2733 (Reissue 1995) only after the 30-day appeal time has run.
9. **Criminal Law: Final Orders: Appeal and Error.** For purposes of appeal, an order entered during the pendency of a criminal cause is final only when no further action is required to completely dispose of the cause pending.
10. ___: ___: ___. A judgment of the district court on appeal from a final order of an inferior court, which leaves nothing further to be done in the district court, is a final order, even though the case is remanded for further proceedings below.
11. **Criminal Law: Sentences: Final Orders: Appeal and Error.** The trial court must pronounce sentence before a criminal conviction constitutes a final, appealable order.
12. **Constitutional Law: Criminal Law: Statutes.** The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.
13. **Constitutional Law: Statutes: Standing.** To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others.
14. ___: ___: ___. The test for standing to assert a vagueness challenge is the same whether the challenge asserted is facial or as applied.
15. **Intent: Words and Phrases.** The intent involved in an actor's conduct is a mental process and may be inferred from the conduct itself, the actor's language in reference to the conduct, and the circumstances surrounding an incident.

Appeal from the District Court for Dodge County, F.A. GOSSETT III, Judge, on appeal thereto from the County Court for Dodge County, DANIEL J. BECKWITH, Judge. Judgment of District Court affirmed in part and in part reversed, and cause remanded for further proceedings.

Timothy M. Schulz, of Yost, Schafersman, Lamme, Hillis, Mitchell, Schulz & Twidwell, 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.

HENDRY, C.J.

## INTRODUCTION

Debra Beyer was convicted in Dodge County Court of theft of lost or mislaid property under Neb. Rev. Stat. § 28-514 (Reissue 1995). Beyer appealed her conviction to the Dodge County District Court. The district court affirmed Beyer's conviction. Beyer appeals, claiming the district court erred in determining that § 28-514 is constitutional on its face and as applied, and in determining that there was sufficient evidence to support the county court's finding of guilt. 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 July 20, 1998, Beyer, a student at Bahner College of Hairstyling, found a cellular telephone on a curb near the intersection of Platte Street and Military Avenue in Fremont, Nebraska. Beyer took the telephone to her residence at the college and attempted to use it. The telephone did not work, and Beyer believed the battery was dead. The next day, Beyer offered to sell the telephone to a fellow student, Angela Victor, for $50. On July 24, Victor offered Beyer $40 for the telephone, which Beyer accepted. After purchasing the telephone, Victor and her boyfriend became suspicious that the telephone was stolen because of the low price at which Beyer had sold it. Later that day, they took the telephone to a Cellular One store to have the telephone's "history checked."

A Cellular One employee determined the telephone had been reported stolen and called the police. A police officer arrived at the Cellular One store, and Victor told the officer that she had

purchased the telephone from Beyer, a fellow student at the college. Denise Winter, who had reported her cellular telephone stolen on July 19, 1998, came to the store and identified the telephone as hers.

The officer then contacted Beyer at her residence. Beyer initially denied ever having the telephone or selling it to Victor, but later admitted that she found the telephone on the street, took it home, and attempted to use it. Even though the telephone did not work, Beyer believed the telephone was too nice to give away, so she decided to sell it to get money with which to pay bills. The officer asked Beyer if she was aware that not making a reasonable effort to locate the owner of lost property was theft. Beyer replied that she was not aware of that fact. When asked why she did not contact the police about finding the telephone, Beyer stated that she had never thought about it.

Beyer then provided the officer with the following handwritten statement:

> On July 20, 1998 I was leaving my friend Sarah's house on Plate [sic] and Military St. - We were with Brenda in her car we were going to go drive around and we noticed a black bag phone on the corner of Platte so we stoped [sic] and picked it up - we went to the Bahner dorms where I live and plugged it in to see if it worked and it didn't - I figured that the battery was dead so I didn't think anything about it - well I decided to sell it to one of the girlses [sic] boyfriends at school cuz [sic] I don't have a car and therefor [sic] have no use for it and it was so nice I didn't plan on just giving it away - I never even thought about calling the cops and reporting it - I just thought I'd use the money to pay off one of my many bills.

Beyer was charged in Dodge County Court with theft of lost or mislaid property in violation of § 28-514. This section provides in relevant part:

> A person who comes into control of property of another that he or she knows to have been lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient commits theft if, with intent to deprive the owner thereof, he or she fails to

take reasonable measures to restore the property to a person entitled to have it.

Beyer filed a motion to quash the complaint, asserting that § 28-514 is unconstitutionally vague on its face. The county court overruled the motion, and the case was tried to the court. The police report, including Beyer's written statement, and photographs of the cellular telephone were introduced into evidence. No live testimony was adduced by either party. Beyer was convicted of theft of lost or mislaid property and ordered to pay $200 restitution, a $50 fine, and $684 in attorney fees.

Beyer timely appealed her conviction to the Dodge County District Court, assigning several errors, including the contention that § 28-514 is unconstitutionally vague, that there was insufficient evidence to support Beyer's conviction, that there was no evidence to support the amount of restitution, and that the court was without authority to order Beyer to pay attorney fees.

In an order dated May 17, 1999, the district court determined that § 28-514 was constitutional and that there was sufficient evidence in the record to support the conviction. However, the district court also determined that the county court did not have authority to order Beyer to pay attorney fees and that the county court failed to hold a restitution hearing in violation of Beyer's due process rights. The district court affirmed Beyer's conviction, vacated the order assessing attorney fees, and remanded the case to the county court for a hearing on the amount of restitution.

On June 8, 1999, before the 30-day time limit from which to appeal the district court's order had run, the county court held a hearing on the restitution issue. At the hearing, Beyer and the State entered into a stipulation as to the amount of restitution, agreeing that restitution in the amount of $39.99 was appropriate. The county court set the restitution amount at $39.99.

On June 15, 1999, Beyer filed an appeal of the district court's order affirming her conviction. The notice of appeal was filed with the district court within 30 days of entry of the district court's order.

## ASSIGNMENTS OF ERROR

Beyer asserts, rephrased and summarized, that the district court erred in (1) finding that § 28-514 is constitutional on its

face and as applied in this case and (2) finding that there was sufficient evidence in the record to affirm the county court's finding of guilt.

## STANDARD OF REVIEW

[1,2] Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion. *State v. Cushman*, 256 Neb. 335, 589 N.W.2d 533 (1999). 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.*

[3] A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. *State v. Blackman*, 254 Neb. 941, 580 N.W.2d 546 (1998). In making this determination, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. *Id.*

## ANALYSIS

### JURISDICTION

[4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. McCracken, ante* p. 234, 615 N.W.2d 902 (2000). The State contends that this court lacks jurisdiction over Beyer's appeal because at the time Beyer filed her appeal, jurisdiction was in the county court, rather than the district court. This argument arises out of the procedural posture presented in this case.

After entry of the district court's order on May 17, 1999, Beyer had 30 days to appeal that order. See Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1998). However, the county court held the restitution hearing on remand on June 8, before the 30-day time from which to appeal the district court's May 17 order had run. After the restitution hearing was held, Beyer timely appealed the district court's order of May 17. The State argues that the district court no longer had jurisdiction over the case when Beyer filed her appeal because the county court had reac-

quired jurisdiction over the case by holding the restitution hearing on June 8. The State argues that this court did not obtain jurisdiction on appeal from the district court's order. Thus, we must determine whether the district court or the county court had jurisdiction over the case at the time Beyer filed her appeal.

[5-7] We determine that the district court had jurisdiction at the time Beyer filed her appeal and that the county court was without jurisdiction to hold the restitution hearing. After an appeal has been perfected to an appellate court, the lower courts are divested of subject matter jurisdiction over that case. *Billups v. Scott*, 253 Neb. 293, 571 N.W.2d 607 (1997). As a general rule, a lower court is not reinvested with jurisdiction over a case until the appellate court's mandate, or the functional equivalent thereof, is filed in the lower court. See, *State v. Horr*, 232 Neb. 380, 441 N.W.2d 139 (1989); *Rehn v. Bingaman*, 152 Neb. 171, 40 N.W.2d 673 (1950); *State Bank of Beaver Crossing v. Mackley*, 118 Neb. 734, 226 N.W. 318 (1929). In order for an inferior court to reacquire jurisdiction, it must take action on the appellate court's mandate. *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994). Neb. Rev. Stat. § 25-2733 (Reissue 1995) provides for the issuance of mandates from district court to county court. This section states, "Within two judicial days after the decision of the district court becomes final, the clerk of the district court shall issue a mandate . . . and transmit the mandate . . . to the clerk of the county court . . . ."

[8] This court has stated that when no appeal is taken from a judgment, that judgment becomes final for all purposes. *Caradori v. Hamilton*, 193 Neb. 500, 227 N.W.2d 850 (1975). See, also, *State v. Jonsson*, 192 Neb. 730, 224 N.W.2d 181 (1974) (judgment and sentence of district court becomes final 30 days after it is entered and no appeal has been filed). However, an appeal properly perfected under the provisions of Neb. Rev. Stat. § 25-1911 (Reissue 1995) and § 25-1912 prevents any final judgment or order from becoming final while the appeal is pending. *Dewey v. Dewey*, 192 Neb. 676, 223 N.W.2d 826 (1974). Accordingly, an order of a district court "becomes final" for the purpose of issuing a mandate under § 25-2733 only after the 30-day appeal time has run.

In the present case, the earliest time at which a mandate, or its functional equivalent, could have issued from the district court was 30 days after entry of the district court's May 17, 1999, order. However, the county court held the restitution hearing before the 30-day time to appeal had run and a mandate could issue. The county court had no jurisdiction to act on the district court's order of remand prior to the issuance and filing of a mandate. The county court was without jurisdiction to enter an order on the restitution issue, and that order is a nullity. See *State v. Dvorak*, 254 Neb. 87, 574 N.W.2d 492 (1998). See, also, *State v. Rieger*, 257 Neb. 826, 600 N.W.2d 831 (1999). The State's contention that this court did not obtain jurisdiction on appeal because jurisdiction was in the county court at the time Beyer filed her appeal is without merit.

### Effect of Restitution Hearing on Beyer's Right to Appeal

The State next claims that "Beyer may not accept the benefits of the order of the district court and, after doing so, appeal from it." Brief for appellee at 12. The State argues that by participating in the restitution hearing which resulted in a reduction of the amount of restitution, Beyer lost her right to appeal the district court's decision affirming the conviction, and her appeal should be dismissed. However, as previously determined, the county court was without jurisdiction to hold the restitution hearing and enter the order regarding restitution. Beyer could not accept a "benefit" by participating in a restitution hearing which the county court was without jurisdiction to hold. See *State v. Trevino*, 251 Neb. 344, 556 N.W.2d 638 (1996) (subject matter jurisdiction may not be created by consent or conduct of parties). Furthermore, Beyer could not accept the "benefit" of a reduction in the restitution amount when the county court was without jurisdiction to enter such order. The State's contention is without merit.

### Final, Appealable Order

[9,10] The State next claims that there was no final order issued by the district court from which Beyer could appeal. We determine that Beyer has timely appealed from a final order of

the district court. For purposes of appeal, an order entered during the pendency of a criminal cause is final only when no further action is required to completely dispose of the cause pending. *State v. Hall*, 252 Neb. 885, 566 N.W.2d 121 (1997); *State v. Wieczorek*, 252 Neb. 705, 565 N.W.2d 481 (1997). In *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 509 N.W.2d 618 (1994), this court determined that a judgment of the district court on appeal from a final order of an inferior court, which leaves nothing further to be done in the district court, is a final order, even though the case is remanded for further proceedings below. When the district court's judgment on appeal remands the case for further proceedings in the inferior tribunal, the case is fully disposed of so far as the district court is concerned. *Id.* The district court's judgment is final when it terminates the proceedings in that court and leaves nothing pending therein. *Id.*

Although *Rhode* was a civil case rather than a criminal case, we see no reason why the same logic should not apply in the criminal context. Sections 25-1911 and 25-1912 provide for an appeal from a final order of a district court in both civil and criminal cases. Thus, in the present case, once the district court rendered a judgment affirming Beyer's conviction, the district court's judgment was final for purposes of filing an appeal from that order, even though the case was remanded for further proceedings on the restitution issue. The judgment terminated the proceedings in the district court, and its judgment could be fully executed without any further action by the district court.

[11] However, the State claims, citing *Kennedy v. State*, 170 Neb. 193, 101 N.W.2d 853 (1960), that the district court's order was not a final, appealable order because it did not include a sentence. The State claims that because the district court vacated the payment of attorney fees and remanded the restitution issue without affirming the $50 fine, the district court's order did not include a sentence. This argument is without merit. The rule announced in *Kennedy* is that the trial court must pronounce sentence before a criminal conviction constitutes a final, appealable order. *Id.* See, also, *State v. Kaba*, 210 Neb. 503, 315 N.W.2d 456 (1982); *State v. Shaw*, 202 Neb. 766, 277 N.W.2d 106 (1979). In the present case, the district court was sitting as an appellate court, not as a trial court sentencing a defendant.

Thus, the rule announced in *Kennedy* is not applicable to the district court's order regarding Beyer's appeal. The State's contention that the district court's order of May 17, 1999, was not a final, appealable order is without merit.

## STANDING

Finally, the State claims that Beyer lacks standing to challenge § 28-514 as unconstitutionally vague. Section 28-514 provides that a person who comes into control of lost or mislaid property commits theft if he or she fails to take "reasonable measures" to restore the property to a person entitled to have it. Beyer claims § 28-514 is unconstitutionally vague because ordinary persons would not know what "reasonable measures" to take to restore the property to its owner. The State asserts that because Beyer took no measures to return the property to its rightful owner, she engaged in conduct which is clearly prohibited under the statute, and that thus Beyer lacks standing to assert a vagueness challenge.

[12-14] The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *State v. Roucka*, 253 Neb. 885, 573 N.W.2d 417 (1998). To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others. *State v. Irons*, 254 Neb. 18, 574 N.W.2d 144 (1998); *Roucka, supra*; *State v. Severin*, 250 Neb. 841, 553 N.W.2d 452 (1996); *State v. Carpenter*, 250 Neb. 427, 551 N.W.2d 518 (1996); *State v. Kelley*, 249 Neb. 99, 541 N.W.2d 645 (1996). The test for standing to assert a vagueness challenge is the same whether the challenge asserted is facial or as applied. See *id.*

Section 28-514 prohibits a person from taking control of lost or mislaid property without taking "reasonable measures" to restore the property to a person entitled to have it. The statute clearly prohibits a person from taking control of lost or mislaid property and doing nothing to restore that property to its rightful owner.

Because the record in this case shows that Beyer took control of the cellular telephone and took no measures to restore the property to its rightful owner, she has no standing to challenge the constitutionality of the statute on the ground that the term "reasonable measures" is vague. Beyer took control of the telephone by picking it up at the intersection at which she found it and taking it back to her residence. Beyer then attempted to use the telephone, but the telephone did not work. The very next day, Beyer offered to sell the telephone to another student in order to get money with which to pay bills. Beyer admitted she was not aware that she needed to take measures to restore the telephone to its owner and "never even thought about calling the cops and reporting it." Beyer took control of the property, then took no measures to restore it to its owner. Such conduct is clearly prohibited by § 28-514.

In her brief, Beyer poses several hypothetical situations in an attempt to demonstrate the vagueness of the term "reasonable measures." Beyer asserts that a person who finds a golf ball while out golfing would not know what measures to take to restore the golf ball to the person entitled to have it. She asserts that a person who finds a quarter, a $1 bill, a $5 bill, a $10 bill, or a $100 bill would not know what measures were reasonable to restore such property to the person entitled to have it. However, the court "will not examine the vagueness of the law as it might apply to the conduct of persons not before the court." *Roucka*, 253 Neb. at 892, 573 N.W.2d at 422. Beyer "cannot maintain that the statute is vague when applied to the conduct of others." See *id.* Beyer engaged in conduct which is clearly prohibited by § 28-514. Beyer lacks standing to challenge the constitutionality of the statute on the ground that the term "reasonable measures" is vague.

### Sufficiency of Evidence

Beyer asserts the district court erred in determining that there was sufficient evidence in the record to affirm the county court's finding of guilt. Beyer claims the evidence was insufficient to show that she had the requisite criminal intent and that she failed to take reasonable measures to restore the property to the person entitled to have it.

A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. *State v. Blackman*, 254 Neb. 941, 580 N.W.2d 546 (1998). In making this determination, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. *Id.*

[15] The intent involved in an actor's conduct is a mental process and may be inferred from the conduct itself, the actor's language in reference to the conduct, and the circumstances surrounding an incident. *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995). See, also, *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998); *State v. Robbins*, 253 Neb. 146, 570 N.W.2d 185 (1997).

Beyer claims the evidence is insufficient to show that she knew the telephone was lost or mislaid and that she took the telephone with the intent to deprive the owner thereof. Beyer claims that she may have thought the telephone was abandoned by the owner, rather than lost or mislaid, especially when she discovered the telephone did not work. However, the record does not support this claim. The record shows that Beyer found the telephone in a black carrying case on a curb near an intersection. It was not found in or near a trash receptacle where abandoned property might normally be found. Photographs of the telephone and the carrying case show both items to be in good condition. Beyer did not discover the telephone did not work until after she took it to her residence and attempted to use it. Furthermore, Beyer believed the reason the telephone did not work was simply that the battery was dead, which does not support an assumption that the owner intentionally discarded the telephone as "valueless property," as Beyer asserts. Brief for appellant at 15. In her written statement, Beyer stated the telephone was "so nice" that she "didn't plan on just giving it away" and that she sold the telephone to get money with which to pay bills. Viewed in the light most favorable to the State, this evidence is sufficient to support the finding that Beyer had the requisite criminal intent under § 28-514 in that she knew the telephone was lost or mislaid and took it with the intent of depriving the owner thereof.

Beyer next claims that the evidence is insufficient to show she took no reasonable measures to restore the property to its owner. Beyer claims that because the police never asked her the specific question, "'Did you make any efforts of any kind to return the cellular telephone to its rightful owner?'" the State failed to prove that Beyer took no measures to return the property. Brief for appellant at 13. However, as previously discussed, Beyer's own written and oral statements support the finding that she took no reasonable measures to restore the telephone to its owner. Viewed in the light most favorable to the State, the evidence is sufficient to support this finding. The district court did not err in determining that there was sufficient evidence in the record to affirm the county court's finding of guilt.

## CONCLUSION

Beyer lacks standing to assert a vagueness challenge to § 28-514, and the evidence was sufficient to support Beyer's conviction. Thus, Beyer's conviction is affirmed. However, because we have determined that the county court was without jurisdiction to hold the restitution hearing and that the county court's order with respect to the restitution issue is a nullity, we remand the cause to the district court with directions to remand the matter to the county court for a hearing and determination on the amount of restitution.

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

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## STRATEGIC STAFF MANAGEMENT, INC., APPELLANT, V. MICHAEL ROSELAND ET AL., APPELLEES.

619 N.W.2d 230

Filed November 9, 2000. No. S-99-1043.

1. **Contracts: Appeal and Error.** The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below.
2. **Appeal and Error.** In a bench trial of an action at law, the factual findings by the trial court have the effect of a jury verdict and will not be set aside unless they are clearly wrong.

3. **Contracts: Compromise and Settlement.** A settlement agreement is subject to the general principles of contract law.
4. ___: ___. To have a settlement agreement, there must be a definite offer and an unconditional acceptance.
5. **Contracts: Intent.** When the terms of a contract are clear, a court may not resort to rules of construction, and terms are accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. In such a case, a court shall seek to ascertain the intention of the parties from the plain language of the contract.
6. **Contracts.** A contract provision to execute effectuating documents in the future is enforceable where all of the material terms are specified in the original contract and leave none to be agreed upon through future negotiations.
7. **Contracts: Parties.** The implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract.
8. **Contracts.** The question of a party's good faith in the performance of a contract is a question of fact.

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

Jeffrey A. Silver for appellant.

Thomas F. Hoarty, Jr., and Scott A. Calkins, of Byam & Hoarty, for appellees.

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

CONNOLLY, J.

Appellees Michael Roseland, Thomas Lentz, Timothy Brotzki, and Profit Advantage, Inc., filed a motion to enforce a settlement agreement reached during mediation negotiations with appellant Strategic Staff Management, Inc. (Strategic). Strategic resisted the motion, arguing that a final agreement had not been reached and that the appellees had acted in bad faith. After a hearing, the district court sustained the motion based on its findings that the parties had resolved all issues in dispute and that there was no credible evidence to support the allegations of bad faith. We conclude that a valid settlement agreement had been entered into by the parties and, therefore, affirm the district court's decision to enforce the agreement according to its terms.

## BACKGROUND

Roseland, Lentz, and Brotzki are all former key employees of Strategic, a professional employer organization. All three terminated their employment with Strategic on May 21, 1998, and formed Profit Advantage, Inc., a company also engaged as a professional employer organization. As a preliminary matter, we note that the interests of Roseland, Lentz, and Brotzki coincide with the interests of Profit Advantage, Inc., in this appeal. Therefore, for ease of discussion, the appellees will be referred to as "Profit." Strategic brought suit against Profit for alleged violations of Nebraska's Trade Secrets Act, Neb. Rev. Stat. §§ 87-501 through 87-507 (Reissue 1999), and for tortious interference with Strategic's business contracts.

The district court issued a 2-year temporary injunction against Profit, enjoining it from actively soliciting or contacting any of Strategic's clients until May 21, 2000. Trial was set for July 12, 1999. Before trial, the district court referred the matter to mediation, which was conducted on June 21. Corporate representatives for each party were present, as were the parties' attorneys.

During the mediation hearing, the parties reached an accord that was reduced to a memorandum of agreement. The memorandum of agreement was reviewed by representatives for both sides and signed by each party's attorney. We set forth the agreement:

> MEMORANDUM OF AGREEMENT
>
> 1. The parties have agreed that the language of Judge Lamberty's temporary injunction entered in the matter of Strategic Staff Management, Inc. vs. Roseland et. al. found at Docket 976 Number 768 in the District Court of Douglas County, Nebraska entered March 30, 1999 will extend by agreement of the parties until January 1, 2004, at which time it will expire. The agreement excepts from the injunction the customers listed in defendant's response to interrogatory number, 5 and the new division of Central Logistics in Hastings Nebraska.
>
> 2. Plaintiff will execute a general release of all claims in favor of all defendants except as to the Gottsch case filed in Douglas County District Court, any COBRA issues that may arise and future violations of the injunction.

3. The Plaintiff's claim for damages in the injunction suit will be dismissed with prejudice.

4. Each party will be responsible for their own attorney fees and costs in the injunction suit.

That same day, Profit's attorney, Thomas F. Hoarty, Jr., faxed and mailed a proposed general release and a proposed agreed order and judgment to Strategic's attorney, Jeffrey A. Silver. The agreed order and judgment to be signed by the court was revised and signed by both Hoarty and Silver. Silver made changes to the general release and faxed a copy back to Hoarty the following day. Hoarty made Silver's changes and returned a revised copy of the general release to Silver.

A pretrial conference was scheduled for the next morning. Hoarty asked Silver to make additional changes to the general release that morning before the conference, and Silver agreed. Silver told Hoarty to get the changes made and delivered, and Silver would have Strategic's representatives sign the general release. At the conference, the parties informed the court that a settlement had been reached. However, when Silver later had Strategic's representatives in California review the latest revision, Strategic indicated that it did not wish to proceed with the settlement.

On July 7, 1999, Silver informed Profit that Strategic found the new language of the general release unacceptable and would not execute the settlement agreement and release. Strategic also accused Profit of intentionally contacting Strategic's clients and slandering Strategic in violation of the spirit and intent of the settlement discussions. Profit then filed a motion to enforce the settlement agreement, which motion was resisted by Strategic.

At a hearing on the motion, Silver acknowledged that he had executed the memorandum of agreement on behalf of Strategic and admitted that he had agreed to the new language of the general release suggested by Hoarty just before the pretrial conference. After the hearing, the district court sustained the motion to enforce the agreement, based on its finding that the parties had reached an agreement which resolved all issues in dispute. The court further found that there was no credible evidence to support Strategic's allegations that Profit had contacted Strategic's clients or disparaged or slandered Strategic. Finally, the court

noted that Strategic was unwilling to suggest alternative language for the section of the settlement agreement pertaining to the general release. The district court therefore ordered that all provisions of the parties' agreement be enforced in accordance with the original memorandum of agreement and the agreed order and judgment. Strategic timely appeals from the district court's order.

## ASSIGNMENTS OF ERROR

Strategic assigns that the district court erred in finding that a settlement agreement existed between Strategic and Profit and in enforcing it accordingly.

## STANDARD OF REVIEW

[1] The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below. *Keller v. Bones*, *ante* p. 202, 615 N.W.2d 883 (2000); *Fraternal Order of Police v. County of Douglas*, 259 Neb. 822, 612 N.W.2d 483 (2000).

[2] In a bench trial of an action at law, the factual findings by the trial court have the effect of a jury verdict and will not be set aside unless they are clearly wrong. *Ruble v. Reich*, 259 Neb. 658, 611 N.W.2d 844 (2000); *Bachman v. Easy Parking of America*, 252 Neb. 325, 562 N.W.2d 369 (1997).

## ANALYSIS

Strategic does not dispute that Silver had authority to sign the memorandum of agreement at the mediation hearing, but it contends that the district court should not have sustained Profit's motion to enforce the settlement agreement because the memorandum of agreement signed by Silver was not a final settlement.

[3] A settlement agreement is subject to the general principles of contract law. *Woodmen of the World Life Ins. Soc. v. Kight*, 246 Neb. 619, 522 N.W.2d 155 (1994). The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below. *Keller v. Bones, supra*; *Fraternal Order of Police v. County of Douglas, supra.*

[4,5] To have a settlement agreement, there must be a definite offer and an unconditional acceptance. *Heese Produce Co. v. Lueders*, 233 Neb. 12, 443 N.W.2d 278 (1989). When the terms of a contract are clear, a court may not resort to rules of construction, and terms are accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. In such a case, a court shall seek to ascertain the intention of the parties from the plain language of the contract. *Farmers Union Co-op Ins. Co. v. Allied Prop. & Cas.*, 253 Neb. 177, 569 N.W.2d 436 (1997).

According to Strategic, the memorandum of agreement was only an agreement to make an agreement. The facts introduced at the hearing, without objection, however, show a definite offer and unconditional acceptance. The record indicates the parties created three drafts of the memorandum of agreement at the mediation hearing before finding language that both parties and their attorneys agreed upon. Both parties informed the district court at a pretrial conference that a settlement had been reached, and no qualifications were placed on that announcement.

The record does indicate that Strategic found the changes made to the general release objectionable because it believed the revised language of the general release was broader than that of the memorandum of agreement. Paragraph 2 of the memorandum of agreement required Strategic to execute a general release of all claims in favor of Profit with three exceptions: (1) a specific claim in the Douglas County District Court, (2) any "COBRA" claims that arose in the future, and (3) any future violations of the injunction.

The final revision of the general release required Strategic to release all "claims, demands, damages or suits of any kind or nature, whether known or unknown, which they may now or hereafter have as of the [mediation] date," subject to the same exceptions. Strategic argued at the hearing that this new language was much broader than that of the previous revision. The district court, however, found that Silver, Strategic's counsel, had agreed to the changes and that Strategic had failed to suggest alternative language for the clause it found unacceptable.

Strategic argues that the preceding exchange of drafts dealing with the general release demonstrates the parties' lack of intent

to be bound by the document. In support of this argument, Strategic relies on two federal circuit cases for the proposition that an unexecuted draft document is not a binding settlement agreement. The facts of these two cases, however, are distinguishable.

In *Wang Laboratories v. Applied Computer Sciences*, 958 F.2d 355 (Fed. Cir. 1992), the parties had informed the district court that they had agreed on the eve of trial to settle. The negotiations had produced a draft settlement document that neither party signed. *Id.* When the plaintiff then filed a motion to enforce the settlement, the district court estopped the defendants from claiming that a settlement had not been reached. *Id.*

The federal circuit court reversed on appeal, noting that the parties had informed the district court three different times that the settlement agreement " 'is not yet in final form and has not yet been executed.' " *Id.* at 359. In addition, the draft document specified that it could not be amended unless executed by the parties. *Id.* The circuit court determined that "no reasonable fact-finder could conclude that the parties intended that the agreement would be binding without execution of the documents by both parties." *Id.*

In *MIF Realty L.P. v. Rochester Associates*, 92 F.3d 752 (8th Cir. 1996), the plaintiff had told its trial counsel the parties had reached a settlement that would be binding when reduced to writing. The plaintiff's counsel had then informed the district court that there was a settlement. Based on that information, the district court then dismissed the action sua sponte. *Id.* On appeal, however, neither party contended that a settlement agreement, written or oral, had been reached. On these circumstances, the federal circuit court concluded the district court had erred in finding that the parties had agreed to settle.

The present case is distinguishable from both of these federal cases. Unlike *MIF Realty L.P.*, the agreement in this case was reduced to writing. Unlike both cases, the memorandum of agreement in this case was executed by each party's counsel.

Although Strategic argues that the necessity of executing future settlement documents demonstrates the parties' lack of intent to be bound by the memorandum of agreement, Strategic's reliance on this argument fails to take into consider-

ation our prior holdings on this issue. In *Satellite Dev. Co. v. Bernt*, 229 Neb. 778, 429 N.W.2d 334 (1988), a property seller argued that a purchase agreement was not a binding contract because a paragraph in the agreement required that a future contract be made with respect to a second mortgage. We noted that the evidence did not show that the second contract was a precondition to performance under the purchase agreement, and we stated that the terms of the second contract were only an elaboration on the terms of the purchase agreement. *Id.* Because the purchase agreement was controlling, we concluded the sellers were bound by it in spite of their refusal to execute a second contract that was part of the transaction. *Id.*

[6] Likewise, in this case, none of the terms of the general release present materially new terms. Rather, the general release is an elaboration of the terms set forth in the memorandum of agreement. A contract provision to execute effectuating documents in the future is enforceable where all of the material terms are specified in the original contract and leave none to be agreed upon through future negotiations. See *id.* See, also, 17A Am. Jur. 2d *Contracts* § 35 (1991).

The parties did not provide in the memorandum of agreement that certain terms would be agreed upon later or that the terms of the memorandum of agreement would not take effect until the general release was executed. It would have been a simple matter to include such a provision in their agreement, had that been the intent. See *Satellite Dev. Co. v. Bernt*, 229 Neb. at 783, 429 N.W.2d at 338 (" '[w]hen an agreement stipulates that certain terms shall be settled later by the parties, such terms do not become binding unless and until they are settled by later agreement' "). Instead, all of the material terms are set forth in the memorandum of agreement, without conditions, and the document was executed by counsel for both parties in the parties' presence.

[7] Finally, Strategic contends that lack of good faith on Profit's part was a sufficient justification for the district court to deny Profit's motion to enforce the settlement agreement. The implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive

the benefit of the contract. *Cimino v. FirstTier Bank*, 247 Neb. 797, 530 N.W.2d 606 (1995).

[8] The question of a party's good faith in the performance of a contract is a question of fact. *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 412 N.W.2d 453 (1988). In a bench trial of an action at law, the factual findings by the trial court have the effect of a jury verdict and will not be set aside unless they are clearly wrong. *Ruble v. Reich*, 259 Neb. 658, 611 N.W.2d 844 (2000); *Bachman v. Easy Parking of America*, 252 Neb. 325, 562 N.W.2d 369 (1997).

In support of the allegation that Profit had contacted Strategic's clients in violation of the injunction, Strategic offered a letter dated July 23, 1999, from one of Strategic's former clients to Nebraska's Department of Labor alleging that Strategic was not properly accounting for unemployment contributions to the State of Nebraska. Leaving aside the sufficiency of this evidence, violations of the injunction were specifically excepted from the general release in the memorandum of agreement. Strategic was not without recourse on this matter.

In support of the allegation that Profit had slandered and disparaged Strategic, Strategic offered a letter dated July 13, 1999, from Nebraska's Department of Insurance to American Employers Group (Strategic's successor in interest) requesting information on its business operations. Strategic seems to argue that the language of the final revision would have deprived it of an action for defamation. However, any claim for defamation would not have existed before the release date and so would not have been lost. See, e.g., *Oliver v. Clark*, 248 Neb. 631, 537 N.W.2d 635 (1995) (holding that settlement agreement which purports to release any and all claims for accident-related damages may be set aside on ground of mutual mistake where there are injuries of serious character wholly unknown to parties and not taken into consideration when release was executed).

First, we note that Silver informed Profit on July 7, 1999, that Strategic would not execute the settlement agreement. The first two letters Strategic offered as evidence of Profit's bad faith were dated after this repudiation. There is also a letter from Lentz to the Department of Insurance suggesting that the department investigate American Employers Group. That letter is

dated April 20, 1999, 2 months before the mediation negotiations.

Although Strategic does not specify exactly when or how it learned of this April letter, the record indicates it did not know the letter existed until it was notified by the Department of Insurance. Without more evidence in the record, it is impossible to determine whether Strategic knew of the letter before the settlement negotiations and chose to ignore it, or learned of the letter at the same time the Department of Insurance wrote American Employers Group about its business practices on July 13, 1999—after Strategic had already repudiated the settlement.

All the letters were attached as exhibits to an affidavit from the vice president of Strategic, who was not available to testify, and the trial court found that no credible evidence had been submitted to support the allegation that Profit had contacted Strategic's clients or disparaged or slandered Strategic. Under these facts, the district court's determination that the evidence did not support allegations of bad faith was not clearly erroneous.

## CONCLUSION

We affirm the district court's determination that a valid settlement agreement had been entered into by the parties, and we likewise affirm the court's decision to enforce the agreement according to its terms.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V.
RODNEY NEISS, APPELLANT.
619 N.W.2d 222

Filed November 9, 2000. No. S-99-1361.

1. **Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Criminal Law: Drunk Driving: Prior Convictions: Sentences.** Neb. Rev. Stat. § 60-6,196 (Supp. 1999) criminalizes the act of driving under the influence of alcoholic liquor or drug, and the fact that the defendant has previously been convicted of such crime is irrelevant to the guilt or innocence of the defendant.

3. **Prior Convictions: Sentences: Double Jeopardy: Death Penalty.** Even when an enhancement proceeding has the "hallmarks" of a trial, double jeopardy principles do not apply to the proceeding, unless the enhancement proceeding is in the capital sentencing context.
4. **Statutes: Drunk Driving: Prior Convictions: Sentences.** Under the enhancement provisions of Neb. Rev. Stat. § 60-6,196(2) (Supp. 1999), a drunk driving offender is not receiving additional punishment for his or her previous convictions, but, rather, the offender is being penalized for persisting in committing the offense of driving while under the influence of alcoholic liquor.
5. **Drunk Driving: Prior Convictions: Sentences: Double Jeopardy: Appeal and Error.** Double jeopardy principles do not apply to driving under the influence enhancement proceedings; thus, a district court is not precluded from reversing an erroneous enhancement determination and remanding the case to county court with directions to resentence the offender according to law.
6. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** Ordinarily, 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.
7. **Constitutional Law: Double Jeopardy: Statutes.** The protections afforded by Neb. Rev. Stat. § 29-2319 (Reissue 1995) are no greater than or different from the double jeopardy protections afforded by the U.S. and Nebraska Constitutions.
8. **Constitutional Law: Double Jeopardy.** The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.

Petition for further review from the Nebraska Court of Appeals, HANNON, INBODY, and CARLSON, Judges, on appeal thereto from the District Court for Dodge County, F.A. GOSSETT III, Judge, on appeal thereto from the County Court for Dodge County, DANIEL J. BECKWITH, Judge. Judgment of Court of Appeals affirmed.

Bradley E. Nick, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy & Nick, for appellant.

Don Stenberg, Attorney General, and Scott G. Gunem for appellee.

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

GERRARD, J.

## FACTUAL AND PROCEDURAL BACKGROUND

On September 5, 1998, Rodney Neiss was arrested and subsequently charged with driving while under the influence of alcoholic liquor (DUI). The State alleged that Neiss had previ-

ously been convicted of DUI on June 10, 1989, and on January 24, 1996; therefore, the State sought enhancement of Neiss' sentence pursuant to Neb. Rev. Stat. § 60-6,196(2)(c) (Supp. 1999). On March 30, 1999, Neiss appeared in the county court with counsel and entered a plea of guilty to the charge of DUI. After accepting Neiss' plea and adjudging him guilty of DUI, the county court scheduled an evidentiary hearing to determine whether Neiss' sentence should be enhanced because of prior DUI convictions. That hearing was conducted, and on September 9, the county court entered a finding that the January 24, 1996, DUI conviction could be utilized to enhance the sentence, but that the State was barred from utilizing the June 10, 1989, conviction for enhancement purposes.

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 DUI had prior DUI convictions. After L.B. 309 went into effect on April 19, 1998, however, courts could look back 12 years to prior DUI convictions for enhancement purposes. See § 60-6,196(2). The county court determined that applying L.B. 309 to look back 12 years for a prior DUI conviction would have the effect of giving the amended statute an ex post facto application. Thus, the county court, utilizing only the 1996 prior conviction, found Neiss guilty of second-offense DUI and sentenced him on that basis.

The State sought and obtained leave to appeal the judgment to the district court, claiming that the county court erred in finding that the State could not utilize Neiss' 1989 DUI conviction for enhancement purposes. On November 9, 1999, the district court, for reasons substantially the same as later articulated by this court in *State v. Hansen*, 258 Neb. 752, 605 N.W.2d 461 (2000), determined that there was no ex post facto violation in applying the 12-year look-back provision of § 60-6,196(2)(c); thus, the district court reversed the judgment of the county court and remanded the matter to the county court for resentencing as a third-offense DUI. Neiss timely appealed the district court's judgment to the Nebraska Court of Appeals.

On appeal to the Court of Appeals, Neiss assigned as error the district court's (1) reversing the county court's decision to sen-

tence him as a second-offense DUI, as opposed to a third offense, and (2) reversing the decision and remanding the case to the county court for resentencing as a third-offense DUI, because Neiss had been "placed legally in jeopardy" in the county court. Under his second assignment of error, Neiss argued that he had been placed legally in jeopardy under the plain language of Neb. Rev. Stat. § 29-2319 (Reissue 1995) and that the district court's decision must therefore be reversed.

The State moved for summary affirmance pursuant to Neb. Ct. R. of Prac. 7B(2) (rev. 2000) on March 15, 2000. Neiss conceded that *State v. Hansen, supra*, was controlling and dispositive of his first assignment of error. Regarding Neiss' second assignment of error, the State argued that the Court of Appeals' decision in *State v. Werner*, 8 Neb. App. 684, 600 N.W.2d 500 (1999), was controlling. In *State v. Werner*, the Court of Appeals addressed a procedural situation virtually identical to the facts in the case at bar. However, the defendant in that case argued that the district court's remand to the county court with directions to find her guilty of third-offense DUI violated her right to be free of *double jeopardy*. The Court of Appeals determined that the district court's reversal of the county court's decision that the defendant was guilty of second-offense DUI and its remand of the case to the county court with directions to find the defendant guilty of third-offense DUI did not violate the defendant's right to be free of double jeopardy. *Id.* In doing so, the Court of Appeals conducted its analysis under constitutional double jeopardy principles as opposed to a purely statutory analysis pursuant to § 29-2319.

In his objection to summary affirmance, Neiss again urged the Court of Appeals to analyze his case under the plain language of § 29-2319, as opposed to a constitutional double jeopardy analysis. The Court of Appeals, however, granted the State's motion for summary affirmance with the following entry on May 2, 2000: "Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2)."

We granted Neiss' petition for further review to analyze whether he was "placed legally in jeopardy" within the meaning of § 29-2319 at the time that the county court determined Neiss to be a second offender and sentenced him accordingly.

## ASSIGNMENT OF ERROR

In his petition for further review, Neiss assigns that the Court of Appeals erred in sustaining the State's motion for summary affirmance of the district court's reversal of the decision and remand of this case to the county court for resentencing as a third-offense DUI, based on the fact that Neiss had been placed legally in jeopardy in the county court within the meaning of § 29-2319.

## STANDARD OF REVIEW

[1] Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Hernandez*, 259 Neb. 948, 613 N.W.2d 455 (2000).

## ANALYSIS

Neb. Rev. Stat. § 29-2317 (Reissue 1995) provides, inter alia, that a prosecuting attorney may appeal any ruling or decision of the county court made during the prosecution of a cause by presenting to the court a notice of intent to take an appeal to the district court with reference to the rulings or decisions of which the complaint is made. That procedure was utilized in the instant case.

Section 29-2319, however, provides in pertinent part:

> (1) The judgment of the court in any action taken under the provisions of [§] 29-2317 . . . shall not be reversed nor in any manner affected when the defendant in the trial court *has been placed legally in jeopardy*, but in such cases the decision of the district court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered, or which may thereafter arise in the district.

(Emphasis supplied.)

The issue to be decided in this appeal is whether Neiss was "placed legally in jeopardy" under the meaning of § 29-2319 when the county court determined that Neiss' 1989 DUI conviction could not be utilized for enhancement purposes and he was sentenced for second-offense DUI.

We have addressed the meaning of being "placed legally in jeopardy" in analyzing Neb. Rev. Stat. § 29-2316 (Reissue 1995) in the context of resentencing proceedings after a reversal by an appellate court. While § 29-2316 deals specifically with appellate courts and § 29-2319 deals with a district court sitting as an appellate court, the relevant language in § 29-2316 is identical to the relevant language in subsection (1) of § 29-2319. Both statutes state that the judgment of the trial court in any action where the prosecutor has appealed "shall not be reversed nor in any manner affected when the defendant in the trial court has been *placed legally in jeopardy.*" We have, however, drawn a distinction between the finality and conclusiveness accorded to a trial verdict of acquittal (bars reprosecution) and the lack of finality accorded to the statutorily granted right of review of a defendant's sentence (does not invoke double jeopardy considerations). See, *State v. Wren*, 234 Neb. 291, 450 N.W.2d 684 (1990); *State v. Schall*, 234 Neb. 101, 449 N.W.2d 225 (1989).

In *State v. Wren, supra*, we analyzed the effects of § 29-2316 on our ability to reverse the sentencing decision of a lower court and impose a harsher sentence upon a defendant. In determining whether the defendant in *State v. Wren* had been placed legally in jeopardy as far as his sentence was concerned, we quoted *United States v. DiFrancesco*, 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980), and stated:

> "The double jeopardy focus, thus, is not on the appeal but on the relief that is requested, and our task is to determine whether a criminal sentence, once pronounced, is to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal. We conclude that neither the history of sentencing practices, nor the pertinent rulings of this Court, nor even considerations of double jeopardy policy support such an equation."

*State v. Wren*, 234 Neb. at 295, 450 N.W.2d at 688. We determined that double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence, and we concluded that the defendant had not been *placed legally in jeopardy* within the meaning of § 29-2316 as far as his sentence was concerned. *State v. Wren, supra.* We therefore reversed the judgment of the district court and remanded the matter to the

district court with directions to impose a harsher sentence upon the defendant. Compare *State v. McDermott*, 200 Neb. 337, 263 N.W.2d 482 (1978) (district court's remand and imposition of stricter sentence upon defendant at county court level placed him legally in jeopardy because defendant had completely served his sentence prior to district court's decision to impose stricter sentence).

The issue in the instant case is slightly different, however. We must determine whether Neiss had been placed legally in jeopardy by virtue of the county court's determination, at the conclusion of the enhancement hearing, that the conviction in the case at bar was Neiss' second offense. Stated another way, are enhancement hearing determinations to be accorded finality and conclusiveness similar to trial verdicts of acquittal or is the review of an enhancement proceeding historically more similar to the review of a defendant's sentence? The U.S. Supreme Court recently considered a similar issue in *Monge v. California*, 524 U.S. 721, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998).

In *Monge v. California*, the defendant was charged in state court with a felony and the State notified the defendant that it would seek to prove two prior conviction enhancement allegations. Under California's " 'three-strikes' law," a defendant convicted of a felony who has two qualifying prior convictions for " 'serious felonies' " receives a minimum prison sentence of 25 years to life; a defendant who has one prior serious felony conviction receives double the normal prison sentence. 524 U.S. at 724. After the defendant was found guilty, the proof of the two prior conviction allegations was argued before the court. The trial court found both prior conviction allegations applicable and sentenced the defendant accordingly. On appeal to the California Court of Appeal, the State conceded that there was not proof beyond a reasonable doubt on one of the prior conviction allegations at the enhancement proceeding but requested another opportunity to prove the issue on remand. *Id.* The Court of Appeal determined that remand for another sentence enhancement proceeding would violate double jeopardy principles. The California Supreme Court reversed the Court of Appeal's ruling that the Double Jeopardy Clause bars retrial of prior conviction allegations. *Monge v. California, supra.*

In affirming the decision of the California Supreme Court, the U.S. Supreme Court discussed the applicability of double jeopardy principles to sentencing proceedings. *Id.* The Court noted that its previous decision in *Bullington v. Missouri*, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981), "established a 'narrow exception' to the general rule that double jeopardy principles have no application in the sentencing context." *Monge v. California*, 524 U.S. at 730. In *Bullington v. Missouri, supra*, the Court determined that double jeopardy principles do apply to capital sentencing proceedings. The reasoning behind the decision in *Bullington v. Missouri* was that "the first jury's deliberations bore the 'hallmarks of the trial on guilt or innocence,' . . . the prosecution undertook the burden of establishing facts beyond a reasonable doubt, and the evidence was introduced in a separate proceeding that formally resembled a trial." *Monge v. California*, 524 U.S. at 730, quoting *Bullington v. Missouri, supra*. However, the Court distinguished the capital sentencing context from other sentencing proceedings by reasoning that

> the "embarrassment, expense and ordeal" as well as the "anxiety and insecurity" that a capital defendant faces "are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial." . . . And we cited the "unacceptably high risk" that repeated attempts to persuade a jury to impose the death penalty would lead to an erroneous capital sentence.

*Monge v. California*, 524 U.S. at 731, quoting *Bullington v. Missouri, supra*.

In addressing whether double jeopardy principles apply to California's enhancement proceeding in *Monge v. California*, 524 U.S. 721, 731-32, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998), the Court stated:

> Even assuming, however, that the proceeding on the prior conviction allegation has the "hallmarks" of a trial that we identified in *Bullington*, a critical component of our reasoning in that case was the capital sentencing context. The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of

> capital murder. . . . Because the death penalty is unique "in both its severity and its finality," . . . we have recognized an acute need for reliability in capital sentencing proceedings.

Quoting *Gardner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

The Court went further to point out that the procedural protections involved in capital sentencing proceedings are based on Eighth Amendment principles. Conversely, "[w]here noncapital sentencing proceedings contain trial-like protections, that is a matter of legislative grace, not constitutional command." *Monge v. California*, 524 U.S. at 734. The Court recognized that if it extended double jeopardy principles to statutory procedural protections, such as California's enhancement proceeding at issue in *Monge v. California*, there might be a disincentive that would diminish these sorts of important procedural protections. *Id.* Finally, the Court concluded that "the Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing context" in order to determine the truth of the allegations supporting the enhanced sentence. 524 U.S. at 734.

Similarly, in the instant case, we conclude that Neiss was not placed legally in jeopardy at the conclusion of the enhancement proceeding. First, we address the nature of the offense for which Neiss was charged and the nature of the enhancement proceeding under Nebraska's DUI law, § 60-6,196. We must determine whether Neiss was guilty of "second-offense DUI," making the prior conviction a necessary element of the offense, or whether the offense was simply "DUI," with the prior DUI convictions only enhancing the sentence. The Court of Appeals addressed this issue in *State v. Werner*, 8 Neb. App. 684, 600 N.W.2d 500 (1999).

In *State v. Werner*, the defendant contended that when the county court found her guilty of second-offense DUI, it acquitted her of third-offense DUI, thereby preventing resentencing as a third offense because it would subject her to reprosecution for the same crime and place her in double jeopardy. The Court of Appeals addressed the issue of whether, pursuant to § 60-6,196 (Reissue 1993), the proscribed offense is "third-offense DUI," making the prior convictions necessary elements of the offense, or whether the offense is simply "DUI," with the prior DUI convic-

tions only enhancing the sentence. Section 60-6,196(2) (Reissue 1993) provided that "[a]ny person who operates or is in the actual physical control of any motor vehicle while [under the influence of alcoholic liquor or of any drug] shall be guilty of a crime and upon conviction *punished* as follows . . . ." (Emphasis supplied.)

[2] The Court of Appeals correctly determined that the plain language of the statute criminalizes the act of DUI and that the fact of prior offenses is irrelevant to the guilt or innocence of the defendant and is only relevant to the defendant's sentence. *State v. Werner, supra.* The relevant language in the current version of § 60-6,196(2) (Supp. 1999) is identical to the language examined by the court in *State v. Werner, supra.* Because we agree with the Court of Appeals' determination that the plain language of the statute criminalizes the act of DUI and that prior offenses are irrelevant to the guilt or innocence of a defendant, we conclude that Neiss was convicted of DUI and that the determination of whether it was his second or third offense was part of a separate enhancement proceeding.

[3,4] Next, we address the issue of whether double jeopardy principles apply to the enhancement proceeding in the case at bar. The Supreme Court's decision in *Monge v. California*, 524 U.S. 721, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998), makes it clear that even when an enhancement proceeding has the "hallmarks" of a trial because the applicability of prior convictions is argued before the trial court, double jeopardy principles do not apply to the proceeding, unless it is in the capital sentencing context. This is because noncapital sentence enhancement proceedings are not accorded the finality and conclusiveness similar to trial verdicts of acquittal. The Court reasoned, and we agree, that

> sentence enhancements [have never] been construed as additional punishment for the previous offense; rather, they act to increase a sentence "because of the manner in which [the defendant] committed the crime of conviction." . . . An enhanced sentence imposed on a persistent offender thus "is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes" but as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."

*Monge v. California*, 524 U.S. at 728, quoting *United States v. Watts*, 519 U.S. 148, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997) (per curiam), and *Gryger v. Burke*, 334 U.S. 728, 68 S. Ct. 1256, 92 L. Ed. 1683 (1948). In other words, a DUI offender is not receiving additional punishment for his or her *previous convictions*, but, rather, the offender is being penalized under § 60-6,196(2) *for persisting in committing* the offense of DUI. See *State v. Hansen*, 258 Neb. 752, 605 N.W.2d 461 (2000).

[5] For these reasons, we hold that double jeopardy principles do not apply to DUI enhancement proceedings; thus, a district court is not precluded from reversing an erroneous enhancement determination and remanding the case to county court with directions to resentence the offender according to law. Neiss, however, argues that the language of § 29-2319 requires us to analyze the instant case under something other than double jeopardy principles. We do not agree.

[6-8] As noted previously, in both *State v. Wren*, 234 Neb. 291, 450 N.W.2d 684 (1990), and *State v. Schall*, 234 Neb. 101, 449 N.W.2d 225 (1989), we utilized Fifth Amendment principles in determining that double jeopardy considerations do not prohibit review and modification of a sentence under § 29-2316. Ordinarily, 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. McCracken, ante* p. 234, 615 N.W.2d 902 (2000). Our interpretation of the meaning of the phrase "placed legally in jeopardy" has not evoked an amendment to § 29-2316, nor has the identical phrase been amended in § 29-2319. We are persuaded that the Legislature intended to prevent offenders from being subjected to double jeopardy when the Legislature used the words "placed legally in jeopardy" in the context of both §§ 29-2316 and 29-2319. Nothing in the legislative history or in the actions of the Legislature since *State v. Schall, supra*, would lead us to conclude otherwise. Consequently, the protections afforded by § 29-2319 are no greater than or different from the double jeopardy protections afforded by the U.S. and Nebraska Constitutions. See *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999) (protection provided by Nebraska's double jeop-

ardy clause is coextensive with that provided by U.S. Constitution).

Thus, we determine that Neiss was not "placed legally in jeopardy" within the meaning of § 29-2319 at the time that the county court determined Neiss to be a second offender and sentenced him accordingly. Neiss' argument to the contrary is without merit.

## CONCLUSION

For the foregoing reasons, we conclude that the district court did not err when it reversed the judgment of the county court and remanded the case to the county court with directions to resentence Neiss as a DUI third offender. The judgment of the Court of Appeals is therefore affirmed.

AFFIRMED.

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# BIG JOHN'S BILLIARDS, INC., A NEBRASKA CORPORATION, APPELLEE, V. M. BERRI BALKA, IN HIS OFFICIAL CAPACITY AS STATE TAX COMMISSIONER FOR THE STATE OF NEBRASKA, ET AL., APPELLANTS.

619 N.W.2d 444

Filed November 17, 2000. No. S-99-1291.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
3. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

5. **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.
6. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
7. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
8. **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.
9. **Statutes.** In order to ascertain the proper meaning of a statute, reference may be had to later as well as earlier legislation upon the same subject.
10. ___. All existing acts should be considered, and a subsequent statute may often aid in the interpretation of a prior one.
11. **Constitutional Law: Statutes: Special Legislation.** A legislative act can violate Neb. Const. art. III, § 18, as special legislation in one of two ways: (1) by creating a totally arbitrary and unreasonable method of classification or (2) by creating a permanently closed class.
12. **Constitutional Law: Special Legislation: Public Policy.** A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to objects to be classified.
13. **Constitutional Law: Special Legislation.** Classification is proper if the special class has some reasonable distinction from other subjects of like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation.

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

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

Sheldon J. Harris and Brent M. Kuhn, of Harris, Feldman Law Offices, for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

The State of Nebraska, Department of Revenue; M. Berri Balka, the former State Tax Commissioner; and his successor,

Mary Jane Egr (collectively the Department), appeal the order of the district court for Lancaster County reversing the commissioner's order which had sustained a deficiency assessment for sales tax on the receipts from hourly fee pool tables owned and operated by Big John's Billiards, Inc. (Big John's). We reverse the judgment of the district court and remand the cause with directions to reinstate the order of the commissioner.

## STATEMENT OF FACTS

Big John's owns and operates entertainment centers equipped with pool tables, some of which are coin operated and some of which are paid for on an hourly fee basis. Big John's was licensed by the State of Nebraska to operate mechanical amusement devices pursuant to the Mechanical Amusement Device Tax Act (the Act), Neb. Rev. Stat. §§ 77-3001 to 77-3011 (Reissue 1990). Big John's paid a specified annual mechanical amusement device tax, which it claimed covered all its pool tables. In these proceedings, Big John's asserted that the hourly fee tables were "mechanical amusement devices" under the definition set forth in § 77-3001(2) and, therefore, did not charge sales tax on the fees paid by customers using those tables.

The Department of Revenue audited Big John's in 1990 and issued a deficiency assessment for Nebraska sales tax against Big John's for its failure to collect sales tax on the hourly fee tables during various tax periods beginning in November 1984 and extending through October 1989. Big John's protested the deficiency assessment before the commissioner, and both parties filed motions for summary judgment. The commissioner granted the Department of Revenue's motion for summary judgment and denied Big John's motion for summary judgment. Big John's appealed to the district court, which reversed the commissioner's decision. The Department appealed the district court's decision to this court. We dismissed the Department's appeal on the basis that we lacked jurisdiction to hear the appeal because the commissioner lacked the authority to grant summary judgment, and therefore, the commissioner's decision was not final. *Big John's Billiards v. Balka*, 254 Neb. 528, 577 N.W.2d 294 (1998).

Following a subsequent hearing before a hearing officer, the commissioner entered an order dated March 29, 1999, sustain-

ing the deficiency assessment and concluding that Big John's hourly fee pool tables did not fall within the definition of "mechanical amusement device" under § 77-3001(2) and that, therefore, receipts generated from fees charged for the use of such tables were subject to Nebraska sales tax. The commissioner further concluded that the distinction in the Act between coin-operated pool tables and hourly fee pool tables "does not contravene the Nebraska and United States Constitutions because there is a rational and distinct reason for the different tax treatment of the two types of pool tables."

Big John's petitioned the district court for Lancaster County for judicial review of the commissioner's decision pursuant to Neb. Rev. Stat. § 84-917 (Reissue 1999). Big John's asserted in its petition that the Department incorrectly interpreted the definition of "mechanical amusement device" in § 77-3001(2) and that a correct interpretation of the statute would include hourly fee pool tables within the definition of "mechanical amusement device." Big John's further asserted that the Department's interpretation of § 77-3001(2), if adopted, would render the Act unconstitutional under certain clauses of the Nebraska and U.S. Constitutions.

The district court issued an order dated October 12, 1999. In its order, the district court adopted Big John's interpretation of the statute, which interpretation included both coin-operated and hourly fee pool tables in the definition of "mechanical amusement device." The district court stated that it was required to reject the Department's interpretation of § 77-3001(2) because such interpretation would cause the Act to be unconstitutional as "special legislation" in violation of Neb. Const. art. III, § 18. Based on its interpretation of the statute, the district court reversed the commissioner's decision which had sustained the deficiency assessment for sales tax on receipts from hourly fee pool tables. The Department appealed the district court's order.

## ASSIGNMENTS OF ERROR

The Department asserts that the district court erred (1) in interpreting § 77-3001(2) to include Big John's hourly fee pool tables within the statutory definition of "mechanical amusement device"

and (2) in concluding that the Department's interpretation of § 77-3001(2) would create an unreasonable classification in violation of the special legislation clause, Neb. Const. art. III, § 18.

## STANDARDS OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Lancaster Cty. Sch. Dist. No. 0001 v. State, ante* p. 108, 615 N.W.2d 441 (2000). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Father Flanagan's Boys' Home v. Agnew*, 256 Neb. 394, 590 N.W.2d 688 (1999).

[3] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. See *Board of Regents v. Pinzon*, 254 Neb. 145, 575 N.W.2d 365 (1998).

[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. *Airport Auth. of Village of Greeley v. Dugan*, 259 Neb. 860, 612 N.W.2d 913 (2000).

[5] 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. *Dykes v. Scotts Bluff Cty. Ag. Socy., ante* p. 375, 617 N.W.2d 817 (2000).

## ANALYSIS

We must first determine whether the district court erred in rejecting the Department's interpretation of § 77-3001(2) and adopting Big John's interpretation. If we conclude that the dis-

trict court did so err and that the Department correctly interpreted § 77-3001(2) to include coin-operated pool tables but exclude hourly fee pool tables from the definition of "mechanical amusement device," we must then consider whether the Act created a classification in violation of Neb. Const. art. III, § 18, which provides that "[t]he Legislature shall not pass local or special laws . . . [g]ranting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever . . . ."

*Statutory Interpretation.*

[6-8] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *R.J. Miller, Inc. v. Harrington, ante* p. 471, 618 N.W.2d 460 (2000). If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *American Employers Group v. Department of Labor, ante* p. 405, 617 N.W.2d 808 (2000); *Sharkey v. Board of Regents, ante* p. 166, 615 N.W.2d 889 (2000). 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. *Sack v. State*, 259 Neb. 463, 610 N.W.2d 385 (2000).

At issue in this case is the interpretation of the definition of "mechanical amusement device" in § 77-3001(2). During the tax periods audited by the Department, § 77-3001(2) defined "mechanical amusement device," in part, as "any machine which, *upon insertion of a coin, or substitute therefor*, operates or may be operated or used for a game, contest or amusement of any description." (Emphasis supplied.) Following this definition, the statute lists examples of mechanical amusement devices including "pinball games, shuffleboard, bowling games, radio-ray rifle games, baseball, football, racing, boxing games, and *coin-operated pool tables*." (Emphasis supplied.) *Id.*

The basic difference between the Department's interpretation of the definition of mechanical amusement device and Big John's interpretation of the definition of mechanical amusement

device was that the Department interpreted the phrase "upon insertion of a coin, or substitute therefor" to mean that as a substitute for a coin, another medium of payment, such as a token, could be inserted into the machine and the machine remained a "mechanical amusement device" for purposes of § 77-3001(2), whereas Big John's interpreted the phrase "upon insertion of a coin, or substitute therefor" to mean that as a substitute for insertion of a coin, another act of payment, such as paying cash to a cashier or attendant, could be substituted, and the machine remained a "mechanical amusement device" for purposes of § 77-3001(2). Under the Department's interpretation, the act of payment must be by insertion of the payment into the machine, but a substitute medium of payment may be used. Under Big John's interpretation, a substitute act, as well as a substitute medium of payment, is allowed.

Applying the rules of statutory interpretation recited above, we conclude that the Department correctly interpreted § 77-3001(2) to exclude hourly fee pool tables from the definition of "mechanical amusement device" and that the district court erred in adopting Big John's interpretation of the statute. The plain language of § 77-3001(2) supports the Department's interpretation that the phrase "upon insertion of a coin, or substitute therefor" was meant to refer to a substitute medium of payment, which substitute must be inserted into the pool table, rather than a substitute act of payment, however accomplished. That is, under § 77-3001(2), the word "substitute" qualifies "coin" rather than "insertion."

We further find it significant that in listing examples of mechanical amusement devices in § 77-3001(2), the Legislature specifically identified "coin-operated" pool tables as mechanical amusement devices but made no mention of hourly fee pool tables. Reading the various provisions of the statute together and giving them a sensible construction, see *Sack v. State, supra*, the language of the statute supports the Department's interpretation that hourly fee pool tables were not included in the definition of "mechanical amusement device" in § 77-3001(2).

In concluding that the statutory language of § 77-3001(2) includes coin-operated but not hourly fee pool tables, we note that such interpretation differentiating between these two types

of pool tables for tax purposes is consistent with the evidence in this case demonstrating the differences surrounding these two devices. In contrast to a pool table into which a coin or substitute therefor is inserted and for which no record of receipts is readily subject to audit, the evidence in this case establishes that users of Big John's hourly fee pool tables register with an attendant prior to using the hourly fee tables and that when the user is finished playing, his or her fee is calculated by computer and the fee is paid directly to the attendant. A record is thus produced of fees paid on the hourly fee tables which is readily subject to audit.

[9,10] We further note that § 77-3001(2) was amended by the Legislature in 1997, operative July 1, 1998, and the relevant portion of the statute now reads "any machine which, upon insertion of a coin, *currency, credit card*, or substitute *into the machine*, operates or may be operated or used for a game, contest, or amusement of any description." (Emphasis supplied.) § 77-3001(2) (Cum. Supp. 1998). In order to ascertain the proper meaning of a statute, reference may be had to later as well as earlier legislation upon the same subject. *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998). All existing acts should be considered, and a subsequent statute may often aid in the interpretation of a prior one. *Id.*

The definition of mechanical amusement device in § 77-3001(2) was amended in 1997 by (1) providing for the insertion of "currency" or a "credit card" in addition to the insertion of a "coin" and (2) adding the prepositional phrase "into the machine." The amended language clarifies that the "substitute" referred to in the statute is a substitute medium of payment inserted into a machine rather than a substituted act of payment. Referring to the 1997 amendment as an aid in interpreting § 77-3001(2), it is clear that the Department correctly interpreted the statute to exclude Big John's hourly fee pool tables from the definition of "mechanical amusement device" and that the district court erred as a matter of law in rejecting the Department's interpretation. See *Airport Auth. of Village of Greeley v. Dugan*, 259 Neb. 860, 612 N.W.2d 913 (2000).

*Constitutionality of Classification Created by Act.*

The district court stated that it was required to reject the Department's interpretation of § 77-3001(2) and to adopt Big

John's interpretation because under the Department's interpretation, the Act created an arbitrary and unreasonable classification in violation of Neb. Const. art. III, § 18. Because we conclude that the language of § 77-3001(2) supports the Department's interpretation and does create a classification which distinguishes between coin-operated pool tables and hourly fee pool tables, we must consider whether such classification violates the Nebraska Constitution. We conclude that the Act creates a classification based on a reasonable distinction and a substantial difference between the objects classified and therefore does not violate Neb. Const. art. III, § 18.

[11-13] A legislative act can violate Neb. Const. art. III, § 18, as special legislation in one of two ways: (1) by creating a totally arbitrary and unreasonable method of classification or (2) by creating a permanently closed class. *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991). We have stated that "'"[a] legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to objects to be classified. . . ."'" *Id.* at 711, 467 N.W.2d at 846. Classification is proper if the special class has some reasonable distinction from other subjects of like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation. *Id.*

Our review of the legislative history of the enactment of the Act reveals that the purpose of the Act was to address the administrative difficulty in auditing the receipts generated by "mechanical amusement devices" for purposes of monitoring sales tax compliance. See, generally, Committee Records, L.B. 1360, 80th Leg. 12-16 (April 29, 1969), and Floor Debate, L.B. 1360, 80th Leg. 2179 (June 13, 1969). Because coins or other media of payment were directly deposited into such devices, no record of receipts was created which was readily subject to audit. The Legislature therefore proposed to create a separate classification for devices into which coins or substitute media were deposited and for which no record of receipts was created. Operators of such "mechanical amusement devices" would be subject to a separate mechanical amusement device tax in lieu of

sales tax on the receipts from such devices. *Id.* This classification would create a separate scheme for taxing the operators of mechanical amusement devices which would be less difficult to administer, while maintaining the sales tax scheme for other forms of amusement for which a record of receipts subject to audit was more readily maintained. *Id.*

We disagree with the district court's conclusion that the Act's classification which makes a distinction between coin-operated pool tables and hourly fee pool tables is "arbitrary and unreasonable." We conclude that the intent in the enactment of the Act, to provide a separate system of taxation for devices whose receipts were not readily subject to audit, was for a legitimate objective and purpose and that the distinction between amusements which are coin operated and those for which an hourly fee is paid bears a reasonable relation to such legitimate objective and purpose. See *Haman v. Marsh, supra.* Because we find that in regard to the legitimate purposes of the Act, a substantial difference of situation or circumstance exists between coin-operated amusement devices and other forms of amusement for which an hourly fee is collected, we conclude that the Act is not "special legislation" in violation of Neb. Const. art. III, § 18. Thus, there is no constitutional impediment to enforcement of § 77-3001(2) as interpreted by the Department.

## CONCLUSION

We conclude that the Department correctly interpreted § 77-3001(2) to exclude Big John's hourly fee pool tables from the definition of "mechanical amusement device" and that the district court erred in adopting Big John's interpretation of the statute. We further conclude that the classification created by § 77-3001(2) of the Act which treats coin-operated pool tables differently from hourly fee pool tables for sales tax purposes does not violate Neb. Const. art. III, § 18. We therefore reverse the judgment of the district court and remand the cause with directions to reinstate the order of the commissioner.

REVERSED AND REMANDED WITH DIRECTIONS.

# MANUEL GUICO, APPELLEE, V. EXCEL CORPORATION, APPELLANT.

619 N.W.2d 470

Filed November 17, 2000. No. S-99-1406.

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 a Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing; the findings of the single judge will not be disturbed on appeal unless clearly wrong.
3. ___: ___. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation: Proof.** It is the employer's burden to prove willful negligence on the part of the employee. In order to avoid workers' compensation 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. 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.
5. **Negligence: Words and Phrases.** 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.
6. **Workers' Compensation: Evidence: Appeal and Error.** If the record contains evidence to substantiate the factual conclusions reached by the trial judge of the compensation court, an appellate court is precluded from substituting its view of the facts for that of the compensation court.
7. **Workers' Compensation: Attorney Fees: Penalties and Forfeitures: Words and Phrases.** Whether a reasonable controversy exists under Neb. Rev. Stat. § 48-125 (Supp. 1999) is a question of fact. A reasonable controversy may exist (1) if there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part vacated.

Darin J. Lang, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Roger Moore, of Rehm Law Firm, for appellee.

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

PER CURIAM.

Excel Corporation appeals from a judgment of the Nebraska Workers' Compensation Court awarding temporary total and permanent partial disability benefits, waiting-time penalties, and attorney fees to Manuel Guico as the result of an injury occurring on December 9, 1997. The principal issue at trial and on appeal is whether Guico's injury resulted from his own willful negligence and was therefore not compensable under Neb. Rev. Stat. § 48-101 (Reissue 1998).

## FACTS

Guico was employed by Excel from 1995 until his termination on December 10, 1997, the day following his injury. At the commencement of his employment, Guico attended an orientation session where he was informed of the importance of wearing protective clothing and using the proper safety equipment. Guico was specifically told that he was required to wear steel-mesh gloves and a mesh apron whenever performing tasks involving the use of a knife.

Guico was assigned to various tasks during his employment by Excel. He described his initial work assignment as "trimming the legs of . . . cows," which necessitated the use of a knife. Guico testified that his supervisor on this job explained the importance of wearing the steel-mesh gloves when using a knife. Guico was subsequently reassigned to the task of "deboning the hands" which also required the use of a knife and, accordingly, the wearing of steel-mesh gloves and a mesh apron. Guico understood that he was required to use the mesh safety equipment while deboning because the work involved the use of a knife. Guico testified that when he was assigned to the tasks of trimming legs and deboning, his supervisor talked to him "[a]ll the time" about the importance of using the proper steel-mesh safety equipment so that no one would get cut.

At various times during his employment with Excel, Guico also performed a task described as "rib splitting." Excel's super-

visor in charge of rib splitting was Reynaldo Marquez. Marquez testified that when rib splitting, the worker inserts a 14-inch knife into a beef carcass at the fifth rib and pulls it back toward the worker's chest. He testified that due to the high risk of injury, the rib-splitter position requires the use of more mesh safety equipment than any other job on the floor at Excel. Guico understood that safety equipment was required while rib splitting "[s]o that one would not get cut."

On the day of his injury, Guico was assigned to operate a bone saw. Because that job did not involve the use of a knife, the only required items of safety equipment were cloth gloves and goggles. Guico began his shift at 2:30 p.m. After operating the bone saw for approximately 1½ hours, he decided to switch jobs with a coworker who had been rib splitting. At the time Guico switched jobs, he was wearing three pairs of cloth gloves on his hands. Guico knew he was required to wear mesh safety equipment to split ribs, but testified that he did not have time to put on the equipment because of the speed at which beef carcasses were coming down the continuous chain line. When Guico inserted the knife into the carcass, it slipped and lacerated his right thumb and index finger, resulting in an 11-percent permanent partial disability to his right hand. He admitted it was a mistake not to wear the steel gloves, but stated that he did not intentionally cut himself and "never imagined" that he would be injured. Guico stated that he switched jobs on the day of the injury without donning the steel-mesh safety equipment because he "never thought about" getting cut.

Guico testified at trial that he had performed the rib-splitter job on previous occasions with the knowledge and consent of Marquez and that he did not recall anyone telling him that he could not perform this task. In Guico's deposition, which was received in evidence at trial, he stated that Marquez told him 1 week before the accident that he could switch to the rib-splitter job whenever he wished. He further stated that Marquez did not mention at that time that he needed to wear the correct safety equipment if he switched jobs, although he admitted that he knew this to be a requirement. Guico stated that he switched from operating the bone saw to rib splitting "many times."

Marquez testified that employees under his supervision were allowed to switch jobs only after receiving his permission so that he could be certain that they were using the proper safety equipment. He testified that Guico did not have his permission to switch jobs on the date of the accident. Marquez testified that on the day before the injury, he discovered Guico had switched jobs and was rib splitting instead of performing his assigned task of operating the bone saw. Marquez noted that Guico was not wearing the steel-mesh safety equipment. He verbally reprimanded Guico and told him to go back to the task of operating the saw. Marquez did not write Guico up at that time, but on December 22, 1997, subsequent to Guico's termination, he prepared a handwritten statement describing this incident. When asked on cross-examination about the incident described by Marquez, Guico replied that he did not remember it.

Upon the court's inquiry, Marquez testified that accidents happen even though employees are using the proper safety equipment. He further testified, however, that a person wearing the steel-mesh gloves would not be cut by a knife, because the knife cannot cut through the mesh.

John Thiem, Excel's assistant human resources manager, testified that the work environment at Excel can be dangerous if the proper safety precautions are not followed. Thiem testified that Excel requires all employees using knives to wear steel-mesh gloves and mesh aprons. He testified that violation of a safety rule could result in a verbal warning, a written suspension, or termination, depending upon the severity of the violation. He stated that a minor violation would be wearing equipment improperly or running in the hall. Thiem testified that complete failure to use required safety equipment was a major violation which could result in termination. Thiem testified that he considered the rule requiring the wearing of steel-mesh gloves and mesh aprons when using a knife to be a reasonable rule because it was in place to protect the "life and limb" of an employee.

Thiem testified that during a meeting on the day after the accident, Guico admitted that he was not wearing the required safety equipment at the time of the injury. Thiem informed Guico at this meeting that in view of the fact that Guico had been warned regarding the same behavior on the day before the

injury, Thiem had decided to terminate his employment for failure to obey safety rules. However, Thiem also told Guico that Excel would pay his workers' compensation and medical bills. Upon the court's inquiry, Thiem stated that Excel does not write up all violations, but instead gives verbal warnings at times. He stated that failure to use an apron or gloves should result in a written violation, although he was not aware of a writeup for Guico's December 8, 1997, violation.

Janet Dostal, Excel's workers' compensation coordinator, testified that when Excel employees are injured, they are placed in the light-duty program, which can accommodate almost any type of work restriction. According to Dostal, had Guico not been terminated on December 10, 1997, he would have been able to participate in the light-duty program up through the time he reached maximum medical improvement. Because of his termination, Guico was not offered light duty. Excel did, however, pay his medical bills based upon the representation made to Guico by Thiem at the time he was terminated. Upon the court's inquiry, Dostal testified that the only written disciplinary action in Guico's file unrelated to the accident was a January 31, 1997, disciplinary action for wearing jewelry while on the production floor.

FINDINGS AND DECISION OF WORKERS' COMPENSATION COURT

On April 28, 1999, the trial judge entered an order finding that Guico was entitled to benefits under the Nebraska Workers' Compensation Act. In its order, the court specifically noted that no Nebraska case addresses whether the failure to follow a safety rule is "willful negligence" as a matter of law. Applying analytical principles discussed in 2 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 33 (2000), the trial judge determined that Excel failed to meet its burden of proving willful negligence on the part of Guico.

The trial judge also found that the evidence did not establish that Guico was terminated for reasons other than his injury. Finally, the trial judge determined there was no reasonable controversy with respect to the compensability of Guico's claim and thus awarded him waiting-time penalties and attorney fees. The final award granted Guico $310.76 per week for 14$^{2}/_{7}$ weeks of

temporary total disability, an additional $310.76 per week for 19.25 weeks for an 11-percent permanent partial disability to the right hand, all medical and hospital expenses incurred as a result of the accident, a 50-percent penalty on all outstanding compensation due and owing, and an attorney fee of $2,000.

Excel appealed the decision to a three-judge review panel of the Workers' Compensation Court. The panel issued an order of affirmance on November 3, 1999, in which it found that the trial judge's findings of fact were not clearly wrong, that there was no error of law, and that a detailed opinion would have no precedential value. The review panel also assessed a $2,000 attorney fee against Excel based upon its finding that the appeal did not bring about a reduction of the award. Excel perfected this timely appeal, which we removed to our docket on our own motion pursuant to our authority to regulate the dockets of the appellate courts. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

## ASSIGNMENTS OF ERROR

Excel assigns, restated and renumbered, that the Workers' Compensation Court erred in (1) failing to find that Guico's actions amounted to willful negligence, (2) awarding temporary total disability benefits due to Guico's termination for cause, and (3) awarding waiting-time penalties and attorney fees.

## 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. Neb. Rev. Stat. § 48-185 (Supp. 1999); *Logsdon v. ISCO Co., ante* p. 624, 618 N.W.2d 667 (2000); *Miller v. E.M.C. Ins. Cos.*, 259 Neb. 433, 610 N.W.2d 398 (2000).

[2,3] In determining whether to affirm, modify, reverse, or set aside a judgment of a Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing; the findings of the

single judge will not be disturbed on appeal unless clearly wrong. See, *Logsdon v. ISCO Co., supra*; *Bottolfson v. Bag 'N Save*, 259 Neb. 124, 608 N.W.2d 171 (2000). An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Logsdon v. ISCO Co., supra*; *Bottolfson v. Bag 'N Save, supra.*

## ANALYSIS

Compensability under the Nebraska Workers' Compensation Act is determined by § 48-101, which provides:

> When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer *if the employee was not willfully negligent at the time of receiving such injury.*

(Emphasis supplied.) The act defines "willful negligence" to include "(a) a deliberate act, (b) such conduct as evidences reckless indifference to safety, or (c) intoxication at the time of the injury." Neb. Rev. Stat. § 48-151(7) (Supp. 1999). As there is no contention that Guico injured himself deliberately or as a consequence of intoxication, the Workers' Compensation Court correctly focused upon whether Guico's conduct at the time of his injury evidenced a reckless indifference to safety.

[4,5] It is the employer's burden to prove willful negligence on the part of the employee. Neb. Rev. Stat. § 48-107 (Reissue 1998); *Collins v. General Casualty*, 258 Neb. 852, 606 N.W.2d 93 (2000). 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. *Collins v. General Casualty, supra*; *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. *Collins v. General Casualty, supra.* 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. *Id.*

As noted by the trial judge, this court has not addressed the specific issue of willful negligence in the context of a worker's violation of a specific safety rule promulgated by an employer. In two cases upon which Guico relies, however, we have considered whether conduct of an employee which was contrary to general principles of industrial safety constituted "willful negligence" within the meaning of the Nebraska Workers' Compensation Act. In *Richards v. Abts*, 136 Neb. 741, 287 N.W. 199 (1939), a worker was killed as the result of an explosion which occurred while he was welding a pressurized tank. Although the employer presented expert testimony that use of an acetylene welding torch upon such a tank as that which exploded was a dangerous practice of which welders were universally aware, we held that this evidence did not establish "willful negligence" because "[t]he proof is lacking that the deceased deliberately, and of his own wilful negligence, failed to take any precaution which he had been taught . . . by his employer, or learned from his own experience." *Id.* at 745, 287 N.W. at 201.

In the second case, *Moise v. Fruit Dispatch Co.*, 135 Neb. 684, 283 N.W. 495 (1939), the resident manager of a company which distributed fruit to wholesale dealers was charged with the duty of inspecting shipments as to which customers registered complaints regarding quality. In response to a complaint by a customer that bananas it had received were too green, the manager entered the room in which the customer stored the bananas. The room contained natural and ethylene gases to hasten ripening of the bananas, and the manager was warned by the customer's personnel prior to entering the room that he should not smoke inside the room because of the danger of explosive gas. As the manager left the room after conducting the inspection, he ignited a match to light his pipe, resulting in an explosion which killed him and others. We rejected the employer's contention that the manager's death was caused by willful negligence on his part. Based upon uncontradicted evidence that the manager was "an inveterate smoker of a pipe," we concluded that it was a proper inference from the facts that he responded automatically to the desire to smoke and ignited the match "without the volition or mental effort essential to the intentional

wilful act of negligence contemplated by the language of the statute." *Id.* at 689, 283 N.W. at 498.

In his treatise, Professor Larson notes that courts have generally not applied what he characterizes as the "wilful misconduct" defense in circumstances where unsafe conduct by an employee, while negligent or thoughtless, is not shown to be intentional or deliberate. 2 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 34.02 at 34-5 (2000). However, he concludes that "the general rule can be stated with confidence that the deliberate defiance of a reasonable rule laid down to prevent serious bodily harm to the employee will usually be held to constitute wilful misconduct, in the absence of . . . specific excuses." *Id.*, § 34.03 at 34-10. This statement has support in the case law. See, e.g., *Adams on Behalf of Boysaw v. Hercules, Inc.*, 21 Va. App. 458, 465 S.E.2d 135 (1995) (affirming finding that employee engaged in "willful misconduct" disqualifying him from benefits under Virginia workers' compensation statute where violation of employer's safety rule requiring permit for access to restricted area containing ether spills was intentional); *Carrico v. Comp. Com'r.*, 127 W. Va. 463, 33 S.E.2d 281 (1945) (reversing award for employee upon determination that injury was due to worker's deliberate and intentional failure to wear safety goggles in violation of employer's rule); *Herman v. Aetna Casualty & Surety Co.*, 71 Ga. App. 464, 465, 31 S.E.2d 100, 101 (1944) (affirming finding that employee's injuries resulted from "wilful misconduct" where he violated a safety rule requiring employees to wear rubber gloves and boots when working with electric motors); *Hamilton v. Swigart Coal Mine*, 59 Wyo. 485, 143 P.2d 203 (1943) (affirming denial of benefits upon finding that miner's injury caused by serious and willful misconduct in violating safety rule which had been clearly explained).

Professor Larson discusses several factors which courts have considered in determining whether the violation of an employer's safety rule should disqualify a worker from benefits, both under statutes which afford a general "willful misconduct" defense and those which specifically provide a defense for safety rule violations. Summarized and restated, these factors include (1) whether an employer has a reasonable rule designed to protect the health

and safety of the employee, (2) whether the employee has actual notice of the rule, (3) whether the employee has an understanding of the danger involved in the violation of the rule, (4) whether the rule is kept alive by bona fide enforcement by the employer, and (5) whether the employee has a bona fide excuse for the rule violation. See 2 Larson & Larson, *supra*, §§ 34 and 35. In the present case, the trial court found as undisputed facts that Excel had "a work rule to the effect that a worker needs to wear a specialized glove when working with knives" and that Guico was not wearing this type of gloves at the time of his injury. Based upon Guico's deposition and trial testimony, it is likewise undisputed that he had actual notice and knowledge of the rule prior to his injury. In this regard, the present case is distinguishable from *Richards v. Abts*, 136 Neb. 741, 287 N.W. 199 (1939).

As to the remaining factors, the trial court specifically found that Guico "did not understand the danger involved in the violation, the rule was not kept alive by bona fide enforcement, and [Guico] did, in fact, have a valid excuse for the violation given the production demands of [Excel]." 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. *Collins v. General Casualty*, 258 Neb. 852, 606 N.W.2d 93 (2000); *Frank v. A & L Insulation*, 256 Neb. 898, 594 N.W.2d 586 (1999).

[6] It is clear from the record that Guico violated a reasonable safety rule which, if heeded, would have prevented his injury. It is beyond serious dispute that he acted negligently and carelessly. As we have previously noted, however, mere negligence is not the equivalent of "willful negligence" as used in § 48-101, which consists of conduct which manifests a reckless disregard for the consequences coupled with a consciousness that injury will naturally or probably result. *Collins v. General Casualty, supra*. Our standard of review requires that we give considerable deference to a trial judge's determination of whether particular conduct amounted to willful negligence. If the record contains evidence to substantiate the factual conclusions reached by the trial judge of the compensation court, an appellate court is precluded from substituting its view of the facts for that of the compensation court. *Frank v. A & L Insulation, supra*.

The record in this case reflects a factual dispute as to whether Excel employees were permitted to switch jobs without first obtaining permission from a supervisor. At trial, Guico testified that he had performed the rib-splitter job prior to his injury with the knowledge and consent of his supervisor Marquez. He testified that he did not remember if anyone had ever told him he could not do the rib-splitter job. In Guico's deposition, he stated that Marquez told him 1 week before the accident that he could switch to the rib-splitter job at any time he wished. Guico stated that he switched from the bone saw to rib splitting "many times." In contrast, Marquez testified that employees under his supervision were allowed to switch jobs only after receiving his permission so that he could ensure they were using the proper safety equipment. Marquez testified that Guico did not have his permission to switch jobs on the date of the accident.

A trier of fact could reasonably conclude from this evidence that requiring a supervisor's permission to switch jobs was a component of Excel's enforcement of the safety rule at issue, which was not always followed. Accordingly, we are unable to say that the trial judge was clearly wrong in finding that Excel's safety rule "was not kept alive by bona fide enforcement." In addition, when asked on cross-examination if Guico had been "willing to take a chance that [he] wouldn't get cut," he responded, "I never thought about that." When pressed on this point and asked, "You just didn't think that it would happen to you, isn't that right?", Guico responded, "I never thought about getting cut." From this testimony, the trier of fact could reasonably conclude that Guico's failure to comply with the safety rule was a momentary lapse of judgment as opposed to reckless indifference to safety. See *Moise v. Fruit Dispatch Co.*, 135 Neb. 684, 283 N.W. 495 (1939). Accordingly, although we cannot say we would reach the same conclusion in the first instance, we conclude that the trial judge was not clearly wrong in finding that Excel failed to meet its burden of proving that Guico was willfully negligent at the time of his injury.

Excel contends that even if the rejection of its willful negligence defense was correct, Guico was still not entitled to temporary total disability benefits following his termination for cause on the day following his injury. Excel contends that the

termination, not the injury, was the proximate cause of Guico's unemployment and that an award of benefits under such circumstances would place Guico "in a better position than other non-injured employees who have engaged in similar misconduct." Brief for appellant at 22. In support of this argument, Excel cites cases from other jurisdictions denying temporary disability benefits to workers who are placed on light duty following a work-related injury and are subsequently terminated due to misconduct unrelated to the injury, such as tardiness, drug use, or absenteeism. See, e.g., *Richfood, Inc. v. Williams*, 20 Va. App. 404, 457 S.E.2d 417 (1995); *Freeman v. Continental Baking Co.*, 212 Ga. App. 855, 443 S.E.2d 520 (1994); *Dawes v. Summers*, 118 Or. App. 15, 845 P.2d 1308 (1993). We note that these cases are factually distinguishable from the present case, in which the injury and the subsequent termination arose from the same conduct of the worker.

Although *Aldrich v. ASARCO, Inc.*, 221 Neb. 126, 375 N.W.2d 150 (1985), did not involve temporary disability benefits, it offers some guidance as to the relationship between a compensable injury and a subsequent termination of employment for cause. In *Aldrich*, an employee who had sustained a work-related back injury was subsequently terminated for reasons unrelated to the injury. The employer appealed an award of a 30-percent loss of earning power, arguing that because the employee was terminated for reasons other than his injury, his earning power was likewise diminished for reasons other than his injury. We stated:

> Earning power is not synonymous with wages . . . and the fact of termination or the reason for it is irrelevant if the plaintiff sustained a compensable injury. The fact that an employer has terminated the employment of an employee, whose ability to perform the work for which he is fitted has been restricted due to an injury arising out of and in the course of his employment, does not destroy the right of the employee to compensation for the injury.

*Id.* at 128, 375 N.W.2d at 152.

On the facts presented in this case, we conclude that the termination of Guico's employment subsequent to his injury did not disqualify him from receiving temporary disability benefits under the Nebraska Workers' Compensation Act.

[7] Finally, we address Excel's contention that the compensation court erred in awarding a waiting-time penalty and attorney fees pursuant to Neb. Rev. Stat. § 48-125 (Supp. 1999) based upon its determination that there was no reasonable controversy with respect to compensability. Whether a reasonable controversy exists under § 48-125 is a question of fact. *Hobza v. Seedorff Masonry, Inc.*, 259 Neb. 671, 611 N.W.2d 828 (2000). A reasonable controversy may exist (1) if there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part. *McBee v. Goodyear Tire & Rubber Co.*, 255 Neb. 903, 587 N.W.2d 687 (1999). We agree with Excel's argument that this case presented a reasonable controversy both factually and legally. As the trial judge noted in the award, this court has not previously addressed the issue of the circumstances under which a violation of an employer's safety rule may constitute willful negligence. Moreover, the evidence in this case supports reasonable but opposite conclusions on this critical issue of fact upon which compensability depended. The trial judge was clearly wrong in concluding that no reasonable controversy existed, and the award of waiting-time penalties and attorney fees constituted error.

## CONCLUSION

For the reasons stated above, we vacate the award of waiting-time penalties and attorney fees pursuant to § 48-125, including the additional fees awarded by the review panel. We affirm the judgment of the compensation court in all other respects.

AFFIRMED IN PART, AND IN PART VACATED.

STEPHAN, J., dissenting.

While I recognize that the scope of our review of factual determinations by the Workers' Compensation Court is exceedingly narrow, it does not require us to ignore undisputed evidence or

abandon common sense. I respectfully dissent because, in my view, the trial judge's analysis of the willful negligence issue was based upon three findings of fact which are clearly wrong.

The first finding involves the question of whether Guico understood and appreciated the danger involved in disobeying the employer's safety rule which is at issue in this case. In concluding that he did not, the trial judge noted that Guico "had never cut himself in the past and testified that he did not expect to cut himself at the time of his accident and injury." This presumably refers to the following testimony by Guico during his direct examination: "Q. Mr. Guico, did you want to cut yourself? A. No. Q. Did you think you were going to cut yourself? A. I never imagined that I would." While this testimony would lead to a reasonable inference that Guico did not commit "a deliberate act" constituting willful negligence under Neb. Rev. Stat. § 48-151(7)(a) (Supp. 1999), it does not rule out the claim made here that he was willfully negligent because of conduct evidencing a "reckless indifference to safety" under § 48-151(7)(b). The record contains substantial and undisputed evidence that Guico fully understood and appreciated the risk involved in using a knife to split ribs without wearing the required safety equipment. Asked if he knew why the steel-mesh safety equipment was required when working as a rib splitter, Guico responded: "So that one would not get cut." He was then asked, "Was it because that job required you to use the knife?" and he responded, "Yes." Guico also admitted that Marquez had informed him "[a] few times" that he could be cut very badly if he did not use the steel-mesh safety equipment. Guico's understanding and appreciation of the danger posed by failure to utilize the safety equipment is demonstrated in the following testimony on cross-examination:

> Q. You knew that you needed to wear safety equipment if you were going to do a job with a knife, didn't you?
>
> A: Correct.
>
> Q. You knew that if you didn't have that safety equipment you could get cut very badly, didn't you?
>
> A. That's true.
>
> Q. And you knew that the mesh gloves and the mesh aprons were there to help, so you would not get cut.
>
> A. Correct.

In my view, these admissions by Guico conclusively establish his understanding and appreciation of the danger involved in using a knife to split ribs without wearing the required steel-mesh safety equipment, and therefore the trial court's finding to the contrary was clearly wrong.

The trial judge next noted his "considerable concern" about Excel's enforcement of the rule, finding that despite testimony that its violation was considered "major," there was also "starkly inconsistent and contradictory" evidence indicating that Guico had violated the same rule the day prior to the accident and "virtually nothing" had happened to him. The judge thus found that the only difference between the two violations was that one resulted in injury. In my view, the record does not support this inference. As noted by the majority, Guico was informed of the safety rules at the commencement of his employment and was reminded of the rules throughout his employment. It is undisputed that when Marquez discovered Guico rib splitting without using the required safety equipment on the day prior to the injury, he immediately removed Guico from the job and verbally warned him about the need to use appropriate safety equipment when rib splitting. The fact that Guico was not "written up" or suspended for this incident does not mean that Excel did not enforce its rule. As Professor Larson notes, "enforcement is not necessarily synonymous with application of outright penalties." 2 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law, § 35.03 at 35-8 to 35-9 (2000). In *Iron Company v. Jenkins*, 207 Va. 399, 405, 150 S.E.2d 120, 125 (1966), the court rejected a contention that verbal warnings and reprimands regarding the necessity of compliance with a safety rule did not constitute bona fide enforcement, stating:

> [I]t is not essential that the employer suspend an employee from his job or reduce his wages for violating a work rule in order for there to be "strict enforcement" of the rule. These sanctions may constitute strict enforcement, but the term is not limited to such penalties. Other actions and conduct of the employer, such as existed in the case at bar, may apply with equal force.

I acknowledge authority holding that a worker's violation of an employer's safety rule cannot be asserted as a defense to a

workers' compensation claim where there is evidence that the employer failed to take steps to enforce the rule despite knowledge of its prior violation. See, e.g., *Lori's Fam. Din. v. Indus. Claim Appeals*, 907 P.2d 715 (Colo. App. 1995) (affirming rejection of safety rule defense where record reflected employer was aware of prohibited horseplay in workplace but never followed policies for disciplining employees for such behavior). However, disregard of safety rule violations by the same or other employees is relevant only " 'under circumstances charging the employer with knowledge and acquiescence.' " *Iron Company v. Jenkins*, 207 Va. at 404, 150 S.E. 2d at 124 (followed in *VEPCO v. Kremposky*, 227 Va. 265, 315 S.E.2d 231 (1984)). See, also, 2 Larson & Larson, *supra*, § 35.03. In the present case, there is no evidence that Excel knowingly permitted Guico or any other employee to work with a knife without wearing the required steel-mesh safety equipment, and thus, there is no basis for an inference that Excel acquiesced in the violation of its rule. Also, whether or not Guico was required to obtain permission from a supervisor before switching jobs is immaterial to the issue of enforcement because, as noted above, it is undisputed that at the time of Guico's injury, he was well aware of Excel's requirement that he wear steel-mesh safety equipment whenever he performed the rib-splitter job. For these reasons, I conclude that the finding by the trial judge that Excel's safety rule "was not kept alive by bona fide enforcement" was clearly wrong.

The third factual basis for the trial judge's determination that willful negligence was not shown was a finding that Guico had "a valid excuse for the violation given the production demands of [Excel]." The trial judge reasoned that because rib splitting was performed from a fixed work station on beef carcasses which were moving on a conveyor system on a "continual and constant basis," "there was simply not enough time available to [Guico] to comply with the safety rule of wearing the gloves." This finding rests upon the false premise that Guico was required by Excel to perform the rib-splitter job at the time he was injured. However, the evidence is undisputed that Guico alone made the decision to switch jobs without first donning the required safety equipment. The record reflects no "production demands" which required him to do so. To the contrary, the undisputed evidence is that Guico

was verbally reprimanded by Marquez for precisely the same unsafe conduct on the previous day. His testimony that he did not have time to put on steel-mesh gloves "[b]ecause I was on the saw, and we switched, and it was quick" cannot afford an excuse for his conduct because Guico was not required by Excel to switch jobs and, in fact, was specifically forbidden from doing so without using the required safety apparel. It is important to note that the conduct at issue here is not simply Guico's failure to wear the steel-mesh safety equipment while rib splitting, but, rather, his failure to do so after deciding to switch jobs under circumstances in which, by his own admission, he did not have time to take the required precautions to protect himself from injury. It is undisputed that Guico alone selected the moment at which he switched jobs and that he did so knowing that at that particular moment, he had insufficient time to put on the safety gear which he knew he was required to wear in order to avoid being accidentally cut. Far from excusing Guico's conduct, these facts underscore its recklessness.

Unlike the circumstances in *Moise v. Fruit Dispatch Co.*, 135 Neb. 684, 283 N.W. 495 (1939), Guico's conduct was not automatic or reflexive, but, rather, was the product of the volition and mental effort which characterizes willful negligence as defined by § 48-151(7)(b). The only reasonable inference I can draw from the evidence is that Guico made a conscious and deliberate decision to leave his assigned work station in order to do other work which he preferred without first donning the safety equipment required by Excel's safety rule to prevent precisely the injury which Guico sustained, notwithstanding his verbal reprimand for the same unsafe conduct on the previous day. Based upon this inference, I conclude that the trial judge was clearly wrong in determining that Guico's actions at the time of his injury did not evidence willful negligence consisting of reckless indifference to safety. I conclude that the evidence establishes willful negligence as a matter of law and that Guico's injury was therefore not compensable under Neb. Rev. Stat. § 48-101 (Reissue 1998). Accordingly, I would vacate the judgment of the Nebraska Workers' Compensation Court and remand the cause with directions to dismiss.

CONNOLLY, J., joins in this dissent.

# ROBERT H. McDONALD, APPELLANT, V. DeCAMP LEGAL SERVICES, P.C., APPELLEE.

619 N.W.2d 583

Filed December 1, 2000. No. S-98-954.

1. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
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. **Rules of the Supreme Court: Appeal and Error.** A cross-appeal must be properly designated, pursuant to Neb. Ct. R. of Prac. 9D(4) (rev. 2000), if affirmative relief is to be obtained.
4. **Judgments: Final Orders: Appeal and Error: Words and Phrases.** Affirmative relief, for purposes of appeal, is a reversal, vacation, or modification of a lower court's judgment, decree, or final order.
5. **Appeal and Error.** An appellee may not raise arguments independent of or not responsive to an appellant's assignments of error without cross-appealing because they will fall beyond the scope of the case as presented in the appellant's brief.
6. ___. An appellee's argument that a lower court's decision should be upheld on grounds specifically rejected below constitutes a request for affirmative relief, and the appellee must cross-appeal in order for that argument to be considered.
7. **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.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges, on appeal thereto from the District Court for Lancaster County, JEFFRE CHEUVRONT, Judge. Judgment of Court of Appeals affirmed.

Rolf Edward Shasteen for appellant.

Shirley K. Williams and William L. Tannehill, of Knudsen, Berkheimer, Richardson, Endacott & Routh, for appellee.

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

WRIGHT, J.

## NATURE OF CASE

Robert H. McDonald brought this legal malpractice action against DeCamp Legal Services, P.C. (DeCamp Legal). The district court for Lancaster County granted summary judgment for DeCamp Legal, and McDonald appealed. The Nebraska Court of Appeals found there existed a genuine issue of material fact and reversed the district court's decision. See *McDonald v. DeCamp Legal Servs.*, No. A-98-954, 2000 WL 249769 (Neb. App. Mar. 7, 2000) (not designated for permanent publication). We granted DeCamp Legal's petition for further review.

## SCOPE OF REVIEW

[1] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Big John's Billiards v. Balka, ante* p. 702, 619 N.W.2d 444 (2000).

[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. *Morrison Enters. v. Aetna Cas. & Surety Co., ante* p. 634, 619 N.W.2d 432 (2000).

## FACTS

According to his operative petition, on January 17, 1995, McDonald was injured while crossing a parking lot of the Northeast Nebraska Technical Community College (College). The lot is divided into separate rows by narrow concrete islands with walkways cut out for pedestrians. Snow and ice had accumulated to a depth of 2 to 3 feet in front of the parking stalls and on the sides of the walkways. McDonald entered a walkway that was blocked on one side by a wrongfully parked car, and as he attempted to walk around the car, he stepped over the accumulated snow and ice, slipped, and fell. McDonald retained DeCamp Legal to handle his workers' compensation case arising from the accident.

McDonald alleged that he also retained DeCamp Legal to pursue a personal injury action against the College. He claimed

that DeCamp Legal did not advise him of the applicable statute of limitations regarding his claim against the College and that DeCamp Legal did not file a tort claim notice prior to the running of the statute. As a result, McDonald was barred from pursuing a tort claim against the College.

The agreement which McDonald entered into with DeCamp Legal, entitled "Fee Contract for Worker Compensation," provided in part: "We do not promise by this agreement to represent you on any other lawsuit or legal matter." McDonald testified at his deposition that he was unsure whether he had signed any other fee agreement with DeCamp Legal.

McDonald was represented by two different attorneys from DeCamp Legal. The second attorney took over the case after the action against the College was time barred. There was conflicting evidence as to whether either attorney represented to McDonald that DeCamp Legal would be pursuing an action against the College and the nature of those representations.

McDonald sued John W. DeCamp (DeCamp) personally in the district court for Lancaster County on September 3, 1997. McDonald's first amended petition, filed October 3, alleged that DeCamp Legal was negligent in failing to advise him of the statute of limitations on the tort claim and in failing to file the tort claim prior to the expiration of the statute of limitations.

A second amended petition was filed with leave of court on March 30, 1998, in which DeCamp Legal was substituted for DeCamp. McDonald alleged that the relation back doctrine should apply to his second amended petition, since the legal malpractice claim would otherwise be barred by Neb. Rev. Stat. § 25-222 (Reissue 1995) after January 17, 1998.

DeCamp Legal's answer alleged that there was no agreement to represent McDonald on the tort claim; that McDonald would not have been able to recover from the College under Neb. Rev. Stat. §§ 13-910(10) (Cum. Supp. 2000) and 13-915 (Reissue 1997); and that, in any event, the malpractice claim was barred by applicable statutes of limitations.

On April 23, 1998, DeCamp Legal moved for summary judgment on four grounds which were stated in the district court's order as follows:

1. The agreement between the plaintiff and DeCamp P.C. related solely to representation in regard to the workers['] compensation claim. DeCamp P.C. never agreed to represent the plaintiff on any claim against the college.

2. No recoverable slip and fall cause of action existed because of the exception in the Political Subdivision Tort Claims Act, NEB. REV. STAT. § 13-910, for incidents caused by ice, snow or temporary weather conditions in a public place.

3. No recoverable slip and fall cause of action existed under the Political Subdivision Tort Claims Act because the plaintiff knew of the alleged condition and there were multiple alternative safe routes available, NEB. REV. STAT. § 13-915.

4. The two-year statute of limitations for professional negligence ran before DeCamp P.C. was named as a defendant and any cause of action against it is therefore barred.

The district court found there was no genuine issue of material fact as to the first two grounds asserted by DeCamp Legal. The district court determined there was no credible evidence that DeCamp Legal had agreed to represent McDonald on any tort claim against the College. It also concluded that an exemption to the waiver of immunity for tort claims existed for temporary conditions caused by snow or ice and that, therefore, McDonald could not have pursued an action against the College because such an exemption resulted in continued immunity against such a claim. The district court stated that there was a genuine issue of fact as to whether there were alternative safe routes available and that the doctrine of relation back should be applied to allow the substitution of DeCamp Legal for DeCamp. Therefore, the district court specifically found against DeCamp Legal on the grounds numbered 3 and 4 above.

The Court of Appeals reversed the district court's judgment, concluding that there was a genuine issue of material fact concerning the existence of a representation agreement and that the exemption to the waiver of immunity in the Political Subdivisions Tort Claims Act found in § 13-910(10) did not apply to McDonald's tort claim. Because DeCamp Legal did not

cross-appeal, the Court of Appeals refused to consider DeCamp Legal's other two grounds for summary judgment that were specifically rejected by the district court. We granted DeCamp Legal's petition for further review to address whether the Court of Appeals erred in requiring DeCamp Legal to file a cross-appeal before it would consider DeCamp Legal's alternative grounds for summary judgment.

## ASSIGNMENTS OF ERROR

DeCamp Legal argues that the Court of Appeals erred by (1) failing to consider two alternative grounds for summary judgment rejected by the district court, (2) finding that a genuine issue of material fact existed as to whether DeCamp Legal agreed to represent McDonald on the tort claim, and (3) finding that the exemption to the Political Subdivisions Tort Claims Act found in § 13-910(10) did not apply to McDonald's tort claim.

## ANALYSIS

DeCamp Legal first assigns as error the failure of the Court of Appeals to consider two alternative grounds for summary judgment on which the district court specifically found against it. Those two grounds were that no cause of action existed for McDonald's tort claim because alternate safe routes existed which McDonald had knowledge of and that the statute of limitations in § 25-222 had run on his malpractice claim. Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Big John's Billiards v. Balka, ante* p. 702, 619 N.W.2d 444 (2000).

The Court of Appeals, with one judge dissenting, refused to consider DeCamp Legal's alternate grounds for summary judgment rejected by the district court, stating:

> In light of the fact that the lower court specifically ruled against DeCamp Legal on each of the other two grounds for summary judgment, we consider DeCamp Legal's argument on appeal to be a request for affirmative relief. We decline to consider the issues, because DeCamp Legal has not filed a proper cross-appeal from the lower court's rulings.

*McDonald v. DeCamp Legal Servs.*, No. A-98-954, 2000 WL 249769 at *4 (Neb. App. Mar. 7, 2000) (not designated for permanent publication).

[3] A cross-appeal must be properly designated, pursuant to Neb. Ct. R. of Prac. 9D(4) (rev. 2000), if affirmative relief is to be obtained. *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999). The issue is whether an argument by an appellee that a lower court's decision should be upheld on grounds specifically rejected below constitutes a request for affirmative relief such that a cross-appeal from the lower court's ruling is necessary.

[4] Affirmative relief on appeal is not statutorily defined per se, although Neb. Rev. Stat. § 25-1911 (Reissue 1995) provides: "A judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record." Affirmative relief, for purposes of appeal, is a reversal, vacation, or modification of a lower court's judgment, decree, or final order.

Here, DeCamp Legal set forth four separate grounds for relief. The district court ruled on each ground, finding in favor of DeCamp Legal on two grounds and against it on two others. Obviously, if the district court granted summary judgment in favor of DeCamp Legal on any one of the four grounds alleged, DeCamp Legal would not appeal. However, since McDonald appealed the ruling of the district court in favor of DeCamp Legal, there is a question of whether DeCamp Legal must cross-appeal the adverse rulings of the district court in order to preserve those issues on appeal.

[5,6] The only judgment for which DeCamp Legal could have sought modification was the summary judgment. While DeCamp Legal could not have cross-appealed the district court's findings underlying the summary judgment, it could and should have cross-appealed the summary judgment and assigned as error those specific adverse findings if believed to have been made in error. Such a cross-appeal is required because consideration of the case will be limited to errors assigned and discussed. See rule 9D(1)e. An appellee may not raise arguments independent of or not responsive to the appellant's assignments of error without cross-appealing because they will fall beyond

the scope of the case as presented in the appellant's brief. Thus, an appellee's argument that a lower court's decision should be upheld on grounds specifically rejected below constitutes a request for affirmative relief, and the appellee must cross-appeal in order for that argument to be considered.

This is consistent with the long-cited proposition that "a proper result will not be reversed merely because it was reached for the wrong reason." *Gestring v. Mary Lanning Memorial Hosp.*, 259 Neb. 905, 921, 613 N.W.2d 440, 453 (2000). Had DeCamp Legal properly cross-appealed, the Court of Appeals could have considered the other decisions of the district court for error. Thus, the Court of Appeals properly refused to consider whether the district court should have granted summary judgment for the alternative reasons advanced by DeCamp Legal at the trial level because DeCamp Legal did not cross-appeal and assign the adverse findings as error. DeCamp Legal's assignment of error on this issue has no merit.

[7] DeCamp Legal argues that the Court of Appeals also erred in finding a genuine issue of material fact existed as to whether DeCamp Legal agreed to represent McDonald on the tort claim. 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. *Morrison Enters. v. Aetna Cas. & Surety Co., ante* p. 634, 619 N.W.2d 432 (2000). 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. *Id.*

The Court of Appeals quoted a passage from McDonald's deposition in which he discussed how his first attorney for DeCamp Legal led him to believe that he had a good cause of action against the College and that DeCamp Legal would work on it after the workers' compensation claim was settled. The Court of Appeals determined that this raised a genuine issue of material fact as to whether an agreement existed. Viewing the evidence in a light most favorable to McDonald and giving him

the benefit of all reasonable inferences, we agree that McDonald's deposition testimony raised a genuine issue of material fact. DeCamp Legal's assignment of error as to this finding is without merit.

Finally, DeCamp Legal assigns as error the finding of the Court of Appeals that the exemption to the Political Subdivisions Tort Claims Act found in § 13-910(10) did not apply to McDonald's tort claim. Section 13-910(10) exempts "[a]ny claim arising out of snow or ice conditions or other temporary conditions caused by nature on any . . . public place due to weather conditions."

The district court found that, as a matter of law, McDonald's claim arose out of snow and ice due to weather conditions in a public place, immunizing the College from any tort claim. The Court of Appeals disagreed, comparing the present case to *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999). The Court of Appeals viewed McDonald's claim as alleging an injury due to the negligence in the manner in which the snow and ice was cleared from the parking lot, not necessarily an injury due to the snow and ice.

In *Woollen*, the plaintiff was injured when he lost control of his car at the bottom of a low-grade slope on a portion of paved road that had become rutted over time. Water had filled the ruts during a steady rain, forming ponds on the road at the site of the accident, which caused the plaintiff to lose control of his vehicle when it began to hydroplane. The trial court found that the maintenance of the road itself was a proximate cause of the accident and held the State liable. We agreed "as a matter of law that . . . the State was not immune from suit, because the defective condition of the highway, rather than a temporary condition caused by nature due to weather conditions, caused the accident." *Id.* at 878, 593 N.W.2d at 739.

Here, McDonald alleged that the College was negligent in its "[f]ailure to maintain safe ingress and egress to, from and across its property at Northeast Nebraska Technical Community College [and in its] [f]ailure to monitor and remove hazardously parked vehicles." McDonald's claim of negligence is not one "arising out of snow and ice conditions." See § 13-910(10). Thus, § 13-910(10) is inapplicable, and the Court of Appeals did not err in so holding. This assignment of error is without merit as well.

## CONCLUSION

For the reasons set forth herein, we affirm the decision of the Court of Appeals which reversed the summary judgment entered by the district court.

AFFIRMED.

STEPHAN, J., not participating.

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JOSEPH VOPALKA, APPELLANT, V. EDDIE ABRAHAM AND WALTER MINSHALL, APPELLEES.

619 N.W.2d 594

Filed December 1, 2000. No. S-99-893.

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. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
3. **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.
4. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
5. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
6. **Statutes: Pleadings: Dismissal and Nonsuit: Words and Phrases.** The language of Neb. Rev. Stat. § 25-217 (Reissue 1995) providing for dismissal of unserved petitions is self-executing and mandatory.
7. **Limitations of Actions: Service of Process.** A defendant's voluntary appearance does not waive the operation of Neb. Rev. Stat. § 25-217 (Reissue 1995).
8. **Limitations of Actions: Dismissal and Nonsuit: Jurisdiction.** After dismissal of an action by operation of Neb. Rev. Stat. § 25-217 (Reissue 1995), a trial court has no jurisdiction to make orders thereafter, except to formalize the dismissal.
9. **Jurisdiction: Appeal and Error.** When lack of jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of a reviewing court to raise and determine the issue of jurisdiction sua sponte.
10. ___: ___. It is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and MOORE, Judges, on appeal thereto from the District Court for Douglas County, LAWRENCE J. CORRIGAN, Judge, Retired. Judgment of Court of Appeals reversed, and cause remanded with directions.

Michael B. Kratville, P.C., for appellant.

Thomas A. Otepka, of Woodke, Otepka & Gibbons, P.C., for appellees.

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

MILLER-LERMAN, J.

## I. NATURE OF CASE

Joseph Vopalka filed a negligence action against Eddie Abraham and Walter Minshall (defendants), in the district court for Douglas County. The district court granted summary judgment in favor of the defendants, and Vopalka appealed to the Nebraska Court of Appeals. The Court of Appeals reversed the district court's order granting summary judgment. *Vopalka v. Abraham*, 9 Neb. App. 285, 610 N.W.2d 433 (2000). The Court of Appeals determined that because Vopalka had failed to serve the defendants within 6 months after filing his petition as required by Neb. Rev. Stat. § 25-217 (Reissue 1995), the action stood dismissed and the district court thereafter lacked jurisdiction to consider the defendants' motion for summary judgment. The Court of Appeals reversed the order of the district court granting summary judgment in favor of the defendants and remanded the cause to the district court with directions to dismiss the action. *Vopalka v. Abraham, supra.*

Vopalka petitioned this court for further review, which we granted. For the reasons recited below, we agree with the reasoning of the Court of Appeals that after dismissal under § 25-217, the action stood dismissed, and that the district court had no jurisdiction to make orders thereafter except to formalize the dismissal. Specifically, the district court lacked jurisdiction to consider the defendants' motion for summary judgment. Given the lack of jurisdiction of the district court, the Court of

Appeals more properly should have vacated rather than reversed the district court's order granting summary judgment. Accordingly, we reverse, and remand to the Court of Appeals with directions to remand the cause to the district court with directions to the district court to vacate the order granting summary judgment in favor of the defendants and to enter an order that Vopalka's petition stands dismissed pursuant to § 25-217.

## II. STATEMENT OF FACTS

At issue in this case is the effect of § 25-217 on an action in which the defendants have not been served within 6 months from the date the petition was filed. Section 25-217 provides that "[a]n action is commenced on the date the petition is filed with the court. The action shall stand dismissed without prejudice as to any defendant not served within six months from the date the petition was filed."

In the instant case, Vopalka filed a petition against Abraham and Minshall on April 7, 1998, alleging he sustained injuries in an accident which occurred April 10, 1994. Neither defendant was served with the petition within 6 months after Vopalka filed the petition. On January 25, 1999, each defendant filed a voluntary appearance in which he stated that he had received a copy of the petition on January 12, that he submitted to the jurisdiction of the district court, and that he would file an answer within 30 days. On March 10, the defendants filed an answer generally denying the allegations in the petition and specifically denying that they were negligent. The defendants further alleged that Vopalka's injuries were a result of his own negligence and contributory negligence and that Vopalka's action against them was barred by the applicable statute of limitations. On March 11, Vopalka filed a reply denying the defendants' affirmative defenses.

The record on appeal is not complete but it appears that at some point, Vopalka filed a motion to reinstate the case to the active trial docket, that the defendants objected to such reinstatement, and that the district court reinstated the case to the trial docket on July 13, 1999.

The defendants filed a motion for summary judgment on July 13, 1999, claiming that the case should be dismissed because

Vopalka had failed to serve them with the petition within 6 months of filing. After taking judicial notice of the court file, the district court found that Vopalka had failed to serve the defendants within 6 months of the date he had filed his petition and therefore sustained the defendants' motion for summary judgment.

Vopalka appealed the district court's order granting summary judgment in favor of the defendants to the Court of Appeals. Vopalka claimed that by entering their voluntary appearances, the defendants had waived any objection related to his failure to serve them within 6 months of the filing of his petition as required under § 25-217. The Court of Appeals rejected Vopalka's argument and reversed the district court's grant of summary judgment and remanded the cause with directions to dismiss. *Vopalka v. Abraham*, 9 Neb. App. 285, 610 N.W.2d 433 (2000).

The Court of Appeals held that pursuant to § 25-217, the unserved petition filed April 7, 1998, had been dismissed by operation of law as of October 7, and that subsequent to that date, the district court lacked jurisdiction to make any orders, except to formalize the dismissal. The Court of Appeals noted that a voluntary appearance is equivalent to service of process, and the defendants' voluntary appearances filed January 25, 1999, effectively amounted to service on January 25, which was not within 6 months after the date Vopalka had filed his petition. The voluntary appearances were filed at a point in time after which the case stood dismissed under § 25-217. The Court of Appeals concluded that the district court erred in reinstating the case and in hearing and granting the defendants' motion for summary judgment, and reversed these orders. The Court of Appeals remanded the cause with directions to the district court to dismiss the case.

## III. ASSIGNMENTS OF ERROR

Vopalka asserts that the Court of Appeals erred in (1) failing to hold that the defendants waived the operation of § 25-217 by filing voluntary appearances and (2) failing to find that the defendants' failure to cross-appeal the district court's reinstatement of the action waived the operation of § 25-217.

## IV. STANDARDS 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. *Airport Auth. of Village of Greeley v. Dugan*, 259 Neb. 860, 612 N.W.2d 913 (2000).

[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Prucha v. Kahlandt, ante* p. 366, 618 N.W.2d 399 (2000).

## V. ANALYSIS

### 1. Court of Appeals' Holdings in *Vopalka v. Abraham*

The Court of Appeals' disposition of this case was premised on two holdings. First, the Court of Appeals held that § 25-217 is self-executing and, thus, an action is dismissed by operation of law as to any defendant who has not been served within 6 months after the petition was filed. *Vopalka v. Abraham, supra.* This holding was based on the Court of Appeals' prior decisions in *Cotton v. Fruge*, 8 Neb. App. 484, 596 N.W.2d 32 (1999), and *McDaneld v. Fischer*, 8 Neb. App. 160, 589 N.W.2d 172 (1999). Second, the Court of Appeals held that after dismissal by operation of law, a trial court lacks jurisdiction to enter any orders in such action, except to formalize the dismissal, and that any orders other than a formal dismissal of the case made by the trial court subsequent to the dismissal by operation of law are nullities. *Vopalka v. Abraham, supra.* The second holding was based on the Court of Appeals' similar decision in *Cotton*. Based on these holdings, the Court of Appeals concluded that Vopalka's unserved petition was dismissed by operation of law on October 7, 1998, which was 6 months after filing the petition, and that the district court lacked jurisdiction after October 7, either to reinstate the action or to enter summary judgment.

We note that no further review was sought in either *McDaneld* or *Cotton*, and we have not previously had occasion to decide the issues surrounding the effect of § 25-217 upon actions in which the defendant has not been served with a petition within 6 months of filing the petition. In order to review the

decision of the Court of Appeals in the instant case, we must decide whether the Court of Appeals was correct in holding that § 25-217 is self-executing and in holding that dismissal by operation of law under § 25-217 deprives the trial court of jurisdiction to take action subsequent to such dismissal other than to formalize the dismissal. In connection with our analysis of *Vopalka v. Abraham*, 9 Neb. App. 285, 610 N.W.2d 433 (2000), a brief review of the decisions in *McDaneld* and *Cotton* is useful.

(a) § 25-217 as Self-Executing Under *McDaneld v. Fischer*

In *McDaneld v. Fischer, supra*, the Court of Appeals first held that § 25-217 is self-executing and that § 25-217 requires that an action be dismissed by operation of law as to a defendant who is not served within 6 months after the petition is filed. In *McDaneld*, the Court of Appeals recognized that the issues surrounding § 25-217 were ones of first impression and therefore explained the reasons for its holding.

The Court of Appeals began its interpretation of § 25-217 by examining the language of the statute and determined that although the statute provided that the action "shall stand dismissed" if the petition was not served within 6 months of filing, § 25-217 failed to delineate how such dismissal occurs. The Court of Appeals posited that dismissal might occur by "motion and order," or "upon the court's own motion," or by passage of time with or without a trial court order. *McDaneld v. Fischer*, 8 Neb. App. at 165, 589 N.W.2d at 176.

Because the Court of Appeals found that § 25-217 was silent on the procedure by which to confer dismissed status under § 25-217, it examined the statute's legislative history to determine legislative intent. The Court of Appeals noted in *McDaneld* that prior to 1979, the statute provided simply that an action was deemed commenced as of the date the summons was served upon the defendant. In 1979, however, § 25-217 was amended to provide that an action was deemed to have commenced not upon service on a defendant, but, instead, "on the date the petition is filed with the court *if proper service is obtained within six months of such filing*." (Emphasis supplied.)

See 1979 Neb. Laws, L.B. 510. The legislative history of the 1979 amendment as explained in *McDaneld* shows that the Judiciary Committee determined that some time limit should be placed for the service of summons and that if the defendant was not served within that time period, the suit would not be deemed to have commenced. The Court of Appeals determined that the Legislature in 1979 intended the 6-month requirement to operate as a "housekeeping measure" to facilitate the dismissal of actions which were filed but unserved and which would otherwise languish on a court's docket. *McDaneld v. Fischer*, 8 Neb. App. 160, 166, 589 N.W.2d 172, 176 (1999).

Although the Court of Appeals noted in *McDaneld* that, after the 1979 amendment, § 25-217 had again been amended in 1986, the Court of Appeals did not explicitly note that the additional and operative language "shall stand dismissed" was part of the 1986 amendment rather than the 1979 amendment. In 1986, the statute was amended to its current form which reads: "An action is commenced on the date the petition is filed with the court. The action shall stand dismissed without prejudice as to any defendant not served within six months from the date the petition was filed." § 25-217. For the sake of completeness, we note that the 1986 amendment to § 25-217 was part of a bill addressing various topics of judicial administration and that the legislative history of the bill contains no specific discussion of the legislative intent regarding the 1986 amendment to § 25-217.

In *McDaneld*, the Court of Appeals construed the phrase "shall stand dismissed" to mean that "the action may be dismissed without the need for initiating action, such as a motion by the defendant, and without the need for a formal entry of an order of dismissal by the trial court." 8 Neb. App. at 166, 589 N.W.2d at 177. The Court of Appeals held that § 25-217 was mandatory and self-executing and that dismissal occurs by operation of law because that was the "only way to ensure that an unserved action stands dismissed, as the statute requires." 8 Neb. App. at 166, 589 N.W.2d at 177.

### (b) Nullity of Rulings After Dismissal Pursuant to § 25-217 Under *Cotton v. Fruge*

In *Cotton v. Fruge*, 8 Neb. App. 484, 596 N.W.2d 32 (1999), decided after *McDaneld v. Fischer, supra*, the Court of Appeals

held that based on its holding in *McDaneld*, the plaintiff's petition was dismissed by operation of law under § 25-217 because it was not served on the defendants within 6 months of its filing and rulings in the case subsequent thereto were nullities. In *Cotton*, the district court granted the plaintiff's motion for service by publication more than 6 months after filing of the petition and thereafter sustained the defendants' demurrer on the basis that the case was barred by the statute of limitations. The Court of Appeals held that "[w]hen a lawsuit is dismissed by operation of law for lack of service of process within 6 months of filing, the district court has no jurisdiction to make orders thereafter, except to formalize the dismissal, and if made, they are a nullity, as are subsequent pleadings." 8 Neb. App. at 490, 596 N.W.2d at 36. The Court of Appeals reasoned that after dismissal by operation of law, there was no longer any action pending in which to make an order or in which to file pleadings. Based on that holding, the Court of Appeals concluded in *Cotton* that the district court's order granting the motion for service by publication was a nullity and further vacated the district court's order granting the demurrer because the statute of limitations issue was not properly before the district court.

### 2. Dismissal by Operation of Law: Self-Executing Nature of § 25-217

[3-5] The full text of § 25-217 reads as follows: "An action is commenced on the date the petition is filed with the court. The action shall stand dismissed without prejudice as to any defendant not served within six months from the date the petition was filed." Whether the language of § 25-217 is self-executing is an issue of statutory interpretation. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *R.J. Miller, Inc. v. Harrington, ante* p. 471, 618 N.W.2d 460 (2000). If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Sharkey v. Board of Regents, ante* p. 166, 615 N.W.2d 889 (2000). 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. *Sack v. State*, 259 Neb. 463, 610 N.W.2d 385 (2000).

[6] We agree with the Court of Appeals' holding in *McDaneld v. Fischer*, 8 Neb. App. 160, 589 N.W.2d 172 (1999), that the language of § 25-217 providing for dismissal of unserved petitions is self-executing and mandatory. As noted by the Court of Appeals, the statute contains the expression "shall stand dismissed." We conclude that this language, including the word "shall," makes the operation of § 25-217 mandatory. See *State on behalf of Minter v. Jensen*, 259 Neb. 275, 277, 609 N.W.2d 362, 365 (2000) ("[a]s a general rule, in the construction of statutes, the word 'shall' is considered mandatory and inconsistent with the idea of discretion"). We further find it significant that the statute specifies that an action which stands dismissed shall stand dismissed "without prejudice." The inference from the entire expression "shall stand dismissed without prejudice" is twofold: (1) that the dismissal of the action is mandatory and automatic in nature and (2) that notwithstanding the dismissed status of the action, the character of the dismissal is "without prejudice" and the action may therefore be refiled if not otherwise barred, such as by the statute of limitations. See Black's Law Dictionary 482 (7th ed. 1999).

We are aware that certain jurisdictions allow courts discretion and specify procedures regarding dismissal of a petition or complaint after a plaintiff has failed to serve a defendant within a certain timeframe. For example, in the federal trial courts, Fed. R. of Civ. P. 4(m) provides:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

We note that various states have adopted rules similar to Fed. R. Civ. P. 4(m) quoted above. See, Ariz. Rules Civ. Proc. 4(i); Ark. Code Ann. § 16-58-134 (Michie Supp. 1999); Fla. R. Civ.

P. 1.070(j); Miss. R. Civ. P. 4(h); Nev. R. Civ. P. 4(i); Utah R. Civ. P. 4(b); W. Va. R.C.P. 4(k). See, also, Idaho R.C.P. 4(a)(2) (service within 6 months); Mass. R. Civ. P. 4(j) (service within 90 days); Ohio Civ. R. 4(E) (service within 6 months); Okla. Stat. Ann. tit. 12, § 2004(I) (West Cum. Supp. 2000-2001) (service within 180 days). Alaska R. Civ. P. 4(j) specifically requires the court clerk to review pending cases for actions that have not been served within 120 days and to send notices to plaintiffs in those actions "to show good cause in writing why service . . . is not complete." Other states have rules which, although not based on the federal rule, provide that actions are to be dismissed upon motion, see Me. R. Civ. P. 3 and Vt. R.C.P. 3, and that dismissal may be avoided by a showing of good cause. See N.Y. C.P.L.R. § 306-b (McKinney Supp. 2000).

By contrast to such rules in other jurisdictions, § 25-217 does not delineate that dismissal is effectuated by review by the clerk or upon motion of a party or the court, nor does it specify that a plaintiff may avoid its operation by showing good cause. Comparison to such other statutes and rules highlights the self-executing and mandatory nature of the language chosen by the legislature in enacting § 25-217.

The language of § 25-217 mandates that an action "shall stand dismissed without prejudice" if unserved 6 months after filing and does not delineate any predicate action which must be taken by a court to effect dismissal. The statute does not contain discretionary language to the effect that a court "may" dismiss an unserved action, nor does it contain exceptions pursuant to which a plaintiff would be able to demonstrate to a court good cause in order to avoid the operation of the statute. Dismissal by operation of law effectuates the mandatory language of the statute.

### 3. Lack of Jurisdiction After Dismissal by Operation of Law Under § 25-217

In this appeal, Vopalka does not appear to dispute the holding by the Court of Appeals that § 25-217 is self-executing, but argues instead that the Court of Appeals erred by failing to conclude that the defendants waived the operation of § 25-217 by filing their voluntary appearances. In his reply brief to the Court

of Appeals and upon further review, Vopalka also argues that the defendants waived the operation of § 25-217 when they failed to cross-appeal, in the appeal taken by Vopalka to the Court of Appeals, the district court's reinstatement of Vopalka's petition. In its opinion in *Vopalka v. Abraham*, 9 Neb. App. 285, 610 N.W.2d 433 (2000), the Court of Appeals impliedly rejected both arguments based on its holding in *Cotton v. Fruge*, 8 Neb. App. 484, 490, 596 N.W.2d 32, 36 (1999), that after dismissal of an action pursuant to § 25-217, there is no longer an action pending and "the district court has no jurisdiction to make orders thereafter, except to formalize the dismissal, and if made, they are a nullity, as are subsequent pleadings." We agree with the Court of Appeals' conclusion that the district court erred in considering the defendants' motion for summary judgment after dismissal under § 25-217. A summary judgment is a disposition on the merits, see *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995), and the district court could not enter a judgment on the merits where it lacked jurisdiction. We see no errors by the Court of Appeals as claimed by Vopalka on further review.

[7] As to Vopalka's first argument, we agree with the Court of Appeals that the defendants' voluntary appearances did not waive the operation of § 25-217. We have held that for the purpose of personal jurisdiction, the voluntary appearance of a party is equivalent to service of process. *Henderson v. Department of Corr. Servs.*, 256 Neb. 314, 589 N.W.2d 520 (1999). Although the voluntary appearances of the defendants in this case were equivalent to service of process, the voluntary appearances were filed more than 6 months after the petition was filed at a time when the action stood dismissed. Service of process effected more than 6 months after the petition was filed at a time when the action stood dismissed does not negate the dismissal pursuant to § 25-217. A voluntary appearance, which is the equivalent of service of process, is a nullity in a dismissed action. This assignment of error is without merit.

[8] Vopalka also asserts as an assignment of error that the defendants waived the operation of § 25-217 because they did not cross-appeal, in Vopalka's appeal to the Court of Appeals, the district court's reinstatement of the action. We agree with the

Court of Appeals' holding in *Cotton* as applied herein that after dismissal of an action by operation of § 25-217, "the district court has no jurisdiction to make orders thereafter, except to formalize the dismissal." *Cotton v. Fruge*, 8 Neb. App. at 490, 596 N.W.2d at 36. We, therefore, conclude that the district court in the instant case was without jurisdiction to reinstate Vopalka's action which stood dismissed by operation of § 25-217.

[9,10] When lack of jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of a reviewing court to raise and determine the issue of jurisdiction sua sponte. *In re Interest of D.W.*, 249 Neb. 133, 542 N.W.2d 407 (1996). It is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. *In re Interest of William G.*, 256 Neb. 788, 592 N.W.2d 499 (1999). The district court lacked jurisdiction at the point in time it ordered reinstatement. The defendants' lack of a cross-appeal challenging the order of the district court which it was without jurisdiction to make is of no consequence. Vopalka's assignment of error is without merit.

In the instant case, Vopalka's petition was dismissed by operation of § 25-217 as of October 7, 1998. Because there was no longer an action pending, any subsequent pleadings were nullities and the district court was without jurisdiction to reinstate the action or rule on the defendants' motion for summary judgment. Contrary to Vopalka's assertion on further review, the defendants were unable to waive the operation of § 25-217 either by having entered voluntary appearances or by their purported failure to cross-appeal a reinstatement order that the district court was without jurisdiction to enter.

## VI. CONCLUSION

The Court of Appeals' holding in *Cotton v. Fruge*, 8 Neb. App. 484, 596 N.W.2d 32 (1999), and as applied in this case was the logical extension of its prior holding in *McDaneld v. Fischer*, 8 Neb. App. 160, 589 N.W.2d 172 (1999), that § 25-217 is self-executing and mandatory. We agree with the rationale in both *Cotton* and *McDaneld*. When an action has been dismissed by operation of law, there is no longer an action pending in which

a district court can enter an order except to formalize the dismissal. The mandatory and self-executing nature of § 25-217 furthers the "housekeeping" function of preventing unserved petitions from languishing on the trial court's docket, which the Court of Appeals identified in *McDaneld* as the legislative intent surrounding § 25-217. In this regard, we note that where systems are not already in place, it would be prudent that trial courts implement a systematic program to track compliance with the 6-month service requirement under § 25-217 such that the trial court is alerted to the failure to serve and can formalize the dismissal.

We conclude that the Court of Appeals correctly held in this case that the language of § 25-217 is self-executing and mandatory and that after an action is dismissed by operation of § 25-217, a district court is without jurisdiction to make an order in the case except an order formalizing the dismissal. Because Vopalka's petition was dismissed by operation of law as of October 7, 1998, the district court was without jurisdiction to enter an order in the case after that date other than an order dismissing the action. A summary judgment is a disposition on the merits, see *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995), and the district court could not enter a judgment on the merits because it lacked jurisdiction. We therefore agree with the Court of Appeals that it was error for the district court to consider the defendants' motion for summary judgment. However, because the district court lacked jurisdiction to grant summary judgment, the Court of Appeals should have vacated, rather than reversed, the district court's order. See *Bonge v. County of Madison*, 253 Neb. 903, 573 N.W.2d 448 (1998). We therefore reverse, and remand to the Court of Appeals with directions to remand the cause to the district court with directions to the district court to vacate the order granting summary judgment in favor of the defendants and to enter an order that Vopalka's petition stands dismissed pursuant to § 25-217.

REVERSED AND REMANDED WITH DIRECTIONS.

# GAGE COUNTY BOARD OF EQUALIZATION, APPELLANT, V. NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION, APPELLEE.

619 N.W.2d 451

Filed December 1, 2000. No. S-99-1023.

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. **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. **Administrative Law: Statutes: Appeal and Error.** The right of appeal in this state is clearly statutory, and unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist.
4. **Statutes: Legislature: Intent.** In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
5. **Statutes.** In order to ascertain the proper meaning of a statute, reference may be had to later as well as earlier legislation upon the same subject. All existing acts should be considered, and a subsequent statute may often aid in the interpretation of a prior one.

Appeal from the Nebraska Tax Equalization and Review Commission. Appeal dismissed.

Stephen H. Nelsen, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellant.

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

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

STEPHAN, J.

This case presents a jurisdictional issue which was recently decided by the Nebraska Court of Appeals in *Boone Cty. Bd. v. Nebraska Tax Equal. & Rev. Comm.*, 9 Neb. App. 298, 611 N.W.2d 119 (2000) (*Boone County*). The issue is whether, at the time this appeal was filed on September 3, 1999, there was a statutory right of appeal from an order of the Nebraska Tax Equalization and Review Commission (TERC) denying a petition filed by a county board of equalization pursuant to Neb.

Rev. Stat. § 77-1504.01 (Supp. 1999). In *Boone County*, the Court of Appeals determined that no such right existed. Operative April 7, 2000, several weeks before the release of the opinion in *Boone County*, the Legislature amended Neb. Rev. Stat. § 77-5019 (Supp. 1999) to specifically authorize judicial review at the request of a party aggrieved by an order issued by TERC "pursuant to section 77-1504.01 or 77-5028." See 2000 Neb. Laws, L.B. 968. In the present case, the appeal was filed under the same statutes in effect on the operative dates in *Boone County* and prior to the amendment of § 77-5019.

## BACKGROUND

On July 26, 1999, the Gage County Board of Equalization (Board) petitioned TERC, pursuant to § 77-1504.01, for an adjustment to certain property value assessments in Gage County. The Board submitted an amended petition on August 5. On August 6, TERC entered its "Findings and Order Denying Petition." TERC found that the Board had not met its statutory burden of showing that failing to make an adjustment would result in values that were not equitable and in accordance with the law. The Board perfected this appeal to the Court of Appeals, which we moved to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

## STANDARD OF REVIEW

[1] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Scottsdale Ins. Co. v. City of Lincoln, ante* p. 372, 617 N.W.2d 806 (2000).

[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. *American Employers Group v. Department of Labor, ante* p. 405, 617 N.W.2d 808 (2000); *Baye v. Airlite Plastics Co., ante* p. 385, 618 N.W.2d 145 (2000).

## ANALYSIS

[3] As the Court of Appeals correctly noted in *Boone County*, "'"[t]he right of appeal in this state is clearly statutory and,

unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist." ' " 9 Neb. App. at 302, 611 N.W.2d at 123 (quoting *Lydick v. Johns*, 185 Neb. 717, 178 N.W.2d 581 (1970)). Our jurisdictional analysis requires consideration of three statutes as they existed from July through September 1999. The first is § 77-1504.01, pursuant to which this action was initiated. That statute is included in chapter 77, article 15, of the Nebraska Revised Statutes, which sets forth the functions of a county board of equalization, and provides:

> After completion of its actions and based upon the hearings conducted pursuant to sections 77-1502 and 77-1504, a county board of equalization may petition the Tax Equalization and Review Commission to consider an adjustment to a class or subclass of real property within the county. Petitions must be filed with the commission on or before July 26. The commission shall hear and take action on a petition filed by a county board of equalization on or before August 10. The commission, in issuing such an order to adjust a class or subclass, may exclude individual properties from that order whose value has already been adjusted by a county board of equalization in the same manner as the commission directs in its order. In implementing the order of the commission, the county assessor shall adjust the values of the class or subclass that is the subject of the order. For properties that have already received an adjustment from the county board of equalization, no additional adjustment may be made applying the commission's order, but such an exclusion from the commission's order shall not preclude adjustments to those properties for corrections or omissions. Hearings held pursuant to this section may be held by means of videoconference and shall comply with section 84-1411, except that a member of the commission need not be present at each videoconference site. A duly appointed representative of the commission shall be present at each videoconference site to take custody of any exhibits and keep a record of persons who appear at the hearing. Hearings conducted pursuant to this section shall be in the manner prescribed

> in section 77-5026. The burden of proof is on the petitioning county to show that failure to make an adjustment would result in values that are not equitable and in accordance with the law. The county assessor of the county adjusted by an order of the commission shall recertify the abstract of assessment to the Property Tax Administrator on or before August 20.

The other pertinent statutes are both included in the Tax Equalization and Review Commission Act, codified at chapter 77, article 50, of the Nebraska Revised Statutes. Neb. Rev. Stat. § 77-5028 (Cum. Supp. 1998) authorizes TERC to order certain adjustments in the valuation of a class or subclass of property. It provides:

> After a hearing conducted pursuant to section 77-5024 or 77-5026, the commission shall enter its order based on information presented to it at the hearing. The order of the commission shall be sent by certified mail to the county assessor and by regular mail to the county clerk and chairperson of the county board on or before May 15 of each year. The order shall specify the percentage increase or decrease and the class or subclass of property affected or the corrections or adjustments to be made to the class or subclass of property affected. The specified changes shall be made by the county assessor to each item of property in the county so affected.

The third and most critical statute for jurisdictional purposes is § 77-5019(1), which establishes a right of judicial review of certain final decisions by TERC. At the time the notice of appeal in this case was filed, § 77-5019(1) provided:

> Any party aggrieved by a final decision in a case appealed to the commission and any county or other political subdivision aggrieved by an order of the commission issued pursuant to section 77-5028 shall be entitled to judicial review in the Court of Appeals. Nothing in this section shall be deemed to prevent resort to other means of review, redress, or relief provided by law.

In *Boone County*, the Court of Appeals reasoned that § 77-5019(1) provided two instances in which a party could appeal a TERC decision: (1) "when the commission renders a

final decision in a case which originated elsewhere and was appealed to the commission through the proper procedures" and (2) "when a person, county, or other political subdivision is aggrieved by an order of the commission rendered pursuant to § 77-5028." 9 Neb. App. at 303, 611 N.W.2d at 123-24. The Court of Appeals held that an appeal from a disposition by TERC of a petition filed pursuant to § 77-1504.01 did not fit into the first category of appeals permitted by § 77-5019(1) because it did not involve a decision of a lower tribunal which was appealed to TERC in the first instance pursuant to Neb. Rev. Stat. § 77-5007 (Supp. 1999). It further held that the dismissal of a petition filed pursuant to § 77-1504.01 could not be considered an order issued pursuant to § 77-5028 because the two statutes were separate and distinct. The court reasoned that while § 77-5028 requires TERC to enter an order by May 15 based upon hearings conducted pursuant to either Neb. Rev. Stat. § 77-5024 (Cum. Supp. 2000) or Neb. Rev. Stat. § 77-5026 (Cum. Supp. 2000), § 77-1504.01 requires petitions to be filed by July 26 of each year and action to be taken by August 10. Further, the court opined that the reference in § 77-1504.01 to § 77-5026 merely set forth the procedure to be followed in hearings conducted by TERC concerning a petition for adjustment.

After moving this case to our docket, we asked the parties to brief the jurisdictional issue in light of *Boone County*, which was decided during the pendency of this appeal. Both sides agree that the right to an appeal is statutory. However, they disagree as to whether § 77-5019(1), as it was worded and in effect in September 1999, conferred a right of appeal in this case. The Board does not contend that this case falls within the category of cases appealed to TERC and therefore reviewable under § 77-5019(1). Rather, it argues that TERC's order denying the relief it sought pursuant to § 77-1504.01 is in reality an order pursuant to § 77-5028 and thus is reviewable on that basis. In support of this contention, the Board argues that § 77-5026 provides the statutory authority for TERC to adjust a class or subclass of property and that because § 77-5028 requires TERC to enter an order based on proceedings pursuant to § 77-5026, the denial of relief requested in a petition pursuant to § 77-1501.04

is in reality an order pursuant to § 77-5028 for which § 77-5019(1) provides a right to judicial review.

[4,5] In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *American Employers Group v. Department of Labor, ante* p. 405, 617 N.W.2d 808 (2000); *In re Interest of Joshua M. et al.*, 256 Neb. 596, 591 N.W.2d 557 (1999). We agree with the reasoning of the Court of Appeals that §§ 77-1504.01 and 77-5028 refer to separate and distinct procedures occurring at different times during the annual process of equalizing property values. This reasoning is reinforced, we believe, by the recent amendment to § 77-5019 which now authorizes judicial review of orders entered by TERC "pursuant to section *77-1504.01 or* 77-5028." (Emphasis supplied.) § 77-5019(1) (Cum. Supp. 2000). In order to ascertain the proper meaning of a statute, reference may be had to later as well as earlier legislation upon the same subject. All existing acts should be considered, and a subsequent statute may often aid in the interpretation of a prior one. *Big John's Billiards v. Balka, ante* p. 702, 619 N.W.2d 444 (2000); *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998). If an order denying a county board's petition pursuant to § 77-1504.01 were in fact a species of order issued pursuant to § 77-5028, this amendment would have been unnecessary. The fact that § 77-5019(1) now makes a disjunctive reference to orders pursuant to the two statutes is a clear indication that the Legislature regards the two statutory procedures as separate and distinct and that an order by TERC pursuant to § 77-1504.01 was not subsumed within the legislative classification of orders "pursuant to section 77-5028" under the prior version of § 77-5019(1) which governs this appeal.

## CONCLUSION

Based upon our review of the relevant statutes existing at the time the Board filed its notice of appeal in this action, and the subsequent action by the Legislature in amending § 77-5019(1) to specifically provide for judicial review of orders entered by TERC pursuant to § 77-1504.01, we conclude that such review

was not authorized by § 77-5019(1) prior to its amendment when this appeal was initiated. We therefore lack jurisdiction to review the TERC order of August 6, 1999, and must dismiss this appeal. We note that because of the amendment to § 77-5019(1), our holding in this case will not apply to appeals from orders entered by TERC pursuant to § 77-1504.01 which are commenced subsequent to April 7, 2000, and therefore, the issue we resolve today is likely one of last impression.

APPEAL DISMISSED.

WRIGHT, J., not participating.

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WILLIAM R. HOLLANDSWORTH, APPELLEE, V. NEBRASKA PARTNERS, DOING BUSINESS AS MEAD CATTLE COMPANY, INC., APPELLANT.

619 N.W.2d 579

Filed December 1, 2000. No. S-00-044.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2000), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. **Statutes: 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. ___: ___. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Workers' Compensation.** Payment of a court-approved lump-sum settlement is subject to the provisions of Neb. Rev. Stat. § 48-125 (Reissue 1998).
5. **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.
6. **Workers' Compensation: Attorney Fees: Appeal and Error.** Neb. Rev. Stat. § 48-125 (Reissue 1998) provides that if the employer files an application for review before the compensation court from an award of a judge of the compensation court and fails to obtain any reduction in the amount of the award, the compensation court shall allow the employee a reasonable attorney fee.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Melvin C. Hansen and Matthew J. Buckley, of Hansen, Engles, Ketcham, Olson & Buckley, P.C., for appellant.

Rolf Edward Shasteen, of Shasteen & Crawford, P.C., for appellee.

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

CONNOLLY, J.

In this appeal, we address whether the payment of a court-approved lump-sum settlement in a workers' compensation case is subject to a waiting-period penalty under Neb. Rev. Stat. § 48-125 (Reissue 1998). The appellee, William R. Hollandsworth, and the appellant, Nebraska Partners, doing business as Mead Cattle Company, Inc., entered into a settlement agreement, which was approved by a single judge of the Nebraska Workers' Compensation Court. Nebraska Partners did not deliver the settlement check to Hollandsworth within 30 days of the order approving the settlement, and the same judge awarded a waiting-period penalty. A review panel affirmed, and Nebraska Partners appeals. We conclude that a lump-sum settlement approved by the Workers' Compensation Court is subject to the waiting-period penalty provided for in § 48-125. Accordingly, we affirm.

## BACKGROUND

In September 1997, Hollandsworth was involved in an accident while employed by Nebraska Partners. From April 29 to May 26, 1998, Hollandsworth received temporary total disability benefits. In June 1998, Hollandsworth filed a petition in the compensation court seeking further benefits, including benefits for permanent partial disability. The parties then reached a settlement agreement under which Hollandsworth would receive a lump-sum settlement of $21,500 in satisfaction of all claims he had against Nebraska Partners. The compensation court approved the settlement on April 9, 1999. On April 19, the insurance company for Nebraska Partners issued a check made out to

Hollandsworth and his attorney in the amount of the settlement. However, Hollandsworth did not receive the check. On May 11, Hollandsworth filed a motion for penalty and attorney fees in the compensation court. On May 13, the law office representing Nebraska Partners hand delivered the check to the office of Hollandsworth's attorney. On May 15, Hollandsworth signed a "Receipt in Satisfaction" stating that he acknowledged receipt of the money and that "the settlement provided in the Lump Sum Settlement filed herein is as of this date fully paid and satisfied of record."

A hearing was held on the motion, during which Hollandsworth's attorney stated, "I waive any claim for an attorney's fee in these proceedings." Following the hearing, the single judge of the compensation court awarded a 50-percent waiting-period penalty pursuant to § 48-125 because the check was delivered after 30 days had passed from the approval of the lump-sum settlement. Nebraska Partners filed an application for review by a three-judge panel of the compensation court. The panel affirmed and awarded attorney fees because Nebraska Partners had appealed and had failed to obtain a reduction in the award. Nebraska Partners appeals.

## ASSIGNMENTS OF ERROR

Nebraska Partners assigns, rephrased, that the compensation court erred in determining that payment on a court-approved lump-sum settlement is subject to a waiting-period penalty under § 48-125 and in calculating a penalty based on the entire amount of the lump-sum award. In addition, Nebraska Partners assigns that the review panel erred in affirming the decision of the compensation court and in awarding attorney fees.

## STANDARD OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2000), 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. *Miller v.*

*E.M.C. Ins. Cos.*, 259 Neb. 433, 610 N.W.2d 398 (2000); *Torres v. Aulick Leasing*, 258 Neb. 859, 606 N.W.2d 98 (2000).

[2,3] 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. *Philpot v. Aguglia*, 259 Neb. 573, 611 N.W.2d 93 (2000); *Ferguson v. Union Pacific RR. Co.*, 258 Neb. 78, 601 N.W.2d 907 (1999). 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.*

## ANALYSIS

Nebraska Partners contends that the waiting-period penalty in § 48-125 applies only to delinquent periodic payments and that payment of a court-approved lump-sum settlement is not subject to the penalty.

Section 48-125 provides in part:

> Except as hereinafter provided, all amounts of compensation payable under the Nebraska Workers' Compensation Act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death; *Provided*, fifty percent shall be added for waiting time for *all delinquent payments* after thirty days' notice has been given of disability.

(Emphasis supplied.)

Neb. Rev. Stat. § 48-138 (Reissue 1998) provides: "The amounts of compensation payable periodically under the law by agreement of the parties with the approval of the Nebraska Workers' Compensation Court may be commuted to one or more lump-sum payments . . . ." Neb. Rev. Stat. § 48-139 (Reissue 1998) states that a lump-sum settlement or agreement approved by the court is final and conclusive.

[4] We conclude that payment of a court-approved lump-sum settlement is subject to the provisions of § 48-125. Although § 48-125 speaks of periodic payments, it does not limit the application of a penalty to periodic payments only. Further, § 48-138 provides that periodic payments may be commuted to

one or more lump-sum payments, thus bringing a lump-sum payment under the scope of § 48-125. In addition, § 48-139 provides that a court-approved lump-sum settlement is final and conclusive. We have previously held that as provided in § 48-125, waiting-period penalties apply to final adjudicated awards. *Gaston v. Appleton Elec. Co.*, 253 Neb. 897, 573 N.W.2d 131 (1998); *Roth v. Sarpy Cty. Highway Dept.*, 253 Neb. 703, 572 N.W.2d 786 (1998); *Leitz v. Roberts Dairy*, 239 Neb. 907, 479 N.W.2d 464 (1992). We further note that operative August 28, 1999, § 48-125 was amended to clearly state that the waiting-period penalty applies to payments made after 30 days from the entry of a final order, award, or judgment of the compensation court.

Nebraska Partners next contends that even if the lump-sum settlement is subject to a penalty, that penalty should be calculated only on the amount of those periodic payments which would have accrued as of April 9, 1999. We disagree.

Nothing in § 48-125 allows a penalty to be assessed on only a portion of a delinquent payment. We have said that the purpose of the 30-day waiting-period penalty and the provision for attorney fees as provided in § 48-125 are to encourage prompt payment by making delay costly if the award has been finally established. *Roth v. Sarpy Cty. Highway Dept., supra.* We have also stated that the only legitimate excuse for delay in the payment of compensation benefits is the existence of a genuine dispute from a medical or legal standpoint. *Id.*; *Grammer v. Endicott Clay Products*, 252 Neb. 315, 562 N.W.2d 332 (1997); *Musil v. J.A. Baldwin Manuf. Co.*, 233 Neb. 901, 448 N.W.2d 591 (1989).

Further, because of the delay which results when a case is contested, the disabled worker's need for the prompt payment of benefits is especially urgent after a final adjudicated award. In such instances, the employee has had to do without a weekly stipend for a longer period than when an employer does not contest the worker's right to benefits. Thus, it is important to discourage unnecessary delay in the payment of benefits. *Leitz v. Roberts Dairy, supra*, citing *Amorosa v. Jersey City Welding & Mach. Works*, 214 N.J. Super. 130, 518 A.2d 529 (1986).

In this case, by entering into a settlement agreement, Nebraska Partners specifically agreed to commute any periodic

payments to a single payment which was due within 30 days of the order approving the settlement. Any assessment of a penalty based on only a portion of the amount of the payment due ignores the importance of timely payment of the lump-sum settlement due and ignores the fact that the parties specifically agreed to commute the periodic payments to one single payment. Had there been a concern about the ability to timely deliver the entire lump-sum settlement due, Nebraska Partners was free to decline to enter into the settlement agreement. Accordingly, we conclude that the single judge was correct in assessing a penalty based on the entire amount of the delinquent lump-sum payment.

Nebraska Partners further contends that regardless of how § 48-125 is interpreted, a waiting-period penalty cannot apply in this case because the order approving the settlement acted to release Nebraska Partners from all liability on account of the accident. Specifically, Nebraska Partners contends that a receipt signed by Hollandsworth on May 15, 1999, acknowledging payment and satisfaction of the settlement operates as an accord and satisfaction. There is nothing in the record showing that Nebraska Partners raised this issue before the compensation court, and Nebraska Partners contends on appeal that it was plain error for the compensation court to fail to find that the doctrine of accord and satisfaction applies to this case.

[5] 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. *Krumwiede v. Krumwiede*, 258 Neb. 785, 606 N.W.2d 778 (2000); *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W.2d 528 (1999). We find no plain error in this case. Accordingly, the argument that an accord and satisfaction occurred is without merit.

[6] Finally, Nebraska Partners contends that the review panel erred in awarding attorney fees. Section 48-125 provides that if the employer files an application for review before the compensation court from an award of a judge of the compensation court and fails to obtain any reduction in the amount of the award, the

compensation court shall allow the employee a reasonable attorney fee.

Although Hollandsworth's attorney expressly waived an award of fees for the hearing before a single judge, there is no indication in the record that an award of fees was waived for the proceedings before the review panel. Because Nebraska Partners filed the application for review and failed to obtain a reduction in the amount of the award, the review panel did not err in awarding attorney fees.

## CONCLUSION

We conclude that payment of a court-approved lump-sum settlement is subject to the waiting-period penalty provided for in § 48-125. Because the lump sum was not paid within 30 days of the order of the compensation court approving the award, the compensation court was correct in awarding a waiting-period penalty. We further determine that the review panel did not err in awarding attorney fees. Accordingly, we affirm.

AFFIRMED.

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## STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. CAROLYN A. ROTHERY, RESPONDENT.

619 N.W.2d 590

Filed December 1, 2000. No. S-00-852.

1. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
2. ___. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
3. ___. An attorney's failure to respond to inquiries and requests for information from the Office of the Counsel for Discipline is a grave matter and a threat to the credibility of attorney disciplinary proceedings.
4. ___. The propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.

Original action. Judgment of suspension.

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

PER CURIAM.

## INTRODUCTION

On August 17, 2000, a formal charge was filed by the Committee on Inquiry of the Second Disciplinary District (Committee) of relator Nebraska State Bar Association (NSBA), alleging one count of attorney misconduct against respondent Carolyn A. Rothery, who was admitted to practice law in the State of Nebraska on September 14, 1978. On September 11, 2000, Rothery entered her appearance and acknowledged receipt of the summons and formal charge in the above-captioned matter. Rothery did not file an answer or any other type of responsive pleading to the formal charge. On October 16, relator moved for judgment on the pleadings pursuant to Neb. Ct. R. of Discipline 10(H) and (I) (rev. 2000). We grant the motion for judgment on the pleadings and suspend Rothery from the practice of law indefinitely, with a minimum of 1 year, effective immediately.

## STATEMENT OF FACTS

The formal charge states, inter alia, that Rothery practices law in Douglas and Sarpy Counties in Nebraska. On May 8, 1997, the Office of the Counsel for Discipline received a letter from Melissa Gregory alleging Rothery failed to act and failed to communicate with Gregory regarding her domestic relations case. On May 8, the Office of the Counsel for Discipline sent Rothery a copy of the complaint by certified mail, together with a letter advising Rothery that pursuant to the disciplinary rules of the Nebraska Supreme Court, Rothery was required to file an appropriate written response to Gregory's complaint within 15 working days and that failure to respond was a ground for discipline. The certified mail receipt indicated Rothery received the Gregory complaint and the Office of the Counsel for Discipline's letter on May 9.

Rothery did not respond to the Office of the Counsel for Discipline's May 8, 1997, letter, and thereafter, the Office of the Counsel for Discipline made numerous unsuccessful attempts to

contact Rothery regarding the Gregory complaint. The Office of the Counsel for Discipline wrote Rothery on June 4 and 18, advising her that it had not received her response to the Gregory complaint and that she needed to file a response. On July 7, the Office of the Counsel for Discipline telephoned Rothery at her home and left a message, requesting that Rothery contact the Office of the Counsel for Discipline using its toll-free telephone number. Rothery did not respond.

On July 8, 1997, the Office of the Counsel for Discipline sent another letter to Rothery by certified mail seeking her response to the Gregory complaint. On July 25, the Office of the Counsel for Discipline telephoned Rothery at the Sarpy County Attorney's office informing her of the need to respond to the Gregory complaint. That same day, the Office of the Counsel for Discipline sent Rothery a letter enclosing a copy of the Gregory complaint and asking for Rothery's response. Receiving no answer to any of these inquiries, the Office of the Counsel for Discipline sent Rothery a letter on September 15, 1997, addressed to her office at the Sarpy County Attorney's office, seeking Rothery's response to the Gregory complaint.

On October 6, 1997, the Office of the Counsel for Discipline sent to Rothery by certified mail a new complaint based upon her failure to respond in the Gregory case. Rothery did not respond to the new complaint. On November 5, the Office of the Counsel for Discipline mailed Rothery a letter reminding her of her obligation to respond to the second complaint. Rothery did not file any answer or responsive pleading to the second complaint.

In early 1998, the Office of the Counsel for Discipline received a complaint regarding Rothery from Marilyn Luttenegger, raising allegations that Rothery neglected a legal matter entrusted to her and failed to communicate with Luttenegger. On or about February 4, the Office of the Counsel for Discipline sent Rothery a copy of the Luttenegger complaint, together with a letter notifying Rothery that she was required to respond to the Luttenegger complaint within 15 working days. Rothery did not respond to the Luttenegger complaint, and on March 5 and April 15, the Office of the Counsel for Discipline sent Rothery letters asking for her response to the Luttenegger complaint.

On April 24, 1998, the Office of the Counsel for Discipline wrote Rothery seeking to schedule a hearing on the charges relating to the Gregory complaint. In the same letter, the Office of the Counsel for Discipline reminded Rothery that she had still not responded to the Luttenegger complaint.

On or about May 27, 1998, Rothery was sent a copy of the charges filed with the Committee relating to the Gregory complaint and her failure to respond to the Gregory complaint. Rothery was notified that a hearing would be held on these charges on June 18 at 4 p.m. On June 18 at 4 p.m., the Committee met as scheduled. Also in attendance were a court reporter, the complaining witness, and the Assistant Counsel for Discipline.

Rothery did not appear at the hearing. At approximately 4:15 p.m., the Assistant Counsel for Discipline telephoned Rothery to determine if she had left for the hearing. Rothery was still at her office. The Committee hearing proceeded, with Rothery participating by speaker telephone. Rothery admitted she had received the envelope containing the charges and the notice of hearing, but that she had not reviewed them. She asked for a continuance, which was granted by the Committee.

On June 29, 1998, the Office of the Counsel for Discipline wrote Rothery a fourth reminder letter regarding her failure to respond to the Luttenegger complaint.

On December 15, 1998, in a letter addressed to the Assistant Council for Discipline, Rothery apologized for failing to respond to the Luttenegger complaint and stated that she "released" any claim she might have for attorney fees. Rothery did not, however, address in her letter any of the allegations raised against her in the Luttenegger complaint.

On September 28, 1999, the Committee conducted a hearing on the charges raised against Rothery relating to the Gregory complaint and Rothery's failure to respond to the Gregory complaint. At the time of the September 28 hearing, Rothery had not responded to the allegations of the Gregory complaint, the Luttenegger complaint, or the complaint relating to Rothery's failure to answer the Gregory complaint.

After the Committee hearing, it was determined that formal charges should be filed against Rothery. The formal charge filed

in this case alleges that Rothery has violated Canon 1, DR 1-102(A)(1) and (5), of the Code of Professional Responsibility, which provides as follows: "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." As stated above, Rothery has entered her voluntary appearance in this matter but she has not filed any responsive pleading to the formal charge.

## ANALYSIS

Pursuant to rule 10(I) of the Disciplinary Rules, "[i]f no answer be filed [in response to formal charges] within the time limited therefor . . . the matter may be disposed of by the Court on its own motion or on a motion for judgment on the pleadings." We find that the requirements of rule 10(I) have been satisfied and see no reason why a judgment on the pleadings should not be granted. Based on the foregoing, this court finds by clear and convincing evidence that Rothery violated DR 1-102(A)(1) and (5).

[1,2] 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. See *State ex rel. NSBA v. Howze, ante* p. 547, 618 N.W.2d 663 (2000). Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case. *Id.*

Neb. Ct. R. of Discipline 9(E) (rev. 2000) states, inter alia, that

> [u]pon receipt of notice of a complaint from the Counsel for Discipline, the member against whom the complaint is directed shall prepare and submit to the Counsel for Discipline, in writing, within fifteen working days of receipt of such notice, an appropriate response to the complaint, or a response stating that the member refuses to answer substantively and explicitly asserting constitutional or other grounds therefor.

Neb. Ct. R. of Discipline 3(B) (rev. 2000) provides that "[a]cts or omissions by a member . . . which violate . . . provisions of these rules, shall be grounds for discipline . . . ."

[3] We view an attorney's failure to respond to inquiries and requests for information from the Office of the Counsel for Discipline as a grave matter and as a threat to the credibility of attorney disciplinary proceedings. "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." *State ex rel. NSBA v. Mefferd*, 258 Neb. 616, 626, 604 N.W.2d 839, 847 (2000). Rothery's refusal to reply to repeated inquiries from the Office of the Counsel for Discipline demonstrates nothing less than a total "disrespect for our disciplinary jurisdiction and [a] lack of concern for the protection of the public, the profession, and the administration of justice." See *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 473, 441 N.W.2d 161, 178 (1989).

[4] In considering the appropriate sanction for Rothery's actions, we note that the propriety of a sanction must be considered with reference to the sanctions we have imposed in prior similar cases. *State ex rel. NSBA v. Mefferd, supra.* In *State ex rel. NSBA v. Simmons*, 259 Neb. 120, 608 N.W.2d 174 (2000), we suspended Simmons for 90 days for failing to respond to requests for information from the Office of the Counsel for Discipline as well as for mishandling certain litigation. In *Simmons*, we noted the presence of certain mitigating factors such as Simmons' poor health and family difficulties, factors which are not apparent from the pleadings upon which we decide the instant case. In *State ex rel. NSBA v. Kirshen, supra*, we entered a judgment of disbarment, in part due to Kirshen's failure to respond to correspondence from the Office of the Counsel for Discipline and in part due to Kirshen's mishandling of an estate. Finally, in *State ex rel. NSBA v. Mefferd, supra*, we suspended Mefferd from the practice of law for 1 year due to Mefferd's (1) failure to respond appropriately and on a timely basis to inquiries from the Office of the Counsel for Discipline, (2) failure to remit funds to a client, and (3) neglect of a legal matter entrusted to him.

In light of the foregoing precedent and the particular facts of this case, and with no mitigating circumstances apparent from the pleadings, we find and hereby order that Rothery should be indefinitely suspended from the practice of law in the State of Nebraska, with a minimum suspension of 1 year, effective immediately. Rothery may apply for reinstatement in accordance with the Nebraska Supreme Court Rules of Discipline, which application shall include a showing which demonstrates her fitness to practice law. Rothery is directed to file an affidavit complying with Neb. Ct. R. of Discipline 16 (rev. 2000).

JUDGMENT OF SUSPENSION.

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STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. WILLIAM C. STANEK, RESPONDENT.

619 N.W.2d 603

Filed December 1, 2000. No. S-00-1136.

1. **Disciplinary Proceedings.** Once a complaint, charge, or formal charge has been filed, suggested, or indicated against a member of the bar, voluntary surrender of the member's license shall not terminate such complaint, charge, or formal charge unless (1) the member knowingly admits in writing the truth of such complaint, charge, formal charge, or suggested or indicated charge, and waives all proceedings against him or her in connection therewith, and (2) an appropriate order is entered by the Nebraska Supreme Court.

Original action. Judgment of disbarment.

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

PER CURIAM.

William C. Stanek, respondent, was admitted to the practice of law in the State of Nebraska on March 5, 1973. On September 27, 2000, a complaint was filed with the Office of the Counsel for Discipline against respondent. On November 3, respondent filed with this court a voluntary surrender of his license to practice law in the State of Nebraska. In his voluntary surrender of license, respondent stated that he did not wish to contest the complaint and "freely, knowingly and voluntarily" admitted that

he engaged in conduct that violated Canon 1, DR 1-102(A)(1) and (4) through (6), and Canon 9, DR 9-102(A) and (B), of the Code of Professional Responsibility. In addition to surrendering his license, respondent voluntarily consented to the entry of an order of disbarment and waived his right to notice, appearance, and hearing prior to the entry of the order of disbarment.

[1] Neb. Ct. R. of Discipline 15 (rev. 2000) provides:

> (A) Once a complaint, Charges, or a Formal Charge has been filed, suggested, or indicated against a member, voluntary surrender of the member's license shall not terminate such complaint, Charges, or Formal Charge:
>
> (1) Unless the member knowingly admits in writing the truth of such complaint, Charges, Formal Charge, suggested or indicated Charges, and waives all proceedings against him or her in connection therewith, and
>
> (2) An appropriate order shall be entered by the Court.

Pursuant to rule 15, this court finds that respondent has voluntarily surrendered his license to practice law, admitted in writing that he engaged in conduct that violated DR 1-102(A)(1) and (4) through (6), and DR 9-102(A) and (B) of the Code of Professional Responsibility, consented to the entry of an order of disbarment, and waived all proceedings against him.

Upon due consideration of the pleadings in this matter, the court finds that respondent's admission and waiver are knowingly made. The court accepts respondent's surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with Neb. Ct. R. of Discipline 16 (rev. 2000), and upon failure to do so, he shall be subject to punishment for contempt of this court.

JUDGMENT OF DISBARMENT.

## DANIEL PLEISS, APPELLANT, V. BRIAN BARNES, APPELLEE.

619 N.W.2d 825

Filed December 8, 2000. No. S-99-520.

1. **Jury Instructions: Judgments: Appeal and Error.** Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
2. **Jury Instructions: Appeal and Error.** In reviewing a claim of prejudice from instructions given or refused, the instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal.
3. **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.
4. **Negligence: Jury Instructions: Appeal and Error.** Failure to instruct a jury with respect to the effects of its allocation of negligence in accordance with Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995) is prejudicial error.
5. **Negligence: Evidence: Trial.** Before the defense of assumption of risk is submissible to a jury, the evidence must show that the plaintiff (1) knew of the specific danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger that proximately caused the damage.
6. **Negligence.** The doctrine of assumption of risk applies to known dangers and not to those things from which, in possibility, danger may flow.
7. **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.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Reversed and remanded for a new trial.

Christopher D. Jerram, of Kelley, Lehan & Hall, P.C., and Jeffery R. Kirkpatrick, of McHenry, Haszard, Hansen & Roth, for appellant.

Mark C. Laughlin and Heidi L. Evatt, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

HENDRY, C.J.

## INTRODUCTION

Daniel Pleiss brought a negligence action against Brian Barnes for injuries Pleiss suffered as a result of a fall from a ladder while assisting Barnes in shingling the roof of Barnes' house. A jury found in favor of Barnes. Pleiss appealed, and we moved the 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 July 1 and 2, 1995, Pleiss was assisting his friend, Barnes, in replacing roofing shingles on Barnes' house. As a means of gaining access to the roof, Barnes placed an aluminum ladder against an aluminum gutter on the house. Pleiss climbed this ladder on approximately six occasions on July 1 while working on the roof and experienced no problems using the ladder. On July 2, Pleiss climbed the ladder, which was in the same position as it had been on July 1, approximately six more times without incident. Pleiss then carried a bundle of shingles up the ladder. While Pleiss was placing the bundle of shingles onto the roof of the house, the ladder "flipped, twisted and started to slide," causing Pleiss to fall from the ladder. The ladder then "bounced back" into its original position. Pleiss suffered injuries to his wrist as a result.

On December 28, 1995, Pleiss filed a negligence action against Barnes. The case was tried to a jury, which found in favor of Barnes. Pleiss appealed to the Court of Appeals which, in a memorandum opinion filed on August 24, 1998, reversed, and remanded for a new trial.

At the second trial, both Barnes and Pleiss testified that they had not noticed or experienced any problems with twisting or sliding of the ladder until Pleiss' fall. Pleiss testified that he had observed other people using ladders and that he was aware that one of the risks of climbing a ladder was that it could "get shaky and fall down." However, he had never experienced twisting or sliding of a ladder until the incident on July 2, 1995.

Barnes testified that he had received some safety training regarding the use of ladders through his employment. As part of that training, Barnes learned that ladders were to be "tied down"

or secured in some manner while in use. Barnes testified that although he often tied down ladders at work, he did not tie down ladders when using them at his house. Barnes testified that he felt the ladder in use at his house on July 1 and 2, 1995, was safe. However, Barnes also admitted that placing an aluminum ladder against an aluminum gutter may create an environment where the ladder might "flip out and slide." At the close of all the evidence, Pleiss made a motion for directed verdict, which was overruled.

At the jury instruction conference, Pleiss requested an instruction explaining the effect of the allocation of negligence, in accordance with Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995), and our decision in *Wheeler v. Bagley*, 254 Neb. 232, 575 N.W.2d 616 (1998). The court determined that the information regarding the effect of the allocation of negligence was already included as part of instruction No. 15, which explained the verdict forms. Pleiss' proposed instruction was not given.

Pleiss objected to instruction No. 2 on the basis that it did not include Pleiss' allegation that Barnes was negligent in placing the ladder in an unsafe position. The court determined that the only allegation of negligence that the jury need be instructed on was Pleiss' allegation that Barnes was negligent in failing to tie down the ladder.

Pleiss also objected to the instruction on the defense of assumption of risk. Pleiss claimed that the assumption of risk doctrine is unconstitutional and that there was insufficient evidence to support that instruction. The objection was overruled, and the instruction on assumption of risk was given.

During its deliberations, the jury presented questions to the court regarding the jury instructions. The court answered the jury's questions in the presence of counsel for both parties without having the proceedings recorded. Pleiss' counsel had requested that the proceedings be recorded, but no court reporter was available.

The jury found in favor of Barnes. Pleiss now appeals.

## ASSIGNMENTS OF ERROR

Pleiss claims, rephrased and summarized, that the trial court erred in (1) failing to fully instruct the jury as to the allocation

of negligence in accordance with § 25-21,185.09, (2) giving an instruction on assumption of risk, (3) refusing to instruct the jury on each allegation of negligence pled and supported by evidence adduced at trial, (4) failing to make a record of the proceeding during which jurors asked questions of the court regarding the jury instructions, and (5) overruling Pleiss' motion for directed verdict requesting that the court find Barnes negligent as a matter of law.

## STANDARD OF REVIEW

[1] Whether a jury instruction given by a trial court is correct is a question of law. *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000). When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Doksansky v. Norwest Bank Neb., ante* p. 100, 615 N.W.2d 104 (2000).

[2] In reviewing a claim of prejudice from instructions given or refused, the instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal. *Jameson v. Liquid Controls Corp., ante* p. 489, 618 N.W.2d 637 (2000).

## ANALYSIS

### Instruction Regarding Allocation of Negligence

Pleiss claims the trial court erred in failing to fully instruct the jury on the effect of the allocation of negligence as required by § 25-21,185.09. Section 25-21,185.09 provides that in cases involving contributory negligence, the jury "shall be instructed on the effects of the allocation of negligence." The trial court determined that this information was included in instruction No. 15, which explained which verdict forms to fill out based on the allocations of negligence. The trial court refused to give the instruction requested by Pleiss.

[3] 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. *Streeks v. Diamond Hill Farms*, 258 Neb. 581, 605 N.W.2d 110 (2000). Pleiss' tendered instruction is a correct statement of the law. In *Wheeler v. Bagley*, 254 Neb. 232, 575 N.W.2d 616 (1998), this court offered a suggested instruction to the bar and trial courts as a guideline to be utilized in single-defendant negligence cases to inform the jury about the effect of the allocation of negligence as required by § 25-21,185.09. The present case is a single-defendant negligence case, and the instruction proposed by Pleiss and refused by the trial court is nearly identical to the instruction suggested by this court in *Wheeler*.

[4] In *Wheeler*, 254 Neb. at 241, 575 N.W.2d at 621, this court held that "failure to instruct a jury with respect to the effects of its allocation of negligence in accordance with § 25-21,185.09 is prejudicial error." We further determined that a verdict form is not a substitute for a proper instruction and that the verdict form utilized in *Wheeler* did not adequately convey the effects of the allocation of negligence in any event. *Id.*

In the present case, the trial court determined that the information explaining the effect of the allocation of negligence was included as part of instruction No. 15. Instruction No. 15 provides in part, "If you find that the Plaintiff has not met his burden of proof you should complete Verdict Form No. 1 and advise the Bailiff you have reached a verdict and go no further."

Barnes claims that because the jury completed verdict form No. 1, finding in favor of Barnes, the jury never reached the issue of contributory negligence. Thus, Barnes contends that Pleiss was not prejudiced by the trial court's failure to instruct the jury on the effect of its allocation of negligence. Barnes' contention is without merit. In *Wheeler*, we rejected the so-called blindfold rule and held that § 25-21,185.09 mandates that the trial court instruct the jury on the effect of the allocation of negligence and that failure to do so is prejudicial error requiring reversal. We note that during the pendency of this appeal, the Court of Appeals decided *Hess v. Heger*, 9 Neb. App. 748, 619 N.W.2d 237 (2000), which held that failure to instruct on the allocation of negligence was harmless error. To the extent that *Hess* conflicts with this opinion, it is expressly disapproved.

Having determined that the trial court's failure to fully instruct the jury on the allocation of negligence requires reversal, we address only Pleiss' remaining assignments of error involving issues that are likely to arise again on retrial.

### ASSUMPTION OF RISK

[5] Pleiss also asserts that the trial court erred in instructing the jury on assumption of risk because the evidence did not support such an instruction. Before the defense of assumption of risk is submissible to a jury, the evidence must show that the plaintiff (1) knew of the specific danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger that proximately caused the damage. *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996); *Vanek v. Prohaska*, 233 Neb. 848, 448 N.W.2d 573 (1989). See, also, Neb. Rev. Stat. § 25-21,185.12 (Reissue 1995). The doctrine of assumption of risk applies a subjective standard, geared to the individual plaintiff and his or her actual comprehension and appreciation of the nature of the danger he or she confronts. *Vanek, supra* (citing W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 68 (5th ed. 1984)). In contrast, the doctrine of contributory negligence uses the objective " 'reasonable person of ordinary prudence' " standard. *Vanek*, 233 Neb. at 852, 448 N.W.2d at 576.

Pleiss asserts that Barnes has failed to show that Pleiss knew or understood the specific danger which caused him to fall. Pleiss contends that the specific danger presented was the likelihood that the ladder would flip, twist, and start to slide. Pleiss admitted that he knew ladders could "get shaky and fall." However, Pleiss also testified that he had never seen a ladder flip, twist, and slide.

[6] In *Winslow v. Hammer*, 247 Neb. 418, 427-28, 527 N.W.2d 631, 637 (1995) (quoting *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991)), we stated that " ' " ' " "a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character, or the danger involved, including the magnitude thereof, and voluntarily accepts the risk.". . .' " ' " The doctrine of assumption of risk " 'applies to *known dangers* and not to those things from which,

in possibility, danger may flow.' " (Emphasis in original.) *Vanek*, 233 Neb. at 852, 448 N.W.2d at 576 (quoting *Hickman v. Parks Construction Co.*, 162 Neb. 461, 76 N.W.2d 403 (1956)).

The evidence in the present case does not show that Pleiss knew or understood the possibility that the ladder could flip, twist, and start to slide. The ladder in this case never fell. Pleiss' admission that ladders can "get shaky and fall" is simply an acknowledgment that he is aware of the general danger involved in using ladders. As we noted in *Williamson v. Provident Group, Inc.*, 250 Neb. 553, 550 N.W.2d 338 (1996), this type of general knowledge is insufficient to support an assumption of risk defense.

In *Williamson*, the plaintiff, a 93-year-old woman, fell and broke her hip while walking unassisted on a graveled parking lot. The fall occurred while the plaintiff was on an outing organized by the assisted living facility in which she resided. The plaintiff brought a negligence action against the assisted living facility. The defendant argued that the plaintiff had assumed the risk of falling because she had fallen before and chose to walk without assistance across the parking lot. This court disagreed, pointing out that the issue was not whether the plaintiff knew that there was "a general danger involved in walking," but whether the plaintiff knew that walking across this particular parking lot unassisted was dangerous at the time. *Williamson*, 250 Neb. at 556, 550 N.W.2d at 340.

Similarly, in the present case, the question is not whether Pleiss knew that in general ladders could be dangerous, but whether he knew and understood that this particular ladder, either because of its placement or because it was not tied down, created a specific danger that it could flip, twist, and slide, causing him to fall. Because this record does not show that Pleiss had any such specific knowledge or understanding, the trial court erred in instructing the jury on assumption of risk.

Pleiss also asserts that § 25-21,185.12, the assumption of risk statute, is an unconstitutional violation of his right to equal protection. However, because we determine that there was insufficient evidence to warrant an instruction on assumption of risk in this case, we need not address Pleiss' claim that § 25-21,185.12 is unconstitutional.

JURY INSTRUCTION NO. 2

[7] Finally, Pleiss asserts the trial court erred in failing to instruct the jury on all of the allegations of negligence pled and supported by the evidence adduced at trial. 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. *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998). Jury instruction No. 2 given by the trial court stated in part: "[T]he plaintiff must prove, by the greater weight of the evidence, each and all of the following: 1. That the defendant was negligent in failing to secure or otherwise tie the ladder; 2. That this negligence was a proximate cause of the plaintiff's fall."

At the jury instruction conference, Pleiss requested that instruction No. 2 also include the allegation that Barnes was negligent "in placing the ladder against a portion of the house which was not reasonably safe for such use." This allegation was included in Pleiss' operative petition, and Pleiss argued that such an instruction was supported by competent evidence at trial. In particular, Pleiss relies on the following testimony from Barnes during cross-examination: "Q. And you placed an aluminum ladder against an aluminum gutter? A. Yes. Q. And would that in your experience tend to create a slippery potential environment where the ladder might flip out and slide? . . . . A. Yes."

Barnes asserts there is no competent evidence to support Pleiss' allegation that the placement of the ladder was negligent. However, Barnes' own testimony quoted above supports the allegation that placing an aluminum ladder against an aluminum gutter could create an unsafe environment. Barnes' assertion to the contrary is without merit.

Barnes further contends that even if competent evidence existed to support giving the instruction on the placement of the ladder, Pleiss was not prejudiced by the lack of such an instruction. Relying on *Scharmann v. Dayton Hudson Corp.*, 247 Neb. 304, 526 N.W.2d 436 (1995), Barnes contends that the instruction on failing to secure or tie down the ladder encompasses any additional instruction on the placement of the ladder.

In *Scharmann*, the plaintiff requested a specific instruction on the alleged negligence of the defendant in failing to erect barri-

ers or barricades in the parking lot to prevent shopping carts from rolling into customers. We held that the court properly refused this instruction because a separate instruction informed the jury that the defendant was liable if it failed to use reasonable care to protect its business visitors. We determined that the substance of the allegation regarding barriers or barricades was included in this broader instruction. Accordingly, we concluded that " '[i]t is not error to refuse to give a requested instruction if the substance of the request is in the instructions actually given.' " *Scharmann*, 247 Neb. at 308, 526 N.W.2d at 439.

In the present case, instruction No. 2 does not encompass the substance of the allegation of negligent placement of the ladder. Rather, instruction No. 2 identifies but one allegation of negligence, that being Barnes' failure to secure or tie down the ladder. Placement of the ladder and tying the ladder down are two distinct acts. Unlike the instructions at issue in *Scharmann*, there was no broader instruction in this case that could be said to encompass the allegation of negligent placement. The trial court erred in refusing to instruct the jury on Pleiss' allegation of negligence regarding the placement of the ladder.

Finally, given our determination of the above-mentioned issues, it is unnecessary to reach Pleiss' fourth and fifth assignments of error.

## CONCLUSION

For the foregoing reasons, we reverse the judgment and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

CONNOLLY, J., not participating in the decision.

WRIGHT, J., dissenting.

Pleiss fell from a ladder while attempting to place a bundle of shingles on the roof of Barnes' house. The day prior to the accident, Pleiss observed Barnes place the ladder against the gutter of the residence near the rear of the house. Pleiss used the ladder to ascend to the roof at least six times without incident prior to the accident. On these occasions, Pleiss had the bundle of shingles removed from his shoulders by Barnes' son, who was standing on the roof.

When Pleiss fell, he was attempting to place a bundle of shingles on the roof by himself. The ladder "flipped, twisted and

started to slide," and he fell to the ground. After the fall, the ladder was in the same position it had been prior to the accident.

Pleiss had been employed as a framer, and he had observed others using a ladder to repair roofing and clean gutters. Pleiss stated he knew that one of the risks of climbing a ladder was that it could "get shaky and fall down."

The majority has determined that the trial court erred in giving an instruction on assumption of risk and in failing to fully instruct on the effects of allocation of negligence. The majority has concluded that the evidence did not show that Pleiss knew or understood the possibility that the ladder could flip, twist, or slide.

I respectfully dissent. The facts of this case establish the obvious danger of climbing a ladder and attempting to place a bundle of shingles on a roof without assistance. One who knows, appreciates, and deliberately exposes himself to a danger assumes the risk thereof. See *Landrum v. Roddy*, 143 Neb. 934, 12 N.W.2d 82 (1943). In my opinion, Pleiss assumed the risk because the risk of falling during such an undertaking would be readily apparent.

Because I do not believe the trial court erred by instructing the jury on assumption of risk, I assert that the trial court's error in not instructing on contributory negligence was harmless. The jury was instructed that if Barnes met the burden of proving that Pleiss assumed the risk, the jury was to complete the verdict form in favor of Barnes. Since the jury found for Barnes on the issue of assumption of risk, it was not necessary to consider whether Pleiss was contributorily negligent.

For these reasons, I would affirm the judgment of the trial court.

# IN RE APPLICATION OF NEBRASKA PUBLIC SERVICE COMMISSION. NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE, V. ALIANT MIDWEST ET AL., APPELLEES, AND U S WEST COMMUNICATIONS, INC., APPELLANT.

619 N.W.2d 809

Filed December 8, 2000. No. S-99-582.

1. **Public Service Commission: Appeal and Error.** The appropriate standard of review for appeals from the Nebraska Public Service Commission is a review for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the administrative agency.
4. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
5. **Public Service Commission: Appeal and Error.** In reviewing a decision of the Nebraska Public Service Commission, it is not the province of an appellate court to weigh or resolve conflicts in the evidence or the credibility of the witnesses; rather, an appellate court will sustain the decision of the commission if there is evidence in the record to support its findings.
6. ___: ___. If there is evidence to sustain the findings of the Nebraska Public Service Commission, an appellate court cannot substitute its judgment for that of the commission.
7. ___: ___. Determinations by the Nebraska Public Service Commission are a matter peculiarly within its expertise and involve a breadth of judgment and policy determination that will not be disturbed by an appellate court in the absence of a showing that the action of the commission was arbitrary or unreasonable.
8. **Administrative Law: Words and Phrases.** A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis that would lead a reasonable person to the same conclusion.
9. ___: ___. An action taken by an administrative agency in disregard of the facts or circumstances of the case and without some basis which would lead a reasonable and honest person to the same conclusion is arbitrary and capricious as a matter of law.
10. **Words and Phrases.** A capricious decision is one guided by fancy rather than by judgment or settled purpose; such a decision is apt to change.
11. **Constitutional Law: Eminent Domain: Damages.** The language of Nebraska's Constitution prohibits both the taking and the damaging of property without just compensation.
12. ___: ___: ___. No set formula exists to determine whether compensation is constitutionally due for a government restriction of property. Ordinarily, a court must engage in essentially ad hoc, factual inquiries.

Appeal from the Nebraska Public Service Commission. Affirmed in part, and in part remanded with directions.

Tory M. Bishop and Jill Vinjamuri, of Kutak Rock, for appellant.

Jon C. Bruning, of Bruning Law Office, for appellee Cox Nebraska Telcom II, L.L.C.

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

WRIGHT, J.

## NATURE OF CASE

U S West Communications, Inc. (U S West), seeks review of an order entered by the Nebraska Public Service Commission (PSC) which directed incumbent local exchange carriers (ILECs) to comply with an order establishing multidwelling unit (MDU) regulations and a statewide policy for access to MDUs by competitive local exchange carriers (CLECs).

## SCOPE OF REVIEW

[1] The appropriate standard of review for appeals from the PSC is a review for errors appearing on the record. *Nebraska Pub. Serv. Comm. v. Nebraska Pub. Power Dist.*, 256 Neb. 479, 590 N.W.2d 840 (1999).

[2] When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3] The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the administrative agency. *Id.*

[4] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *American Employers Group v. Department of Labor, ante* p. 405, 617 N.W.2d 808 (2000).

## FACTS

Cox Nebraska Telcom II, L.L.C. (Cox), filed a formal complaint with the PSC, seeking to require U S West to give Cox

access to U S West's facilities so that Cox could provide telephone service to residents of MDUs. On its own motion, the PSC entered an order on August 25, 1998, entitled "Order Opening Investigation and Requesting Comments." The order stated that it was the intention of the PSC to determine a policy regarding access to residents of MDUs in Nebraska by CLECs. After the PSC opened its investigation, Cox withdrew its complaint against U S West.

The PSC requested that all interested persons submit comments by September 8, 1998, on the following issues: (1) Who is entitled to choose a local telephone carrier, the resident of an MDU or the building owner? Why? (2) At what point should a CLEC be given access to customers (e.g., individual apartment location, building site, property line, et cetera)? What is the appropriate point of demarcation? (3) What are the rights and responsibilities of CLECs and ILECs when the cable facilities serving an MDU are not currently wired for competition? (4) If it is necessary for an ILEC to sell a portion of the existing wiring to accommodate competitive access, how should a fair price be determined? and (5) Who should pay for the rewiring of facilities, and in what amount, if rewiring is necessary? In response, Cox, U S West, and others filed comments. The PSC held a hearing on the matter on September 14, at which hearing appearances were made on behalf of Cox, U S West, and the Community Associations Institute. After testimony was given, interested parties were given until October 14 to submit additional comments. Following the hearing, Cox and U S West filed posthearing comments. Cox also submitted a proposal to the PSC which other parties, including U S West, commented on.

On March 2, 1999, the PSC entered an order entitled "Order Establishing Statewide Policy for MDU Access." The intent of the order was to foster competition while simultaneously providing residents of MDUs with a realistic opportunity to select their preferred telecommunications provider. The stated purpose of the order was to create a uniform framework which ILECs and CLECs alike would utilize to serve residents of MDUs.

In summary, the PSC ordered ILECs to provide CLECs with unlimited access to the portion of the wire loop between a demarcation point and the newly moved minimum point of entry

(MPOE), as well as any existing campus wire. The MPOE is where the campus wire begins and is generally located at the edge of the property line. The demarcation point is the point where the telephone company's facilities end and the property owner's facilities begin. It is generally where the individual customer's inside wire connects to the campus wire. Campus wire in an MDU setting runs between the property line and each building. It includes the portion of an exchange access line circuit that commences at the MPOE and extends up to and includes the demarcation point.

At the request of a CLEC or an MDU owner, ILECs were directed to provide an MPOE at the MDU property line or at a location mutually agreeable to all parties to allow the CLEC to connect to the campus wire and serve residents. The ILEC or a mutually agreed upon third-party contractor must move the MPOE in the most expeditious and cost-effective manner possible. The CLEC or requesting property owner was directed to pay the full cost of the move of the MPOE. ILECs were to retain ownership of any portion of the loop between the demarcation point and the newly moved MPOE as well as any existing campus wire.

CLECs that connected to the MPOE were permitted to use the ILEC's campus wire for a one-time fee of 25 percent of "current" construction charges of the campus wire based on an average cost-per-foot calculation. This calculation was to be derived from a sample of recently completed ILEC construction work orders for MDUs. For 3 years after the move's completion, connecting CLECs were to contribute on an equitable and nondiscriminatory pro rata basis to the one-time 25-percent charge. Maintenance expenses were to be shared by the parties on a pro rata basis based on the percentage of customers each party serves within the affected area at the time of the maintenance and were to be completed in the most expeditious and cost-effective manner possible. Finally, the PSC ordered that exclusionary contracts and marketing agreements between telephone companies and MDU owners be prohibited except with regard to condominiums, cooperatives, and homeowners' associations.

On April 20, 1999, the PSC clarified and amended its order of March 2. The PSC stated:

> While it is true that the Commission is requiring the ILEC to "share" a portion of its existing facilities, the ILEC retains complete ownership and in our opinion is adequately compensated.
>
> The Commission's authorizing the property to be used for competitive telephone service in accordance with its deregulatory policies, when the property was already dedicated to the public use of providing telephone service, does not constitute an unconstitutional taking or physical invasion of private property.

The PSC also incorporated a "Charges and Remission Schedule" for the first 3 years from the date when the first CLEC begins serving the property. This schedule was to be administered by the ILEC.

The PSC further ordered ILECs to respond to requests for reengineering of MPOEs with a formal price quote and construction schedule within 15 business days of the request. The PSC required ILECs and CLECs to meet within 30 days of a request to determine a mutually agreeable third party for maintenance or repair. Maintenance was required to be performed within 24 hours and repairs within 4 hours of the request for service by any party.

The PSC also ordered ILECs to provide samples of recently completed MDU construction jobs or work orders to find both an average distance calculation as well as an average cost-per-foot calculation. Once both numbers were derived, the two were to be multiplied to determine the overall average cost for the MDU properties that were to be used as the "current" construction charges for MDU properties. U S West timely appeals from the order of the PSC.

## ASSIGNMENTS OF ERROR

U S West makes the following assignments of error, which we have summarized and restated: (1) The PSC erred in promulgating an order which conflicts with the requirements of 47 U.S.C. § 252 (Supp. IV 1998) and is preempted by a subsequent dispositive Federal Communications Commission (FCC) order; (2) the PSC erred in promulgating a regulation inconsistent with the specific terms of the Telecommunications Act of 1996 (1996

Act); (3) the PSC erred in failing to recognize that its order constituted a taking for purposes of the Fifth Amendment and Neb. Const. art. I, § 21; (4) the PSC erred in its interpretation of Neb. Rev. Stat. § 75-109(2) (Cum. Supp. 1998); (5) the PSC erred in failing to provide ILECs just compensation for the taking of campus wire; and (6) the PSC erred in establishing an arbitrary and capricious one-time 25-percent charge for the use of an ILEC's campus wire.

## ANALYSIS

We begin with a brief factual background of the 1996 Act and a summary of the positions of the parties as to the PSC's order of March 2, 1999. The 1996 Act fundamentally restructured local telephone markets. States were no longer permitted to enforce laws that impede competition, and ILECs were subject to a variety of duties intended to facilitate market entry. Foremost among these duties was the ILEC's obligation under 47 U.S.C. § 251(c) (Supp. IV 1998) to share its network with competitors. Under this provision, a CLEC could obtain access to an ILEC's network in three ways: (1) The CLEC could purchase local telephone services at wholesale rates for resale to end users, (2) the CLEC could lease elements of the ILEC's network " 'on an unbundled basis,' " or (3) the CLEC could interconnect its own facilities with the ILEC's network. See *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371, 119 S. Ct. 721, 142 L. Ed. 2d 835 (1999). It is possible for an ILEC to negotiate an agreement with a CLEC without regard to the duties the ILEC would otherwise have under § 251(b) or (c); however, if private negotiations fail, either party can petition the state commission that regulates local telephone use, which arbitration is subject to § 251 and the FCC regulations promulgated thereunder. *AT&T Corp. v. Iowa Utilities Bd., supra.*

As defined by 47 U.S.C. § 153(29) (Supp. IV 1998) of the 1996 Act, the term "network element" means both "a facility or equipment used in the provision of a telecommunications service" and "features, functions, and capabilities that are provided by means of such facility or equipment." Access to network elements " 'on an unbundled basis' " means that ILECs must provide the facility or functionality of a particular element to requesting carriers, sep-

arate from the facility or functionality of other elements, for a separate fee. See *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499, 15,635 (1996).

Six months after the 1996 Act was passed, the FCC issued a report and order implementing the local competition provisions through a series of regulations and orders. See *id.* The FCC listed a minimum set of network elements that ILECs must provide to CLECs, established interconnection rules, and adopted a methodology for pricing network elements known as TELRIC (total element long-run incremental cost). *Id.*

Pursuant to § 252(d)(1) of the 1996 Act, the FCC promulgated 47 C.F.R. § 51.503 (1999), which sets forth the general pricing standard governing what ILECs should charge CLECs for interconnection and for furnishing of network elements on an unbundled basis. In relevant part, § 51.503 states:

> (b) An incumbent LEC's rates for each element it offers shall comply with the rate structure rules set forth in §§ 51.507 and 51.509, and shall be established, at the election of the state commission—
>
> (1) Pursuant to the forward-looking economic cost-based pricing methodology set forth in §§ 51.505 and 51.511; or
>
> (2) Consistent with the proxy ceilings and ranges set forth in § 51.513.

It appears that § 51.503(b) contains two separate requirements with respect to the rates ILECs can charge. First, the rates must comply with the rate structure standards of 47 C.F.R. §§ 51.507 and 51.509 (1999). Second, the rates must be established in compliance with either 47 C.F.R. §§ 51.505 and 51.511 (1999) or 47 C.F.R. § 51.513 (1999).

Numerous challenges to this rulemaking were filed across the country by ILECs and state utility commissions. See *AT&T Corp. v. Iowa Utilities Bd., supra*. These challenges were consolidated in the U.S. Court of Appeals for the Eighth Circuit in *Iowa Utilities Bd. v. F.C.C.*, 120 F.3d 753 (8th Cir. 1997). There, the ILECs and the state commissions argued that the primary authority to implement the local competitive provisions belonged to the states rather than to the FCC. The Eighth Circuit agreed

and vacated the pricing rules and several other aspects of the order as reaching beyond the FCC's jurisdiction. The court concluded that § 252(c)(2) and (d) of the 1996 Act gave state utility commissions exclusive authority to make pricing decisions under §§ 251 and 252, thereby depriving the FCC of any rulemaking authority in that area. The court held that the general rulemaking authority conferred by the Communications Act of 1934 extended only to interstate matters and that the FCC needed specific congressional authorization before implementing provisions of the 1996 Act addressing intrastate telecommunications.

The U.S. Supreme Court affirmed in part, and in part reversed the judgments and remanded the causes to the Eighth Circuit. See *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 835 (1999). The Court held that the FCC had rulemaking authority and had jurisdiction to design a pricing methodology. Thus, the causes were remanded to the Eighth Circuit for consideration of substantive challenges to the rules.

In response to the U.S. Supreme Court's decision, the FCC entered its third report and order on November 5, 1999. See *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 F.C.C.R. 3696 (2000). The FCC specifically noted that § 251(c)(3) and (d)(2) require ILECs to make their facilities available at cost-based rates. The FCC also stated that if the parties were unable to negotiate a reconfigured single point of interconnection at multiunit premises, the ILEC was required to construct a single point of interconnection that would be fully accessible and suitable for use by multiple carriers. *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, supra.* Any disputes regarding the implementation of this requirement, including the provisions for compensation to the ILEC under forward-looking price principles, were to be subject to the usual dispute resolution process under § 252. *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, supra.*

On remand, in *Iowa Utilities Bd. v. F.C.C.*, 219 F.3d 744 (8th Cir. 2000), the Eighth Circuit examined the FCC's pricing provisions that pertain to the pricing of interconnection and net-

work elements utilizing a forward-looking economic cost methodology that is based on the TELRIC of the element. In part, the court concluded that the hypothetical network standard upon which the TELRIC is based violated the plain meaning of the 1996 Act. Thus, the court vacated § 51.505(b)(1). In doing so, the court stated:

> It is clear from the language of the statute that Congress intended the rates to be "based on the cost . . . of *providing the interconnection or network element*," . . . not on the cost some imaginary carrier would incur by providing the newest, most efficient, and least cost substitute for the actual item or element which will be furnished by the existing ILEC pursuant to Congress's mandate for sharing.

*Iowa Utilities Bd.*, 219 F.3d at 750.

The Eighth Circuit then went on to further illustrate the cost that ILECs could recover from CLECs. The court stated:

> It is the cost to the ILEC of providing its existing facilities and equipment either through interconnection or by providing the specifically requested existing network elements that the competitor will in fact be obtaining for use that must be the basis for the charges. The new entrant competitor, in effect, piggybacks on the ILEC's existing facilities and equipment. It is the cost to the ILEC of providing that ride on those facilities that the statute permits the ILEC to recoup. This does not defeat the purpose of using a forward-looking methodology as the intervenors assert. Costs can be forward-looking in that they can be calculated to reflect what it will cost the ILEC in the future to furnish to the competitor those portions or capacities of the ILEC's facilities and equipment that the competitor will use including any system or component upgrading that the ILEC chooses to put in place for its own more efficient use. In our view it is the cost to the ILEC of carrying the extra burden of the competitor's traffic that Congress entitled the ILEC to recover, and to that extent, the FCC's use of an incremental cost approach does no violence to the statute.

*Iowa Utilities Bd.*, 219 F.3d at 751.

The Eighth Circuit focused on § 252(d)(1)(A)(i), which provides that rates are to be "based on the cost . . . of providing the interconnection or network element." Instead of using a mythical type of efficient telephone network, state commissions must now focus on the costs that ILECs incur as a result of providing their existing facilities and equipment to a competitor, either through interconnection or by providing the specifically requested existing network elements.

In the case at bar, U S West is an ILEC which has built and maintained an infrastructure of wires and facilities to provide telecommunications services to the State of Nebraska. It provides residences and businesses in Nebraska with access to essential local exchange facilities. Prior to January 31, 1996, U S West had installed facilities on MDU campuses all the way to the demarcation point. MDU owners were not asked to pay for any aspect of the facilities on U S West's side of the demarcation point. U S West has paid for and owns these facilities, including the campus wires.

For single-family dwellings, when a CLEC is requested to provide service, it obtains approval to bury the wire in the customer's yard up to the home. This process is simple and inexpensive. With an MDU that has multiple buildings, paved or finished common areas, parking lots, swimming pools, et cetera, the process becomes more complex and expensive.

To implement the 1996 Act, the Nebraska Legislature passed 1997 Neb. Laws, L.B. 660, codified at § 75-109, which authorized the PSC to "do all things reasonably necessary and appropriate to implement" the Act. At all relevant times, § 75-109 stated:

> [T]he commission shall regulate and exercise general control as provided by law over all common carriers . . . furnishing communication services for hire in Nebraska intrastate commerce.
>
> (2) The commission is authorized to do all things reasonably necessary and appropriate to implement the federal Telecommunications Act of 1996 . . . including section 252 of the act which establishes specific procedures for negotiation and arbitration of interconnection agreements between telecommunications companies. . . . The authority

> granted to the commission pursuant to this subsection shall be broadly construed in a manner consistent with the federal Telecommunications Act of 1996.

It is not disputed between U S West and Cox that the CLECs should have unrestricted access to the wire within each building. The dispute involves the campus wire and the PSC's order that ILECs must lease the campus wire to interested CLECs at a reasonable cost. Ultimately, the question before the PSC is what is the just and reasonable rate that can be charged for a CLEC's use of U S West's facilities.

U S West proposed to the PSC that if a CLEC sought access to residents of an MDU, each building in the complex should be considered to have one demarcation point at that building. It proposed that the CLEC lease the campus wire running from the mutually-agreed-upon MPOE to the initial demarcation point at each building at an average cost-based rate. U S West claimed this would ensure that each MDU resident always had a choice of provider. U S West's proposal required the ILEC to maintain all facilities up to the demarcation point of each building and required the CLEC to pay a nonrecurring charge to install necessary facilities to connect to the network. Since the facilities surrounding each MDU differ substantially, U S West recommended that the CLEC and the ILEC utilize a bona fide request process to work through the details of how best to connect the two networks before beginning construction.

U S West claimed that once constructed, the service provider would have access to its own facility at any spot up to and including the point of connection. Each carrier would be responsible for maintaining its own facilities. U S West contended that this would ensure that any resident of an MDU could change providers at any time. It argued that Cox's proposal, which would allow access to all facilities of an MDU for 25 percent of the replacement value of the campus wire, (1) was not cost based, (2) drastically underestimated the cost of the facilities, and (3) had no relationship to any economic measure at all.

Cox asserted that the ILECs should move the demarcation point for an MDU complex to an MPOE at or near the property line to enable multiple carriers to interconnect and serve residents and that U S West had previously agreed to this proposal.

As a compromise, Cox proposed that until campus wire is fully deregulated, CLECs should pay a one-time 25-percent payment for the use of the campus wire. According to Cox, U S West's proposal would charge a recurring fee of 64 percent of the total loop rate for a 2-percent use of the total loop. This charge would equal a rate of $20 per month per customer for use of the network elements by Cox. At the time, U S West was charging each customer a fee of $18.35 per month, and Cox had proposed a rate of $17.89 per month per customer. Cox claimed that a charge of $20 would effectively kill competition in the MDU marketplace because the charge for the campus wire would exceed the actual retail cost of the service. Cox claimed that U S West had already depreciated such cost or had been paid the cost by the MDU owners.

With this background, we proceed to address U S West's assignments of error. U S West first argues that the FCC has entered an order which as a matter of law preempts the PSC's order of March 2, 1999. Specifically, U S West claims that the PSC's order is in direct conflict with the 1996 Act and the subsequent third report and order by the FCC and therefore is preempted.

The applicable portions of the 1996 Act are §§ 251 and 252. Section 251 provides in relevant part:

> **(c) Additional obligations of incumbent local exchange carriers**
>
> In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:
>
> . . . .
>
> **(2) Interconnection**
>
> The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—
>
> (A) for the transmission and routing of telephone exchange service and exchange access;
>
> (B) at any technically feasible point within the carrier's network;
>
> (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary,

affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

**(3) Unbundled access**

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

Section 252 states in relevant part:

**(d) Pricing standards**

**(1) Interconnection and network element charges**

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

U S West claims that paragraph 60 of the FCC's third report and order, which states that "sections 251(c)(3) and 251(d)(2) require incumbent LECs to make their facilities available at cost-based rates," is directly contrary to the language found in the PSC's order and therefore preempts the PSC's order. *In the Matter of Implementation of the Local Competition Provisions*

*of the Telecommunications Act of 1996*, 15 F.C.C.R. 3696, 3729 (2000). U S West argues that as a result of *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 835 (1999), the FCC entered an order which had the effect of preempting the PSC's order.

U S West further argues that the PSC regulation which requires CLECs to pay a total of 25 percent of replacement costs of the campus wire as a prerequisite to serving an MDU is inadequate. It claims that the PSC failed to calculate or consider the substantial cost of installing the facilities, the historical cost of maintaining the facilities, or the location of the demarcation point, which would increase U S West's cost, and failed to consider the actual market value of the facilities once they are installed. It contends that the PSC addressed only one component of the cost and value of the facilities and ignored all the other elements of investment in the telecommunications network.

Thus, U S West asserts that any order by the PSC regarding unbundled subloops which is inconsistent with cost-based rates is preempted because it specifically conflicts with the 1996 Act and the authority of the FCC to set price regulations. It asserts that since the FCC regulation occupies the field of rate setting for the use of unbundled loops by CLECs, the PSC regulation must yield to the federal regulation.

Cox argues that U S West has mischaracterized the FCC's third report and order and that the order supports Cox's position by identifying the unbundled network elements that ILECs are required to make available under the 1996 Act. Cox claims that *AT&T Corp. v. Iowa Utilities Bd., supra*, required ILECs to offer access to subloops or portions of a loop such as campus wire at any accessible point.

Cox claims that the 1996 Act and the FCC's order reinforce the PSC's order and that the FCC's order supports the PSC's order in that it notes that competition is best served by a single point of interconnection that is fully accessible to multiple carriers upon request. Cox argues that while § 252(d)(1) sets forth the pricing standards for unbundled network elements such as campus wire, the FCC's order and the 1996 Act are clear that only a state commission can set prices for those unbundled network elements.

In summary, U S West argues that the PSC's order regarding the unbundled subloops is inconsistent with cost-based rates that are required by the FCC's order and the 1996 Act and is therefore preempted because it conflicts with the 1996 Act and the authority of the FCC to set price regulations. Cox argues that the PSC set a cost-based rate for the campus wire in accordance with the 1996 Act and the FCC's order.

The basic disagreement between the parties is the interpretation of § 252(d)(1), which sets forth the pricing standards for interconnection and network element charges. The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the administrative agency. *Nebraska Pub. Serv. Comm. v. Nebraska Pub. Power Dist.*, 256 Neb. 479, 590 N.W.2d 840 (1999).

Under the 1996 Act, state commissions are given authority to decide disputes between carriers. § 251(d)(3). The FCC has determined that lack of access to unbundled subloops materially diminished a CLEC's ability to provide services that it sought to offer and that, therefore, ILECs must provide unbundled access to subloops nationwide where technically feasible. *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 F.C.C.R. 3696 (2000). Disputes regarding implementation, including compensation to the ILEC under forward-looking pricing principles, are subject to the dispute resolution process under § 252. *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, supra.*

The provisions of the 1996 Act set forth the pricing standards for unbundled network elements such as campus wire, but the state commissions are given the authority to set the just and reasonable rate for the interconnection of facilities and equipment. See § 252(d)(1)(A)(i). The state commissions make the determination as to what will be the just and reasonable rate based on the cost of providing the interconnection or network element. "It is the cost to the ILEC of providing its existing facilities and equipment . . . that the competitor will in fact be obtaining for use that must be the basis for the charges." *Iowa Utilities Bd. v. F.C.C.*, 219 F.3d 744, 751 (8th Cir. 2000).

It is not disputed that ILECs are required to give CLECs access to their networks or that state commissions can enforce such requirement. The dispute centers on how the ILECs are to be compensated for providing their existing facilities and equipment to the CLECs. As stated above, "[i]t is the cost to the ILEC of providing that ride on those facilities that the statute permits the ILEC to recoup." *Id.*

We therefore conclude that the PSC is given the authority to set just and reasonable rates for the interconnection of the facilities in question. The language of *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 835 (1999), readily implies that the state commissions have authority to implement rates and regulations subject to the provisions of the 1996 Act and the FCC regulations promulgated thereunder. Section 252(c)(2) requires that the state commissions establish rates for interconnection services or network elements according to § 252(d). Section 252(d) specifies that prices are to be set to recover costs. Via *Iowa Utilities Bd. v. F.C.C., supra*, the Eighth Circuit has given direction as to how those rates are to be determined. Thus, the PSC's order is not preempted by the 1996 Act or the FCC's order.

U S West claims that the one-time fee of 25 percent of the construction costs for perpetual use of the property does not compensate U S West for its investment, ownership, maintenance, repair, administration, and future legal obligations. Our review is to determine whether the rates established by the PSC comply with the requirements of the 1996 Act as such requirements have been judicially interpreted.

> Congress knew it was requiring the existing ILECs to share their existing facilities and equipment with new competitors as one of its chosen methods to bring competition to local telephone service, and it expressly said that the ILECs' costs of providing those facilities and that equipment were to be recoverable by just and reasonable rates.

(Emphasis omitted.) *Iowa Utilities Bd.*, 219 F.3d at 750.

The PSC set forth several pricing standards in its March 2, 1999, order which are set forth above. U S West argues that the PSC's order contains no reasonable economic, factual, or other basis in support of its one-time fee of 25 percent of "current"

construction charges or the 3-year cap placed on charges once an MPOE is relocated. It claims there is no evidence which would support the PSC's order to divest U S West and other ILECs of their property for a 25-percent charge. U S West contends that the fee has no relationship to any valid standard governing the use of an ILEC's network by a CLEC. It claims that the percentage is not based on amount of use, number of customers served, or any other reasonable factor or evaluation, nor is it tied to any economic data regarding cost or revenue associated with the campus wire. Similarly, it argues there was not a rational basis to exempt CLECs after 3 years.

Cox argues that the PSC's order was in essence a compromise between U S West's and Cox's initial proposals. Consistent with its argument that no compensable taking has occurred, Cox asserts that U S West is being compensated a second or perhaps even a third time for its capital investment in each property. Cox points out that in Nebraska, ILECs were not compensated by property owners for the inside wire but were instead ordered to amortize the remaining undepreciated value of the investment over 8 years or "flash cut" the amount from the fiscal year operations cost. Cox argues that it initially proposed this type of solution and continues to believe that this is the most fair long-term solution but that the PSC chose a reasonable compromise.

The FCC is given the task of listing the unbundled network elements that ILECs must provide CLECs and the task of setting rules for pricing of those unbundled network elements. State commissions are given the duty to actually set the prices for those unbundled network elements. See § 251(c)(3) and (d)(1). Under § 75-109(2), the PSC is given broad power to do all things reasonably necessary and appropriate to implement the 1996 Act.

In Nebraska, the ILEC typically owns and controls the campus wire at the MDU complex. Since it is impractical and undesirable for a CLEC to purchase or install the wire, the only economically feasible option is to lease the subloop based upon a reasonable charge. Cox asserts that the charge established by the PSC was a reasonable compromise and was therefore neither arbitrary nor capricious. It claims that the PSC did not need to compensate U S West at all and that the PSC's order was a reasonable compromise.

When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Nebraska Pub. Serv. Comm. v. Nebraska Pub. Power Dist.*, 256 Neb. 479, 590 N.W.2d 840 (1999). Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *American Employers Group v. Department of Labor, ante* p. 405, 617 N.W.2d 808 (2000).

[5-7] In reviewing a decision of the PSC, it is not the province of an appellate court to weigh or resolve conflicts in the evidence or the credibility of the witnesses; rather, an appellate court will sustain the decision of the PSC if there is evidence in the record to support its findings. *In re Application of Nebraskaland Leasing & Assocs.*, 254 Neb. 583, 578 N.W.2d 28 (1998). If there is evidence to sustain the findings of the PSC, an appellate court cannot substitute its judgment for that of the PSC. *Id.* Determinations by the PSC are a matter peculiarly within its expertise and involve a breadth of judgment and policy determination that will not be disturbed by an appellate court in the absence of a showing that the action of the PSC was arbitrary or unreasonable. *Id.*

[8-10] A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis that would lead a reasonable person to the same conclusion. *Southeast Rur. Vol. Fire Dept. v. Neb. Dept. of Revenue*, 251 Neb. 852, 560 N.W.2d 436 (1997). An action taken by an administrative agency in disregard of the facts or circumstances of the case and without some basis which would lead a reasonable and honest person to the same conclusion is arbitrary and capricious as a matter of law. See *Wagner v. City of Omaha*, 236 Neb. 843, 464 N.W.2d 175 (1991). A capricious decision is one guided by fancy rather than by judgment or settled purpose; such a decision is apt to change. See *Southeast Rur. Vol. Fire Dept. v. Neb. Dept. of Revenue, supra.*

Congress has set forth the pricing standards for the rates that ILECs should charge CLECs for interconnection and for the fur-

nishing of network elements on an unbundled basis pursuant to the 1996 Act. Section 251(c) imposes an identical duty on ILECs to provide interconnection and access to network elements "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." In addition, both interconnection and unbundled network elements are made subject to the same pricing standard in § 252(d)(1). *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499 (1996). The FCC promulgated § 51.505, which provides:

> **Forward-looking economic cost.**
>
> (a) *In general.* The forward-looking economic cost of an element equals the sum of:
>
> (1) The total element long-run incremental cost of the element, as described in paragraph (b); and
>
> (2) A reasonable allocation of forward-looking common costs, as described in paragraph (c).
>
> (b) *Total element long-run incremental cost.* The total element long-run incremental cost of an element is the forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent LEC's provision of other elements.
>
> (1) *Efficient network configuration.* The total element long-run incremental cost of an element should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers.
>
> . . . .
>
> (c) *Reasonable allocation of forward-looking common costs*—(1) *Forward-looking common costs.* Forward-looking common costs are economic costs efficiently incurred in providing a group of elements or services (which may include all elements or services provided by the incumbent LEC) that cannot be attributed directly to individual elements or services.

Section 51.505(d) sets forth the factors that may not be considered: (1) embedded costs, (2) retail costs, (3) opportunity costs, and (4) revenues to subsidize other services.

These pricing standards were examined by the Eighth Circuit in *Iowa Utilities Bd. v. F.C.C.*, 219 F.3d 744 (8th Cir. 2000). The court concluded that the FCC's use of a forward-looking cost methodology was reasonable but vacated § 51.505(b)(1). It concluded that basing the allowable charge for the use of an ILEC's existing facilities and equipment on what the costs would be if the ILEC provided the most efficient technology and configuration violated the plain meaning of the 1996 Act. The pricing standard is to be based on the cost that an ILEC will incur as a result of providing its existing facilities and equipment that will be used by the competitor. See *Iowa Utilities Bd. v. F.C.C., supra.*

The Eighth Circuit found that the term "cost," as used in the 1996 Act, did not mean historical cost. It noted, however, that the term "cost" as used in § 252(d)(1)(A)(i) was ambiguous. It is a " 'chameleon, capable of taking on different meanings, and shades of meaning, depending on the subject matter and the circumstances of each particular usage.' " *Iowa Utilities Bd.*, 219 F.3d at 751-52. State commissions are required to determine the cost that an ILEC will incur as a result of providing its existing facilities and equipment either through interconnection or by providing the specifically requested network elements. *Id.*

Here, the request by Cox involves the interconnection to the campus wire and the cost associated with its use that U S West is entitled to recover. The PSC has required Cox to pay all costs associated with the movement of the MPOE. Therefore, it is the just and reasonable rate for Cox's use of the campus wire that must be determined.

The record does not establish whether the PSC's rate for the use of the campus wire conforms to the requirements set forth in *Iowa Utilities Bd. v. F.C.C., supra.* The PSC's rate is a one-time fee of 25 percent of "current" construction charges for campus wire based upon an average cost per foot of a sample of recently completed ILEC construction work orders for MDUs. We are unable to determine whether the PSC's rate accurately sets forth the cost that U S West will incur as a result of allowing Cox to interconnect to the campus wire. As noted, such cost is a

"chameleon, capable of taking on different meanings," depending upon the circumstances. Such a determination of cost should be left to the expertise of the PSC. Therefore, the PSC should reexamine its determination in light of the requirements set forth in *Iowa Utilities Bd. v. F.C.C., supra.*

[11] Although we are remanding the PSC's determination of cost, we will independently consider U S West's argument that the PSC's order results in an unconstitutional taking of ILEC property. U S West claims that the PSC's order is an unjust per se taking in violation of the Fifth Amendment and Neb. Const. art. I, § 21. The Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." Article I, § 21, of the Nebraska Constitution provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." The language of Nebraska's Constitution prohibits both the taking and the damaging of property without just compensation. See *Bargmann v. State*, 257 Neb. 766, 600 N.W.2d 797 (1999).

In *Strom v. City of Oakland*, 255 Neb. 210, 583 N.W.2d 311 (1998), we stated that there are two discrete categories of regulatory actions that are compensable without a case-specific inquiry into the public interest and concomitant regulatory requirement nexus. The first category is where the regulation denies a landowner all economically beneficial or productive use of his or her land. See, also, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). U S West does not argue that it has been deprived of all economically beneficial or productive use of its property. The PSC's order does not deny U S West the use of the wire. U S West retains ownership and full use of the property. The order issued by the PSC directs that the wire is to be shared between U S West and any CLEC. U S West is not prohibited from occupying the wire and is not denied the power to control use of the property. The policy order permits a CLEC to use the campus wire to provide telephone service only if the CLEC has been selected by a tenant. Until a CLEC is selected, U S West has exclusive use of the campus wire.

The other category of regulatory action is where the landowner suffers a physical invasion of his or her property. See

*Strom v. City of Oakland, supra.* See, also, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982). U S West argues that a physical taking of property occurs when the government invades the property itself or adopts a law or regulation that authorizes private parties to physically occupy or control another's property.

U S West contends that there is no state or federal statutory authority for the taking of its property as set forth in the PSC's order. It claims that the only statutes which address a CLEC's use of an ILEC's property are §§ 251 and 252 and that neither of these provisions allow the taking outlined in the PSC's order. U S West claims that the PSC's order, which requires U S West to provide CLECs with perpetual and unlimited access to property that is undisputably owned by U S West, deprives it of a fundamental element of ownership.

In *Loretto v. Teleprompter Manhattan CATV Corp., supra*, the landlord claimed that the cable television company's installation of its facilities on the landlord's property pursuant to New York law requiring a landlord to permit such installation was a constitutionally compensable taking. The Court held that the New York law requiring property owners to allow a cable company access to their property constituted a physical invasion and, thus, a per se taking under the Fifth Amendment.

[12] In *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), the Court examined the general principles of the takings clause of the Fifth Amendment. The Court noted that no set formula exists to determine whether compensation is constitutionally due for a government restriction of property. Ordinarily, the court must engage in "essentially ad hoc, factual inquiries." *Penn Central Transp. Co.*, 438 U.S. at 124. The inquiry is not standardless. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. *Id.* If the physical intrusion results in a permanent physical occupation, the Court has generally found that a taking has occurred. See *Loretto v. Teleprompter Manhattan CATV Corp., supra.*

CLECs such as Cox are permitted access to serve local markets via § 251(c)(2), which provides that ILECs have a duty to "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network." Article IV, § 20, of the Nebraska Constitution gives the PSC powers and duties, including the regulation of rates and service, and general control of common carriers as the Legislature may provide by law. With the enactment of § 75-109(2), the PSC is authorized to do all things reasonably necessary and appropriate to implement the 1996 Act. The authority granted to the PSC pursuant to § 75-109(2) is to be broadly construed in a manner consistent with the 1996 Act.

We conclude that a taking has not occurred. The PSC's order does not prevent U S West from occupying its property. The order requires that the wire be shared between U S West and other requesting CLECs. U S West is not prevented from occupying any space, nor does the order deny U S West the power to control or use the property. U S West maintains ownership of the wire, but the order requires that it must share the wire in existence with other requesting CLECs. These requirements are set forth in §§ 251 and 252. The 1996 Act requires that the ILEC shall recoup the costs of providing its facilities to the CLEC.

One of the express purposes of the 1996 Act was to extend competition into local telephone markets and to encourage CLECs to service local markets. The authority granted to the PSC pursuant to § 75-109(2) is to be broadly construed. The PSC's order authorized the property to be used for competitive telephone services in accordance with its deregulatory policy. U S West has total use of the facility unless and until another competitor is selected over it as the chosen local exchange carrier.

We have previously stated in our discussion of the factual background of the 1996 Act that local telephone markets have been fundamentally restructured. Now, ILECs are required to share their networks with competitors. See *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 835 (1999). The FCC has promulgated rules and regulations relating to the 1996 Act which have been the subject of scrutiny by the federal courts. See, *id.*; *Iowa Utilities Bd. v. F.C.C.*, 219 F.3d 744 (8th Cir. 2000). Congress has effected a change in the public pol-

icy regarding the local telephone markets. The 1996 Act provides that an ILEC shall recover the cost of providing its existing facilities and equipment, and the FCC has promulgated regulations to provide for such cost. *Iowa Utilities Bd. v. F.C.C., supra.*

In *Sutter Butte Canal Co. v. R. R. Comm'n*, 279 U.S. 125, 49 S. Ct. 325, 73 L. Ed. 637 (1929), the Court held that regulation of a public utility to effectuate a reasoned and legitimate change in public policy does not constitute a compensable taking of property under the state and federal Constitutions. Similarly, the regulation of ILECs under the 1996 Act would not constitute a compensable taking. We therefore conclude that the PSC's order does not constitute a taking under the Fifth Amendment or Neb. Const. art. I, § 21.

## CONCLUSION

For the reasons set forth herein, we remand the PSC's cost determination regarding use of the campus wire for reexamination in accordance with this opinion. We affirm all other aspects of the PSC's order.

AFFIRMED IN PART, AND IN PART REMANDED WITH DIRECTIONS.

CONNOLLY, J., not participating.

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# STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. W. MARK JENSEN, RESPONDENT.

619 N.W.2d 840

Filed December 8, 2000. No. S-99-1059.

1. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in an attorney proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance and reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
2. ___. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.
3. ___. For the purpose of determining the proper discipline, the Nebraska Supreme Court considers the respondent's acts both underlying the events of the case and throughout the disciplinary proceeding.

4. ___. Mitigating circumstances shown in the record are considered in determining the appropriate discipline imposed on an attorney for violating the Code of Professional Responsibility.
5. ___. 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.

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

PER CURIAM.

This is an original action brought by the relator, the Nebraska State Bar Association, seeking assessment of discipline against the respondent, W. Mark Jensen, an attorney who was admitted to practice law in the State of Nebraska on September 24, 1996. On August 24, 1999, Jensen submitted an affidavit to the chairperson of the Committee on Inquiry of the Second Disciplinary District, requesting the entry of an order temporarily suspending his license to practice law in Nebraska because of his alcoholism. Based upon Jensen's affidavit, the Committee on Inquiry of the Second Disciplinary District filed an application for temporary suspension of Jensen's license to practice law, which was granted by this court on September 15.

On June 21, 2000, the Committee on Inquiry of the Second Disciplinary District filed formal charges against Jensen with this court. As specified below, each of the formal charges alleged violations of one or more of the following provisions of the Code of Professional Responsibility, Canons 1, 6, and 9:

> DR 1-102 Misconduct.
> (A) A lawyer shall not:
> (1) Violate a Disciplinary Rule.
> . . . .
> DR 6-101 Failing to Act Competently.
> (A) A lawyer shall not:
> . . . .
> (3) Neglect a legal matter entrusted to him or her.
> . . . .
> DR 9-102 Preserving Identity of Funds and Property of a Client.

(A) All funds of clients paid to a lawyer or law firm shall be deposited in one or more identifiable bank or savings and loan association accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay account charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(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.

Each of the formal charges also alleged that Jensen had violated his oath of office as an attorney, and several alleged that Jensen had violated Neb. Ct. R. of Discipline 16 (rev. 2000), which provides, inter alia, that when an attorney is suspended from the practice of law, that attorney must notify his or her clients, in writing, of such suspension.

In a stipulation filed June 21, 2000, and signed by Jensen and the Chair of the Committee on Inquiry of the Second Disciplinary District, Jensen admitted most of the allegations contained in the formal charges. On June 28, this court appointed a referee to hear evidence and make a recommendation as to the appropriate sanction to be imposed. A referee hearing was held on September 12 and 19.

On October 20, 2000, the referee filed his report. The parties did not file written exceptions. Neb. Ct. R. of Discipline 10(L) (rev. 2000) provides that when no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. Based upon the findings in the referee's

report, which we consider to be final and conclusive, we conclude the formal charges are supported by the evidence.

Relator has filed a motion under rule 10(L). The relator's burden of proof in disciplinary proceedings is to establish the allegations set forth in the formal charges against the attorney by clear and convincing evidence. See, *State ex rel. NSBA v. Aupperle*, 256 Neb. 953, 594 N.W.2d 602 (1999); *State ex rel. NSBA v. Johnson*, 256 Neb. 495, 590 N.W.2d 849 (1999). Based on the final and conclusive findings in the referee's report, relator's motion under rule 10(L) is granted, and Jensen is suspended from the practice of law as set forth below.

## FACTS

At all times relevant to these disciplinary proceedings, Jensen has been practicing law in Douglas County, Nebraska. As stated above, on August 24, 1999, Jensen submitted an affidavit requesting that this court enter an order temporarily suspending him from the practice of law, pursuant to Neb. Ct. R. of Discipline 11 (rev. 2000). In the affidavit, Jensen stated that he had been suffering from alcoholism and that he had committed himself to Immanuel Medical Center for depression, morbid thoughts of suicide, memory loss, and ongoing alcohol abuse. Jensen acknowledged in the affidavit that several disciplinary investigations were pending against him, and he requested that the investigations continue during his suspension. Jensen's license to practice law in Nebraska was temporarily suspended by this court on September 15, 1999.

The record shows that on June 8, 1999, Jensen voluntarily placed himself into inpatient treatment for alcoholism at Immanuel Medical Center in Omaha. After approximately 3 weeks of inpatient treatment at Immanuel Medical Center, Jensen was discharged, and he voluntarily entered the Lyle House, a transitional living facility for persons suffering from alcoholism. Jensen was a resident of the Lyle House from July 21 through December 21. Jensen is a member of Alcoholics Anonymous (AA), and he attends three AA meetings a week. Jensen has voluntarily entered into a monitoring contract with the Nebraska Lawyers Assistance Program (NLAP), in which he has agreed to do the following during any period of suspension

of his license to practice law: (1) submit to supervision by a monitor selected by the NLAP, (2) abstain from alcohol, (3) attend at least three AA meetings a week, and (4) submit and pay for random drug screening tests.

## FORMAL CHARGES: COUNT I

Count I alleges violations of Jensen's oath of office as an attorney as well as DR 1-102(A)(1), DR 6-101(A)(3), and DR 9-102(A)(1) and (2).

On June 13, 1998, Judy Stewart hired Jensen to represent her in a chapter 13 bankruptcy proceeding. Stewart paid Jensen a total of $610 and provided him with various documents. Jensen failed to deposit the advanced fees into his attorney trust account.

Stewart had difficulty contacting Jensen. Jensen failed to return Stewart's telephone calls. On November 24, 1998, Stewart wrote to Jensen, terminating his employment and demanding a refund of the advanced costs and fees, as well as the return of her documents. Sometime after November 30, after she had retained new counsel, Stewart recovered her papers from Jensen, and Jensen refunded $550 to Stewart.

Stewart filed a complaint against Jensen with the Office of Counsel for Discipline on November 25, 1998. In the stipulation filed June 21, 2000, Jensen admitted the allegations of count I.

## FORMAL CHARGES: COUNT II

Count II alleges violations of Jensen's oath of office as an attorney as well as DR 1-102(A)(1), DR 6-101(A)(3), and DR 9-102(A).

On December 9, 1998, Sylvia Byrd hired Jensen to represent her in a chapter 7 bankruptcy proceeding. She paid Jensen fees in the amount of $475. Jensen failed to deposit these advanced fees in his attorney trust account.

On April 12, 1999, Byrd filed a complaint against Jensen with the Office of Counsel for Discipline alleging that Jensen neglected her bankruptcy case. Jensen was served with Byrd's complaint on June 24, and on July 1, Jensen filed Byrd's chapter 7 bankruptcy petition. In the stipulation filed June 21, 2000, Jensen admitted the allegations of count II.

## FORMAL CHARGES: COUNT III

Count III alleges violations of Jensen's oath of office as an attorney as well as DR 1-102(A)(1), DR 6-101(A)(3), and DR 9-102(A) and (B)(4).

On January 19, 1999, Adriane Camacho hired Jensen to represent her in an uncontested divorce action. She paid Jensen $283 in fees and costs. Jensen failed to deposit these advanced fees and costs in his attorney trust account.

After repeated difficulties in contacting Jensen, Camacho retained new counsel. On April 28, 1999, Camacho's new counsel wrote Jensen informing him that Jensen no longer represented Camacho and requesting a refund of the advanced fees and costs. On or about June 20, 2000, Jensen refunded $283 to Camacho.

On June 4, 1999, Camacho filed a complaint against Jensen with the Office of Counsel for Discipline. In the stipulation filed June 21, 2000, Jensen admitted that with respect to the allegations of count III, his conduct violated DR 1-102(A)(1), DR 6-101(A)(3), and DR 9-102(A) and (B)(4).

## FORMAL CHARGES: COUNT IV

Count IV alleges violations of Jensen's oath of office as an attorney, rule 16, and DR 1-102(A)(1), DR 6-101(A)(3), and DR 9-102(A) and (B)(4).

On July 28, 1998, Louise Vaccaro hired Jensen to represent her in an uncontested divorce action. Vaccaro paid Jensen $583 as a flat fee. Jensen failed to deposit the fee in his attorney trust account.

In April 1999, Vaccaro directed Jensen to prepare the petition for dissolution of marriage. From May through October 1999, Vacarro was unable to contact Jensen because Jensen did not return her telephone calls. Jensen did not prepare Vaccaro's petition for dissolution of marriage.

On November 10, 1999, Vaccaro filed a complaint with the Office of Counsel for Discipline, complaining that Jensen had neglected her case and failed to refund her fees. On or about November 12, Jensen received a copy of Vaccaro's complaint, together with a letter from the Office of Counsel for Discipline instructing Jensen to respond to the substance of Vaccaro's

complaint within 15 working days. Jensen did not respond as instructed. On January 20, 2000, the Office of Counsel for Discipline sent a second letter to Jensen, again instructing him to respond to Vaccaro's complaint.

On February 1, 2000, Vaccaro wrote to the Office of Counsel for Discipline stating that Jensen had refunded to her the advanced fee around Thanksgiving 1999, but that he had not provided her with an explanation. On March 7, 2000, Jensen filed a response to Vaccaro's complaint, stating that he had refunded the advanced fee to Vaccaro because he did not do the legal work he had been retained to do. In June, Jensen mailed Vaccaro notification that he was no longer practicing law. In the stipulation filed June 21, Jensen admitted that, with respect to the allegations of count IV, his conduct violated DR 1-102(A)(1), DR 6-101(A)(3), and DR 9-102(A) and (B)(4).

## FORMAL CHARGES: COUNT V

Count V alleges violations of Jensen's oath of office as an attorney, rule 16, and DR 1-102(A)(1), DR 6-101(A)(3), and DR 9-102(A) and (B)(4).

On November 18, 1999, Ora Celeste St. Julien filed a complaint against Jensen with the Office of Counsel for Discipline alleging that she had paid Jensen $250 to file a bankruptcy petition for her, but that he had failed to file the petition and that he had not refunded the fees. Jensen received a copy of St. Julien's complaint on or about November 19, together with a letter from the Office of Counsel for Discipline instructing Jensen to respond to St. Julien's complaint within 15 working days. Jensen did not respond. The Office of Counsel for Discipline sent a second letter to Jensen on January 20, 2000, again instructing him to respond to St. Julien's complaint.

On March 7, 2000, Jensen responded to St. Julien's complaint explaining that he understood the payment was for work he had already done on St. Julien's child support modification case. He further stated that if he were mistaken, he would refund the money. Jensen had not deposited these advanced fees in his lawyer trust account. In June, Jensen mailed St. Julien notification that he was no longer practicing law. In his stipulation, Jensen admitted the allegations of count V but affirmatively

alleged that he was hospitalized or in treatment with restricted communication at the time the complaint was mailed to him and, furthermore, that the payment was for work he had completed on a child support modification.

FORMAL CHARGE: COUNT VI

Count VI alleges violations of Jensen's oath of office as an attorney, rule 16, and DR 1-102(A)(1), DR 6-101(A)(3), and DR 9-102(A) and (B)(4).

On October 21, 1997, on behalf of Ruth Lutz, Jensen filed a petition for appointment of guardian for Joyce J. Randall in the county court for Douglas County, Nebraska. The petition named Jensen as the individual to be appointed as Randall's guardian. Following a hearing, on November 19, the county court appointed Jensen as Randall's guardian. On December 30, the county court issued a show cause order, requiring Jensen to file his acceptance of appointment as guardian on or before January 13, 1998. On January 13, Jensen filed his acceptance.

On January 14, 1998, the county court issued to Jensen letters of guardianship. The letters provided, inter alia, that Jensen was to report annually regarding Randall's condition and the condition of her estate. The letters further provided that Jensen was not to pay himself compensation as Randall's guardian except as approved by order of the court.

Shortly after he was appointed Randall's guardian, Jensen became the designated payee of Randall's periodic Social Security checks. Jensen failed to deposit the checks into his lawyer trust account or into a separate account for Randall's benefit. Instead, Jensen deposited the check into his personal or business account, paid Randall's rent, provided Randall with $60 per month as her needs allowance, and retained the balance as his fee.

Jensen did not have court permission to pay himself these fees. Jensen failed to file an annual report regarding the condition of Randall and her estate. On December 14, 1999, Randall filed a complaint with the Office of Counsel for Discipline alleging that Jensen was her guardian and that he had failed to communicate with her and make timely payments on her behalf. On or about December 15, Jensen received a copy of Randall's

complaint, together with a letter from the Office of Counsel for Discipline instructing Jensen to file a written response to Randall's complaint within 15 working days. Jensen did not respond, and on January 20, 2000, the Office of Counsel for Discipline sent a second letter to Jensen instructing him to respond to Randall's complaint.

On March 7, 2000, Jensen responded to Randall's complaint by explaining that during his recent illness, checks for Randall's rent and for her allowance were not always sent on a regular basis. Jensen stated that Randall's rent account was current. On May 2, the county court accepted Jensen's resignation as Randall's guardian and approved his final accounting. In the stipulation filed June 21, Jensen admitted the allegations of count VI.

## REFEREE'S REPORT

In addition to the facts recited above, the referee stated in his report that prior to the charges listed in this case, no other reprimands or charges had been filed against Jensen by the relator. The referee found that the complaints against Jensen involved primarily issues of neglect and poor office management and that there was no evidence in the record establishing that Jensen had misappropriated client funds or that any of Jensen's clients had lost any money as a result of Jensen's actions. Although there were allegations concerning the mismanagement of funds in the Randall guardianship matter, the referee determined that those issues had been resolved and that the county court had approved the final accounting in the case.

The referee further determined that Jensen has abstained from alcohol since June 1, 1999, and that he intended to continue to abstain from alcohol. In the referee's report, he stated that Jensen has made significant progress in the recovery from his alcoholism and that the prognosis for Jensen's further recovery is positive if Jensen continues on his plan for recovery.

## FINDINGS AND ASSESSMENT OF DISCIPLINE

With respect to counts I and II, we conclude that the facts clearly and convincingly establish that Jensen violated attorney disciplinary rules, neglected a legal matter entrusted to him, and

failed to deposit client funds into his attorney trust account, in violation of DR 1-102(A)(1), DR 6-101(A)(3), DR 9-102(A), and his oath of office as an attorney.

With respect to count III, we conclude the facts clearly and convincingly establish that Jensen violated attorney disciplinary rules, neglected a legal matter entrusted to him, failed to deposit client funds into his attorney trust account, and failed to deliver promptly to his client funds or other properties that were in his possession which the client was entitled to receive, in violation of DR 1-102(A)(1), DR 6-101(A)(3), DR 9-102(A) and (B)(4), and his oath of office as an attorney.

With respect to counts IV, V, and VI, we conclude that the facts clearly and convincingly establish that Jensen violated attorney disciplinary rules, neglected a legal matter entrusted to him, failed to deposit client funds into his attorney trust account, and failed to deliver promptly to his client funds or other properties that were in his possession which the client was entitled to receive, in violation of DR 1-102(A)(1), DR 6-101(A)(3), DR 9-102(A) and (B)(4), rule 16, and his oath of office as an attorney.

## DISCIPLINE

[1-3] To determine whether and to what extent discipline should be imposed in an attorney proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance and reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law. *State ex rel. NSBA v. Pullen, ante* p. 125, 615 N.W.2d 474 (2000); *State ex rel. NSBA v. Aupperle*, 256 Neb. 953, 594 N.W.2d 602 (1999). Each case must be evaluated individually in light of its particular facts and circumstances. *Id.* For the purpose of determining the proper discipline, we consider the respondent's acts both underlying the events of the case and throughout the disciplinary proceeding. *Id.*

Jensen has admitted his misconduct and acknowledged responsibility for his actions. These actions

> [reflect] positively upon his attitude and character and [are] a factor which we consider in determining the appropriate discipline, bearing in mind that the purpose of a dis-

> ciplinary proceeding against an attorney is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice.

See *State ex rel. NSBA v. Aupperle*, 256 Neb. at 963, 594 N.W.2d at 608. See, also, *State ex rel. NSBA v. Pullen, supra*; *State ex rel. NSBA v. Barnett*, 248 Neb. 601, 537 N.W.2d 633 (1995).

Jensen has admitted his addiction to alcohol and believes the disease of alcoholism is the primary cause for his misconduct in violation of the disciplinary rules. The record reflects that Jensen has satisfactorily completed a treatment program for alcoholism and that Jensen has remained sober since completing the treatment program.

[4] Mitigating circumstances shown in the record are considered in determining the appropriate discipline imposed on an attorney for violating the Code of Professional Responsibility. *State ex rel. NSBA v. Aupperle, supra*; *State ex rel. NSBA v. Gleason*, 248 Neb. 1003, 540 N.W.2d 359 (1995). We have recognized that "while substance abuse in no way justifies or excuses attorney misconduct, the facts that an attorney has acknowledged the condition, voluntarily sought treatment, and terminated use of the substance may under some circumstances be considered as mitigating factors in a disciplinary proceeding." *State ex rel. NSBA v. Pullen, ante* at 132, 615 N.W.2d at 479. Whether such facts warrant the mitigation of discipline in any particular case depends upon the particular facts and circumstances of the attorney's misconduct. *State ex rel. NSBA v. Pullen, supra*; *State ex rel. NSBA v. Aupperle, supra.*

[5] The propriety of a sanction must be considered with reference to the sanctions imposed by this court in prior cases presenting similar circumstances. See *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000). In *State ex rel. NSBA v. Aupperle, supra*, six disciplinary counts were filed against the attorney, each of which alleged he had neglected his clients' cases. Aupperle cooperated with the Counsel for Discipline and admitted the allegations against him. He raised his alcoholism as a mitigating factor and showed evidence that he was addressing his alcohol addiction. This court indefinitely suspended Aupperle's license to practice law for a minimum of 2 years, retroactive to the date of Aupperle's temporary suspension, and

provided that he could regain his license upon showing his future fitness to practice law.

In *State ex rel. NSBA v. Pullen, ante* p. 125, 615 N.W.2d 474 (2000), Pullen admitted the two disciplinary counts which were filed against him. He admitted that he had misled his clients with regard to the status of litigation, neglected legal matters entrusted to him, and failed to handle client property appropriately. Furthermore, Pullen had entered into an agreement with the NLAP's monitoring program. We suspended Pullen's license to practice law for an indefinite period, with no possibility of reinstatement prior to 18 months from the date of the filing of the opinion. We also required Pullen to comply with the terms of his NLAP monitoring contract.

The referee in the instant case has recommended that Jensen receive a sanction similar to those imposed in the *Aupperle* and *Pullen* cases. The Assistant Counsel for Discipline agrees that such a sanction would be appropriate in this case.

Prior to the filing of the instant case, Jensen had no prior history of disciplinary violations. Jensen appears to have made sincere and productive efforts to confront his alcoholism and obtain the necessary professional treatment. We agree with the recommendations of the referee and the Assistant Counsel for Discipline that a sanction similar to those imposed in the *Aupperle* and *Pullen* cases is appropriate in the instant case.

Accordingly, we hereby grant the motion under rule 10(L) and suspend Jensen from the practice of law in the State of Nebraska for an indefinite period retroactive to the date of his temporary suspension on September 15, 1999, with no possibility of reinstatement prior to September 15, 2001. Upon application for reinstatement, Jensen shall have the burden of proving that he has not practiced law during the period of suspension, that he has met the requirements of rule 16, and that he is fit to practice law. In addition, reinstatement shall be conditioned upon (1) the payment of all costs of this action, which are hereby taxed to Jensen; (2) Jensen's compliance with the terms of his contract with the NLAP monitoring program; (3) a showing by independent third-party proof that Jensen has continued active participation in a recovery program and has maintained abstinence from the use of alcohol during the period of suspen-

sion; and (4) the submission by Jensen and approval by this court of a probation plan, to be in effect for a period of 2 years following reinstatement, whereby Jensen's recovery program and his compliance with the Code of Professional Responsibility would be monitored by the NLAP and the Counsel for Discipline. Failure to comply with the terms of the probation plan would constitute grounds for further disciplinary action. See *State ex rel. NSBA v. Barnett*, 248 Neb. 601, 537 N.W.2d 633 (1995).

JUDGMENT OF SUSPENSION.

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STATE OF NEBRASKA, APPELLEE,
V. GREG A. CARLSON, APPELLANT.
619 N.W.2d 832

Filed December 8, 2000. No. S-99-1283.

1. **Pleas: Appeal and Error.** Prior to sentencing, the withdrawal of a plea forming the basis of a conviction is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion.
2. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion.
3. **Pleas.** After the entry of a plea of guilty or no contest, but before sentencing, a court, in its discretion, may allow a defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution has not been or would not be substantially prejudiced by its reliance on the plea entered.
4. **Pleas: Proof.** The burden is upon the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea.
5. **Effectiveness of Counsel: Proof.** In order to establish that a defendant was denied effective assistance of counsel, the defendant must ordinarily demonstrate that counsel's performance was deficient and that the defendant was prejudiced thereby.
6. **Trial: Effectiveness of Counsel: Presumptions.** In determining whether a trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.
7. **Effectiveness of Counsel: Pleas: Proof.** In order to satisfy the prejudice requirement in the context of a plea, the defendant must show that his or her counsel erred and there is a reasonable probability that but for counsel's errors, the defendant would not have pled and would have insisted upon going to trial.
8. **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 Robert W. Kortus, of the Nebraska Commission on Public Advocacy, for appellant.

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

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and SIEVERS, Judge.

MILLER-LERMAN, J.

## I. NATURE OF CASE

Greg A. Carlson was convicted of second degree murder pursuant to a plea of no contest. Carlson filed a motion to withdraw his plea. After an evidentiary hearing, the motion was denied. Thereafter, Carlson was sentenced to 60 years' to life imprisonment.

Carlson appeals his conviction, claiming that the district court abused its discretion in denying his motion to withdraw his plea. Carlson also appeals his sentence, claiming that it is excessive. We affirm Carlson's conviction and sentence.

## II. STATEMENT OF FACTS

On June 12, 1998, Carlson was charged with first degree murder in connection with the death of his estranged wife, Marilyn Carlson. Marilyn was murdered in her apartment on April 11. She was stabbed four times in the chest. Carlson pled not guilty. Trial was originally set for November 4 but was continued three times, and the trial date was eventually set for July 6, 1999.

Prior to trial, Carlson reached a plea agreement with the State pursuant to which the State would reduce the charge to second degree murder and recommend a flat life sentence in exchange for a plea of no contest. On July 2, 1999, Carlson was rearraigned on an amended information charging him with second degree murder.

The plea hearing was conducted on July 2, 1999. Before accepting Carlson's plea of no contest, the district court questioned Carlson as to the voluntariness of his plea. At the hearing, Carlson stated that he had had sufficient time to discuss the mat-

ter of entry of the plea of no contest with his attorney, that the plea agreement had been correctly described to the district court by the attorneys, and that he was aware that the district court was not obligated to impose the sentence recommended by the State. When asked by the court whether Carlson was satisfied with the representation of his attorney, Carlson stated, "Very."

The district court advised Carlson that by pleading no contest, he would be "giving up the right to confront witnesses against [him] . . . the right to require witnesses to be present at any hearing or trial and to have them testify on [his] behalf and . . . the right to trial to a jury." The district court advised Carlson of the range of penalties for second degree murder. Carlson stated that he understood the significance of his plea and the range of penalties for second degree murder.

The district court further asked Carlson, "[H]as anybody threatened you or coerced you or forced you in any way to make this no-contest plea?" Carlson answered, "No, sir." Carlson further indicated that he made his plea of his own free will. The district court also asked Carlson, "Knowing everything that we have discussed now up to this point, Mr. Carlson, I'm going to ask you one last time, sir, do you wish this Court to accept your no-contest plea or do you wish to withdraw it?" Carlson replied, "Accept it, sir." The district court accepted Carlson's plea and in its corresponding written journal entry filed July 2, 1999, found that Carlson's plea was "knowingly, intelligently, and voluntarily made" and that "no promises or threat [had been made] to [Carlson]." Having accepted Carlson's plea of no contest, the district court found Carlson guilty of second degree murder.

Carlson wrote a letter to the district court which was filed on July 19, 1999. In the letter, Carlson complained of his attorney's performance. Carlson asserted that his attorney had conducted an insufficient investigation which Carlson claimed was occasioned by Carlson's family's inability to raise funds to pay the attorney fees. Carlson also indicated his desire to withdraw his plea and to "take this to a jury trial." Carlson's original attorney was discharged on July 26, and the district court appointed new counsel.

The parties agreed to treat Carlson's letter filed on July 19, 1999, as a motion to withdraw the no contest plea. An evidentiary hearing was held on September 16 on the motion to with-

draw the plea. Carlson and his original attorney testified at the hearing. Their testimony is contradictory.

Carlson testified that immediately prior to entering his plea, he had discussed with his attorney certain items he thought should be investigated. Carlson testified that he had told his attorney that the attorney should interview an individual named "Joe Weakley." Carlson claimed that Weakley knew of a witness who had seen Carlson at another location on the night of the murder. According to Carlson's testimony, Carlson's attorney told him that he had contacted Weakley but that nothing had come of the interview. Carlson then told his attorney that he had called Weakley the night before and that Weakley had told Carlson that he had not been contacted by Carlson's attorney. Carlson testified that Carlson's attorney then started to walk out of the room and indicated that they should "take it to trial then." Carlson stated that he panicked because he did not think they were ready to go to trial, so he stopped his attorney and again gave him the information regarding Weakley.

Carlson testified that he asked his attorney what should be done regarding the plea. Carlson testified that his attorney replied that "if we find out more information from Joe Weakley . . . then we can come back and withdraw the plea." Carlson testified that based on the foregoing, he decided to proceed with the plea of no contest. On appeal, Carlson claims the foregoing evidence established that his attorney had promised him he could withdraw the plea and that his attorney gave him erroneous advice.

Carlson's original attorney also testified at the hearing on the motion to withdraw. The attorney's testimony regarding the advice he had given Carlson regarding entry of the plea differed from Carlson's account. The attorney indicated that he had not promised Carlson that the plea could be withdrawn. Rather, with respect to Carlson's claim that the attorney had told Carlson that he could withdraw his plea if new evidence was discovered, the attorney testified:

> I told him that it [new evidence] would have to be quite powerful and it [sic] made it clear to him the very fact that somebody might have remembered Mr. Carlson being at the park that evening was probably — would not be the

> basis of a motion to withdraw; that the basis of a motion to withdraw based upon that type of evidence, I have a hard time envisioning existing, but it — as I say, it would have to involve somebody who had a specific recollection of observing Mr. Carlson through at least most of the period he was absent from the — from the Carlson's [sic] home where he was staying at the time of the homicide.

The attorney also testified that on the day of the plea, he had advised Carlson they could go to trial because "I didn't want him to think that I was trying to press him into a plea."

On September 27, 1999, the district court overruled Carlson's motion to withdraw his plea. In its written journal entry, the district court concluded that Carlson had made a "free, informed and voluntary decision" to enter his plea of no contest and that Carlson had presented no " 'fair and just reason' " to allow withdrawal of the plea. In so concluding, the district court found, inter alia, that there was no basis for Carlson to claim that he was "coerced or forced" into entering his plea. With respect to the discussion which Carlson and his attorney had regarding possible new evidence and withdrawal of a plea, the district court found that such conversations were "trial strategy discussions between [Carlson] and his counsel" and therefore not a promise to Carlson that he could withdraw his plea in the future. The district court also found that Carlson had had "sufficient time to discuss and contemplate the matter prior to pleading." The district court noted that Carlson had failed to present the witness who could purportedly provide Carlson with an alibi. The district court further stated that pleas of no contest "are treated with the seriousness for which they deserve to be treated" and that a court should not "let them be set aside solely upon [Carlson]'s feeling that he now wants a jury trial."

On November 1, 1999, the district court sentenced Carlson to imprisonment for a term of not less than 60 years nor more than life. Carlson thereafter appealed his conviction and sentence. Carlson petitioned to bypass the Nebraska Court of Appeals, and his petition to bypass was granted.

## III. ASSIGNMENTS OF ERROR

Carlson assigns three errors which combine into two. For his first assignment of error, Carlson claims, restated, that the dis-

trict court abused its discretion in concluding that Carlson had not established a "fair and just reason" for withdrawal of his plea and in denying his motion to withdraw his plea. Specifically, Carlson argues that he established fair and just reasons for withdrawal of the plea because the district court failed to ask him if any promises had been made to him prior to accepting his plea and that his original attorney had incorrectly advised him that if new evidence was discovered, Carlson could withdraw his plea. For his second assignment of error, Carlson claims that the district court abused its discretion by imposing an excessive sentence.

## IV. STANDARDS OF REVIEW

[1] Prior to sentencing, the withdrawal of a plea forming the basis of a conviction is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion. *State v. Wetherell*, 259 Neb. 341, 609 N.W.2d 672 (2000).

[2] Sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion. *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000).

## V. ANALYSIS

### 1. Conviction: Denial of Motion to Withdraw Plea of No Contest

Carlson argues on appeal that he established fair and just reasons for withdrawing his plea of no contest in two respects and that the district court abused its discretion in denying his motion to withdraw his plea. As his first "fair and just reason," Carlson argues that because the district court did not explicitly ask him at the plea hearing whether his plea had been induced by any "promises," the district court erred in accepting his plea. As his second "fair and just reason," Carlson argues that his evidence at the hearing on the motion to withdraw the plea proved that his decision to plead was based on his original attorney's erroneous legal advice regarding the withdrawal of pleas. For the reasons recited below, we conclude that the district court did not err when it concluded that Carlson had not established a "fair and

just reason" to withdraw his plea and that the district court did not abuse its discretion in denying Carlson's motion to withdraw his plea.

(a) Standard of Trial Court in Ruling on Motion to Withdraw Plea Prior to Sentencing

In connection with our evaluation of Carlson's claim that the district court abused its discretion by denying his motion to withdraw his plea, Carlson observes that there is an inconsistency in the case law as to the standard which a trial court should follow when ruling on a motion to withdraw a plea prior to sentencing. We address this observation as a preliminary matter.

[3] We recently noted the correct standard in Nebraska for a trial court's disposition of a defendant's request to withdraw a plea before sentencing as follows: After the entry of a plea of guilty or no contest, but before sentencing, a court, in its discretion, may allow a defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution has not been or would not be substantially prejudiced by its reliance on the plea entered. *State v. Wetherell, supra.* This is the correct standard which the trial courts in Nebraska are to apply.

We note that the standard in Nebraska differs from that suggested by the American Bar Association (ABA). The ABA has formulated the following standard:

> After entry of a plea of guilty or nolo contendere and before sentence, the court *should* allow the defendant to withdraw the plea for any fair and just reason. In determining whether a fair and just reason exists, the court should also weigh any prejudice to the prosecution caused by reliance on the defendant's plea.

(Emphasis supplied.) ABA Standards for Criminal Justice 14-2.1(a) (3d ed. 1999).

This court, in *State v. Minshall*, 227 Neb. 210, 214, 416 N.W.2d 585, 588 (1987), specifically disapproved "any statements, heretofore appearing in opinions of this court, that any form of the ABA standards governs disposition of a defendant's request to withdraw a plea before sentencing." The court in *Minshall* went on to state that the correct standard in Nebraska contains the "in its discretion, may" language rather than the

"should" language of the ABA standard. *Id.* We note that at times subsequent to the release of *Minshall*, opinions of the appellate courts of this state have incorrectly recited the standard using the "should" language in place of the "may" language. See, e.g., *State v. Spahnle*, 238 Neb. 265, 469 N.W.2d 780 (1991); *State v. James*, 6 Neb. App. 444, 573 N.W.2d 816 (1998). To the extent such cases state a standard different from the correct standard enunciated in *Minshall* and repeated by this court recently in *State v. Wetherell*, 259 Neb. 341, 609 N.W.2d 672 (2000), they are hereby disapproved.

[4] In the instant case, the district court stated the correct standard in its consideration of Carlson's motion to withdraw his plea. The district court's denial of Carlson's motion to withdraw his plea will be disturbed on appeal only if we conclude that the district court abused its discretion in determining that Carlson had not presented a fair and just reason to allow him to withdraw his plea. In this regard, we note that the burden is upon the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea. *State v. Wetherell, supra.*

(b) Alleged Error by District Court in Accepting Plea at Plea Hearing

Carlson argues that the district court erred by failing to ask him prior to the acceptance of the plea if Carlson's plea of no contest was induced by a "promise." On appeal, Carlson claims that the absence of an inquiry at the plea hearing regarding a promise made to Carlson established a fair and just reason requiring withdrawal of the plea. We do not agree.

Carlson asserts that the district court erred in accepting his plea because it did not specifically ask him whether his plea was induced by any "promises." Carlson relies on the decision of the Court of Appeals in *State v. Jefferson*, 5 Neb. App. 646, 562 N.W.2d 77 (1997), for the proffered proposition that the trial court must explicitly ask if a "promise" had been made prior to accepting a plea. Although the trial court must ascertain that a plea is made freely, intelligently, voluntarily, and understandingly, see *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), there is no requirement in Nebraska jurisprudence that a trial court must specifically ask if any "promise" had been made prior

to validly accepting a plea. *Jefferson* imposes no such duty on the trial court, and Carlson's reliance on *Jefferson* is misplaced.

We note initially that *Jefferson* is an appeal from the denial of postconviction relief without evidentiary hearing. At issue in *Jefferson* was the sufficiency of the record regarding entry of the plea and whether an evidentiary hearing was needed to resolve the postconviction motion claim that the plea was not freely entered. In this context, in *Jefferson*, the Court of Appeals observed that

> while a plea of guilty may be valid when the judge taking the plea does not ask the defendant if any promises were made to induce that plea, nonetheless, in postconviction proceedings where the defendant alleges that his or her plea was induced by some promise, the court must hold an evidentiary hearing on the issue unless the record conclusively shows that the plea was not induced by any promises, except those included in the plea bargain.

5 Neb. App. at 652, 562 N.W.2d at 81.

The instant case is not a postconviction case, but, rather, a direct appeal. At issue in the instant case is whether the district court erred in denying Carlson's motion to withdraw his plea. In the instant case, the trial record on the issue of withdrawal of the plea consists of the record of the proceeding at which Carlson initially entered his plea as well as the record of the evidentiary hearing on the motion to withdraw the plea at which Carlson and his counsel testified. The record in the instant case is ample and conclusive, and we are therefore able to review both the circumstances surrounding the district court's acceptance of the plea and the propriety of the district court's denial of Carlson's motion to withdraw the plea.

In the instant case, although the district court did not specifically ask Carlson at the plea hearing whether his plea was induced by any "promises," in its journal entry, the district court specifically found "no promises or threat" had been made to Carlson prior to entering his plea of no contest. The colloquy between the district court and Carlson at the plea hearing was sufficient to support the district court's determination that the plea was entered freely, intelligently, voluntarily, and understandingly. See, e.g., *State v. Irish, supra*. Although such inquiry

may have been prudent, the district court was not required to specifically ascertain whether any promises had been made to Carlson before accepting the plea. To the extent that Carlson claims that the district court failed to make the proper inquiry prior to the time the plea was entered and accepted, the claim is without merit. Accordingly, the district court did not abuse its discretion in denying Carlson's motion to withdraw the plea on the basis of an inadequate allocution at the time of acceptance of the plea.

(c) Alleged Erroneous Advice by Original Counsel

Carlson argues that at the hearing on the motion to withdraw the plea, he established that his attorney had improperly promised him that he could withdraw the plea upon the possible discovery of additional evidence. On appeal, Carlson claims that his original attorney's erroneous advice upon which he relied established a fair and just reason requiring withdrawal of the plea. Following our review of the record on the motion to withdraw the plea, we cannot conclude that the district court which heard and observed the witnesses abused its discretion in rejecting Carlson's assertion that his attorney had promised him that he could withdraw his plea upon the possible discovery of additional evidence and in concluding that Carlson had failed to establish a fair and just reason to withdraw the plea.

In connection with the alleged promise by original counsel regarding entry of the plea, Carlson argues on appeal that the advice his attorney gave him was deficient, that he was prejudiced by such advice, and that he was therefore denied effective assistance of counsel. Carlson asserts that because he was denied effective assistance of counsel in connection with the entry of the plea, the district court erred in denying his motion to withdraw the plea.

[5-7] In order to establish that a defendant was denied effective assistance of counsel, the defendant must ordinarily demonstrate that counsel's performance was deficient and that the defendant was prejudiced thereby. *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000). In determining whether a trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably. *State v. Williams*, 259 Neb. 234, 609

N.W.2d 313 (2000). In order to satisfy the prejudice requirement in the context of a plea, the defendant must show that his or her counsel erred and there is a reasonable probability that but for counsel's errors, the defendant would not have pled and would have insisted upon going to trial. *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000).

Carlson claims that but for his original attorney's advice that he could withdraw his plea if new evidence was discovered, he would not have entered his plea of no contest and would have insisted upon going to trial. Carlson claims his attorney's purported advice regarding withdrawal of a plea was erroneous. In so claiming, Carlson relies on cases, not repeated here, concerning the discovery of new evidence after trial, counsel's advice in relation thereto, and the propriety of rulings on motions for new trial. See, e.g., *State v. Kluge*, 198 Neb. 115, 251 N.W.2d 737 (1977). The cases are inapposite.

At the hearing on the motion to withdraw the plea, Carlson testified that his original attorney had told him he could withdraw his plea if new evidence was discovered. In contrast, the attorney's testimony indicates that his advice regarding the utility of new evidence in connection with withdrawal of a plea was tempered by his assessment communicated to Carlson that the new evidence "would have to be quite powerful" and that he had "a hard time envisioning" the discovery of evidence in Carlson's case that would form the basis for withdrawal of a plea.

In its evaluation of the evidence from the evidentiary hearing on the motion to withdraw the plea, the district court found that the attorney's discussion with Carlson regarding the possible discovery of additional evidence and withdrawal of a plea was a part of "trial strategy discussions between [Carlson] and his counsel" and therefore not a promise to Carlson that he could withdraw his plea in the future. In denying the motion to withdraw the plea, it is clear that having heard and observed the witnesses, the district court accepted the testimony of Carlson's attorney. The court found that no promise that a plea could be withdrawn was made by the original attorney and concluded that such advice was not deficient and, therefore, Carlson's attorney was not ineffective.

Given the strong presumption that counsel acted reasonably, see *State v. Williams, supra*, and considering the above recited testimony which the district court observed and heard, we cannot find that the district court erred in crediting the attorney's testimony nor do we find that the attorney's performance as reflected in his testimony was deficient. Thus, Carlson's original attorney's performance was not deficient and Carlson was not denied effective assistance of counsel in connection with the entry of his plea of no contest.

We conclude that on this record, the district court did not abuse its discretion in concluding that Carlson had failed to present by clear and convincing evidence a "fair and just reason" to withdraw his plea. Accordingly, the district court did not err in denying Carlson's motion to withdraw his plea.

### 2. Excessive Sentence

Carlson asserts that the district court abused its discretion by imposing an excessive sentence. Sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion. *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000).

Second degree murder is a Class IB felony. Neb. Rev. Stat. § 28-304(2) (Reissue 1995). The statutory penalty for a Class IB felony is a maximum sentence of life imprisonment and a minimum sentence of 20 years' imprisonment. Neb. Rev. Stat. § 28-105 (Reissue 1995). The district court sentenced Carlson to imprisonment for a term of not less than 60 years nor more than life upon his conviction for second degree murder. Carlson's sentence was within statutory limits.

Carlson points to such factors as his lack of a prior record, his dependent children, and his aptitude for successful rehabilitation as reasons why the sentence imposed by the district court was excessive. The State argues that such factors are "counterbalanced by the brutality of his offense, his malicious thought process whereby he stalked and killed the victim, and his attempts to conceal his commission of the crime." Brief for appellee at 16.

[8] A judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriv-

ing a litigant of a substantial right, and denying a just result in matters submitted for disposition. *State v. Burkhardt*, 258 Neb. 1050, 607 N.W.2d 512 (2000). The record indicates no abuse of discretion by the district court in sentencing Carlson, and we conclude that this assignment of error is without merit.

## VI. CONCLUSION

We conclude that the district court did not abuse its discretion in denying Carlson's motion to withdraw his plea. We further conclude that the district court did not abuse its discretion in sentencing Carlson. We therefore affirm Carlson's conviction and sentence.

AFFIRMED.

HENDRY, C.J., not participating.

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# IN RE ADOPTION OF DEBORAH JEAN HEMMER ET AL.
## DIANA JO ROHLOFF, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

619 N.W.2d 848

Filed December 8, 2000. No. S-00-195.

1. **Equity: Courts: Jurisdiction.** A county court acquires equity jurisdiction only through legislative action.
2. **Adoption: Legislature.** In cases of adoption, the Legislature has provided a specific statute, Neb. Rev. Stat. § 43-116 (Cum. Supp. 2000), which addresses the finality of all adoption orders.
3. **Statutes.** Specific statutory provisions relating to a particular subject control over general provisions.
4. **Adoption: Statutes.** The matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed.

Appeal from the County Court for Platte County: FRANK J. SKORUPA, Judge. Affirmed.

James C. Stecker for appellant.

No appearance for appellee.

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

HENDRY, C.J.

## INTRODUCTION

On December 14, 1999, Diana Jo Rohloff (formerly Diana Jo Schneider) filed an application in the Platte County Court requesting the court to set aside her 1963 adoption by John Schneider (Schneider). The court denied the application. Diana appealed, and we moved the case to this court pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

## FACTUAL BACKGROUND

Diana's biological parents are Ardith Jean Redler (formerly Ardith Jean Schneider) and James L. Hemmer. On December 11, 1963, Diana was adopted by her stepfather, Schneider. Pursuant to statute, Diana's original birth certificate listing her name as Diana Jo Hemmer was replaced with a new birth certificate listing her name as Diana Jo Schneider. See Neb. Rev. Stat. § 71-626 (Cum. Supp. 2000). Schneider is the surname that presently appears on Diana's birth certificate, while Rohloff is her current married surname.

On January 4, 2000, a hearing was held on Diana's application. Diana testified at the hearing that she was bringing this action in order to restore her original birth certificate with the surname of Hemmer. Diana explained that she wanted her original birth certificate restored because Schneider abused her when she was a child. Ardith and James both filed written consents in support of Diana's application. Schneider has been dead approximately 10 years.

The statutory procedure for restoring an adopted person's original birth certificate is set out in Neb. Rev. Stat. § 71-626.01(3) (Cum. Supp. 2000), which states that "[u]pon receipt of notice that an adoption has been set aside, the original certificate of birth shall be restored to its place in the files . . . ."

In denying the application, the county court stated in its order "the application would be granted if a statutory means were available. The Court is unaware of such authority, and therefore, the application is denied."

## STANDARD OF REVIEW

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 Adoption of Trystyn D.*, 259 Neb. 539, 611 N.W.2d 112 (2000).

## ASSIGNMENT OF ERROR

Diana asserts the trial court erred in denying her application to set aside her adoption.

## ANALYSIS

Diana asserts that the county court had the authority to set aside her adoption under either (1) "general equity jurisdiction," (2) Neb. Rev. Stat. § 25-2001 et seq. (Reissue 1995 & Cum. Supp. 2000), or (3) Neb. Rev. Stat. § 43-116 (Reissue 1998). Brief for appellant at 4. We will analyze each basis for Diana's claim separately.

[1] Diana's first basis for relief must fail because county courts do not possess general equitable jurisdiction. *Scherbak v. Kissler*, 245 Neb. 10, 510 N.W.2d 318 (1994). As we have previously stated, a county court "only acquire[s] equity jurisdiction through legislative action." *Id.* at 12, 510 N.W.2d at 319, citing *Iodence v. Potmesil*, 239 Neb. 387, 476 N.W.2d 554 (1991). "If the Legislature should choose to grant equity jurisdiction to county courts . . . it will do so in a specific mandate." *Scherbak v. Kissler*, 245 Neb. at 12-13, 510 N.W.2d at 320. There is no specific mandate in the adoption statutes granting a county court equity jurisdiction to set aside an adoption.

Section 25-2001 et seq. also fails to provide a basis upon which to grant Diana's requested relief. This section discusses when a court may modify or set aside its judgments or orders. In particular, § 25-2009 grants a county court the general power to modify or set aside its orders.

[2,3] However, the order Diana is seeking to set aside in this case is an adoption order. In cases of adoption, the Legislature has provided a specific statute which addresses the finality of all adoption orders. Section 43-116(1) states that adoptions, and all proceedings in connection therewith, are "conclusively pre-

sumed . . . valid in all respects . . . unless an action shall be brought within two years . . . attacking its validity." "[S]pecific statutory provisions relating to a particular subject control over general provisions." *Marks v. Judicial Nominating Comm.*, 236 Neb. 429, 432, 461 N.W.2d 551, 553 (1990); *Reed v. Parratt*, 207 Neb. 796, 301 N.W.2d 343 (1981). Accordingly, if the county court is authorized to set aside Diana's adoption, it can do so only under § 43-116.

[4] Section 43-116 fails to provide a basis upon which to grant Diana's requested relief. Diana has neither claimed nor offered evidence of any procedural defect or invalidity which would provide a basis in law under § 43-116 to set aside the adoption. We have recognized that allegations of fraud or estoppel, in an unusual situation, might toll the 2-year time limit in which to bring a legal challenge to an adoption. *In re Adoption of Trystyn D.*, 259 Neb. 539, 611 N.W.2d 112 (2000). We need not address whether the 2-year time limit is tolled in this case, however, because § 43-116 provides no basis for Diana to bring the present action. As a result, the county court correctly determined that it lacked the authority to grant Diana's petition. "[T]he matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed." *In re Adoption of Kassandra B. & Nicholas B.*, 248 Neb. 912, 918, 540 N.W.2d 554, 558 (1995). See, also, *Kellie v. Lutheran Family & Social Service*, 208 Neb. 767, 305 N.W.2d 874 (1981); *In re Petition of Ritchie*, 155 Neb. 824, 53 N.W.2d 753 (1952).

In *In re Petition of Ritchie, supra*, the petitioner sought to adopt an adult. The district court denied the adoption. The petitioner, recognizing that no statutory authority existed which would allow the adoption, urged this court to recognize the adoption as a matter of equity. We declined, concluding that the petitioner was attempting to "extend the rights of adoption beyond the plain terms of the statutes," which could not be done. *Id.* at 828, 53 N.W.2d at 755. Because the adoption of adults was not included in the plain language of Neb. Rev. Stat. § 43-101 (Reissue 1952), this court determined it could not grant the relief requested.

Diana attempts to distinguish *In re Petition of Ritchie* on the ground that the petitioner in that case was seeking to adopt, not seeking to set aside an adoption. This distinction is unpersuasive. In either case, this court is being asked to grant relief without the authority to do so under the adoption statutes.

Nebraska's current adoption statutes do not permit Diana's adoption to be set aside. Whether the adoption statutes should allow for the type of relief requested by Diana is a matter best addressed by the Legislature. See *Rosse v. Rosse*, 244 Neb. 967, 510 N.W.2d 73 (1994).

## CONCLUSION

The decision of the county court is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE,
v. THOMAS J. SILVERS, APPELLANT.
620 N.W.2d 73

Filed December 8, 2000. No. S-00-214.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, a convicted defendant has the burden to first show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
3. **Convictions: Effectiveness of Counsel: Pleas: Proof.** When a conviction is based upon a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.
4. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.
5. **Warrantless Searches: Consitutional Law.** Three factors govern the constitutionality of warrantless and nonconsensual entries onto premises that are damaged by fire: whether there are legitimate privacy interests in the fire-damaged property that are

protected by the Fourth Amendment, whether exigent circumstances justify the government intrusion regardless of any reasonable expectations of privacy, and whether the object of the search is to determine the cause of the fire or to gather evidence of criminal activity.

6. **Search and Seizure.** If reasonable privacy interests remain in property damaged by fire, in the absence of a consent, any official entry must be made pursuant to a warrant or pursuant to exigent circumstances.
7. **Warrantless Searches: Evidence.** A burning building creates an exigency that justifies a warrantless entry by fire officials to fight the blaze.
8. ___: ___. Once fire officials are in a building, they may remain there without a warrant for a "reasonable time" to ensure that the fire will not reignite and to investigate the cause of the fire after it has been extinguished.
9. **Search and Seizure.** When reasonable expectations of privacy exist, additional investigations after a fire has been extinguished and officials have left the scene must be made pursuant to a warrant or a new exigency.
10. **Rules of Evidence: Appeal and Error.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by such rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence.
11. **Pleadings.** A court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, permit a party upon motion to amend any pleading, process, or proceeding by inserting other allegations material to the case.
12. ___. The decision to grant or deny an amendment to a pleading rests in the discretion of the court.

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

Charles D. Brewster for appellant.

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

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

WRIGHT, J.

## NATURE OF CASE

Thomas J. Silvers appeals from an order of the Buffalo County District Court that denied his motion for postconviction relief.

## SCOPE OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court

will not be disturbed unless they are clearly erroneous. *State v. Soukharith, ante* p. 478, 618 N.W.2d 409 (2000).

## FACTS

In 1986, Silvers pled guilty to first degree arson and first degree felony murder and was sentenced for those convictions. No direct appeal was taken. In a motion for postconviction relief, Silvers sought relief on the basis that the arson conviction violated double jeopardy because arson is an underlying felony of first degree felony murder. He also asserted that he was denied effective assistance of counsel because his attorney failed to file a motion to suppress evidence seized by fire and police officials.

The district court summarily dismissed the arson conviction based upon a violation of double jeopardy but denied Silvers' request for relief regarding the felony murder conviction on the basis that his pleadings did not allege facts sufficient to justify an evidentiary hearing. On appeal, we concluded that Silvers' motion alleged sufficient facts to state a claim for postconviction relief and accordingly remanded the cause with directions that Silvers be granted an evidentiary hearing with the assistance of appointed counsel. See *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

Silvers' motion for postconviction relief alleged that a fire broke out at his home in Kearney, Nebraska, on May 3, 1986, and that his stepdaughter, Sheila Heard, died on May 11 as a result of burns she suffered in the fire. He alleged that the alarm which summoned the Kearney Fire Department to his home was turned in at 1:23 a.m. on May 3. He claimed that firefighters arrived a short time later and extinguished the fire in approximately 5 to 6 minutes after their arrival. He alleged that the fire was confined to a bedroom area and that investigators were able to enter the home and examine the scene shortly after the fire had been extinguished.

Silvers alleged that after examining the point of the fire's origin, investigators contacted Gary Nelson, a deputy State Fire Marshal, who arrived at the scene at 1:48 a.m., and that based on Nelson's experience and training and the presence of various burn patterns, Nelson determined that the fire had been inten-

tionally set. Silvers further alleged that Det. Donald Dreyer of the Kearney Police Department was then contacted and requested to photograph the area of the home where the arson was believed to have occurred. Silvers claimed that firefighters departed the scene at 2:25 a.m., leaving only a guard outside the home, and that Dreyer left at 3 a.m., leaving no police officials either inside or outside the home.

Silvers alleged that while Nelson was at the hospital where the victim had been taken, he detected a strong odor of gasoline upon the victim's clothing. Silvers alleged that several meetings and telephone calls occurred during which various investigators and a senior deputy State Fire Marshal concluded that the fire had been caused by arson. Subsequently, a call was made requesting assistance from the Nebraska State Patrol.

Silvers further alleged that beginning at 6:30 a.m. on May 3, 1986, two deputy State Fire Marshals and a detective from the sheriff's office began searching his home for the sole purpose of gathering evidence. He claimed that a mobile crime unit from the Nebraska State Patrol arrived at 7:30 a.m. and participated in the search. He stated that these searches were carried out in the absence of any exigent circumstances, that they were not accomplished pursuant to either an administrative warrant or a search warrant, and that items of evidence were seized which had not been discovered during the initial investigation.

Silvers claimed that the evidence seized was then used to coerce him and his wife to consent to further searches of the home, which searches resulted in the seizure of 18 more items of evidence. He further alleged that in mid-July, another search resulted in the seizure of a barbell.

Silvers claimed that his trial counsel did not advise him of the potential illegality of the searches, did not file a motion to suppress the evidence seized during the searches, and failed to advise him of the true strengths of his case had the evidence been suppressed. Silvers claimed that he would not have entered pleas of guilty if his trial counsel had advised him of the viability of a motion to suppress and that his pleas of guilty were therefore not intelligently made due to ineffective assistance of counsel.

In its analysis of the evidence, the district court noted that Silvers had complained of three separate occasions on which he

believed law enforcement improperly conducted searches of his home for evidence. The first two searches occurred shortly after the fire, and the third search was conducted some time later.

The district court found that at the time Silvers entered his pleas, both he and his trial counsel believed that a plea agreement did in fact exist. It appeared that the plea agreement was to be "informal" in nature and involved a promise by the State not to seriously pursue the death penalty. The district court found that there was some question as to whether or not the State complied with this agreement. Evidence was offered by the State at the sentencing hearing, and the State requested imposition of the death penalty, but the State's evidence was not compelling, and the arguments concerning the aggravating circumstances were without merit.

The district court found that Silvers had asserted that his guilty pleas were entered, in part, to avoid the necessity of a trial and the effect that such a trial would have had on his family. Probably more important, the district court noted, was the desire of both Silvers and his trial counsel to limit the State's further investigation and to limit the evidence offered to the sentencing court in order to avoid the possible imposition of the death penalty. The district court suggested that the facts presented at sentencing did not warrant the imposition of a death sentence but that other facts, if brought to the attention of the sentencing court, might well have led to a different result.

The district court found that the pleas of guilty entered by Silvers protected his family from the pain which would have been occasioned by a lengthy trial and served to protect Silvers from the possible imposition of the death penalty. The district court concluded that Silvers had not shown a reasonable probability that had he been better informed of Fourth Amendment issues, he would have insisted on going to trial. The district court denied Silvers' motion for postconviction relief, and Silvers appealed.

## ASSIGNMENTS OF ERROR

Silvers asserts, summarized and restated, that the district court erred (1) in denying him postconviction relief, (2) in overruling his objections to the admission of exhibits 39 and 40 at

the evidentiary hearing, and (3) in overruling his request to amend his motion for postconviction relief.

## ANALYSIS

Silvers' first 12 assignments of error relate to his claim that the district court erred in denying his motion for postconviction relief. The basis of Silvers' claim is that he received ineffective assistance of counsel. Silvers claims that his trial counsel did not adequately advise him of his Fourth Amendment rights pertaining to evidence seized from his home after the fire. He alleges that improper searches and seizures occurred during the investigation of the fire by the police and the fire department. He claims that his trial counsel's failure to file a motion to suppress this evidence or to discuss defenses available to him pursuant to the Fourth Amendment was ineffective assistance and that had he been properly advised of these defenses, he would not have entered pleas of guilty and would have insisted on a trial.

There were three different searches of Silvers' home which form the basis for his assertion that he received ineffective assistance of counsel. The following legal principles are applicable to our review of the district court's decision regarding the searches in question and Silvers' postconviction claim based upon ineffective assistance of counsel.

[2] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Soukharith, ante* p. 478, 618 N.W.2d 409 (2000). In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, a convicted defendant has the burden to first show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *Id.*

[3,4] When a conviction is based upon a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty. *State v. Buckman,*

259 Neb. 924, 613 N.W.2d 463 (2000). The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice. *Id.*

[5] In *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998), we set forth the standards with respect to evidence seized from premises during a warrantless and nonconsensual entry following a fire. Three factors govern the constitutionality of warrantless and nonconsensual entries onto premises that are damaged by fire: whether there are legitimate privacy interests in the fire-damaged property that are protected by the Fourth Amendment, whether exigent circumstances justify the government intrusion regardless of any reasonable expectations of privacy, and whether the object of the search is to determine the cause of the fire or to gather evidence of criminal activity. *Id.* See, also, *Michigan v. Clifford*, 464 U.S. 287, 104 S. Ct. 641, 78 L. Ed. 2d 477 (1984).

[6-9] If reasonable privacy interests remain in the property damaged by fire, in the absence of a consent, any official entry must be made pursuant to a warrant or pursuant to exigent circumstances. *Id.* A burning building creates an exigency that justifies the warrantless entry by fire officials to fight the blaze. *Id.* In addition, once fire officials are in the building, they may remain there without a warrant for a "reasonable time" to ensure that the fire will not reignite and to investigate the cause of the fire after it has been extinguished. See *id.* See, also, *Michigan v. Tyler*, 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978). During this time, warrantless seizures of evidence found in plain view while inspecting the premises are also constitutional. *Id.* However, when reasonable expectations of privacy exist, additional investigations after the fire has been extinguished and officials have left the scene must be made pursuant to a warrant or a new exigency. *Id.*

What constitutes a "reasonable time" depends upon the circumstances of the case. The U.S. Supreme Court held that when officials could not remain in a building following a fire to investigate its cause due to darkness and smoke, a search that occurred after the officials left the scene and returned during

daylight was a continuation of the initial search and did not require a warrant. See *id.* See, also, *U.S. v. Veltmann*, 869 F. Supp. 929 (M.D. Fla. 1994) (delay justified due to darkness, smoke, and haze). However, when officials leave a private residence and return after the owner has taken steps to secure the area, reentry without a warrant is impermissible. *Michigan v. Clifford, supra.*

### First Search

Silvers argues that a search that was conducted at approximately 6:30 a.m. on May 3, 1986, was illegal and was for the sole purpose of obtaining evidence to prove that he had committed the crime of arson. During this search, certain evidence was seized from Silvers' home. Following is a list of the items seized and the location where they were found: empty milk container (607 10th Drive, Kearney, Nebraska); sheet linen of victim (victim's waterbed); door knob (hallway just outside victim's bedroom); Discover magazine (floor of bathroom adjacent to victim's bedroom); burned tissue (floor of bathroom shower); clock (victim's waterbed); burned tissue (along wall of bathroom); burned cloth (east end of bathroom floor); hollow-cored door (victim's bedroom); book of cardboard matches (bathroom counter or vanity); bathroom door, hollow-cored (intact with part of jamb); one red cardboard match (living room floor); book of cardboard matches (bathroom counter or vanity, upstairs hall); beer can three-quarters full of liquid (sidewalk adjacent to 607 10th Drive, Kearney, Nebraska); book of cardboard matches (front steps of 1010 Sixth Avenue, Kearney, Nebraska); and book of cardboard matches (curb on north side of 1010 Sixth Avenue, Kearney, Nebraska).

The district court assumed that all entries of Silvers' home between 1:30 a.m. and 4:20 p.m. on May 3, 1986, were warrantless and nonconsensual. It found that the following sequence of events had occurred in the early morning hours of May 3: Around 1:23 a.m., the fire department was called to a structure fire at Silvers' home. Law enforcement officers and Kearney volunteer firefighters arrived at the scene and extinguished the blaze by approximately 1:45 a.m. The fire continued to smolder for a period of time thereafter.

At about the same time, Nelson was contacted. He proceeded to the scene and was met by the fire chief, who provided Nelson with general information concerning the fire. Nelson was advised that the occupants, including one child, had been taken to the hospital. He then began his own investigation to determine the cause of the fire. He concluded that a flammable liquid was necessarily involved and proceeded to the hospital to make further inquiry of the occupants and to determine the extent of the injuries involved.

At the hospital, Nelson was advised that the victim had second and third degree burns over approximately 90 percent of her body and had suffered several lacerations. He was advised by one of the attending police officers that clothing had been removed from the victim and that some of the clothing "smelled like gasoline."

Silvers and his wife were subsequently interviewed by Nelson. Silvers' wife advised Nelson that she had been awakened by a "boom" or explosion. She believed the fire could have been caused by a natural gas leak. Silvers told Nelson that the fire had probably started in the "heater control" of the victim's waterbed. He stated that the heater control was on the right side of the bed next to the wall and that this was where the fire had started.

Nelson then interviewed additional persons, including ambulance attendants who had transported the victim to the hospital. These individuals had noticed a strong odor of gasoline on the victim but repeated the mother's assertion that the fire had started when something "blew up." Nelson then returned to the scene of the fire, and the house was reentered to continue the investigation as to the cause of the fire.

The district court found that Nelson had requested the assistance of another deputy State Fire Marshal, Bradley Hoppe, to assist Nelson in determining the cause of the fire. Hoppe testified that he arrived at the scene between 5 and 6 a.m. and began an external examination of the building at approximately 7 a.m. He then reentered the home at 7:50 a.m. to further his investigation. Hoppe testified that when he arrived on the scene, the information which had been relayed to him created a suspicion that arson was the cause of the fire. He testi-

fied, however, that he could not determine the cause of the fire without completing his own investigation and that it took several hours before he came to his own independent conclusion that arson was the cause of the fire. Based upon this evidence, the district court found that Nelson's and Hoppe's investigations of the fire were proper and were for the purpose of determining the cause of the fire rather than merely garnering evidence of criminal activity.

We will not disturb the findings of the district court unless they are clearly erroneous. See *State v. Soukharith, ante* p. 478, 618 N.W.2d 409 (2000). After reviewing the evidence, we cannot say that the district court's conclusion that these investigations were for the purpose of determining the cause of the fire was clearly erroneous.

### SECOND SEARCH

Silvers also complains of a search conducted between 4:20 and 5:05 p.m. on May 3, 1986. During this search, fire and law enforcement personnel seized 18 additional pieces of evidence. The district court found that Silvers had acknowledged that the search was conducted upon a consent to search given by Silvers and his wife. Silvers' motion for postconviction relief alleged that the consent was coerced by the actions of Det. Jeff Hupp of the Kearney Police Department.

During this search, the following items were seized: waterbed heater, two curling irons (victim's bedroom), two bedsheets and afghans (victim's waterbed), blood smear and tissue (victim's bedroom on west wall), clawhammer (garage), ball peen hammer (garage), two 1-gallon red gas cans (garage), liquid in the gas cans, 1-quart container of charcoal starting fluid and a sample of the contents therein (garage), a sample of liquid found in a pan on the floor in which brushes were soaking (garage), yellow flashlight (kitchen counter next to entrance to garage), two empty milk cartons (kitchen drainer next to sink), and two pink shoes (victim's bedroom at foot of waterbed).

The district court found that nothing in the evidence offered by Silvers, not even his own testimony, revealed any indication that Silvers or his wife had been coerced into giving consent for law enforcement to conduct the search between 4:20 and 5:05

p.m. The district court found that without some evidence of a legitimate Fourth Amendment complaint, the court could not find fault with Silvers' trial counsel for not raising, pursuing, or advising Silvers of a meritless legal claim.

We review the findings of the district court for clear error. See *State v. Soukharith, ante* p. 478, 618 N.W.2d 409 (2000). The record does not support Silvers' claim that he and his wife were coerced into this search. It was not disputed by Silvers that he had consented to the search, and reports offered in evidence noted that a consent to search had been signed by both Silvers and his wife. The only evidence to which Silvers referred was that his wife declined to give consent to search the home while she was being questioned. That evidence does not establish that Silvers was coerced into giving consent to the search.

Since nothing in the record demonstrated that the consent to this search was coerced, Silvers has not established that his trial counsel was ineffective. Thus, we conclude that the district court's findings as to this search are not clearly wrong.

### THIRD SEARCH

A third search of Silvers' residence occurred in mid-July 1986. Silvers argues that a barbell discovered during this search contributed to his decision to plead guilty. The district court found that Silvers apparently believed that the barbell could have incriminated him in an assault on the victim shortly before he set the fire.

In his motion for postconviction relief, Silvers alleged that the failure of his trial counsel to seek suppression of this item of evidence contributed to his decision to plead guilty. The district court found that such allegation was directly contradicted by Silvers' postconviction testimony:

> Q Did Mr. Hogg have any discussion with you about the State's locating the weight bar in the basement of your residence?
>
> A Just prior to me entering the plea.
>
> Q And what influence, if any, did the location of that — finding that weight bar have to do with the entry of the plea?
>
> A I believe at that time I had already decided to plead.

Q So it really didn't play a role in your making that decision?

A Not a significant one.

Based on Silvers' testimony, the district court found that the seizure of the barbell had no significant bearing on Silvers' decision to enter a plea of guilty regardless of whether the search was appropriate. We cannot say that the district court was clearly erroneous in concluding that the discovery of the barbell did not play a role in Silvers' decision to plead guilty.

### EXHIBITS 39 AND 40

Next, Silvers argues that exhibits 39 and 40, transcripts of his interviews with private investigator Tom Gorgan, should not have been admitted into evidence at the postconviction evidentiary hearing. Gorgan had been contacted by Silvers' family, and Silvers' trial counsel allowed Gorgan to interview Silvers. The interview in exhibit 39 took place on July 10, 1986, at the Buffalo County Detention Center in Kearney. The interview in exhibit 40 took place on July 11 at the same location.

Exhibits 39 and 40 were offered by the State and received by the district court over several objections by the defense. Silvers' objections included foundation, hearsay, relevancy, attorney-client privilege, and best evidence. The district court overruled all of these objections except Silvers' objection based on relevancy, which the court took under advisement. During the cross-examination of Silvers, the district court determined that the matter contained in exhibits 39 and 40 was relevant because it discussed information that would affect the nature of the representation of Silvers by his trial counsel.

However, our analysis of Silvers' argument with regard to the admissibility of exhibits 39 and 40 is hereinafter limited to a discussion of the foundation required for the admission of evidence of this nature because in his brief, Silvers argues only his objection based on foundation. Errors that are assigned but not argued will not be addressed by an appellate court. *State v. Sheets, ante* p. 325, 618 N.W.2d 117 (2000).

Silvers relies on *State v. Pearson*, 215 Neb. 339, 338 N.W.2d 445 (1983), in which we stated that for a tape recording of a telephone conversation between a witness and a defendant to be

admissible in evidence, it need only be shown that the conversation is relevant; that it accurately reflected the conversation; that the tapes had not been altered, changed, or erased in any way; and that the voices heard on the tapes were those of the witness and the defendant.

[10] The foundation for these exhibits is governed by the Nebraska Evidence Rules. In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by such rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence. *State v. Rieger, ante* p. 519, 618 N.W.2d 619 (2000). Neb. Rev. Stat. § 27-901(1) (Reissue 1995) provides that the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Silvers' trial counsel testified that Silvers' family hired Gorgan to assist him in Silvers' defense and that he allowed Gorgan to interview Silvers. He stated that after the interviews, Gorgan delivered exhibits 39 and 40 to him within a day or two of July 11, 1986. Silvers' trial counsel stated that during a subsequent meeting with Silvers, he discussed the contents of these exhibits with Silvers, and Silvers confirmed the contents of the exhibits. Silvers' trial counsel stated that exhibits 39 and 40 were thereafter sealed in an envelope and marked not to be opened except in the presence of a judge. The envelope was later opened in the presence of a Buffalo County Court judge.

We conclude that the State has established sufficient foundation for the admissibility of exhibits 39 and 40, which set forth the details of the crimes committed by Silvers. We are not certain how the admissibility of exhibits 39 and 40 relates to Silvers' claim for postconviction relief based upon ineffective assistance of counsel. However, these exhibits do disclose what Silvers' trial counsel knew about the facts surrounding the crime and create the inference that if such facts were disclosed either at trial or sentencing, the death penalty might have been imposed.

The evidence that could have been presented at trial would have established that the victim sustained several blows to the

head, resulting in a skull fracture. The victim sustained a severe laceration to the hand that was described as a defensive injury sustained while raising her hand to defend against a blow from a blunt instrument. She also had several lacerations on her liver as a result of blunt trauma. The evidence would have further established that the victim had been saturated with gasoline and then set on fire. Silvers' pleas served to protect him from the imposition of a death sentence.

The district court noted that Silvers had on several occasions stated that his entry of guilty pleas was in part to avoid the necessity of trial and the effect that such trial would have had on his family. The district court found that more important in the decision to enter guilty pleas was the fact that both Silvers and his trial counsel wanted to limit the State's further investigation and limit the evidence offered at sentencing in order to avoid the possible imposition of the death penalty. The district court found that the facts presented at the time of the sentencing hearing would not have warranted the imposition of the death penalty. The district court pointed out that if the facts of the crime had been brought to the attention of the sentencing court, a death sentence might have resulted. Since Silvers has not established that exhibits 39 and 40 were improperly admitted or improperly considered by the district court, we therefore conclude that this assignment of error has no merit.

### Request to Amend

Silvers' final argument is that the district court erred in overruling his request to amend his motion for postconviction relief. On August 11, 1999, 2 days before the evidentiary hearing was scheduled, Silvers filed an amended motion for postconviction relief. The amended claim alleged that the trial court had failed to properly advise Silvers of the crimes to which he was pleading guilty at the time of his plea. The district court found that this amended claim had not been timely filed and proceeded with the evidentiary hearing on Silvers' original motion.

[11,12] "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, permit a party upon motion to amend any pleading, process, or proceeding by . . . inserting other allegations material to the case . .

. ." Neb. Rev. Stat. § 25-852 (Reissue 1995). The statute is to be liberally construed so as to prevent a failure of justice. *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992). Thus, the decision to grant or deny an amendment to a pleading rests in the discretion of the court. *Id.*

We conclude the district court did not abuse its discretion in disallowing Silvers' amended motion. This action for postconviction relief was on remand for an evidentiary hearing with specific directions from this court, and Silvers failed to timely raise this issue prior to the hearing. Therefore, we find no merit to this final assignment of error.

## CONCLUSION

The victim was a 16-year-old girl who was doused with gasoline and set on fire in her bedroom. She had sustained a skull fracture and lacerations to her hand and liver as a result of blunt trauma. She died 8 days later from burns over 90 percent of her body. It can reasonably be inferred that Silvers pled guilty in an attempt to avoid a trial that would have elicited the gruesome details of this heinous murder and to avoid the death penalty. Much if not all of the evidence obtained during the first search was in plain view in the area of the fire. The second search was determined to have been made with the written consent of Silvers and his wife. The third search, in which the barbell was discovered, was admittedly of no consequence to Silvers.

Silvers' guilty pleas were made to avoid the death penalty. He has not established a reasonable probability that but for errors of counsel, he would have insisted on going to trial rather than pleading guilty. We therefore affirm the judgment of the district court which denied Silvers' motion for postconviction relief.

AFFIRMED.

# BERGAN MERCY HEALTH SYSTEM, APPELLANT, V. DONDI S. HAVEN, APPELLEE.

620 N.W.2d 339

Filed December 15, 2000. No. S-99-078.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **Constitutional Law: Statutes: Presumptions: Proof.** Statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void.
3. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
4. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
5. **Constitutional Law: Statutes: Special Legislation.** A legislative act constitutes special legislation, violative of Neb. Const. art. III, § 18, if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.
6. **Constitutional Law: Special Legislation.** When the Legislature confers privileges on a class arbitrarily selected from a large number of persons standing in the same relation to the privileges, without reasonable distinction or substantial difference, then the statute in question has resulted in the kind of improper discrimination prohibited by the Nebraska Constitution.
7. **Constitutional Law: Special Legislation: Public Policy.** A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified.
8. **Special Legislation.** Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference.
9. **Constitutional Law: Special Legislation.** The general test of constitutionality with respect to prohibitions against special legislation is reasonableness of classification and uniformity of operation.
10. ___: ___. Classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation. The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class with reference to the purpose of the act.
11. **Health Care Providers: Liens.** The underlying goal of a hospital lien statute is to lessen the burden on hospitals and other medical providers imposed by nonpaying accident cases.
12. **Legislature: Statutes.** When the Legislature seeks to inaugurate reforms in the area of economics or social welfare, it need not choose between attacking every aspect of the problem or not attacking the problem at all.
13. **Statutes.** Repeal of a statute by implication is not favored.

14. ___. A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable.
15. **Statutes: Legislature: Intent.** In the absence of clear legislative intent, the construction of a statute will not be adopted which has the effect of nullifying or repealing another statute.
16. **Statutes.** If the doctrine of repeal by implication is applied, the later statute controls over the earlier statute. The later-enacted statute is, for these purposes, the later-amended statute.
17. **Statutes: Liens.** Neb. Rev. Stat. § 52-401 (Reissue 1998), as a statute giving a lien, is regarded as remedial and must be so construed as to give full force and effect to the remedy, in view of the beneficial purpose contemplated.
18. **Statutes.** To the extent that there is conflict between two statutes on the same subject, the specific statute controls over the general statute.
19. ___. Where general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same, and a special law will not be repealed by general provisions unless by express words or necessary implication.
20. **Liens: Words and Phrases.** A lien is a claim, encumbrance, or charge on property for payment of some debt, obligation, or duty.
21. ___: ___. A lien is an obligation, tie, duty, or claim annexed to or attached upon property by the common law, equity, contract, or statute.

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

John J. Jolley, Jr., of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellant.

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Neil B. Danberg, Jr., Lyman L. Larsen, and Michael J. Leahy, of Stinson, Mag & Fizzell, for amicus curiae Nebraska Association of Hospitals and Health Systems.

Denzel R. Busick for amicus curiae Nebraska Association of Trial Attorneys.

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

PER CURIAM.

## I. NATURE OF CASE

The two questions presented in this appeal are (1) whether the Nebraska medical lien statute, Neb. Rev. Stat. § 52-401 (Reissue 1998), constitutes unconstitutional special legislation under Neb. Const. art. III, § 18, and (2) whether Neb. Rev. Stat. § 25-1563.02 (Reissue 1995) exempts the proceeds of a personal injury settlement from a lien filed under § 52-401.

## II. FACTUAL BACKGROUND

The underlying facts of this case are not in dispute. Appellee Dondi S. Haven was injured in an automobile accident and was treated by appellant Bergan Mercy Health System (Bergan) from November 1 through 4, 1996, and on February 21 and June 5, 1997. There is no issue in this appeal whether the charges of $23,000 are the usual, customary, or reasonable charges as the parties have stipulated for the purposes of this motion that the charges are usual, customary, and reasonable.

Bergan's operative petition alleges that General Casualty Insurance (General Casualty) insured the tort-feasor responsible for Haven's injuries. Bergan alleges that it filed a notice of hospital lien with General Casualty, pursuant to § 52-401. Bergan further alleges that subsequent to the filing of the notice of hospital lien, Haven settled his claim against the tort-feasor for in excess of $100,000 and that Haven's attorney claimed an attorney fee of one-third of that amount.

## III. PROCEDURAL BACKGROUND

Bergan filed suit in the district court, alleging two "counts," the first of which simply prayed for judgment on the unpaid debt, and the second of which invoked the provisions of § 52-401. Haven's answer, inter alia, charged that § 52-401 was unconstitutional special legislation and was in direct conflict with § 25-1563.02, which exempts personal injury settlements from the claims of creditors.

Bergan filed a motion for partial summary judgment, which the district court sustained on March 10, 1998. Haven filed a motion to reconsider, which was sustained on July 23, 1998. In its order sustaining the motion to reconsider, the district court

determined that § 52-401 conflicted with § 25-1563.02 and that § 52-401 was unconstitutional special legislation under Neb. Const. art. III, § 18. Bergan appealed from the July 23 order, but the appeal was dismissed on September 18, 1998, by the Nebraska Court of Appeals for lack of a final, appealable order in case No. A-98-847.

Trial was had to the district court on January 15, 1999. Incorporating by reference the reasons stated in its order of July 23, 1999, the district court entered judgment in favor of Bergan on count I of its petition, finding that such services and supplies were provided at the specific request of Haven on an open account and per Haven's express agreement to pay. Haven has not cross-appealed the decision as to count I. As to count II, whether § 25-1563.02 exempts the proceeds of a personal injury settlement from a lien filed under § 52-401, the district court, giving deference to *Matter of Borgmann*, 176 B.R. 172 (Bankr. D. Neb. 1994), determined that under the exemption statute, § 25-1563.01, the mandatory terms thereof exempt personal injury or wrongful death settlements, whether in a lump sum or on a periodic basis, from any claims of creditors, which exemption includes liens under § 52-401. As to the defense of unconstitutionality of § 52-401, the district court found that the hospital lien statute, § 52-401, fails the "substantial difference" classification test and creates an arbitrary and unreasonable method of classification not based on any substantial difference or circumstances or situation between patients with a claim for their injuries against a third party and those patients who seek treatment for injuries who do not have a claim for the injuries against a third party.

Bergan filed a motion in this court to bypass the Court of Appeals, which was granted. Bergan has also properly filed a notice of a constitutional question as required by Neb. Ct. R. of Prac. 9E (rev. 2000).

## IV. ASSIGNMENTS OF ERROR

Bergan assigns, consolidated and restated, that the district court erred in determining that (1) § 52-401 is unconstitutional because it constitutes special legislation that contravenes Neb. Const. art. III, § 18, and (2) § 52-401 conflicts with

§ 25-1563.02 and that the proceeds of a personal injury settlement are exempt from the lien established by § 52-401.

## V. 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*, 258 Neb. 738, 605 N.W.2d 440 (2000); *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 602 N.W.2d 465 (1999).

[2,3] Statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void. *Daily v. Board of Ed. of Morrill Cty.*, 256 Neb. 73, 588 N.W.2d 813 (1999). The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *Daily v. Board of Ed. of Morrill Cty., supra*; *State ex rel. Shepherd v. Neb. Equal Opp. Comm.*, 251 Neb. 517, 557 N.W.2d 684 (1997).

[4] 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. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb. 810, 606 N.W.2d 736 (2000); *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000).

## VI. ANALYSIS

### 1. Special Legislation

Bergan assigns that the trial court erred in determining that § 52-401 is unconstitutional special legislation. Section 52-401 provides:

> Whenever any person employs a physician, nurse, or hospital to perform professional service or services of any nature, in the treatment of or in connection with an injury, and such injured person claims damages from the party causing the injury, such physician, nurse, or hospital, as the case may be, shall have a lien upon any sum awarded the injured person in judgment or obtained by settlement or compromise on the amount due for the usual and customary charges of such physician, nurse, or hospital applicable

at the times services are performed, except that no such lien shall be valid against anyone coming under the Nebraska Workers' Compensation Act.

[5,6] A legislative act constitutes special legislation, violative of Neb. Const. art. III, § 18, if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class. *Swanson v. State*, 249 Neb. 466, 544 N.W.2d 333 (1996); *City of Ralston v. Balka*, 247 Neb. 773, 530 N.W.2d 594 (1995). When the Legislature confers privileges on a class arbitrarily selected from a large number of persons standing in the same relation to the privileges, without reasonable distinction or substantial difference, then the statute in question has resulted in the kind of improper discrimination prohibited by the Nebraska Constitution. *Swanson v. State, supra.*

[7,8] A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. *Big John's Billiards v. Balka, ante* p. 702, 619 N.W.2d 444 (2000); *State ex rel. Douglas v. Marsh*, 207 Neb. 598, 300 N.W.2d 181 (1980). See, also, *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991). Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference. *State ex rel. Douglas v. Marsh, supra.*

[9,10] The general test of constitutionality with respect to prohibitions against special legislation is reasonableness of classification and uniformity of operation. Classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation. *Kuchar v. Krings*, 248 Neb. 995, 540 N.W.2d 582 (1995); *State ex rel. Douglas v. Marsh, supra.* The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class with reference to the purpose of the act. *Id.*

As Haven has conceded that § 52-401 does not create a closed class, our analysis is focused upon whether § 52-401 creates an arbitrary and unreasonable method of classification. Haven

argues, and the trial court found, that the relevant classification for the special legislation analysis is the class of persons subject to a lien under § 52-401—persons injured by tort-feasors. The Nebraska Association of Hospitals and Health Systems, as amicus curiae, argues that the appropriate classification for analysis consists of the doctors, nurses, and hospitals benefited by § 52-401.

In fact, § 52-401 must be analyzed with respect to both classifications, as it presents a unique circumstance in which two classifications are implicated. Section 52-401 provides one class (doctors, nurses, and hospitals) with privileges that may be exercised against another class (persons injured by tort-feasors). If either classification is based upon an unreasonable distinction, or if the distinction underlying either classification is not reasonably related to the objectives of the legislation, then § 52-401 is unconstitutional.

(a) Hospitals, Doctors, and Nurses

In an attempt to lessen the burden imposed on hospitals by nonpaying accident cases, the legislatures of many states have enacted statutes which give a hospital a lien upon any recovery which the patient might receive from a tort-feasor causing the injuries for which treatment is given, or upon claims which the patient may have on account of the injuries for which the hospital rendered treatment. See, generally, Annot., 16 A.L.R.5th 262 (1993 & Supp. 2000). Forty-two states and the District of Columbia have laws authorizing liens for medical care provided for injuries resulting from an accident or wrongful act. See Meta Calder, *Florida's Hospital Lien Laws*, 21 Fla. St. U. L. Rev. 341 (1993). Nebraska's statute, first enacted in 1927, is the oldest in the United States. *Id.*

[11] The underlying goal of a hospital lien statute is to lessen the burden on hospitals and other medical providers imposed by nonpaying accident cases. *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994). In *Buchanan v. Beirne Lumber Company*, 197 Ark. 635, 639, 124 S.W.2d 813, 815 (1939), the Supreme Court of Arkansas noted that the Arkansas hospital lien law was "enacted for the very humane purpose of encouraging physicians, hospitals and nurses to extend their services and facilities to indigent persons

who suffer personal injuries through the negligence of another, by providing the best security available to assure compensation for services and facilities." See, also, *Hosp. Bd. of Directors of Lee v. McCray*, 456 So. 2d 936, 939 (Fla. App. 1984) (hospital lien act "is a manifestation of the legislature's concern for the public welfare in that the Hospital is assured of compensation and should not be reluctant to treat indigents").

Legislative history is unavailable for the original 1927 enactment of the predecessor to § 52-401. The Legislature addressed the intent and purposes of § 52-401 at length, however, in 1995, during a debate regarding amendment of that section. The amendment was occasioned by this court's decision in *In re Guardianship & Conservatorship of Bloomquist, supra.* In that case, this court determined that hospitals were liable for their pro rata portion of the legal expenses and costs where they sought payment out of a judgment or settlement for the amount of a lien filed pursuant to § 52-401. *Id.* The Legislature amended the statute in response to the *In re Guardianship & Conservatorship of Bloomquist* decision. See, generally, Introducer's Statement of Intent, L.B. 172, Committee on Health and Human Services, 94th Leg., 1st Sess. (February 8, 1995).

The legislative history states:

> The purposes of the lien law include the following:
>
> —It helps health care providers by ensuring they are paid for their services out of the proceeds of any litigation arising from a patient's injuries; and
>
> —It helps the patient because it provides a measure of security to the health care provider thereby diminishing or eliminating altogether the need to pursue other collection efforts.

*Id.*

The testimony provided at the committee hearing on the bill provided support for the stated objectives of the legislation. The testimony provided by representatives of hospitals and health care professionals generally established that health care providers give care to injured persons without regard to a person's ability to pay for such care and that the restriction placed on § 52-401 by *In re Guardianship & Conservatorship of Bloomquist* threatened the fiscal solvency of health care institu-

tions, particularly to the continuing ability to afford provision of emergent care to indigent injured persons. See, generally, Committee on Health and Human Services Hearing, L.B. 172, 94th Leg., 1st Sess. (February 8, 1995). The testimony also established that some health care providers, deprived of the benefit of § 52-401, would resort to immediately pursuing collection efforts against injured parties and obtaining judgments against them, rather than simply securing a lien and waiting for a judgment or settlement against the tort-feasor. *Id.*

Senator Wesely, in his remarks introducing L.B. 172 for floor debate, stated:

> But the bottom line of why we are trying to do this is to recognize that if we don't provide for the medical care providers to be compensated for the care that they provide individuals, you will have a loss of millions of dollars to hospitals and other medical providers. And then you will have a problem, I think, resulting in these hospitals so quickly and completely giving care to individuals in trauma situations and otherwise needing medical assistance. . . . [T]he bottom line is that if we don't pass this bill, we will see hospitals losing millions of dollars, and in turn I think jeopardizing the care provided by those hospitals, and particularly the trauma care provided by those hospitals . . . .

Floor Debate, 94th Leg., 1st Sess. 2958 (March 23, 1995).

The facts underlying these comments establish the reasonable basis for the distinction between doctors, nurses, and hospitals and other creditors. Unlike other creditors, doctors, nurses, and hospitals may be called upon to provide services without first ascertaining the patient's ability to pay. See, 42 U.S.C. § 1395dd (1994) (federal Emergency Medical Treatment and Active Labor Act requiring hospital emergency facilities to screen patients and stabilize emergency medical conditions before transferring or releasing patients); *Gestring v. Mary Lanning Memorial Hosp.*, 259 Neb. 905, 613 N.W.2d 440 (2000). Thus, doctors, nurses, and hospitals are unable to protect themselves from the inevitable financial effects of providing services to those who are unable to pay for these services. This is the basis for doctors', nurses', and hospitals' "reasonable distinction from other

subjects of a like general character." *Kuchar v. Krings*, 248 Neb. 995, 1001, 540 N.W.2d 582, 586 (1995).

This distinction also "bears some reasonable relation to the legitimate objectives and purposes of the legislation." *Id.* The clear public purpose of the law, as stated in the legislative history, is to protect health care providers so that they can continue to provide care, particularly trauma care, to those who require such care without regard to a patient's ability to pay. The Legislature's clear intent was to ensure that medical care remained available to indigent persons by supplying health care providers with a means for eventually securing some compensation for the potentially charitable act of providing care to an injured party who is unable to pay.

Support for this argument is found in *Campbell v. City of Lincoln*, 195 Neb. 703, 240 N.W.2d 339 (1976). In that case, the appellant argued that the Political Subdivisions Tort Claims Act was special legislation because it placed persons injured by governmental torts in a different class than those injured by private torts. *Id.* This court rejected this argument, stating:

> The act creates one single class of tort-feasors — all political subdivisions — which includes "villages, cities of all classes, counties, school districts, public power districts, and all other units of local government." The act applies equally and uniformly to all tort claims against a political subdivision. The fact that public agencies, generally speaking, differ from private persons or corporations in many respects is obvious.

*Id.* at 709, 240 N.W.2d at 342. This court further stated that "[t]he taxpaying public has an interest in seeing that prompt and thorough investigation of claims is made where a political subdivision is involved. The public does not have such an interest as to claims against private persons or corporations." *Id.* at 710, 240 N.W.2d at 343.

Similarly, in the instant case, § 52-401 creates a class of lienholders—doctors, nurses, and hospitals—and treats that class equally and uniformly. The distinction between doctors, nurses, and hospitals and other creditors is clear, as doctors, nurses, and hospitals are unlike other creditors in that they are often called upon to provide medical services to an accident victim without

first ascertaining the patient's ability to pay. Finally, it is clear that the public at large has a particular interest in encouraging and enabling doctors, nurses, and hospitals to provide care without regard to the ability to pay, where it does not have such a compelling interest in the protection of the interests of other creditors.

See, also, *Taylor v. Karrer*, 196 Neb. 581, 586, 244 N.W.2d 201, 204 (1976), *disapproved on other grounds, Jorgensen v. State Nat. Bank & Trust*, 255 Neb. 241, 583 N.W.2d 331 (1998) (2-year statute of limitations for professionals not special legislation because "[t]he situation of professional people and of those to whom they render services is substantially different from the normal situation encountered in the rendering of ordinary services and injuries sustained thereby").

The Nebraska Association of Trial Attorneys, as amicus curiae, argues that the classification of doctors, nurses, and hospitals is unconstitutional because there is no reasonable distinction between doctors, nurses, and hospitals and other creditors whose services have been necessitated by an injury such as physical therapists, home health care aides, chauffeurs, or babysitters. This argument is without merit.

[12] As we have noted in the context of equal protection, when the Legislature seeks to inaugurate reforms in the area of economics or social welfare, it need not choose between attacking every aspect of the problem or not attacking the problem at all. *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989). The fact that the Legislature has not protected the interests of other persons whose services are necessitated by accidents does not preclude it from addressing the needs of doctors, nurses, and hospitals, whose services are frequently necessitated by injury accidents, and whose financial well-being is most directly affected by the inability of injured persons to pay for their care.

Nor is the purpose of the Legislature limited to protecting the interests of doctors, nurses, and hospitals. In *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977), the appellant raised special legislation and equal protection challenges to the then applicable version of the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. §§ 44-2801 to 44-2855 (Cum. Supp. 1976). We determined that the act was constitutional, stat-

ing, "We are dealing with the fundamental right to adequate medical care," and affirming "the right of the Legislature to exercise the police power to promote the general health and welfare of the citizens of this state." 199 Neb. at 114, 356 N.W.2d at 668.

The appellant in that case also argued that the act could not be justified on the basis of the societal circumstances under which it was alleged to have been adopted. *Id.* We rejected that argument, stating:

> Defendant . . . assumes the legislation was enacted to relieve doctors or insurance companies of some of their burden. We do not accept defendant's premise. Doctors and insurance companies are able to protect themselves against financial burdens by passing the cost on to their patients. Because they were doing so, [they] created part of the problem. The Legislature deemed it necessary to exercise its police power to make available qualified medical services at reasonable prices for the Nebraska public. We find no constitutional violation of this effort.

*Id.* at 119-20, 256 N.W.2d at 671.

Similarly, in the instant case, doctors, nurses, and hospitals would be equally able to protect themselves from the effects of nonpaying accident cases by passing those costs on to other patients, and by pursuing immediate collection efforts against accident victims. The Legislature has not violated the constitution by seeking to eliminate the need for such collection efforts, thus making medical services more affordable for all citizens of Nebraska by enacting § 52-401.

(b) Persons Injured by Tort-Feasors

The classification of those injured by tort-feasors is also constitutionally justified. The distinction between those injured by tort-feasors and injured parties generally is clear—where persons are injured by tort-feasors, the ultimate legal responsibility for the injuries sustained rests with the tort-feasor and not the injured party. Therefore, those injured by tort-feasors are substantially different from other injured parties.

The public policy underlying the statute is that doctors, nurses, and hospitals are *intended* to be compensated by any judgment or settlement reached as compensation for the injuries

sustained. It has been decided by the Legislature, for the policy reasons stated above, that doctors, nurses, and hospitals should be compensated when funds are available from the responsible party. It is reasonable to ensure that when an injured party seeks damages based upon the cost of medical services necessitated by an injury, the compensation for those services should be directed toward the providers of the services. This also serves the public interest through the financial solvency of the doctors, nurses, and hospitals, as detailed above.

We determine that Bergan's assignment of error has merit, as § 52-401 is not special legislation in allowing hospitals, doctors, and nurses to perfect a lien not allowed to other creditors, nor in limiting that lien to debtors who have been injured by tortfeasors. Haven has not argued that the statute is special legislation in providing doctors, hospitals, and nurses an exception from the "common fund" doctrine not available to other creditors, and we do not consider that question.

### 2. Statutory Conflict

Bergan assigns that the trial court erred in determining that § 52-401 conflicts with § 25-1563.02. Section 25-1563.02 provides:

> (1) Except as provided in subsection (2) of this section, all proceeds and benefits, including interest earned thereon, which are paid either in a lump sum or are accruing under any structured settlement providing periodic payments, which lump-sum settlement or periodic payments are made as compensation for personal injuries or death, shall be exempt from attachment, garnishment, or other legal or equitable process and from all claims of creditors of the beneficiary or the beneficiary's surviving dependents unless a written assignment to the contrary has been obtained by the claimant.
>
> (2) All proceeds and benefits, including interest earned thereon, which are paid for personal injuries may be garnished by a county attorney or authorized attorney pursuant to section 43-512.03 or garnished for child support as defined in section 43-1705 by an obligee as defined in section 43-1713.

The legislative history behind § 25-1563.02 indicates that it was enacted as part of a larger reform of the bankruptcy statutes. See, generally, Floor Debate, L.B. 335, Banking, Commerce, and Insurance Committee, 90th Leg., 1st Sess. (May 27, 1987). The reform was intended to close a perceived "loophole" in the bankruptcy statutes by which assets could be protected from creditors in annuities or insurance policies. *Id.* at 6354. Section 25-1563.02 was enacted in order to ensure that structured settlements of personal injury claims were not subjected to creditors' claims when the annuity loophole was closed. *Id.* The section was later amended to include lump-sum payments in addition to structured settlements. 1993 Neb. Laws, L.B. 118. The section was subsequently amended to provide that such settlements could be garnished for child support payments. 1994 Neb. Laws, L.B. 1224.

Under the trial court's resolution of the perceived conflict between §§ 25-1563.02 and 52-401, the latter statute would be rendered an almost complete nullity. The trial court's determination is, in effect, a finding that § 25-1563.02 impliedly repealed § 52-401.

[13-15] Repeal by implication, however, is not favored. *Hamilton v. Hamilton*, 242 Neb. 687, 496 N.W.2d 507 (1993); *Sarpy Co. Pub. Emp. Assn. v. County of Sarpy*, 220 Neb. 431, 370 N.W.2d 495 (1985). A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable. See *id.* In the absence of clear legislative intent, the construction of a statute will not be adopted which has the effect of nullifying or repealing another statute. See *In re Invol. Dissolution of Battle Creek State Bank*, 254 Neb. 120, 575 N.W.2d 356 (1998). See, also, *Sarpy Co. Pub. Emp. Assn. v. County of Sarpy, supra.*

[16] We note that while § 25-1563.02 was enacted in 1987 and last amended in 1994, § 52-401 was last amended, and quite explicitly reaffirmed by the Legislature, in 1995. If the doctrine of repeal by implication is applied, the later statute controls over the earlier statute. See *In re Invol. Dissolution of Battle Creek State Bank, supra.* The later-enacted statute is, for these purposes, the later-amended statute. See *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995). Consequently, to the extent that

the statutes irreconcilably conflict, § 52-401 would control over the earlier-enacted § 25-1563.02.

[17] In this case, we can find no clear indication of an intent to repeal in the language or legislative history of either section. Consequently, we must endeavor to construct the statutes in a way which harmonizes them. *In re Invol. Dissolution of Battle Creek State Bank, supra.* See, also, *Sarpy Co. Pub. Emp. Assn. v. County of Sarpy, supra.* Moreover, we have noted that § 52-401, as a statute giving a lien, is regarded as remedial and must be so construed as to give full force and effect to the remedy, in view of the beneficial purpose contemplated. See *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994).

[18,19] To the extent that there is conflict between two statutes on the same subject, the specific statute controls over the general statute. See *In re Invol. Dissolution of Battle Creek State Bank, supra.*

> We have stated that " '[w]here general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same, and a special law will not be repealed by general provisions unless by express words or necessary implication . . . .' "

(Citations omitted.) *Nebraska Equal Opp. Comm. v. State Emp. Retirement Sys.*, 238 Neb. 470, 472, 471 N.W.2d 398, 400 (1991).

In this instance, § 25-1563.02 applies generally to all creditors of those who receive personal injury settlements. Section 52-401 applies to a specific subset of creditors (doctors, nurses, and hospitals) and a specific subset of debtors (those injured by tort-feasors). Therefore, § 52-401 is the more specific statute and must control where the specific conditions therein are satisfied. Bergan's assignment of error therefore has merit.

[20,21] Bergan argues briefly that the statutes can be harmonized by holding that a "claim" under § 25-1563.02 does not equate to a "lien" under § 52-401. This argument is without merit. We have defined a lien as a " '*claim*, encumbrance, or charge on property for payment of some debt, obligation or duty.' " (Emphasis supplied.) *McCook Nat. Bank v. Bennett*, 248

Neb. 567, 572, 537 N.W.2d 353, 357 (1995). We have further stated that a lien is an obligation, tie, duty, or *claim* annexed to or attached upon property by the common law, equity, contract, or statute. *Dupuy v. Western State Bank*, 221 Neb. 230, 375 N.W.2d 909 (1985); *Landis Machine Co. v. Omaha Merchants Transfer Co.*, 142 Neb. 389, 6 N.W.2d 380 (1942).

## VII. CONCLUSION

We conclude that § 52-401 is not special legislation and that where §§ 52-401 and 25-1563.02 conflict, the specific provisions of § 52-401 control over the general provisions of § 25-1563.02. We reverse the judgment of the trial court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HENDRY, C.J., dissenting.

I respectfully dissent from the majority opinion insofar as it addresses Neb. Const. art. III, § 18.

Neb. Const. art. III, § 18, prohibits the Legislature from passing local or special laws that grant "to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever."

We have interpreted this constitutional provision to mean:

> When the Legislature confers privileges on a class arbitrarily selected from a large number of persons standing in the same relation to the privileges, without reasonable distinction or substantial difference, then the statute in question has resulted in the kind of improper discrimination prohibited by the Nebraska Constitution. *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991). A legislative act can violate article III, § 18, in one of two ways: by creating a totally arbitrary and unreasonable method of classification, or by creating a permanently closed class.

*Swanson v. State*, 249 Neb. 466, 479, 544 N.W.2d 333, 341-42 (1996).

Further, in *Stanton v. Mattson*, 175 Neb. 767, 773, 123 N.W.2d 844, 849 (1963), we said, "The very purpose of Article III, section 18, of the Constitution, is to prevent legislative action which

grants benefits or immunities to persons or property within the general class that is made the subject of legislation."

In this appeal, Haven asserts that the medical lien statute, Neb. Rev. Stat. § 52-401 (Reissue 1998), is unconstitutional special legislation. In analyzing a special legislation claim, we must determine (1) the privilege created by the statute, (2) the particular class which is singled out to receive the privilege, (3) the persons within the general class that is made the subject of the legislation who stand in the same relation to the privilege as the particular class, and finally (4) whether the statute violates Neb. Const. art. III, § 18, either because the particular class which receives the privilege is a permanently closed class, or because the particular class has no reasonable distinction or substantial difference from the general class. See, *Swanson, supra*; *Stanton, supra*.

The privilege granted by § 52-401 is the lien which attaches against any recovery obtained by the injured person. This lien is a special privilege which exists by operation of the statute. The particular class privileged by the legislative grant is composed of physicians, nurses, and hospitals. The general class of persons "standing in the same relation to the privileges," *Swanson*, 249 Neb. at 479, 544 N.W.2d at 341, would be all professional service providers who likewise perform services of any nature in the treatment of, or in connection with, an injury. § 52-401.

Haven instead argues that the act creates two classes consisting of those injured by tort-feasors and those not injured by tort-feasors. Neither of these two purported classes, however, is granted the privilege of the lien which the statute creates. Notwithstanding, Haven contends there is in effect a privilege granted to people not injured by tort-feasors. The privilege for people in this "class" is that there is no lien which attaches due to the rendering of professional services to that person.

What Haven is asserting is the act, in its application, discriminates against people such as Haven, who are injured by tort-feasors, in the form of a lien. This, in my view, is an equal protection claim and does not address the issue of whether § 52-401 has conferred an unconstitutional privilege upon physicians, nurses, and hospitals.

The majority opinion, and Justice McCormack's dissent, analyze the classification of physicians, nurses, and hospitals in great detail. However, I respectfully suggest that such analyses are unnecessary at this time because Haven lacks standing to assert that the classification of physicians, nurses, and hospitals created by § 52-401 is unconstitutional as special legislation under Neb. Const. art. III, § 18.

To establish standing to bring a special legislation claim, the plaintiff must show that the statute is depriving him or her of a constitutionally protected right. *State v. Cushman*, 256 Neb. 335, 589 N.W.2d 533 (1999); *Kalisek v. Abramson*, 257 Neb. 517, 599 N.W.2d 834 (1999); *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996); *State ex rel. Dept. of Health v. Jeffrey*, 247 Neb. 100, 525 N.W.2d 193 (1994). In order to establish standing, Haven must show that his constitutional rights are being violated because the privilege granted under § 52-401 to physicians, nurses, and hospitals is being arbitrarily denied to him. This Haven cannot do.

As Justice Shanahan stated in his concurrence in *School Dist. No. 46 v. City of Bellevue*, 224 Neb. 543, 556, 400 N.W.2d 229, 238 (1987):

> Ordinarily, a challenge to constitutionality of a statute on the ground that the assailed statute denies equal rights and privileges by discriminating between persons or classes may not be made by one not belonging to the class alleged to be discriminated against. See *Griffin v. Gass*, 133 Neb. 56, 274 N.W. 193 (1937). See, also, *Ritums v. Howell*, 190 Neb. 503, 209 N.W.2d 160 (1973) (one who is not harmfully affected by a particular feature of a statute, alleged to be unconstitutional, may not urge the unconstitutionality of the statute in question).

In my view, the only persons who would have standing to assert that § 52-401 is unconstitutional special legislation are the general class of persons who stand "in the same relation to the privilege" as the particular class. Under § 52-401, the general class would include those persons who are not physicians, nurses, or hospitals, but nevertheless "perform professional services or services of any nature, in the treatment of or in connection with an injury." Only members of this general class would

have standing to claim that their constitutional rights are being violated because the privilege of a lien is given to physicians, nurses, and hospitals, but denied to them.

Accordingly, because I believe Haven lacks standing, I would withhold any opinion regarding whether § 52-401 violates Neb. Const. art III, § 18.

McCORMACK, J., dissenting.

I believe that Neb. Rev. Stat. § 52-401 (Reissue 1998) is special legislation, violative of Neb. Const. art. III, § 18. On that basis, I would affirm the judgment of the trial court.

PART I

I agree with the majority regarding the fact that § 52-401 deals with two different classifications, and I agree with the majority's assessment of the intended purpose of the statute. I believe, however, that the classifications set forth in § 52-401 are not based upon a reasonable distinction from other subjects of a like general character and that the distinction that is present does not bear a reasonable relation to the objectives and purposes of the legislation. See *Kuchar v. Krings*, 248 Neb. 995, 540 N.W.2d 582 (1995).

The unreasonable classifications of the statute are the result of the Legislature's not choosing a legitimate objective and enacting legislation to achieve that objective. If the objective is to provide for emergency care, for instance, then the statute is too broad because it is not limited to emergency care. If the objective, however, is to provide for all health care needs, then the statute is too narrow because it does not encompass all health care providers.

Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference. *State ex rel. Douglas v. Marsh*, 207 Neb. 598, 300 N.W.2d 181 (1980). I see no substantial difference between hospitals, doctors, and nurses and other health care providers whose services are equally necessary and valuable to persons injured by tort-feasors.

In *Stanton v. Mattson*, 175 Neb. 767, 123 N.W.2d 844 (1963), the appellant sought a declaratory judgment regarding the constitutionality of a statute allowing higher interest rates for retail

installment contracts. This court determined that the statute was special legislation, stating:

> Are there real differences in situation and circumstances that warrant making retail sellers on installment contracts a reasonable classification for fixing a higher interest rate for a loan or forbearance of money, goods, or things in action?
>
> We can see no valid reason, nor has one been pointed out to us, that warrants retail sellers to charge a rate of interest that is denied to all others.

*Id.* at 771, 123 N.W.2d at 847-48.

Similarly, in the instant case, there is no valid reason for affording hospitals, doctors, and nurses a method of securing debts that is denied other providers of necessary health care services. From the perspective of indigent injured persons, there is no reasonable distinction between the services provided by hospitals, doctors, and nurses and other necessary services of other health care providers.

## PART II

Second, I do not believe the classification of persons injured by tort-feasors forms, by itself, a proper and legitimate class with reference to the ostensible purpose of the act. See, *Kuchar v. Krings, supra*; *State ex rel. Douglas v. Marsh, supra.* While encouraging the provision of health care to indigent accident victims is a worthwhile legislative purpose, the terms of § 52-401 are not focused on that purpose.

The legislative history of § 52-401 indicates that the Legislature was concerned with the financial losses that could be sustained by hospitals, doctors, and nurses who treated indigent accident victims, absent an effective lien statute. The statute does not, however, limit the ability of hospitals, doctors, and nurses to perfect liens simply to those circumstances where indigent persons are otherwise unable to pay for services. Instead, § 52-401 allows the health care provider to perfect a lien against all persons injured by tort-feasors, regardless of whether or not the injured person has access to insurance or some other source of payment.

This creates the possibility that an injured person could have access to health insurance, yet the hospital, doctor, or nurse

could refuse the payment offered by an insurance company and choose to pursue a potentially more lucrative payment from the injured party's tort judgment. Compare Ind. Code Ann. § 32-8-26-3 (Michie 1995) (lien must be reduced by amount of medical insurance proceeds paid to hospital on behalf of patient). It is difficult to see how the purpose of encouraging health care for indigent persons can justify liens against a class of injured persons that is not limited to indigent persons.

Similarly, the legislative history indicates that one of the primary concerns of the Legislature was the financial effect of uncompensated emergency care. The statute, however, does not limit the costs that can be secured by the lien to the costs of emergent care. Compare Mo. Ann. Stat. § 430.230 (West 1992) (limiting lien to $25 per day plus necessary x-ray, laboratory, operating room, and medication services). Nebraska's statute, however, becomes overly broad and does not limit itself to the purpose as expressed in the legislative history. Under the Nebraska statute, a hospital or doctor would have a lien for services rendered 2 years after the accident, and that certainly cannot be labeled as emergent care. In Meta Calder, *Florida's Hospital Lien Laws*, 21 Fla. St. U. L. Rev. 341 (1993), there is a study on how the various states limit their lien for emergent care. This study shows:

| State: | Limitation of Lien: |
|---|---|
| Alabama | Limited to 1 week after receiving injury |
| California | Limited to first 72 hours of emergency; then lien attaches to 50 percent of final judgment or settlement |
| Illinois | Lien based on "ward rates" and limited to one-third of sum paid |
| Kansas | Lien may not exceed $5,000 |
| Maryland | Limited to 50 percent of recovery |
| Massachusetts | Limited to "ward charges" |
| Missouri | Limited to $25 a day and reasonable costs of necessary x ray, laboratory, operating room, and medication; limited to 50 percent of recovery after attorney fees |
| New Jersey | "Ward rates." Limited to 25 percent of total recovery |

| | |
|---|---|
| New York | Limited to "cost rates" for injury received up to 1 week prior to hospitalization |
| North Carolina | Limited to 50 percent of total amount recovered exclusive of attorney fees |
| Tennessee | Limited to one-third of recovery |
| Texas | Limited to hospital charges from first 100 days of hospitalization for person admitted to hospital within 72 hours of accident |
| Virginia | Limited to $1,500 for hospital and $300 for physician, nurse, or physical therapist |
| Washington | Limited to 25 percent of recovery |

Moreover, the testimony from the legislative history indicates that the primary complaint of health care providers was that they would incur financial losses from nonpaying accident cases. This concern, however, could be alleviated by the limited step of allowing health care providers a lien to recover the actual costs of the treatment. See, e.g., Conn. Gen. Stat. Ann. § 49-73 (West Cum. Supp. 2000) (limiting lien to the extent of the actual costs of service and materials). The purpose of protecting health care providers from financially debilitating losses could be achieved by so limiting the lien and by not allowing health care providers to potentially assert a lien for additional profit from the accident victim's tort judgment.

In short, I believe that the purpose of making health care available for indigent accident victims is not reasonably related to the overly broad classification of persons injured by tort-feasors, as all persons injured by tort-feasors are not indigent. The vast majority of people who enter hospitals have insurance and are, therefore, not indigent. The further objection that I have to § 52-401 is that it allows liens to be perfected for amounts that go beyond the expenses of the health care provider in rendering treatment for emergent care.

Hence, I respectfully dissent.

STATE OF NEBRASKA, APPELLEE, V. JAMES RAY, APPELLANT.
620 N.W.2d 83

Filed December 15, 2000. No. S-99-869.

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. **Police Officers and Sheriffs: Arrests: Search and Seizure: Motor Vehicles.** When law enforcement officers are conducting a search of a motor vehicle incident to the driver's arrest, they may inspect passengers' personal belongings found in the passenger compartment of the motor vehicle, because to allow a distinction between packages or containers based on ownership would create an impracticable rule.

Petition for further review from the Nebraska Court of Appeals, SIEVERS and INBODY, Judges, and BUCKLEY, District Judge, Retired, on appeal thereto from the District Court for Lancaster County, KAREN FLOWERS, Judge. Judgment of Court of Appeals affirmed.

Dorothy A. Walker, P.C., for appellant.

Don Stenberg, Attorney General, and Marie Colleen Clarke for appellee.

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

STEPHAN, J.

James Ray was convicted in the district court for Lancaster County on one count of possession of a controlled substance in violation of Neb. Rev. Stat. § 28-416(3) (Reissue 1995), a Class IV felony. He was sentenced to incarceration for a period of 180 days. He appealed on the sole ground that the district court erred in denying his motion to suppress evidence contained in his knapsack found during the search of a vehicle in which he had been a passenger. The Nebraska Court of Appeals affirmed, based upon its determination that the search was incident to the lawful arrest of the operator of the vehicle and was constitutionally permissible under the reasoning of *New York v. Belton*, 453

U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), and *Wyoming v. Houghton*, 526 U.S. 295, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999). *State v. Ray*, 9 Neb. App. 183, 609 N.W.2d 390 (2000). We granted Ray's petition for further review and now affirm the judgment of the Court of Appeals.

## BACKGROUND

We briefly summarize the facts of this case which are fully set forth in the published opinion of the Court of Appeals. See *State v. Ray, supra.* On the evening of November 4, 1997, Ray was a passenger in a vehicle operated by David C. Almery. Nebraska State Patrol Trooper Michael L. Tumbleson stopped the vehicle, after observing traffic violations, as it was proceeding north on Highway 77 in Lancaster County. When a criminal history check conducted during the stop disclosed an outstanding warrant for Almery on a fraudulent check charge, Tumbleson arrested Almery and placed him in Tumbleson's patrol car.

Tumbleson then made contact with Ray, who had remained in the vehicle and was its only passenger. Tumbleson asked Ray to exit the vehicle so that it could be searched and then conducted a pat-down search of Ray that yielded an object which Tumbleson believed to be a marijuana pipe and two film canisters containing a substance believed to be marijuana. At that point, Tumbleson informed Ray that he would receive a citation for possession of marijuana and drug paraphernalia.

After completing the citation and obtaining Ray's signature upon it, Tumbleson began searching Almery's vehicle while Ray stood nearby in the company of another officer who had arrived on the scene. Ray responded affirmatively when Tumbleson asked him if a black knapsack which he had found on the passenger-side floorboard of the vehicle belonged to Ray. Tumbleson then inquired whether there was contraband in the knapsack, and Ray again gave an affirmative response, stating that the knapsack contained a mirror, a snorting tube, and a razor. When Tumbleson opened the knapsack, he found a brown leather bag containing the items Ray described. He then arrested Ray. Subsequent tests of the items contained in the knapsack revealed the presence of cocaine on the snorting tube.

On February 9, 1998, an information was filed charging Ray with possession of a controlled substance. Ray filed motions to

suppress the evidence seized and the statements he made to Tumbleson during the search. On December 21, the district court sustained Ray's motion as to the paraphernalia found pursuant to the pat-down of his person but overruled the motions in all other regards. The district court specifically found that Ray's statements were freely and voluntarily made and that the search of the vehicle and the knapsack found therein was constitutional as a search incident to an arrest.

A stipulated trial was held on February 25, 1999. The only evidence offered was the transcript of Tumbleson's testimony from the suppression hearing, a videotape of the stop, and the laboratory report from the testing of the items found in Ray's possession. Ray preserved the objections raised by his suppression motions. Following his conviction and sentence, Ray perfected this appeal and subsequently petitioned for further review of the judgment of the Court of Appeals affirming the judgment of the district court.

## ASSIGNMENT OF ERROR

In his petition for further review, Ray's sole assignment of error is that the Court of Appeals erred in affirming the district court's overruling of his motion to suppress the contents of his knapsack.

## STANDARD OF REVIEW

[1] 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. Lara*, 258 Neb. 996, 607 N.W.2d 487 (2000).

## ANALYSIS

Modern law governing the permissible scope of a warrantless search incident to an arrest flows from *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). After the defendant in that case was arrested at his home pursuant to an arrest warrant, police officers conducted a warrantless search of the entire residence. California appellate courts upheld the

search as being incident to a lawful arrest. The Supreme Court reversed, concluding that the scope of the search was unreasonably broad and therefore not constitutionally justified. The Court stated:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. . . . There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

395 U.S. at 762-63. After articulating this principle, the Court concluded that there was "no comparable justification . . . for routinely searching any room other than that in which an arrest occurs — or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself." 395 U.S. at 763.

The seminal case defining the scope of a warrantless search of a motor vehicle incident to the arrest of its occupant is *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). In that case, a law enforcement officer stopped a vehicle for speeding and determined that none of its four occupants owned the vehicle or were related to its owner. The officer also smelled burnt marijuana and saw an envelope in the vehicle with a marking he knew to be associated with marijuana. The officer ordered all four occupants out of the car and arrested them for possession of marijuana. Upon searching the passenger compartment of the vehicle, the officer found a jacket belonging to Belton, one of the passengers, and discovered cocaine in one of its pockets.

In determining whether the cocaine was obtained as the result of a valid warrantless search, the Court reasoned that *Chimel*

created an exception to the warrant requirement for lawful custodial arrests and authorized a contemporaneous search of the arrestee and the immediately surrounding area. It noted that *Chimel* emphasized that the scope of such a search must be strictly tied to and justified by the circumstances which rendered its initiation possible. The Court then held:

> When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority. While the *Chimel* case established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, courts have found no workable definition of "the area within the immediate control of the arrestee" when that area arguably includes the interior of an automobile and the arrestee is its recent occupant. Our reading of the cases suggests the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within "the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m]." . . . In order to establish the workable rule this category of cases requires, we read *Chimel*'s definition of the limits of the area that may be searched in light of that generalization. Accordingly, we hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.
>
> It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach. . . . Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.

(Citations omitted.) *Belton*, 453 U.S. at 459-61. The Court noted that even containers inside a vehicle which could not hold a weapon or evidence could be searched in this circumstance. Quoting *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), it reasoned:

> "The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification."

*New York v. Belton*, 453 U.S. 454, 461, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). Several state courts have characterized *Belton* as providing law enforcement officers with a "bright-line" rule to define the permissible scope of warrantless vehicle searches incident to a lawful arrest. See, e.g., *State v. Steele*, 613 N.W.2d 825 (S.D. 2000); *Vasquez v. State*, 990 P.2d 476 (Wyo. 1999); *People v. Mitchell*, 36 Cal. App. 4th 672, 42 Cal. Rptr. 2d 537 (1995).

This case is factually distinguishable from *Belton* in that Ray, the owner of the property seized during the vehicle search, had not been arrested prior to the search. Thus, the question presented is whether, upon the lawful arrest of the operator of a motor vehicle, a warrantless search incident to that arrest may properly extend to a container situated in the passenger compartment of the vehicle which belongs to a passenger who has not been arrested at the time of the search. In resolving this question in the affirmative, the Court of Appeals relied upon the reasoning of *Wyoming v. Houghton*, 526 U.S. 295, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999). In that case, an officer stopped a vehicle for speeding. While talking to the driver, the officer noticed a hypodermic syringe in the driver's shirt pocket, and upon inquiry, the driver replied that he used the syringe to take drugs. The officer then ordered two female passengers out of the car. On the strength of the driver's incriminating admission, the officer searched the passenger compartment of the car for contraband

and in doing so, found a purse on the back seat belonging to Houghton, one of the passengers. The officer discovered methamphetamine and drug paraphernalia inside the purse. In addressing the validity of the search of the purse, the Supreme Court noted the uncontroverted fact that the officer had probable cause to believe there were illegal drugs in the car. The Court noted its holding in *United States v. Ross*, 456 U.S. 798, 825, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982), wherein it determined that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." Recognizing that under the facts of *Ross* it was not claimed that the package searched belonged to anyone other than the driver, the Court nevertheless reasoned that "if the rule of law that *Ross* announced were limited to contents belonging to the driver, or contents other than those belonging to passengers, one would have expected that substantial limitation to be expressed." *Houghton*, 526 U.S. at 301-02. The Court further reasoned that "[a] passenger's personal belongings, just like the driver's belongings or containers attached to the car like a glove compartment, are 'in' the car, and the officer has probable cause to search for contraband *in* the car." (Emphasis in original.) 526 U.S. at 302. In addition, the Court held "[p]assengers, no less than drivers, possess a reduced expectation of privacy with regard to the property that they transport in cars . . . ." 526 U.S. at 303. The Court distinguished cases involving the search of a passenger's person, which it found to hold a significantly heightened protection, from searches of a passenger's belongings. See *United States v. Di Re*, 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210 (1948). The Court also found that a "criminal might be able to hide contraband in a passenger's belongings as readily as in other containers in the car." *Houghton*, 526 U.S. at 305. Rejecting the rationale applied by the Wyoming Supreme Court in determining the search to be invalid, the Supreme Court reasoned:

> To require that the investigating officer have positive reason to believe that the passenger and driver were engaged in a common enterprise, or positive reason to believe that the driver had time and occasion to conceal the item in the passenger's belongings, surreptitiously or with friendly

> permission, is to impose requirements so seldom met that a "passenger's property" rule would dramatically reduce the ability to find and seize contraband and evidence of crime. Of course these requirements would not attach (under the Wyoming Supreme Court's rule) until the police officer knows or has reason to know that the container belongs to a passenger. But once a "passenger's property" exception to car searches became widely known, one would expect passenger-confederates to claim everything as their own. And one would anticipate a bog of litigation—in the form of both civil lawsuits and motions to suppress in criminal trials—involving such questions as whether the officer should have believed a passenger's claim of ownership, whether he should have inferred ownership from various objective factors, whether he had probable cause to believe that the passenger was a confederate, or to believe the driver might have introduced the contraband into the package with or without the passenger's knowledge.

*Wyoming v. Houghton*, 526 U.S. 295, 305-06, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999).

[2] While recognizing that *Houghton* involved a probable cause search, the Court of Appeals found its reasoning equally applicable to a search incident to a lawful arrest. It concluded:

> We hold that when law enforcement officers are conducting a search of a motor vehicle incident to the driver's arrest, they may inspect passengers' personal belongings found in the passenger compartment of the motor vehicle, because to allow a distinction between packages or containers based on ownership would create an impracticable rule.

*State v. Ray*, 9 Neb. App. 183, 192, 609 N.W.2d 390, 397 (2000).

Several other courts addressing this issue have reached the same conclusion on facts similar to those of this case. For example, in *State v. Lopez*, 198 Ariz. 420, 10 P.3d 1207 (Ariz. App. 2000), the court held that after arresting the operator of a vehicle because he lacked proof of a driver's license, police were justified in searching a backpack found behind the front passenger seat which belonged to a passenger who had not been

arrested. The backpack contained a pair of trousers with packages of cocaine in the pockets. Relying upon the reasoning of *Houghton*, the court concluded that the backpack and trousers within it were lawfully searched incident to the driver's arrest, notwithstanding the fact that they were owned by the unarrested passenger. The court noted that "weapons and evidence of the arrestee's suspected offense can be concealed in a passenger's belongings," 198 Ariz. at 424, 10 P.3d at 1211, and held that as in the case of a vehicle search based upon probable cause, the needs of law enforcement in a search of a vehicle incident to the operator's arrest outweighed a nonarrested passenger's privacy interest in belongings found within the passenger compartment.

Similarly, in *State v. Steele*, 613 N.W.2d 825 (S.D. 2000), the South Dakota Supreme Court held that upon arresting the driver of a vehicle for probation violations and securing him in a patrol car, officers were justified in searching a purse belonging to a passenger, which purse was observed on the front seat of the vehicle at the time of the arrest. The court relied upon the reasoning of *Houghton* and further noted that the "legitimate governmental concerns" underlying the *Belton* rule could not be "negated by passenger discretion." *Steele*, 613 N.W.2d at 830. See, also, *People v. McMillon*, 892 P.2d 879 (Colo. 1995) (holding that under *Belton*, police may validly search belongings of passenger after driver of vehicle has been arrested so long as belongings are in vehicle when search is made); *People v. Mitchell*, 36 Cal. App. 4th 672, 42 Cal. Rptr. 2d 537 (1995) (holding that consistent with bright-line rule of *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), upon arresting occupant of vehicle, police may search passenger compartment and any containers therein, including containers belonging to nonarrested individuals); *State v. Moore*, 619 So. 2d 376 (Fla. App. 1993) (holding that after arresting driver of vehicle based upon outstanding warrants discovered during traffic stop, police had right under *Belton* to search vehicle, including passenger's purse which was found on front floorboard).

We agree that *Belton* established a bright-line rule which permits a warrantless search of the passenger compartment of a vehicle and containers situated therein incident to the lawful arrest of any occupant of the vehicle. We further agree that the

reasoning of *Wyoming v. Houghton*, 526 U.S. 295, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999), leads to the logical conclusion that the scope of such search extends to items of property within the passenger compartment at the time of the search belonging to an occupant of the vehicle who was not arrested. Accordingly, the Court of Appeals correctly determined that the district court did not err in denying Ray's motion to suppress evidence found in Ray's knapsack which was situated within the passenger compartment of Almery's vehicle at the commencement of the search incident to the lawful arrest of Almery.

## CONCLUSION

For the reasons stated above, upon further review of this matter, we affirm the holding and judgment of the Court of Appeals.

AFFIRMED.

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JEREMY D. PARNELL, APPELLANT, V. GOOD SAMARITAN HEALTH SYSTEMS, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS GOOD SAMARITAN HOSPITAL, APPELLEE.

620 N.W.2d 354

Filed December 15, 2000. No. S-99-925.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **Constitutional Law: Statutes: Special Legislation.** A legislative act constitutes special legislation, violative of Neb. Const. art. III, § 18, if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.
3. **Constitutional Law: Special Legislation.** When the Legislature confers privileges on a class arbitrarily selected from a large number of persons standing in the same relation to the privileges, without reasonable distinction or substantial difference, then the statute in question has resulted in the kind of improper discrimination prohibited by the Nebraska Constitution.
4. **Constitutional Law: Special Legislation: Public Policy.** A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified.
5. **Special Legislation.** Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference.

6. **Legislature: Public Policy.** The Legislature is the appropriate forum for resolution of questions concerning public policy.
7. **Statutes: Judicial Construction: Legislature: Intent: Presumptions.** 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.

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

James D. Carson and Eric W. Kruger, of Rickerson & Kruger, for appellant.

Neil B. Danberg, Jr., Lyman L. Larsen, and Michael J. Leahy, of Stinson, Mag & Fizzell, for appellee.

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

GERRARD, J.

## NATURE OF CASE

Jeremy D. Parnell sustained serious injuries in an automobile accident and received treatment at Good Samaritan Hospital (Good Samaritan). Good Samaritan filed a lien against a settlement obtained by Parnell pursuant to Neb. Rev. Stat. § 52-401 (Reissue 1998). The question presented in this appeal is whether § 52-401 constitutes unconstitutional special legislation because it provides an exception to the common fund doctrine.

## FACTUAL AND PROCEDURAL BACKGROUND

On July 25, 1996, Parnell was injured in a motor vehicle accident in Buffalo County, Nebraska. After the accident, Parnell received medical care at Good Samaritan. On November 11, 1997, Parnell entered into a settlement agreement with the alleged tort-feasor. The terms of the settlement acknowledged payment already made to Parnell in the amount of $400,000 and also provided for deferred lump-sum payments totaling $1,929,156 over a 40-year period.

Good Samaritan requested payment of unpaid bills in the amount of $56,043.73 and has perfected a lien, pursuant to § 52-401, against the proceeds of Parnell's personal injury set-

tlement. Parnell has received a check from the alleged tortfeasor's insurance company, dated November 10, 1997, and made payable to both Parnell and Good Samaritan in the amount of $57,039.28.

Parnell filed a declaratory judgment action seeking, inter alia, to have the district court determine that (1) Parnell's settlement was exempt from Good Samaritan's lien under Neb. Rev. Stat. § 25-1563.02 (Reissue 1995); (2) the amount claimed by Good Samaritan did not reflect the usual and customary charges for services rendered; and (3) § 52-401 was unconstitutional as special legislation under article III, § 18, of the Nebraska Constitution. Good Samaritan denied that there was a conflict between §§ 52-401 and 25-1563.02, alleged that § 25-1563.02 had no applicability to a lien perfected under § 52-401, and denied the unconstitutionality of § 52-401. In a counterclaim, Good Samaritan sought a declaratory judgment that its lien was valid in the amount of $57,039.28.

Good Samaritan filed a motion for summary judgment, and Parnell filed a motion for partial summary judgment. The district court denied Parnell's motion and granted Good Samaritan's motion, thereby dismissing Parnell's petition. The district court also granted summary judgment in favor of Good Samaritan on its counterclaim. The district court found that Good Samaritan had a hospital lien properly perfected, valid, and enforceable for services rendered to Parnell in the amount of $57,039.28; that this amount is the usual and customary value of the services actually provided by Good Samaritan to Parnell; that § 52-401 is constitutional; and that § 52-401 is not limited by § 25-1563.02. Parnell appeals.

## ASSIGNMENTS OF ERROR

Parnell assigns, restated, that the district court erred in (1) overruling his motion to compel discovery when the accounting records are needed to determine the usual and customary charges of Good Samaritan, (2) incorrectly determining that the amounts medical care providers actually receive for the services they render are not a relevant factor when determining the "usual and customary charges" under § 52-401, (3) granting Good Samaritan's motion for summary judgment when an issue

of material fact remained as to Good Samaritan's usual and customary charges, and (4) not finding § 52-401 to be unconstitutional special legislation.

## 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. *Dykes v. Scotts Bluff Cty. Ag. Socy.*, *ante* p. 375, 617 N.W.2d 817 (2000); *State ex rel. Stenberg v. Moore*, 258 Neb. 738, 605 N.W.2d 440 (2000).

## ANALYSIS

We first note, with respect to Parnell's first three assignments of error, that Parnell presented his argument with respect to "usual and customary charges" to this court in *Parnell v. Madonna Rehab. Hosp.*, 258 Neb. 125, 602 N.W.2d 461 (1999). In that case, we rejected Parnell's claim that "usual and customary charges" should be determined by considering the amounts actually collected by a service provider, instead of the amount charged. *Id.* Parnell conceded at oral argument that *Parnell v. Madonna Rehab. Hosp., supra*, would be determinative of the issues presented in the instant case as well. We agree. We decline to reconsider our decision in *Parnell v. Madonna Rehab. Hosp.* and on that authority, determine Parnell's first three assignments of error to be without merit. We therefore turn to Parnell's remaining assignment of error, claiming that § 52-401 is special legislation.

[2,3] A legislative act constitutes special legislation, violative of Neb. Const. art. III, § 18, if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class. *Bergan Mercy Health Sys. v. Haven*, *ante* p. 846, 620 N.W.2d 339 (2000); *Pfizer v. Lancaster Cty. Bd. of Equal.*, *ante* p. 265, 616 N.W.2d 326 (2000). When the Legislature confers privileges on a class arbitrarily selected from a large number of persons standing in the same relation to the privileges, without reasonable distinction or substantial difference, then the statute in question has resulted in the kind of improper discrimination prohibited by the Nebraska Constitution. *Bergan Mercy Health Sys. v. Haven, supra.*

[4,5] A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. *Id.*; *Big John's Billiards v. Balka, ante* p. 702, 619 N.W.2d 444 (2000). Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference. *Bergan Mercy Health Sys. v. Haven, supra.*

The sole argument offered by Parnell in his appellate brief as to why § 52-401 is unconstitutional is that it deprives him of the benefits of the common fund doctrine. Section 52-401 provides, in relevant part:

> Whenever any person employs a physician, nurse, or hospital to perform professional service or services of any nature, in the treatment of or in connection with an injury, and such injured person claims damages from the party causing the injury, such physician, nurse, or hospital, as the case may be, shall have a lien upon any sum awarded the injured person in judgment or obtained by settlement or compromise on the amount due for the usual and customary charges of such physician, nurse, or hospital applicable at the times services are performed . . . .
>
> . . . .
>
> A physician, nurse, or hospital claiming a lien under this section shall not be liable for attorney's fees and costs incurred by the injured person in securing the judgment, settlement, or compromise, but the lien of the injured person's attorney shall have precedence over the lien created by this section.

The latter paragraph of § 52-401 quoted above was enacted by the Legislature in response to this court's decision in *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994). In *In re Guardianship & Conservatorship of Bloomquist*, this court held that liens under § 52-401 were subject to the common fund doctrine, such that lienholders were liable for their pro rata portion of the legal expenses and costs where they sought payment out of a judgment or settlement for the amount of a lien filed pursuant to § 52-401.

In response, the Legislature enacted 1995 Neb. Laws, L.B. 172, which amended § 52-401 to provide, as quoted above, that physicians, nurses, or hospitals claiming a lien under § 52-401 were not liable for attorney fees and costs incurred by the injured person in securing the judgment, settlement, or compromise. It is this language that Parnell argues invalidates § 52-401 as special legislation because, Parnell claims, persons with access to third-party payment for injuries, such as insurance, are treated differently from those without such access.

Parnell argues that our decision in *In re Guardianship & Conservatorship of Bloomquist, supra*, established that when either a subrogated third party or a lienholder is benefited by an award of funds to a tort victim, the benefited party must share in the costs associated with the collection of those funds. Parnell notes that in *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. at 725, 523 N.W.2d at 360, this court stated that "[t]he lien statute grants hospitals a method of obtaining a full or partial recovery for the value of services that the hospitals would probably have 'written off' as uncollectible; and while not a windfall to the hospitals, the recovery should not come without costs."

Parnell argues that § 52-401, as amended, creates an unreasonable and arbitrary distinction between those who have access to insurance or other source of third-party payment and those who do not. Parnell argues that if an insured person, for instance, is the victim of a tort-feasor, the victim's insurer would pay the victim's bill from the medical care provider. The insurer would then be entitled to claim a subrogation interest in any judgment or settlement the tort victim might collect, but the amount the insurer could collect from the judgment or settlement would be subject to attorney fees and costs pursuant to the common fund doctrine. See *In re Guardianship & Conservatorship of Bloomquist, supra.*

On the other hand, if an uninsured person is injured by a tort-feasor, the medical care provider would be uncompensated and would act directly against the victim pursuant to § 52-401. If a judgment is rendered or settlement reached, the lienholder can then collect from the proceeds without being subject to the common fund doctrine. Thus, argues Parnell, tort victims with

otherwise identical injuries and expenses could ultimately be compensated differently because one would obtain the benefit of the common fund doctrine and the other would not.

We confronted similar questions regarding § 52-401 in *Bergan Mercy Health Sys. v. Haven, ante* p. 846, 620 N.W.2d 339 (2000), although we specifically reserved judgment on the question of the exception to the common fund doctrine, see *id.* (party did not argue issue of common fund doctrine, and court did not consider it). We examined the legislative history of 1995 Neb. Laws, L.B. 172, and determined that it had been decided by the Legislature that doctors, nurses, and hospitals should be compensated when funds are available from the responsible party.

> The testimony provided at the committee hearing on the bill provided support for the stated objectives of the legislation. The testimony provided by representatives of hospitals and health care professionals generally established that health care providers give care to injured persons without regard to a person's ability to pay for such care, and that the restriction placed on § 52-401 by *In re Guardianship & Conservatorship of Bloomquist* threatened the fiscal solvency of health care institutions, particularly to the continuing ability to afford provision of emergent care to indigent injured persons. See, generally, Committee on Health and Human Services Hearing, L.B. 172, 94th Leg., 1st Sess. (February 8, 1995). The testimony also established that some health care providers, deprived of the benefit of § 52-401, would resort to immediately pursuing collection efforts against injured parties and obtaining judgments against them, rather than simply securing a lien and waiting for a judgment or settlement against the tort-feasor. *Id.*

*Bergan Mercy Health Sys. v. Haven, ante* at 853-54, 620 N.W.2d at 346.

The concerns expressed by the Legislature in amending § 52-401, and noted by this court in *Bergan Mercy Health Sys. v. Haven, supra*, apply with equal force to the issue raised by Parnell in the instant case. The Legislature determined that application of the common fund doctrine to health care providers would threaten the fiscal solvency of those providers and would potentially endanger their ability to continue provid-

ing care to indigent injured persons. We noted in *Bergan Mercy Health Sys. v. Haven* that unlike other creditors, physicians, nurses, and hospitals may be called upon to provide services without first ascertaining the patient's ability to pay. We concluded that this was a reasonable distinction, as the public at large has a particular interest in encouraging physicians, nurses, and hospitals to provide care without regard to the patient's ability to pay. See *id.*

The same distinction and the same logic compel us to conclude that physicians, nurses, and hospitals are reasonably distinct from other creditors, such as third-party payors, where the application of the common fund doctrine is concerned. The logical consequence of this distinction, as noted by Parnell, is that injured parties who are covered by third-party payment schemes obtain the benefit of the common fund doctrine, while other injured parties do not. This distinction, however, was reasonably drawn by the Legislature in order to protect the ability of health care providers to offer treatment without first ascertaining the patient's ability to pay, and we cannot say that this policy choice was so untenable as to render the statute unconstitutional.

We also note that, generally, third-party payors are able to protect themselves against the application of the common fund doctrine. For example, insurers are aware that the doctrine could be applied to any subrogation interest they might assert and can consider that expense when establishing the premiums that they will charge for coverage. Additionally, in *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994), the lienholders in that case argued that application of the common fund doctrine to them should be limited because of the distinction between a subrogation interest and a hospital lien. The lienholders argued that, unlike subrogated insurers, hospital lienholders have no interest in the injured patient's cause of action against the third-party tort-feasor, no standing to participate in the injured patient's personal injury action, and no separate cause of action against the tort-feasor or the tort-feasor's insurer. See *id.*

[6,7] This court, in *In re Guardianship & Conservatorship of Bloomquist, supra*, found that public policy argument to be unpersuasive, but that does not compel us to conclude that the

distinction identified by the lienholders in that case would not support the Legislature's subsequent decision to amend § 52-401. The Legislature is the appropriate forum for resolution of questions concerning public policy. *Else v. Else*, 219 Neb. 878, 367 N.W.2d 701 (1985). We have often stated that 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. Neiss, ante* p. 691, 619 N.W.2d 222 (2000). In this instance, the Legislature did not acquiesce and exercised its prerogative to change the law. The action taken by the Legislature did not exceed its constitutional boundaries.

## CONCLUSION

For the foregoing reasons, we conclude that Parnell's assignments of error are without merit and, therefore, affirm the judgment of the district court.

AFFIRMED.

HENDRY, C.J., dissenting.

I respectfully dissent from the majority opinion insofar as it addresses Neb. Const. art III, § 18. As explained by my dissent in *Bergan Mercy Health Sys. v. Haven, ante* p. 846, 620 N.W.2d 339 (2000), the classes created by Neb. Rev. Stat. § 52-401 (Reissue 1998) with regard to a special legislation claim are (1) the particular class of physicians, nurses, and hospitals who receive the privilege of the lien and (2) the general class of those who likewise perform services of any nature in the treatment of, or in connection with, an injury without the privilege of the lien. Under the rationale set out in my dissent in *Bergan Mercy Health Sys.*, I believe Parnell lacks standing to assert that the class of physicians, nurses, and hospitals created by § 52-401 violates Neb. Const. art III, § 18. Accordingly, I withhold any opinion regarding whether § 52-401 violates Neb. Const. art III, § 18.

MCCORMACK, J., dissenting.

I respectfully dissent. It is obvious from the legislative history that the Legislature was responding to complaints from the hospitals who were unhappy with this court's decision 1 year before in *In re Guardianship & Conservatorship of Bloomquist*, 246

Neb. 711, 523 N.W.2d 352 (1994), wherein we ruled that the hospital must pay its proportionate share of the attorney fees from the recovery. The amendment to § 52-401 guts the *In re Guardianship & Conservatorship of Bloomquist* decision.

The stated purpose of the amendment to § 52-401 is to provide protection to those physicians, hospitals, and nurses who treat persons without any regard as to how that person is going to pay for those services. I do not have a quarrel with that purpose and would agree that any physician, hospital, or nurse who, when approached by a patient, does not require that before treatment is rendered, the patient show proof of insurance, medicare, or medicaid, or post a cash deposit if there is no insurance, or require another guaranty of payment, should get the protection of the stated purpose of § 52-401. However, I believe that the physicians, hospitals, or nurses seeking the protection afforded by § 52-401 should be required to make a showing that they do, in fact, regularly render health care without requiring, prior to rendering treatment, that the patient is covered by insurance, medicare, or medicaid or post a cash deposit, or require another guaranty of payment. Unless the physician, hospital, or nurse makes such a showing, there is no rational basis for affording this physician, hospital, or nurse the protection of § 52-401, and § 52-401 would be unconstitutional as to those particular physicians, hospitals, or nurses who do not make such a showing.

This case is troubling for another reason, namely, assignment of error No. 1, wherein the district court erred in overruling Parnell's motion to compel discovery for the accounting records of Good Samaritan. I joined in the unanimous decision of this court in *Parnell v. Madonna Rehab. Hosp.*, 258 Neb. 125, 602 N.W.2d 461 (1999), as to "usual and customary charges," and I believe that my thinking has changed on this subject. In today's society, the vast majority of patients who enter hospitals or visit physicians are insured in one way or another, be that a health maintenance or preferred provider organization, standard health insurance, medicare, medicaid, et cetera. A substantial number, if not the majority, of the medical bills of these persons are discounted by the insurance payor. To say that the "usual and customary charge" of a hospital is the amount it bills rather than the amount that it actually receives in payment is akin to assuming

that every person who goes into a new car dealership pays "sticker price." I have no idea what discovery of Good Samaritan's records would show as to the "usual and customary" amount actually collected as opposed to the gross amount of its bill before discounts, but I believe that the trial court abused its discretion in denying Parnell access to this information which, in turn, may have provided the basis for this court to reconsider its decision in *Parnell v. Madonna Rehab. Hosp.* I respectfully submit that this discovery would also have shed light, and therefore be relevant, on whether Good Samaritan accepts all patients without requiring, before treatment is rendered, that the patient show proof of insurance, medicare, or medicaid or post a cash deposit, or require another guaranty of payment.

Additional reasons for my dissent can be found in my dissent in *Bergan Mercy Health Sys. v. Haven, ante* p. 846, 620 N.W.2d 339 (2000), and will not be reiterated here.

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## THOMAS E. HAMILTON, INDIVIDUALLY AND ON BEHALF OF ELIZABETH A. HAMILTON ET AL., MINOR CHILDREN, APPELLANT, V. SHARON M. FOSTER, APPELLEE.

620 N.W.2d 103

Filed December 15, 2000. No. S-99-1349.

1. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
2. **Demurrer: Pleadings: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the legal conclusions of the pleader.
3. **Child Custody: Jurisdiction: States.** The Nebraska Child Custody Jurisdiction Act, Nebraska's version of the Uniform Child Custody Jurisdiction Act, speaks to the jurisdiction of courts of this state to modify child custody decisions initially determined in the courts of other states.
4. ___: ___: ___. The end goal of the Nebraska Child Custody Jurisdiction Act is that litigation concerning the custody of a child take place in the state which can best decide the case.
5. ___: ___: ___. Neb. Rev. Stat. § 43-1214 (Reissue 1998) establishes a strong preference for the state which originally determined custody to exercise its continuing juris-

diction if the jurisdictional prerequisites enumerated in the Nebraska Child Custody Jurisdiction Act are satisfied.

6. ___: ___: ___. Under Neb. Rev. Stat. § 43-1214 (Reissue 1998), it must first be determined whether the issuing state appears to have continuing exclusive jurisdiction under the jurisdictional prerequisites enumerated in the Uniform Child Custody Jurisdiction Act.
7. **Child Custody: Modification of Decree: Jurisdiction: States.** If the issuing state no longer has continuing exclusive jurisdiction, a custody decree may be modified by a Nebraska court if Nebraska itself has jurisdiction under the Nebraska Child Custody Jurisdiction Act.
8. **Child Custody: Jurisdiction: States: Proof.** When the issuing state no longer has continuing exclusive jurisdiction, Neb. Rev. Stat. § 43-1214(1)(a) (Reissue 1998) is satisfied and there is no requirement that a petitioner also show that the issuing state "declined" jurisdiction.
9. **Child Custody: Modification of Decree: Jurisdiction: States.** If the issuing state continues to have jurisdiction under the jurisdictional prerequisites enumerated in the Uniform Child Custody Jurisdiction Act, that exclusive jurisdiction cannot be vitiated by another state. In such a case, the issuing state must first decline to exercise jurisdiction before a custody decree may be modified in another state.
10. ___: ___: ___: ___. The state which initially enters a custody decree may lose continuing exclusive jurisdiction to modify the decree if it loses all or almost all connection with the child.
11. **Jurisdiction.** Continuing exclusive jurisdiction is not without limits.
12. **Child Custody: Jurisdiction: States.** When a child and all parties have moved away from the state in which an initial custody decree was granted, deference to that state's continuing jurisdiction is no longer required.
13. **Child Custody: Modification of Decree: Jurisdiction: States.** Generally, when another state has entered a child custody decree and one of the parents remains a resident of that state, the courts of this state are without jurisdiction to modify custody unless the first state affirmatively declines jurisdiction.
14. **Child Custody: Jurisdiction: States.** The fact that a parent continues to reside in the issuing state is not alone sufficient to show that the issuing state retains continuing exclusive jurisdiction.
15. ___: ___: ___. In order for the issuing state to retain continuing exclusive jurisdiction, not only must a parent or other contestant reside in that state, but the child must continue to have a significant connection with that state.
16. **Child Custody: Jurisdiction: States: Visitation.** The state in which the initial decree was entered has exclusive continuing jurisdiction to modify an initial custody decree if (1) one of the parents continues to reside in the decree state and (2) the child continues to have some connection with the decree state, such as visitation.
17. **Child Custody: Modification of Decree: Jurisdiction: States.** The issuing court will continue to have modification jurisdiction so long as one of the parties remains in the state and so long as the child's contact with the state continues to be more than slight. When all parties move out of the issuing state *or* when a parent remains in the issuing state but has no contact with the child, contact with the issuing state has become slight.

18. **Parent and Child: Jurisdiction.** Even if a parent resides in the issuing state, that state may still lose continuing exclusive jurisdiction if that parent does not maintain contact with the child.
19. **Child Custody: Jurisdiction.** Under the Nebraska Child Custody Jurisdiction Act, one of the circumstances under which a Nebraska court may exercise jurisdiction in a child custody case is when Nebraska is the child's home state.
20. **Child Support: States.** The general purpose of the Uniform Interstate Family Support Act is to unify state laws relating to the establishment, enforcement, and modification of child support orders.
21. ___: ___. The goal of the Uniform Interstate Family Support Act is to streamline and expedite interstate enforcement of support decrees and to eliminate the problems arising from multiple or conflicting support orders from various states by providing for one tribunal to have continuing and exclusive jurisdiction to establish or modify a child support order.
22. ___: ___. The Uniform Interstate Family Support Act provides a system where only one child support order may be in effect at any one time.
23. **Child Support: Modification of Decree: Jurisdiction: States.** The Uniform Interstate Family Support Act allows, under certain circumstances, a Nebraska court to enforce or modify a support order issued in another state or to establish a support order on behalf of a nonresident of this state when a Nebraska court has jurisdiction over the person obligated to pay support.
24. **Child Support: States.** The Uniform Interstate Family Support Act does not create an independent duty of support.
25. **Child Support: Liability.** Neb. Rev. Stat. § 43-1402 (Reissue 1998), which deals with liability for child support, speaks in terms of only parents, the mother and father, being liable for the support of children.
26. **Parent and Child: Words and Phrases.** A person standing in loco parentis to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent.
27. **Parent and Child.** In order to stand in loco parentis, one must assume all obligations incident to the parental relationship.
28. ___. Once the person alleged to be in loco parentis no longer discharges all duties incident to the parental relationship, the person is no longer in loco parentis.
29. ___. Termination of the in loco parentis relationship also terminates the corresponding rights and responsibilities afforded thereby.
30. ___. Once the person alleged to be in loco parentis denies the obligation to support the child, the in loco parentis relationship terminates.
31. **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.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Lisa C. Lewis for appellant.

Benjamin M. Belmont, of Lustgarten & Roberts, P.C., for appellee.

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

HENDRY, C.J.

## INTRODUCTION

Thomas E. Hamilton brought this action against his former girl friend, Sharon M. Foster, requesting that the court award sole custody of Hamilton's three granddaughters to Hamilton and order Foster to pay child support. Foster demurred to Hamilton's petition for failure to state a cause of action. The district court sustained the demurrer and dismissed the action. Hamilton appealed, and we moved the case to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

## BACKGROUND

Hamilton's petition alleges, inter alia, the following: For 14 years, Hamilton and Foster lived together and held themselves out to be husband and wife, although the two were never married. For approximately 10 years, Hamilton's three granddaughters resided with Hamilton and Foster.

On May 21, 1993, the district court for Denver, Colorado, entered an order awarding "permanent custody" of the three children to Hamilton and Foster. The order provided that the children's parents, Wendy Rettig and Stephen Rettig, were not to have visitation with the children. The court also ordered Wendy Rettig to pay $25 per month and Stephen Rettig to pay $100 per month in child support. The matter was then reviewed on January 18, 1994, resulting in the child support obligation of Stephen Rettig to be increased to $200 per month. In addition, the Rettigs were not to have visitation with the children unless authorized by the children's therapist. No further review of the case was scheduled. Copies of both the May 21, 1993, and January 18, 1994, orders from the Colorado court were incorporated in Hamilton's petition.

Hamilton further alleged that the Rettigs have not had any contact with the children since January 1994. The Rettigs' exact whereabouts are unknown, other than that Stephen Rettig resides in Denver, Colorado, and Wendy Rettig may reside in Las Vegas, Nevada. The Rettigs have not paid any child support for the children, and the likelihood of the Rettigs providing support is, according to Hamilton's petition, "nonexistent."

In 1997, Hamilton, Foster, and the children moved to Omaha, Nebraska. In July 1999, Hamilton and Foster separated. Hamilton and the children moved to another residence in Omaha. Foster also continues to reside in Omaha.

On October 8, 1999, Hamilton filed a petition in Douglas County District Court requesting that he be awarded sole custody of the three children and that Foster be afforded reasonable visitation and be required to pay support for the children. Hamilton based his petition on the Nebraska Child Custody Jurisdiction Act (NCCJA), Neb. Rev. Stat. §§ 43-1201 to 43-1225 (Reissue 1998), and the Uniform Interstate Family Support Act (UIFSA), Neb. Rev. Stat. §§ 42-701 to 42-7,105 (Reissue 1998).

In response, Foster filed a demurrer, claiming that Hamilton's petition failed to state a cause of action because Foster had no legal duty to provide support for the children under UIFSA or any other statute. In an order dated November 24, 1999, the district court sustained Foster's demurrer, finding that the petition failed to state a cause of action. The court further determined that Hamilton would be unable to amend his petition to state a cause of action because neither UIFSA nor any other statute imposed a duty upon Foster to provide support for the children. The order did not specifically address the reason for dismissing Hamilton's request for sole custody pursuant to the NCCJA. Hamilton now appeals.

## ASSIGNMENTS OF ERROR

Hamilton claims, restated and summarized, that the district court erred in (1) determining that Hamilton had not stated a cause of action under the NCCJA and sustaining Foster's demurrer as to that claim, (2) finding that Hamilton's petition failed to state a cause of action under UIFSA, (3) failing to find that Foster

had a duty to support the children under UIFSA based on the fact that she was named joint custodian of the children pursuant to the Colorado custody order, and (4) not allowing Hamilton to amend his petition to allege facts sufficient to show that Foster had a duty to support the children under the doctrine of in loco parentis.

## STANDARD OF REVIEW

[1,2] Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *Brown v. Social Settlement Assn.*, 259 Neb. 390, 610 N.W.2d 9 (2000). When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the legal conclusions of the pleader. *Id.*

## ANALYSIS

### HAMILTON'S CLAIM UNDER NCCJA

Hamilton claims that the district court erred in determining that Hamilton had not stated a cause of action under the NCCJA and sustaining Foster's demurrer as to that claim. The district court's order did not specifically address Hamilton's custody claim, other than to simply dismiss the entire case based on the determination that Foster had no duty to pay child support.

[3,4] The NCCJA, Nebraska's version of the Uniform Child Custody Jurisdiction Act (UCCJA), speaks to the jurisdiction of courts of this state to modify child custody decisions initially determined in the courts of other states. § 43-1203. See, also, *Dorszynski v. Reier*, 6 Neb. App. 877, 578 N.W.2d 457 (1998). The end goal of the NCCJA is that litigation concerning the custody of a child take place in the state which can best decide the case. § 43-1201. See, also, *Dorszynski, supra.*

In the present case, the Colorado court entered an initial custody decree awarding permanent custody of the children to Hamilton and Foster. By filing a petition under the NCCJA in Douglas County District Court, Hamilton sought to have the Colorado custody decree modified in Nebraska, awarding sole custody to Hamilton.

Section 43-1214 of the NCCJA, which is identical to § 14 of the UCCJA, provides for a court in this state to modify a custody decree issued in another state under certain circumstances. Section 43-1214(1) states:

> If a court of another state has made a custody decree, a court of this state shall not modify that decree unless (a) it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with sections 43-1201 to 43-1225 or has declined to assume jurisdiction to modify the decree and (b) the court of this state has jurisdiction.

[5] This section establishes a strong preference for the state which originally determined custody to exercise its continuing jurisdiction if the jurisdictional prerequisites enumerated in that state's version of the UCCJA are satisfied. *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994). Such jurisdictional prerequisites are set forth in § 43-1203, which provides in relevant part:

> (1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
>
> (a) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding . . . .
>
> (b) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his or her parents, or the child and at least one contestant, have a significant connection with this state and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

Colorado has enacted substantially similar jurisdictional prerequisites which were in effect at the time Hamilton's petition was filed. See Colo. Rev. Stat. Ann. § 14-13-104 (West 1997).

[6-9] In determining whether a Nebraska court should exercise jurisdiction to modify a custody decree issued in another state, we begin with § 43-1214. See *Range v. Range*, 232 Neb.

410, 440 N.W.2d 691 (1989). See, also, *Kumar v. Superior Court of Santa Clara Cty.*, 32 Cal. 3d 689, 652 P.2d 1003, 186 Cal. Rptr. 772 (1982). Under this section, it must first be determined whether the issuing state appears to have continuing exclusive jurisdiction under the jurisdictional prerequisites enumerated in the UCCJA. See § 43-1214(1)(a). See, also, *State in Interest of D.S.K.*, 792 P.2d 118 (Utah App. 1990). If the issuing state no longer has continuing exclusive jurisdiction, a custody decree may be modified by a Nebraska court if Nebraska itself has jurisdiction under the NCCJA. § 43-1214(1)(a) and (b). See, also, *State in Interest of D.S.K, supra.* When the issuing state no longer has continuing exclusive jurisdiction, § 43-1214(1)(a) is satisfied and there is no requirement that a petitioner also show that the issuing state "declined" jurisdiction. See, *State in Interest of D.S.K., supra*; *Kumar, supra.* However, if the issuing state continues to have jurisdiction under the jurisdictional prerequisites enumerated in its version of the UCCJA, that exclusive jurisdiction cannot be vitiated by another state. See *State in Interest of D.S.K., supra.* In such a case, the issuing state must first decline to exercise jurisdiction before a custody decree may be modified in another state. *Id.*; *Kumar, supra.* See, also, § 43-1214(1)(a).

Thus, in order to satisfy § 43-1214(1)(a), Hamilton must plead facts sufficient to show one of two things: (1) that the Colorado court which rendered the initial decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with the NCCJA *or* (2) if the Colorado court continues to have jurisdiction, that it has declined to assume jurisdiction to modify the decree. Hamilton has not alleged in his petition that Colorado has declined to assume jurisdiction. However, if Hamilton has pled facts sufficient to show that Colorado no longer has continuing exclusive jurisdiction, he may still satisfy § 43-1214(1)(a).

[10,11] The state which initially enters a custody decree may lose continuing exclusive jurisdiction to modify the decree if it loses all or almost all connection with the child. *Range, supra.* See, also, *Butler v. Grant*, 714 A.2d 747 (Del. 1998); *Lough v. Superior Court (Lough)*, 8 Cal. App. 4th 136, 10 Cal. Rptr. 2d 250 (1992); *Kumar, supra.* Clearly, continuing exclusive juris-

diction is not without limits. *In re Gloria F.*, 212 Cal. App. 3d 576, 260 Cal. Rptr. 706 (1989).

Professor Bodenheimer, reporter for the special committee which drafted the UCCJA, provided the following often-quoted interpretation of § 14 of the UCCJA:

> In other words, the continuing jurisdiction of the prior court is exclusive. Other states do not have jurisdiction to modify the decree. They must respect and defer to the prior state's continuing jurisdiction. . . .
>
> . . . .
>
> Exclusive continuing jurisdiction is not affected by the child's residence in another state for six months or more. Although the new state becomes the child's home state, significant connection jurisdiction continues in the state of the prior decree where the court record and other evidence exists and where one parent or another contestant continues to reside. Only when the child and all parties have moved away is deference to another state's continuing jurisdiction no longer required.

Brigitte M. Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA*, 14 Fam. L.Q. 203, 214-15 (1981).

[12] Likewise, this court has recognized that when a child and all parties have moved away from the state in which an initial custody decree was granted, deference to that state's continuing jurisdiction is no longer required. *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996). Deference to the issuing state's continuing jurisdiction is no longer required because when the child and the parents have moved away from the issuing state, the issuing state no longer meets the jurisdictional prerequisites of § 43-1203(b).

[13-15] This court has further stated that generally, when another state has entered a child custody decree and one of the parents remains a resident of that state, the courts of this state are without jurisdiction to modify custody unless the first state affirmatively declines jurisdiction. *In re Interest of L.W.*, 241 Neb. 84, 486 N.W.2d 486 (1992); *In re Interest of J.L.H., J.L.H., and R.H.*, 2 Neb. App. 40, 507 N.W.2d 641 (1993). However, the fact that a parent continues to reside in the issuing state is not

alone sufficient to show that the issuing state retains continuing exclusive jurisdiction. The UCCJA is not meant to simply mediate jurisdictional disputes, but to direct litigation to the state best able to resolve it. *In re Gloria F., supra.* Thus, in order for the issuing state to retain continuing exclusive jurisdiction, not only must a parent or other contestant reside in that state, but the child must continue to have a "significant connection" with that state. § 43-1203(b)(i).

The comments to § 14 of the UCCJA provide guidance as to under what circumstances an issuing state would lose continuing jurisdiction, stating:

> In order to achieve greater stability of custody arrangements and avoid forum shopping, subsection (a) declares that other states will defer to the continuing jurisdiction of the court of another state as long as that state has jurisdiction under the standards of this Act. In other words, all petitions for modification are to be addressed to the prior state if that state has sufficient contact with the case . . . . If, however, all the persons involved have moved away *or the contact with the state has otherwise become slight*, modification jurisdiction would shift elsewhere.

(Emphasis supplied.) Unif. Child Custody Jurisdiction Act § 14, comment, 9IA U.L.A. 580 (1999).

Professor Bodenheimer provides the following example of a situation in which the issuing state would no longer have continuing exclusive jurisdiction to modify that decree:

> A typical example is the case of the couple who are divorced in state *A*, their matrimonial home state, and whose children are awarded to the wife, subject to visitation rights of the husband. Wife and children move to state *B*, with or without permission of the court to remove the children. State *A* has continuing jurisdiction and the courts in state *B* may not hear the wife's petition to make her the sole custodian, eliminate visitation rights, or make any other modification of the decree, even though state *B* has in the meantime become the "home state" under section 3. The jurisdiction of state *A* continues and is exclusive as long as the husband lives in state *A unless he loses contact*

> *with the children, for example, by not using his visitation privileges for three years.*

(Emphasis supplied.) Brigitte M. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 Vand. L. Rev. 1207, 1237 (1969). See, also, *Marriage of Greenlaw*, 123 Wash. 2d 593, 869 P.2d 1024 (1994); *State in Interest of D.S.K.*, 792 P.2d 118 (Utah App. 1990); *Kumar v. Superior Court of Santa Clara Cty.*, 32 Cal. 3d 689, 652 P.2d 1003, 186 Cal. Rptr. 772 (1982).

[16] The majority of courts that have considered the issue of continuing jurisdiction have followed Professor Bodenheimer's reading of the UCCJA and have held that " 'the state in which the initial decree was entered has exclusive continuing jurisdiction to modify the initial decree if: (1) one of the parents continues to reside in the decree state; and (2) the child continues to have some connection with the decree state, such as visitation.' " *Butler v. Grant*, 714 A.2d 747, 752 (Del. 1998), quoting *Marriage of Greenlaw, supra.* See, also, *State in Interest of D.S.K., supra*; *Lough v. Superior Court (Lough)*, 8 Cal. App. 4th 136, 10 Cal. Rptr. 2d 250 (1992); *Daves v. Daves*, 173 Cal. App. 3d 97, 218 Cal. Rptr. 879 (1985).

[17,18] As stated in *Marriage of Greenlaw*, 123 Wash. 2d at 597, 869 P.2d at 1027, the issuing court will continue to have modification jurisdiction "so long as one of the parties remains in the state and so long as the child's contact with the state continues to be more than slight." When all parties move out of the issuing state *or* when a parent remains in the issuing state but has no contact with the child, contact with the issuing state has become slight. *Daves, supra.* Thus, even if a parent resides in the issuing state, that state may still lose continuing exclusive jurisdiction if that parent does not maintain contact with the child. In such a case, the child no longer has a "significant connection" with the issuing state as required under § 43-1203(b)(i), and the issuing state no longer meets the jurisdictional prerequisites of the UCCJA.

In the present case, the biological father resides in Colorado, the issuing state. However, the father does not have custody or visitation rights and has had no contact with the children since

1994. Hamilton, Foster, and the children have all moved away from the State of Colorado, and according to Hamilton's petition, the children have not lived in Colorado since 1992. The children have lived in Nebraska since 1997. The children's only arguable connection with the State of Colorado is that their biological father, who has had no contact with the children since 1994, resides in that state. Accepting as true the facts pled and the reasonable inferences therefrom, Hamilton has alleged facts sufficient to show that Colorado has lost all or almost all connection with the children and thus no longer has continuing jurisdiction. Because Colorado no longer has continuing jurisdiction, Hamilton is not required to show that Colorado has declined jurisdiction. Hamilton has pled facts sufficient to satisfy § 43-1214(1)(a).

[19] The next step in this analysis is to determine whether Hamilton has sufficiently alleged that Nebraska has acquired jurisdiction over the case as required by § 43-1214(1)(b). Under the NCCJA, one of the circumstances under which a Nebraska court may exercise jurisdiction in a child custody case is when Nebraska is the child's "home state." § 43-1203(a). "Home state" is defined as "the state in which the child immediately preceding the time involved lived with his or her parents, a parent, or a person acting as parent, for at least six consecutive months." § 43-1202(5). In his petition, Hamilton alleged that he, Foster, and the children had been residents of Nebraska for over 1 year at the time of the filing of the petition and continued to reside in Nebraska. Thus, Nebraska is now the children's home state, and the Nebraska court could properly exercise jurisdiction.

Hamilton's petition also includes the additional information required as part of a pleading under the NCCJA. See § 43-1209 (requiring that pleading include children's present address and addresses over past 5 years, names and addresses of persons with whom children lived during that period, whether that party has participated in any other litigation concerning custody of these children, whether there is another pending custody proceeding regarding these children, and whether that party knows of any person not party to proceedings who has physical custody, or claims to have custody or visitation rights). The trial court granted Foster's demurrer on the ground that Foster had no

legal duty to support the children, but failed to address the issue of whether the Nebraska court had jurisdiction to modify the Colorado custody order with respect to the issue of custody only. We determine that Hamilton has alleged sufficient facts to state a cause of action for modification of custody under § 43-1214. Thus, the district court erred insofar as it sustained Foster's demurrer and dismissed Hamilton's custody claim under the NCCJA.

### HAMILTON'S CLAIM UNDER UIFSA

The trial court also dismissed Hamilton's claim for child support, determining that Hamilton did not state a cause of action against Foster for child support under UIFSA. The court further determined that Hamilton could not amend his petition to establish a legal duty on the part of Foster to pay support. Hamilton asserts that his petition contained sufficient facts to state a cause of action under UIFSA. Foster claims that UIFSA is simply not applicable to the claim Hamilton is asserting in this case.

[20-24] UIFSA, as its name implies, deals with the interstate enforcement and modification of support orders. The general purpose of UIFSA is to unify state laws relating to the establishment, enforcement, and modification of child support orders. *Groseth v. Groseth*, 257 Neb. 525, 600 N.W.2d 159 (1999); *Kasdan v. Berney*, 587 N.W.2d 319 (Minn. App. 1999). The goal of UIFSA is to streamline and expedite interstate enforcement of support decrees and to eliminate the problems arising from multiple or conflicting support orders from various states by providing for one tribunal to have continuing and exclusive jurisdiction to establish or modify a child support order. See, *OCSE v. Clemmons*, 65 Ark. App. 84, 984 S.W.2d 837 (1999); *Reis v. Zimmer*, 263 A.D.2d 136, 700 N.Y.S.2d 609 (1999); *In re Marriage of Zinke*, 967 P.2d 210 (Colo. App. 1998); *Cowan v. Moreno*, 903 S.W.2d 119 (Tex. App. 1995). UIFSA provides a system where only one child support order may be in effect at any one time. See Unif. Interstate Family Support Act, Prefatory Note, 9IB U.L.A. 241 (1999). See, also, *Linn v. Child Support Enforcement*, 736 A.2d 954 (Del. 1999). UIFSA allows, under certain circumstances, a Nebraska court to enforce or modify a support order issued in another state or to establish a support

order on behalf of a nonresident of this state when a Nebraska court has jurisdiction over the person obligated to pay support. See §§ 42-701 to 42-7,105. Hamilton asserts that under UIFSA, "[a] person can assume a duty to support a child." Brief for appellant at 12. However, UIFSA does not create an independent duty of support. The purpose of UIFSA in regard to child support is to enforce or establish a child support order against someone who has a duty to pay support or to modify an existing child support order when interstate aspects are involved. See § 42-714. Thus, Hamilton cannot use UIFSA to create a duty on Foster's part to pay support. UIFSA's provisions may only be used to enforce an existing support order, establish a support order where no order has previously been established, or modify an existing support order. See §§ 42-714 and 42-733. Hamilton may utilize UIFSA only if his claim fits one of these categories. The claim does not fit for several reasons.

First, Hamilton's claim is not for enforcement of a child support order issued in another state. He is not seeking enforcement of the biological parents' child support obligation as established in the Colorado order. Hamilton's petition states that any possibility that the biological parents will pay support is nonexistent.

Second, Hamilton's claim is not for the establishment of a child support order. Section 42-733 provides in relevant part: "(a) If a support order entitled to recognition under the Uniform Interstate Family Support Act has not been issued, a responding tribunal of this state may issue a support order if: (1) the individual seeking the order resides in another state . . . ."

This section is inapplicable to Hamilton's claim for two reasons. Section 42-733 applies only when a support order entitled to recognition under UIFSA "*has not been issued.*" In the present case, a support order entitled to recognition regarding these children has been issued by the Colorado court. Section 42-711 provides for recognition of support orders under UIFSA. This section provides that if "only one tribunal has issued a child support order, the order of that tribunal controls and must be so recognized." § 42-711(a). In the present case, only one tribunal has issued a support order, and thus the Colorado order is entitled to recognition and is the controlling order. Additionally, under § 42-733(a)(1), the individual seeking the order must reside in

another state. In the present case, Hamilton, the person seeking the order, does not reside in another state, but resides in Nebraska. Thus, this situation does not involve the establishment of a support order under § 42-733.

Third, Hamiliton's claim is not for modification of a support order recognized under UIFSA. Sections 42-746 and 42-747.01 provide for modification of a child support order issued in another state. However, the facts as pled by Hamilton show that § 42-747.01 is not applicable in this case. This section provides in relevant part: "If all of the parties who are individuals reside in this state and the child does not reside in the issuing state, a tribunal of this state has jurisdiction to enforce and to modify the issuing state's child support order in a proceeding to register that order." § 42-747.01(a).

In the present case, all of the parties to the original child support order do not reside in Nebraska. Only Hamilton, Foster, and the children reside in Nebraska. According to Hamilton's petition, the biological parents, who were ordered to pay support under the Colorado order, do not reside in Nebraska. Thus, all parties to the original Colorado support order which Hamilton seeks to modify do not reside in Nebraska and § 42-747.01 is not applicable.

When § 42-747.01 is not applicable, § 42-746 may allow modification of a support order entered in another state. Section 42-746 provides in relevant part:

> (a) After a child support order issued in another state has been registered in this state, the responding tribunal of this state may modify that order only if section 42-747.01 does not apply and after notice and hearing it finds that:
>
> (1) the following requirements are met:
>
> (i) the child, the individual obligee, and the obligor do not reside in the issuing state;
>
> (ii) a petitioner who is a nonresident of this state seeks modification; and
>
> (iii) the respondent is subject to the personal jurisdiction of the tribunal of this state; or
>
> (2) the child, or a party who is an individual, is subject to the personal jurisdiction of the tribunal of this state and all of the parties who are individuals have filed written

> consents in the issuing tribunal for a tribunal of this state to modify the support order and assume continuing, exclusive jurisdiction over the order.

The facts as pled by Hamilton reveal that § 42-746 is not applicable in this case. This section is inapplicable because the petitioner, Hamilton, is not a "nonresident" of this state as required under § 42-746(a)(ii). Hamilton's petition states that he is a resident of Nebraska. Furthermore, Hamilton's petition contains no allegation that the parties have agreed by written consent to submit to the jurisdiction of the Nebraska court under § 42-746(a)(2). Hamilton would be unable to amend his petition to make such an allegation. Even if Hamilton could obtain the biological parents' consent, it is reasonable to infer from the facts pled that Foster would not be willing to file a consent allowing modification to take place in Nebraska. Thus, neither § 42-746 nor § 42-747.01, which allow for modification of support orders, apply under the circumstances of this case.

We conclude that UIFSA provisions are not applicable in the present case because Hamilton's claim does not fit any of the three situations under which UIFSA may be utilized regarding child support. The UIFSA provisions relating to enforcement, establishment, or modification of child support orders simply do not apply to Hamilton's claim.

Hamilton's petition also fails to allege facts sufficient to establish a duty of support on Foster's part on any other basis. In his petition, Hamilton alleges that "under the Uniform Interstate Family Support Act, the Respondent, as joint permanent custodian of the minor children owes a duty of support to the minor children." Hamilton cites the Alabama case of *Ex parte Lipscomb*, 660 So. 2d 986 (Ala. 1994), in support of this proposition. In *Ex parte Lipscomb*, a grandfather and his wife, who was not the child's biological grandmother, were granted "legal custody" of the grandfather's grandchild pursuant to an Alabama statute which expressly provided for this type of custody arrangement. The child's mother was incarcerated, but her parental rights had not been terminated. The grandfather and his wife divorced. The wife was granted custody of the grandchild, and the grandfather was ordered to pay support. The grandfather appealed the order of support, contending that

he had no legal duty to pay support. The Alabama Supreme Court determined that the grandfather had a duty to support the child because he was granted "legal custody" of the child pursuant to the Alabama statute that specifically provided for the grant of such custody and a consequent duty of support. The court determined that because, at the time of the divorce, the grandfather had "legal custody" as specifically defined by the statute, he had a duty to pay child support as ordered in the divorce decree.

[25] *Ex parte Lipscomb* is clearly distinguishable from the present case. *Ex parte Lipscomb* did not involve any interstate issues. The majority of the court in *Ex parte Lipscomb* simply determined that the Alabama legal custody statute created a duty of support in Alabama, the state in which the support order was originally sought. Nebraska has no similar statute. Section 43-1402, which deals with liability for child support, speaks in terms of only parents, the "mother" and "father," being liable for the support of children. Furthermore, as previously determined, UIFSA does not create an independent duty of support and, in any event, UIFSA is not applicable to Hamilton's claim. Hamilton has failed to allege a duty on Foster's part to support the children under this theory and would be unable to amend his petition to establish such a duty under these circumstances.

[26] Finally, Hamilton claims that the trial court erred in not allowing him to amend his petition to assert a duty on the part of Foster to pay child support under the doctrine of in loco parentis. A person standing in loco parentis to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent. *Weinand v. Weinand, ante* p. 146, 616 N.W.2d 1 (2000); *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998). The assumption of the relationship is a question of intention, which may be shown by the acts and declarations of the person alleged to stand in that relationship. *Id.* Hamilton argues that he was not permitted to amend his petition to show such relationship between Foster and the children.

[27-29] In order to stand in loco parentis, one must assume all obligations incident to the parental relationship. *Weinand, supra.* These obligations include providing support for the child and providing day-to-day care for the child. See *id.* Once the person alleged to be in loco parentis no longer discharges all duties incident to the parental relationship, the person is no longer in loco parentis. See *Weinand, supra.* See, also, *Quintela v. Quintela*, 4 Neb. App. 396, 544 N.W.2d 111 (1996). Termination of the in loco parentis relationship also terminates the corresponding rights and responsibilities afforded thereby. *Quintela, supra.* See, also, *State on behalf of Hopkins, supra*; *State on behalf of J.R. v. Mendoza*, 240 Neb. 149, 481 N.W.2d 165 (1992); *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991).

In the recent case of *Weinand, supra*, this court determined that a child's ex-stepfather was no longer in loco parentis because he was no longer living in the same household as the child and was not carrying out the day-to-day functions of a father, even though he visited the child two to three times a week and was voluntarily paying child support. We determined that because the ex-stepfather was no longer discharging all of the duties of a parent, he was no longer in loco parentis and could not be ordered to pay child support under that doctrine.

[30] Likewise, in the present case, Foster is no longer living in the same household as the children and it is reasonable to infer from the facts pled that she is no longer providing for their daily care. Furthermore, once the person alleged to be in loco parentis denies the obligation to support the child, the in loco parentis relationship terminates. See *Quintela, supra.* A reasonable inference may be drawn from Hamilton's petition requesting that the court enter an order requiring Foster to pay support that Foster has declined to support the children. Accepting as true the facts pled in Hamilton's petition and the reasonable inferences therefrom, we find that Foster has terminated her in loco parentis relationship because she is no longer discharging all duties incident to the parental relation. Thus, she may not be ordered to pay child support on that basis.

[31] Hamilton has failed to allege facts sufficient to show a duty on Foster's part to pay child support. If, upon the sustain-

ment 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. *Wilkinson v. Methodist, Richard Young Hosp.*, 259 Neb. 745, 612 N.W.2d 213 (2000). The trial court properly granted Foster's demurrer as to the issue of Hamilton's claim for child support and properly determined that Hamilton would be unable to amend his pleading to allege a duty of support on Foster's part.

## CONCLUSION

Hamilton's petition states a cause of action under the NCCJA on the issue of custody. The trial court erred in granting Foster's demurrer and dismissing Hamilton's custody claim. Hamilton's petition fails to state a cause of action against Foster for child support based on UIFSA or any other grounds. Hamilton would be unable to amend his petition to allege such a duty, and the trial court did not err in dismissing Hamilton's claim for child support without granting leave to amend. The cause is remanded for further proceedings consistent with this opinion.

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

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## CREIGHTON ST. JOSEPH REGIONAL HOSPITAL, APPELLANT, V. NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION AND DOUGLAS COUNTY BOARD OF EQUALIZATION, APPELLEES.

620 N.W.2d 90

Filed December 15, 2000. No. S-99-1398.

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. **Taxation: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the Tax Equalization and Review Commission.
3. **Statutes: Legislature: Intent.** In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
4. ___: ___: ___. The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.

5. **Statutes: Judicial Construction: Legislature: Intent: Presumptions.** 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.
6. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there.
7. **Taxation: Jurisdiction: Fees: Appeal and Error.** The failure to pay a filing fee at the time of filing an appeal pursuant to Neb. Rev. Stat. § 77-5013 (Cum. Supp. 2000) is not a jurisdictional flaw that subjects the appeal to an automatic dismissal by the Tax Equalization and Review Commission.
8. **Taxation: Fees: Appeal and Error.** The Supreme Court's determination that the filing fee under Neb. Rev. Stat. § 77-5013 (Cum. Supp. 2000) is not jurisdictional does not mean that the filing fee is discretionary. The Tax Equalization and Review Commission may insist upon the payment of the filing fee prior to consideration of any appeal, and dismissal of an appeal may ultimately be an appropriate remedy in the event that an appellant fails to comply with the statutory filing fee requirement within a reasonable period of time.
9. **Statutes: Words and Phrases.** As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion.
10. **Administrative Law: Statutes.** A legislative enactment may properly confer general powers upon an administrative agency and delegate to the agency the power to make rules and regulations concerning the details of the legislative purpose.
11. ___: ___. An administrative agency is limited in its rulemaking authority to powers granted to the agency by the statutes which it is to administer, and it may not employ its rulemaking power to modify, alter, or enlarge portions of its enabling statute.
12. **Taxation: Statutes.** The general power to adopt rules and regulations to carry out a set of statutes is limited to the powers delegated to the Tax Equalization and Review Commission by the specific statute which the agency is to administer.
13. **Taxation: Fees: Appeal and Error.** The Tax Equalization and Review Commission has not been delegated the power, by virtue of any specific statute which it is to administer, to adopt a rule which excludes appeals to the commission that are not accompanied by the filing fee provided for by Neb. Rev. Stat. § 77-5013 (Cum. Supp. 2000).
14. **Statutes: Legislature: Intent.** In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
15. **Taxation: Statutes.** Because the Tax Equalization and Review Commission exceeded its rulemaking power in promulgating 442 Neb. Admin. Code, ch. 5, § 001.05 (1999), the rule is without statutory authorization and of no effect.
16. **Actions: Jurisdiction: Appeal and Error.** Even though an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the absence of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
17. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
18. **Jurisdiction: Time: Appeal and Error.** To acquire jurisdiction over the subject matter of the action, there must be strict compliance with the time requirements of the statute granting the appeal.

19. **Administrative Law: Legislature.** An administrative agency's authority is delegated to it by the Legislature and is embodied in statutes.
20. **Taxation: Appeal and Error: Words and Phrases.** The word "filed" means "in the possession of" a particular person or agency, as the circumstance dictates, and Neb. Rev. Stat. § 77-1510 (Cum. Supp. 2000) makes it clear that appeals must be in the possession of the Tax Equalization and Review Commission in order to be considered filed.
21. **Statutes: Jurisdiction.** Jurisdictional statutes are to be strictly construed.
22. **Taxation: Statutes.** The Tax Equalization and Review Commission exceeded its statutory authority when it adopted the "mailbox rule" in 442 Neb. Admin. Code, ch. 5, § 001.03 (1999); thus, this rule, which allowed appeals to be considered so long as they were postmarked within the statutory filing period, is without statutory authorization and of no effect.
23. **Taxation: Legislature.** The Tax Equalization and Review Commission is an agency which has only the powers conferred upon it by the Legislature.
24. **Taxation: Equity.** The Tax Equalization and Review Commission's power of equity is confined to those questions which relate to the liability of the property to assessment, or to the amount thereof.
25. **Taxation: Equity: Jurisdiction.** The Tax Equalization and Review Commission does not have the power to apply equitable principles in jurisdictional matters.
26. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.
27. **Administrative Law: Jurisdiction: Appeal and Error.** When an administrative agency lacks subject matter jurisdiction over a claim, the courts also lack subject matter jurisdiction on appeal.

Appeal from the Nebraska Tax Equalization and Review Commission. Appeal dismissed.

William E. Peters, of Peters & Chunka, P.C., for appellant.

James S. Jansen, Douglas County Attorney, James R. Thibodeau, and, on brief, Timothy J. Buckley for appellee Douglas County Board of Equalization.

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

GERRARD, J.

## I. INTRODUCTION

In this appeal from the Nebraska Tax Equalization and Review Commission (TERC), we are presented with the following issues: (1) Whether the filing fee provided for in Neb. Rev. Stat. § 77-5013 (Cum. Supp. 2000), which states that a "person filing an appeal with [TERC] shall pay a filing fee of twenty-

five dollars," must be paid in order to confer jurisdiction upon TERC; (2) whether TERC had the authority to adopt a rule stating that if the filing fee does not accompany the appeal, the appeal will not be accepted by TERC; (3) whether TERC had the authority to adopt a so-called "mailbox rule," whereby TERC will accept appeals so long as they are *postmarked* within the statutorily prescribed time for *filing* appeals; and (4) whether TERC has the equitable power to adopt a "doctrine of unique circumstances," which allows TERC to accept appeals that have been filed outside the statutory filing period because of the appellant's reliance on an erroneous statement by TERC that such appeals would be accepted. For the reasons that follow, we answer all of these issues in the negative and dismiss the appeal.

## II. FACTUAL AND PROCEDURAL BACKGROUND

Creighton St. Joseph Regional Hospital (St. Joseph) owns certain real property located in Douglas County. St. Joseph's parent company is Tenant Corporation, which "out sources" its property tax work to a property tax consultant in Texas. In 1998, St. Joseph received an unfavorable determination from the Douglas County Board of Equalization on a valuation protest it filed for 1998. St. Joseph's tax consultant postmarked and sent St. Joseph's appeal to TERC on August 25, 1998, but did not include the $25 filing fee set forth in § 77-5013, and as required by a rule adopted by TERC which states that if the filing fee does not accompany the petition, the petition will not be accepted by TERC. See 442 Neb. Admin. Code, ch. 5, § 001.05 (1999). After receiving the petition with no filing fee, TERC apparently attempted to contact St. Joseph's tax consultant, and on September 3, TERC mailed the appeal form back to St. Joseph's tax consultant in Texas. St. Joseph's tax consultant subsequently sent a completed appeal form, accompanied by a check for the filing fee, with a letter explaining why the appeal should be continued. TERC accepted the appeal form on September 16.

At a hearing on St. Joseph's appeal, TERC raised the issue of whether it had jurisdiction to hear the appeal. Following the hearing, on November 10, 1999, TERC issued an order dismissing St. Joseph's appeal for "want of jurisdiction." TERC first

determined that it had the power to promulgate its so-called "mailbox rule," whereby TERC views appeals that have been postmarked within the statutory filing period as properly "filed." See 442 Neb. Admin. Code, ch. 5, § 001.03 (1999). TERC cited its statutory power to adopt and promulgate rules and regulations for notice and hearing in cases as authority for its adoption of this rule.

Second, TERC addressed the fact that the TERC appeal form for 1998 misstated the deadline for filing an appeal with TERC. The form stated that appeals cannot be filed after August 25, 1998. However, the statutory deadline for filing appeals to TERC in 1998 was August 24. See Neb. Rev. Stat. § 77-1510 (Cum. Supp. 2000). Because TERC had misstated the filing deadline on its own appeal form, TERC invoked what it termed as the "doctrine of unique circumstances." The doctrine is based on estoppel principles and would apparently allow untimely filings to be considered by TERC if the untimeliness was due to reliance on TERC's misstatement of the filing deadline. TERC based its decision to invoke such doctrine on Kansas case law and on its power to consider decisions of the county boards of equalization in equity.

Finally, TERC determined that it lacked jurisdiction to hear the appeal, concluding that the filing fee, provided for in § 77-5013 and in TERC's formally adopted rules, "is a prerequisite to conferring subject matter jurisdiction upon the Commission." It is from this determination that St. Joseph appeals.

## III. ASSIGNMENTS OF ERROR

St. Joseph assigns that TERC erred in (1) finding that the payment of the $25 fee was jurisdictional and (2) dismissing the case.

## IV. STANDARD OF REVIEW

[1,2] Appellate review of a Tax Equalization and Review Commission decision shall be conducted for error on the record. *Mid City Bank v. Douglas Cty. Bd. of Equal., ante* p. 282, 616 N.W.2d 341 (2000). The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the Tax Equalization

and Review Commission. See, *State v. Hernandez*, 259 Neb. 948, 613 N.W.2d 455 (2000); *Baker's Supermarkets v. State*, 248 Neb. 984, 540 N.W.2d 574 (1995).

## V. ANALYSIS

### 1. $25 Filing Fee

The filing fee associated with appeals from county boards of equalization to TERC is currently provided for by § 77-5013 and a rule adopted by TERC, 442 Neb. Admin. Code, ch. 5, § 001.05. We have not previously addressed whether the filing fee in § 77-5013 is jurisdictional, nor have we addressed whether the rule TERC adopted is valid. Section 77-5013 states, in relevant part, the following: "The person filing an appeal with the commission shall pay a filing fee of twenty-five dollars . . . ." We first address whether the statute establishes the filing fee as necessary to confer jurisdiction on TERC. If the statute does not, we must determine whether TERC has the authority to adopt a rule which effectively makes the filing fee jurisdictional, stating that petitions "filed without the filing fee will not be accepted by the Commission." See 442 Neb. Admin. Code, ch. 5, § 001.05.

#### (a) Whether $25 Filing Fee in § 77-5013 is Jurisdictional

[3,4] In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *American Employers Group v. Department of Labor, ante* p. 405, 617 N.W.2d 808 (2000). The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *State ex rel. AMISUB v. Buckley, ante* p. 596, 618 N.W.2d 684 (2000); *Alegent Health Bergan Mercy Med. Ctr. v. Haworth, ante* p. 63, 615 N.W.2d 460 (2000). In ascertaining what the Legislature intended when it enacted § 77-5013, we begin by considering the statutory provisions regarding how appeals are to be taken to TERC.

In order to appeal a matter to TERC from a county board of equalization, § 77-1510 states:

> Appeals may be taken from any action of the county board of equalization to the Tax Equalization and Review Commission in accordance with the Tax Equalization and Review Commission Act. The appeal shall be filed within thirty days after adjournment of the board which, for actions taken pursuant to section 77-1502, shall be deemed to be July 25 of the year in which the action is taken. After an appeal has been initiated, the county board of equalization shall have no power or authority to compromise, settle, or otherwise change the action it has taken with respect to such assessment, and exclusive jurisdiction thereof shall be vested in the Tax Equalization and Review Commission, except that the county board of equalization may offer to confess judgment pursuant to section 77-1510.01.

Section 77-5013 provides for filing fees and states, in relevant part, that "[t]he person filing an appeal with the commission shall pay a filing fee of twenty-five dollars . . . ." St. Joseph contends that the plain language of § 77-5013 does not render the filing fee jurisdictional and that if the Legislature had intended to make it jurisdictional, it would have explicitly done so as it has done in other appeal statutes.

Indeed, prior to the enactment of the TERC act, the Legislature had explicitly established filing fees as jurisdictional in other appeal statutes. In appeals from county court to district court, the Legislature explicitly stated that depositing the filing fee "shall perfect the appeal and give the district court jurisdiction of the matter appealed." Neb. Rev. Stat. § 25-2729(2) (Reissue 1995). We affirmed that the language of this statute explicitly established the filing fee as jurisdictional in *State v. Hunter*, 234 Neb. 567, 451 N.W.2d 922 (1990). See, also, *Rorick Partnership v. Haug*, 228 Neb. 364, 422 N.W.2d 365 (1988).

With respect to appeals from a district court ruling, the Legislature provided:

> [A]n appeal shall be deemed perfected and the appellate court shall have jurisdiction of the cause when such notice of appeal has been filed and such docket fee deposited in the office of the clerk of the district court . . . and no step other than the filing of such notice of appeal and the depositing of such docket fee shall be deemed jurisdictional.

Neb. Rev. Stat. § 25-1912(3) (Reissue 1995). The Legislature was clear in making the filing fee jurisdictional in this statute. With respect to § 25-1912, this court has long held that "the Legislature intended that the filing of the notice of appeal and the depositing of the docket fee 'in the office of the clerk of the district court' are both mandatory and jurisdictional." *American Legion Post No. 90 v. Nebraska Liquor Control Commission*, 199 Neb. 429, 430-31, 259 N.W.2d 36, 37 (1977), quoting *Barney v. Platte Valley Public Power and Irrigation District*, 144 Neb. 230, 13 N.W.2d 120 (1944).

[5] 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. *Brown v. Kindred*, 259 Neb. 95, 608 N.W.2d 577 (2000). The Legislature has not amended these two statutes in response to our interpretation of its intent with respect to filing fees. Because it has clearly and explicitly made filing fees jurisdictional in at least two other statutes, see §§ 25-2729 and 25-1912, it is obvious that the Legislature understands how to make the filing fee a jurisdictional requirement. See *Dalition v. Langemeier*, 246 Neb. 993, 524 N.W.2d 336 (1994) (when Legislature enacts law affecting area which is already subject of other statutes, it is presumed that it did so with full knowledge of preexisting legislation and decision of Supreme Court construing and applying that legislation).

[6,7] The statute TERC determined to be jurisdictional in the case at bar does not resemble the statutes in which the Legislature has made filing fees explicitly jurisdictional. If the Legislature had intended the $25 filing fee in § 77-5013 to be jurisdictional, it could have clearly included jurisdictional language as it has done in other appeal statutes. See *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998) (this court refused to read particular disclosure into statute where Legislature was fully aware of how to make such disclosure explicitly required by statute). It is not within the province of the courts to read a meaning into a statute that is not there. *Ramsey v. State*, 259 Neb. 176, 609 N.W.2d 18 (2000). We therefore hold that in the absence of clear legislative expression, the failure to pay a filing fee of $25 at the time of filing an appeal pursuant to § 77-5013 is not a juris-

dictional flaw that subjects the appeal to an automatic dismissal by TERC. TERC erred when it determined that the payment of the $25 filing fee was a jurisdictional prerequisite.

[8,9] We pause, however, to note that our determination that the statutory filing fee is not jurisdictional does not mean that the filing fee is discretionary. Indeed, we have held that as a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion. *State on behalf of Minter v. Jensen*, 259 Neb. 275, 609 N.W.2d 362 (2000). It is clear that the Legislature has required the filing fee to be paid by use of the word "shall" in § 77-5013. Thus, TERC may insist upon the payment of the filing fee prior to acting upon any appeal, and dismissal of an appeal may ultimately be an appropriate remedy in the event that an appellant fails to comply with the statutory filing fee requirement within a reasonable period of time. There is an obvious distinction between an administrative body not *acting upon* an appeal because of *nonpayment* of the $25 filing fee and an administrative body not *accepting* an appeal, based on jurisdictional grounds, because of *late payment* of the $25 filing fee. Our holding is limited to the extent that the submission of the $25 filing fee under § 77-5013 is not required to confer jurisdiction upon TERC.

(b) Whether TERC Was Given Power to Adopt Rule Requiring $25 Filing Fee to Accompany Appeal

Because § 77-5013 does not explicitly require the filing fee to accompany the appeal to TERC, we must determine whether TERC had the power to adopt a rule which does more than merely preserve the mandatory nature of the filing fee—a rule, incidentally, which TERC could properly adopt, as noted in the preceding paragraph. Rather, we must address the validity of a rule which makes the filing fee a jurisdictional prerequisite. As stated earlier, TERC has adopted a rule which declares that petitions "filed without the filing fee will not be accepted by the Commission." 442 Neb. Admin. Code, ch. 5, § 001.05. We begin by examining the manner in which powers are delegated to TERC by the Legislature.

[10,11] It is a well-established principle that a legislative enactment may properly confer general powers upon an admin-

istrative agency and delegate to the agency the power to make rules and regulations concerning the details of the legislative purpose. *County Cork v. Nebraska Liquor Control Comm.*, 250 Neb. 456, 550 N.W.2d 913 (1996). It is equally well established, however, that an administrative agency is limited in its rulemaking authority to powers granted to the agency by the statutes which it is to administer, and it may not employ its rulemaking power to modify, alter, or enlarge portions of its enabling statute. *Id.* In other words, although the Legislature may give TERC the power to adopt rules and regulations to carry out a set of statutes (the TERC act), such delegated authority is limited to the powers delegated to TERC by the particular statute which the agency is to administer. See, *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994); *State ex rel. Spire v. Stodola*, 228 Neb. 107, 421 N.W.2d 436 (1988).

[12] The Legislature has, as it may properly do, given TERC the general power to adopt rules and regulations to carry out the TERC act. See *County Cork v. Nebraska Liquor Control Comm., supra*. Neb. Rev. Stat. § 77-5021 (Reissue 1996) states that "[t]he commission may adopt and promulgate rules and regulations to carry out the Tax Equalization and Review Commission Act." As noted above, this general power to adopt rules and regulations to carry out a set of statutes is limited to the powers delegated to TERC by the specific statute which it is to administer. See *Clemens v. Harvey, supra*. Thus, we must look to the specific statutes which TERC is charged with administering in order to determine whether TERC has exceeded its granted powers.

[13] We determine that TERC has not been delegated the power, by virtue of any specific statute which it is to administer, to adopt a rule which excludes appeals to TERC that are not accompanied by the filing fee provided for by § 77-5013. The statute regarding filing fees would be the most logical place for the Legislature to grant TERC the specific power to promulgate a rule regarding filing fees. The Legislature has not done so. Again, § 77-5013 states, in relevant part, that "[t]he person filing an appeal with the commission shall pay a filing fee of twenty-five dollars . . . ." As we have concluded, the statute does not, in itself, require the filing fee to accompany the appeal. Not only has the Legislature not made the filing fee jurisdictional,

nowhere in § 77-5013 has the Legislature given TERC the power to make it jurisdictional.

[14] The only other statute which TERC could have been given the power to regulate its own jurisdiction is Neb. Rev. Stat. § 77-5015 (Reissue 1996). TERC has been granted the authority to "adopt and promulgate rules and regulations for notice and hearing in cases appealed." § 77-5015. In the context of the language in § 77-5015, it is clear that the Legislature did not intend to give TERC the power to regulate its jurisdiction when it used the phrase "notice and hearing":

> In any case appealed to the commission all parties shall be afforded an opportunity for hearing after reasonable notice. The notice shall state the time, place, and issues involved, but if, by reason of the nature of the proceeding, the issues cannot be fully stated in advance of the hearing or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable. Opportunity shall be afforded all parties to present evidence and argument. . . . Informal disposition may also be made of any case by stipulation, agreed settlement, consent order, or default. *The commission shall adopt and promulgate rules and regulations for notice and hearing in cases appealed.*

(Emphasis supplied.) In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *American Employers Group v. Department of Labor, ante* p. 405, 617 N.W.2d 808 (2000).

The plain and ordinary meaning of the phrase "notice and hearing" does not encompass jurisdictional matters. The language of § 77-5015, prior to the provision granting power to regulate notice and hearing, clearly indicates that the statute is intended to satisfy the due process requirements of the U.S. and Nebraska Constitutions by adequately providing notice and hearing to parties appealing to TERC.

[15] Finding no authority for TERC to promulgate a rule which, in essence, restricts TERC's jurisdiction by stating that TERC will not accept an appeal if the filing fee does not accompany the appeal, we conclude that TERC exceeded its statutory

grant of power by promulgating such a rule. Because TERC exceeded its rulemaking power in promulgating 442 Neb. Admin. Code, ch. 5, § 001.05, the rule is without statutory authorization and of no effect in the instant case. Therefore, it was error for TERC to dismiss St. Joseph's appeal on the ground that St. Joseph did not submit a filing fee with its appeal. Payment of the filing fee is not a prerequisite to conferring jurisdiction upon TERC either by statute or by rule adopted by TERC.

2. Extension of Statutory Filing Deadline

In its findings and order in the case at bar, TERC discussed its so-called "mailbox rule," which essentially states that appeals will be deemed filed so long as they are postmarked within the statutorily prescribed filing period. See 442 Neb. Admin. Code, ch. 5, § 001.03. TERC also discussed its borrowing of the "doctrine of unique circumstances" from Kansas case law, which has allowed TERC to accept appeals filed and postmarked after the statutory deadline. Both have effectively extended the 30-day filing deadline for appeals to TERC as set forth by statute in § 77-1510. Although neither of these issues was assigned as error on appeal, it is necessary for us to address the jurisdictional issues these proposed extensions present.

[16-18] Even though an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the absence of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. *County of Sherman v. Evans*, 252 Neb. 612, 564 N.W.2d 256 (1997). Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved. *Glass v. Nebraska Dept. of Motor Vehicles*, 248 Neb. 501, 536 N.W.2d 344 (1995). To acquire jurisdiction over the subject matter of the action, there must be strict compliance with the time requirements of the statute granting the appeal. See *id.* Here, we are concerned with the statute under which appeals are taken to TERC, specifically § 77-1510, which provides the time line within which appeals to TERC must be taken. We must determine whether TERC had the authority to adopt a rule which affects the timing of appeals filed as well as TERC's adoption of

an equitable principle which would give it subject matter jurisdiction over untimely filed appeals in certain situations.

(a) Whether TERC Was Given Power to Extend Statutory Filing Time by Adopting "Mailbox Rule"

[19] In its findings and order, with respect to its authority to adopt a "mailbox rule," TERC stated that "[w]hether an agency has the authority to adopt the 'mailbox rule' appears to be a question of first impression in the State of Nebraska." The issue, however, is not whether just any agency has the authority to adopt the "mailbox rule." The proper question is whether a particular agency, in this case TERC, has specifically been given the power by the Legislature to adopt a rule which effectively expands its jurisdiction. As discussed above, an administrative agency's authority is delegated to it by the Legislature and is embodied in statutes. See *County Cork v. Nebraska Liquor Control Comm.*, 250 Neb. 456, 550 N.W.2d 913 (1996).

TERC has promulgated a rule regarding appeals filed by mail. It states, in relevant part, the following:

> An appeal is deemed to have been filed when the filing fee is paid, the Appeal Form . . . and, if applicable, the Petition, are mailed to the Commission at its office in Lincoln, Nebraska, and the envelope which contains the filing fee, Appeal Form and, if applicable, the petition, bears a postmark . . . establishing that the envelope was mailed not later than the deadline for the filing of petitions in person. Appeals mailed to the Commission with a postmark earlier than the first date for filing appeals as allowed by statute, or later than the last date for filing appeals as allowed by statute, are filed out of time.

442 Neb. Admin. Code, ch. 5, § 001.03. For appeals filed in person, the rule adopted by TERC mirrors § 77-1510, which is the statute setting forth the time line for filing appeals. Section 77-1510 states, in relevant part, the following:

> Appeals may be taken from any action of the county board of equalization to the Tax Equalization and Review Commission in accordance with the Tax Equalization and Review Commission Act. The appeal shall be filed within thirty days after adjournment of the board which, for

> actions taken pursuant to section 77-1502, shall be deemed to be July 25 of the year in which the action is taken.

In order to decide whether TERC's mailbox rule is valid, we must determine whether TERC has been given the power to adopt such a rule. See *County Cork, Inc. v. Nebraska Liquor Control Comm., supra.* As noted earlier, TERC's general power to adopt rules and regulations to carry out a set of statutes is limited to the powers delegated to TERC by the specific statute which it is to administer. *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994). Section 77-1510 clearly states that appeals *must be filed* within 30 days after adjournment of county boards of equalization. TERC's mailbox rule effectively states that appeals will be deemed filed so long as they are *postmarked* by the statutory filing deadline. In determining whether the statute requires the appeal to be in the possession of TERC within the statutory filing period or whether the statute leaves open the possibility for TERC to adopt a rule allowing appeals so long as they are postmarked within the statutory filing period, we find it helpful to consider similar statutory schemes and how they relate to other administrative agencies.

The Department of Labor (DOL) and the Department of Motor Vehicles (DMV) have both adopted rules which allow appeals postmarked, but not filed, within the filing period to be accepted as filed under certain circumstances. The DMV has a procedure for filing a petition for a hearing and has adopted a rule relating to the time of filing. The rule adopted by the DMV states that a petition must be "delivered to the Department or postmarked within ten (10) days after receipt of the petition form by the Appellant." 247 Neb. Admin. Code, ch. 1, § 013.02 (1998). This rule was adopted by the DMV pursuant to a statute which states that "[t]he arrested person shall postmark or return to the director a petition within ten days after the receipt of the notice of revocation if the arrested person desires a hearing." Neb. Rev. Stat. § 60-6,205(6)(a) (Reissue 1998). The Legislature explicitly gave the DMV the power to adopt a rule which sets forth the same standard as the enabling statute sets forth.

The DOL has also adopted a rule regarding the filing of appeals for disputed claims. The rule states the following:

> The notice of appeal must be received by a Department office, or the Employment Security office of another state, within twenty calendar days after the determination was mailed. . . . Appeals postmarked within the twenty days but not received by the Department or other state's office within the twenty days shall not be considered as timely filed.
>
> The Appeal Tribunal may hear an appeal filed outside the twenty days for good cause shown.

224 Neb. Admin. Code, ch. 1, § 003 (1989). The enabling statute the DOL relied on in promulgating this rule sets forth the same standard as that set forth by the rule: "Notice of appeal must be in writing and must be delivered and received within twenty days . . . . For good cause shown, the tribunal may also take jurisdiction over appeals filed outside the prescribed appeal period." Neb. Rev. Stat. § 48-634 (Reissue 1998). The DOL properly has discretion to allow appeals filed outside the appeal period because the Legislature specifically provided as much in the DOL's enabling legislation. The Legislature was quite specific in providing which appeals the DOL may and may not hear.

Additionally, we have previously addressed a situation similar to the issue at hand in the context of an election statute. In *State, ex rel. Smith, v. Marsh*, 120 Neb. 287, 232 N.W. 99 (1930), this court was faced with language in an election statute requiring a candidate to file a document by a certain number of days before the primary election. The statute stated that a candidate's name shall not be printed on a ballot " 'unless at least forty days prior to such primary [the candidate] shall have filed a written application with the proper authority.' " *Id.* at 290, 232 N.W. at 101. The proper authority to file with in that case was the Secretary of State. The Secretary of State had a practice of accepting applications so long as they were *postmarked* within the legal filing time, as the Secretary of State had deemed the deadline to be discretionary. This court held that the Secretary of State erred when he equated a postmark to filing an application:

> Here the statute is perfectly plain as to the upset time of filing. There was nothing to construe or interpret. Either the filing was in time or it was not. To hold otherwise is to allow the [Secretary of State] to legislate as to the time of

> filing. That is the office and function of the legislature. It has definitely expressed its will.

*Id.* at 295, 232 N.W. at 103. *State, ex rel. Smith, v. Marsh* is quite similar to the case at bar.

[20] The statute we are presented with in the instant case states that appeals must be filed within a certain time period each year. See § 77-1510. It is clear that the court in *Marsh* interpreted the word "filed" to mean "in the possession of" the Secretary of State. We agree that the word "filed" means "in the possession of" a particular person or agency, as the circumstance dictates, and that § 77-1510 makes it clear that the appeal must be in the possession of TERC in order to be considered filed.

[21] These statutes and this court's prior rulings make it clear that the Legislature was fully aware of how to make postmarking equivalent to filing and fully aware of our interpretation of statutory language similar to the language at issue here. Armed with this knowledge, the Legislature did not make postmarking equivalent to filing with respect to an appeal to TERC. Jurisdictional statutes are to be strictly construed. See, *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998); *Barney v. Platte Valley Public Power and Irrigation District*, 144 Neb. 230, 13 N.W.2d 120 (1944). Again, it is not within the province of the courts to read a meaning into a statute that is not there. *Ramsey v. State*, 259 Neb. 176, 609 N.W.2d 18 (2000). Therefore, we refuse to read language into § 77-1510 which would make the postmarking of an appeal equivalent to filing an appeal. If the Legislature had intended as much, it would have done so in § 77-1510.

[22] We conclude that TERC exceeded its statutory authority when it adopted a rule which allowed appeals to be considered so long as they were postmarked within the statutory filing period. Therefore, TERC's "mailbox rule" in 442 Neb. Admin. Code, ch. 5, § 001.03, is without statutory authorization and of no effect in the instant case. As a result, St. Joseph's appeal must have been received by TERC on or before the final date for filing appeals under § 77-1510. The statute provides that an appeal must be filed within 30 days of July 25 of any particular year. Therefore, because August 24, 1998, was a Monday, and was 30 days after July 25, St. Joseph's appeal must have been in

TERC's possession on or before August 24 in order be considered timely. Because St. Joseph did not file on or before August 24, 1998, the appeal was not timely filed and TERC did not have subject matter jurisdiction to hear the appeal.

(b) Whether TERC had Authority to Adopt Doctrine of Unique Circumstances

[23-25] TERC is an agency which has only the powers conferred upon it by the Legislature. TERC has been given the power to hear appeals from county boards of equalization in equity to determine the questions raised before the county board of equalization "which relate to the liability of the property to assessment, or the amount thereof." Neb. Rev. Stat. § 77-1511 (Reissue 1996). This statute does not, however, grant TERC general equitable power to use in any situation. Its power of equity is confined to those questions "which relate to the liability of the property to assessment, or to the amount thereof." See § 77-1511. In other words, TERC's equitable power is confined to its review of the specific actions of the county boards of equalization. See, *Bartlett v. Dawes Cty. Bd. of Equal.*, 259 Neb. 954, 613 N.W.2d 810 (2000); *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 603 N.W.2d 447 (1999). Therefore, TERC does not have the power to apply equitable principles in jurisdictional matters, much less borrow equitable doctrines from other states in order to expand its own jurisdiction. TERC erred in adopting and applying the "doctrine of unique circumstances," as the Legislature has not given TERC the power to use equitable powers in jurisdictional matters.

[26,27] Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties. *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999). When an administrative agency lacks subject matter jurisdiction over a claim, the courts also lack subject matter jurisdiction on appeal. *R-D Investment Co. v. Board of Equal. of Sarpy Cty.*, 247 Neb. 162, 525 N.W.2d 221 (1995). Because TERC did not have subject matter jurisdiction to hear St. Joseph's appeal, we also lack subject matter jurisdiction to consider St. Joseph's appeal.

## VI. CONCLUSION

For all of the above reasons, TERC lacked subject matter jurisdiction to consider St. Joseph's appeal. We likewise lack subject matter jurisdiction and dismiss St. Joseph's appeal for lack of jurisdiction.

APPEAL DISMISSED.

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# IN RE GUARDIANSHIP OF REBECCA B. ET AL., CHILDREN UNDER 18 YEARS OF AGE. REBECCA B. ET AL., APPELLEES, V. SANDRA B., APPELLANT. IN RE INTEREST OF REBECCA B. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. SANDRA B., APPELLANT.

621 N.W.2d 289

Filed December 22, 2000. Nos. S-99-1262 through S-99-1265.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decision made by the lower courts.
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. **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, the order in the special proceeding must affect a substantial right.
5. **Juvenile Courts: Parental Rights: Final Orders: Appeal and Error.** 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.
6. **Juvenile Courts: Final Orders: Time: Appeal and Error.** In juvenile cases, where an order from a juvenile court is already in place and a subsequent order merely extends the time for which the previous order is applicable, the subsequent order by itself does not affect a substantial right and does not extend the time in which the original order may be appealed.
7. **Jurisdiction: Final Orders: Appeal and Error.** In the absence of a judgment or appealable order, an appellate court has no authority or jurisdiction to act, and in the absence of such judgment or order, the appeal will be dismissed.
8. **Juvenile Courts: Jurisdiction: Minors.** Under Neb. Rev. Stat. § 43-247 (Supp. 1997), once a minor is adjudged to be within the jurisdiction of the juvenile court, the juvenile court shall have exclusive jurisdiction as to any such juvenile and as to the

parent, guardian, or custodian who has custody of any juvenile described within this section.

9. **Juvenile Courts: Child Custody: Minors.** Pursuant to Neb. Rev. Stat. § 43-285(3) (Reissue 1998), when a separate juvenile court or county court sitting as a juvenile court awards custody of a minor to the Department of Health and Human Services, the court has authority to award custody to a family the Department of Health and Human Services has designated as suitable guardians without resorting to a proceeding under Neb. Rev. Stat. § 30-2608 (Cum. Supp. 2000).
10. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
11. **Statutes: Legislature: Presumptions: Judicial Construction.** When legislation is enacted which makes related preexisting law applicable thereto, it is presumed that the Legislature acted with full knowledge of the preexisting law and judicial decisions of the Supreme Court construing and applying it.
12. **Juvenile Courts: Jurisdiction: Minors: Guardians and Conservators.** When a minor is adjudged to be within the jurisdiction of the juvenile court, a guardianship appointment must be made pursuant to the juvenile code.

Appeals from the County Court for Lincoln County: KENT E. FLOROM, Judge. Judgments in Nos. S-99-1262, S-99-1263, and S-99-1264 vacated, and appeals dismissed. Appeal in No. S-99-1265 dismissed.

Michael E. Piccolo, of Clough, Dawson, Piccolo & Jones, for appellant.

Patrick B. Hays, guardian ad litem for appellees Rebecca B. et al.

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

CONNOLLY, J.

These consolidated appeals by Sandra B. arise from the Lincoln County Court's decisions in four separate cases involving her three children: Rebecca B., Elizabeth B., and Jessica B.

Case No. S-99-1265 is an appeal from a review hearing wherein the county court, sitting as a juvenile court, adopted the Department of Health and Human Services' (DHHS) case plan that recommended all three children be placed with their maternal grandparents. The plan also recommended that the maternal grandparents have permanent guardianship and that Sandra have

reasonable visitation with the children. In this case, we dismiss the appeal because the September 24, 1999, review order merely continued or extended the terms of the November 18, 1998, disposition order and, thus, did not affect a substantial right and was not a final, appealable order.

Cases Nos. S-99-1262, S-99-1263, and S-99-1264 are appeals from the county court's orders appointing the grandparents as coguardians for each child under Neb. Rev. Stat. § 30-2608 (Cum. Supp. 2000). In these cases, we vacate the county court's orders granting guardianship under § 30-2608 because the juvenile court had already assumed jurisdiction, and we dismiss the appeals.

## BACKGROUND

In March 1998, at the initiation of the grandparents, the State filed a petition in Lincoln County Court, alleging that Rebecca, born January 12, 1983; Elizabeth, born May 15, 1985; and Jessica, born February 5, 1988, were minors within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Supp. 1997). At an April hearing, the children were placed in the temporary custody of the grandparents, and an adjudication hearing was set for June.

### Adjudication Hearing

At the adjudication hearing, evidence was adduced showing that Sandra and James B. were divorced in 1993 and that James was not permitted visitation because of his convictions for sexual abuse of the children. The marriage was marked by James' physical abuse of Sandra as well. After separating from James in 1990 when she discovered the sexual abuse, Sandra was hospitalized at what was then the Richard H. Young Memorial Hospital in Kearney, Nebraska, for depression and suicidal thoughts. Upon release, she began counseling with Lynda Perry, a mental health practitioner, until 1993.

The record reflects that sometime in 1993, Sandra locked herself in a bedroom with a gun while her children were present in the home. She called Perry for help and was admitted to the hospital. She was diagnosed with major depression and a personality disorder, which Perry stated was difficult, if not impossible, to treat. The hospital assessment also found Sandra was a suicidal and a homicidal risk at that time, and Sandra told Perry she felt she had the potential to harm her children.

In 1995, Sandra began counseling with Karen L. Mueller. Mueller testified that Sandra's mental health issues and parenting skills had improved. Mueller stated she was not concerned for the safety of Sandra's children because Sandra had always asked for help with her depression when needed and had never formed any actual homicidal plans. Mueller admitted, however, that on three separate occasions in October 1995, March 1996, and February 1997, she had hospitalized Sandra when she was concerned for Sandra's safety or for the safety of the children. She admitted that Sandra had stated in March 1996 that she had experienced thoughts of killing her daughters as well as herself and that in 1997, Sandra had made specific plans for killing herself.

In 1996, Sandra voluntarily asked for help from DHHS, and she was provided in-home family support therapy and services until 1997. These service providers testified that they never saw or heard of a reason to refer the family to DHHS. DHHS had knowledge of Sandra's disability due to mental illnesses and her hospitalizations, but did not recommend out-of-home placement for the children.

Other evidence showed that Sandra's depression had affected her ability to parent. Perry testified that Sandra would frequently report her concerns about her children's behavior and that after a while, Perry came to the conclusion Sandra was determined to keep her children traumatized by exaggerating their problems. There was also testimony by Sandra's sister that Sandra was determined to find mental health professionals who would place Rebecca and Jessica into long-term-care facilities. Rebecca and Jessica were hospitalized in 1998, but mental health professionals testified that they had recommended the placements. Two of those recommendations, concerning Jessica, were based on a belief that Sandra was not capable of emotionally or physically providing a safe and structured environment for Jessica to deal with her problems. One counselor also recommended out-of-home placements for Rebecca in 1995 and 1996 because of disruptions she was causing at home.

Sandra had also allegedly stated she thought she could get Rebecca into the Youth Rehabilitation and Treatment Center in Geneva, Nebraska, by making Rebecca angry enough to hit Sandra and then calling the sheriff. Sandra's mother testified

that Jessica had stated she did not wish to return home because no one took care of them and they had to get their own food because Sandra was always in her room.

The county court determined that each child was within the definition of § 43-247(3)(a) and placed the children in the temporary custody of DHHS, with physical placement to continue with the grandparents. The court also ordered DHHS to prepare a case plan for a disposition hearing in November.

### Disposition Hearing

At the disposition hearing on November 18, 1998, the State offered evidence of the family evaluation performed by Karen Sharer-Mohatt, a clinical psychologist. The report suggested that either a type of maltreatment referred to as "Factitious Disorder by Proxy" (FDP) or a type referred to as "Munchausen by Proxy" (MBP), wherein the perpetrator deliberately induces or exaggerates a physical or psychological problem in the victim for personal gratification, may have been a factor in Sandra's relationships with Rebecca and Jessica. Sandra asked for an evidentiary hearing on this issue, which the court said would be granted.

The court then adopted the first case plan calling for guardianship with the grandparents by May 1999, with reasonable visitation, but no reunification goal for Sandra. In its disposition order, the court found that reasonable efforts had been made to eliminate the need for removal from the parental home and that it was not in the best interests of the children to return home. The court placed the children in the custody of DHHS. On June 18, Sandra filed a motion for an evidentiary hearing to contest the FDP or MBP suggestion in Sharer-Mohatt's report. On June 30, the guardian ad litem petitioned the county court under § 30-2608 to appoint the children's grandparents as coguardians on the ground that Sandra's parental rights to custody had been terminated or suspended.

### Review Hearing

At the requested review hearing on September 24, 1999, Sharer-Mohatt testified that she felt the State's case plan should have set out a plan for confirming or ruling out the FDP or MBP maltreatment and if the FDP or MBP were ruled out, to set

reunification goals. She was also concerned that the children and grandparents were not receiving counseling, a condition for her acquiescence in the State's recommendation that the children be placed with the grandparents. Sandra's expert on MBP, Louisa J. Lasher, testified that she found no behavior pattern that would indicate MBP.

Sandra attempted to elicit evidence from the DHHS caseworker demonstrating that DHHS had known of Sandra's mental health history in January 1998, yet had found allegations of abuse and neglect to be unfounded. The court specifically overruled this line of questioning as irrelevant because Sandra had not appealed from the June 1998 adjudication determination. The caseworker stated reunification had not been attempted because of Sandra's past mental illnesses and the children's desire not to return to Sandra's home.

The court found that even ruling out FDP or MBP, Sandra had persistent mental disorders. The court also found that reasonable efforts had been made to prevent removal from the parental home and approved the second case plan, which was essentially identical to the first case plan, with the exception of extending the time goal for the grandparents' becoming coguardians to August 1999.

### Guardianship Hearing Under § 30-2608

Four days later, a guardianship proceeding was held in the county court with the same judge who presided over the juvenile proceeding. At that hearing, the court took judicial notice of the entire juvenile file. However, transcriptions of the prior hearings were not offered at that time, nor did the judge specify what facts he was judicially noticing. The parties simply agreed that the transcriptions would be marked as exhibits after the hearing. Sandra asked the court to take the matter under advisement until all the evidence was received but did not object to the judicially noticed material. The record does not indicate if the transcripts were received into evidence.

Sandra, the caseworker, and the grandmother were the only witnesses to testify at the guardianship hearing. The caseworker testified as to DHHS' knowledge of Sandra's mental health history and hospitalizations before January 1998, when DHHS

concluded that charges of abuse and neglect were unfounded. The caseworker admitted that the possibility of the FDP or MBP maltreatment was a concern to DHHS but that no steps had been taken to confirm the possibility. She also admitted that Sharer-Mohatt had not recommended guardianship and that reunification was not attempted in this case.

Sandra testified that she had not been hospitalized in the last 3 years and had continued in therapy. She stated she had been allowed to visit her children for only 4 to 6 hours a week; that she had not seen her children on holidays, birthdays, or days off from school; and that the grandparents had been uncooperative about telephone visits.

The grandmother testified that the children were doing well in their home and at school, that DHHS had approved the discontinuation of therapy for the children, and that she and the grandfather intended to fully cooperate with Sandra's visitations. She also stated that Rebecca did not often wish to visit with Sandra.

The court, relying on Sharer-Mohatt's report, concluded that Sandra was not capable of parenting and probably never would be. The court then appointed the grandparents as coguardians for each child. Supervised visitation was set at reasonable times for Rebecca and at least 6 hours per week for Elizabeth. A similar order was entered regarding Jessica. In its order, the court found Sandra's parental right to custody had been suspended by circumstances or prior court order and that it was in the children's best interests to have coguardians appointed.

## ASSIGNMENTS OF ERROR

### Juvenile Case Proceedings

On appeal, Sandra assigns the following errors to the county court, sitting as a juvenile court, in case No. S-99-1265: The court erred in (1) approving and adopting the case plan and court report submitted at the review hearing on September 24, 1999; (2) not ordering that a plan of reunification should be adopted and implemented; (3) approving the placement of the minor children with the grandparents, contrary to evidence adduced at the review hearing; and (4) limiting and restricting Sandra's visitation with one or all of the minor children.

### GUARDIANSHIP PROCEEDINGS UNDER § 30-2608

Sandra also assigns the following errors to the guardianship proceedings, cases Nos. S-99-1262, S-99-1263, and S-99-1264: The county court erred in (1) approving and appointing the grandparents to be coguardians of the children, (2) placing the children with the grandparents contrary to the evidence adduced at the hearing, (3) restricting and limiting Sandra's visitation, and (4) approving the guardianship when the juvenile proceeding was still pending and active.

## STANDARD OF REVIEW

[1] 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 decision made by the lower courts. *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000); *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999).

## ANALYSIS

### JUVENILE CASE PROCEEDINGS, CASE NO. S-99-1265

The State argues that this court lacks appellate jurisdiction because the September 24, 1999, disposition order merely continued a previous determination and is, therefore, nonappealable.

[2] Before we address Sandra's assigned errors, we first consider the issue of whether this court has jurisdiction to hear the appeal. *In re Interest of Clifford M. et al., supra*; *Breeden v. Nebraska Methodist Hosp.*, 257 Neb. 371, 598 N.W.2d 441 (1999).

[3,4] A proceeding before a juvenile court is a special proceeding for appellate purposes. *In re Interest of Clifford M. et al., supra*; *In re Interest of Sarah K., supra.* To be appealable, an order in a special proceeding must affect a substantial right. *In re Interest of Clifford M. et al., supra*; *In re Interest of Sarah K., supra.*

[5,6] It is well settled 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 Clifford M. et al., supra*; *In re Interest of Sarah K., supra*; *In re Interest of Tabatha R.*, 255

Neb. 818, 587 N.W.2d 109 (1998). However, in juvenile cases, where an order from a juvenile court is already in place and a subsequent order merely extends the time for which the previous order is applicable, the subsequent order by itself does not affect a substantial right and does not extend the time in which the original order may be appealed. *In re Interest of Sarah K., supra*; *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). Accordingly, to determine whether the review order can be appealed in this case, it is necessary to consider the nature of the court's order on September 24, 1999, and what parental rights, if any, were affected by that order.

At the disposition hearing on November 18, 1998, Sandra objected to the court's receipt of the case plan and court report on the ground that there was no opportunity to cross-examine Sharer-Mohatt, the psychologist who had performed the individual and family evaluations for the State and whose report was part of the case plan and court report. The report suggested that a serious and uncommon maltreatment, either FDP or MBP, might be present and had only been made available to Sandra on October 30. The case plan and court report was received over objection.

Sandra then asked for an evidentiary hearing in order to present expert testimony to rebut the suggestion of this maltreatment. The court agreed that an evidentiary hearing could be scheduled in the future but emphasized that the disposition was being decided at the hearing of November 18, 1998. The court found that reasonable efforts had been made to avoid removing the children from the parental home and that it was not in the best interests of the children to return home. The court ordered that they be placed in the custody of DHHS. The case plan adopted by the court called for the grandparents to be made coguardians of the children by May 1999, with consistent and appropriate visitation for Sandra.

At the review hearing on September 24, 1999, the court adopted the June 15, 1999, case plan, which was almost identical to the first case plan. The court again found reasonable efforts had been made to avoid removing the children from their home but that the children should continue in the custody of DHHS.

In *In re Interest of Sarah K.*, 258 Neb. 52, 56, 601 N.W.2d 780, 783 (1999), we noted that we have previously held:

> [W]here an order from a juvenile court is already in place and a subsequent order merely extends the time for which the previous order is applicable, the subsequent order by itself does not affect a substantial right and does not extend the time in which the original order may be appealed.

Citing *In re Interest of Joshua M. et al., supra.* We then determined that because the second order merely continued the terms of the earlier adopted case plan, an appeal from the latter order was a collateral attack on the former order and, thus, impermissible.

Likewise, in this case, the county court's order of November 18, 1998, was a final, appealable order. The court's September 24, 1999, order merely continued or extended the terms of the disposition order from the previous November. Both orders called for the children to be placed in the custody of DHHS, placement to remain with the grandparents, and appropriate visitation for Sandra. The only difference between the first case plan adopted at the November 1998 disposition hearing and the second case plan adopted at the review hearing the following September was an extended time period for the grandparents to become coguardians.

[7] In the absence of a judgment or appealable order, an appellate court has no authority or jurisdiction to act, and in the absence of such judgment or order, the appeal will be dismissed. *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000). Because the September 24, 1999, juvenile order effects no change in Sandra's status or the plan to which Sandra was previously subjected, it was not a final order affecting a substantial parental right, and was not appealable. Thus, we dismiss the appeal in case No. S-99-1265.

### GUARDIANSHIP PROCEEDINGS UNDER § 30-2608, CASES NOS. S-99-1262, S-99-1263, AND S-99-1264

Sandra contends that the county court did not have jurisdiction to appoint coguardians for her children under § 30-2608 because the county court, sitting as a juvenile court, had already assumed jurisdiction.

[8] Under the juvenile code, once a minor is adjudged to be within the definition of § 43-247(3), "[t]he juvenile court shall have exclusive original jurisdiction as to any juvenile," § 43-247, and as to "[t]he parent, guardian, or custodian who has custody of any juvenile described in this section," § 43-247(5).

"Notwithstanding any disposition entered by the juvenile court under the Nebraska Juvenile Code, the juvenile court's jurisdiction over any individual adjudged to be within the provisions of this section shall continue until the individual reaches the age of majority or the court otherwise discharges the individual from its jurisdiction." § 43-247. Finally, § 43-247(9) gives the juvenile court jurisdiction over "[t]he adoption or guardianship proceedings for a child over which the juvenile court already has jurisdiction under another provision of the Nebraska Juvenile Code."

The Nebraska Court of Appeals, in two separate cases, has considered the problem of guardianship appointments under § 30-2608 for adjudicated minors. In *In re Guardianship of Alice D. et al.*, 4 Neb. App. 726, 548 N.W.2d 18 (1996), the Court of Appeals concluded that Neb. Rev. Stat. § 43-285(1) (Reissue 1993) operated to effect a guardianship appointment, making a separate appointment under § 30-2608 unnecessary. Then, as now, § 43-285(1) (Reissue 1998) provides in part:

> When the court awards a juvenile to the care of [DHHS], an association, or an individual in accordance with the Nebraska Juvenile Code, the juvenile shall, unless otherwise ordered, become a ward and be subject to the guardianship of the department, association, or individual to whose care he or she is committed.

In addition, § 43-285(3) provides for a change in placement from what the court originally ordered:

> The department, association, or individual shall file a report and notice of placement change with the court and shall send copies of the notice to all interested parties at least seven days before the placement of the juvenile is changed from what the court originally considered to be a suitable family home or institution to some other custodial situation . . . .

[9] Thus, pursuant to § 43-285(3), when a separate juvenile court or county court sitting as a juvenile court awards custody of a minor to DHHS, the court has authority to award custody to a family that DHHS has designated as suitable guardians without resorting to a proceeding under § 30-2608.

In *In re Guardianship of Alice D. et al., supra*, the Court of Appeals determined that when a juvenile has already been adjudged to be within the jurisdiction of the juvenile court, a guardianship proceeding under § 30-2608 would create the possibility of a separate guardian being appointed, with conflicting powers and duties to those assigned to DHHS under § 43-285(1).

The Court of Appeals also considered the possibility of the same individual or entity being awarded custody in a juvenile proceeding and appointed a guardian in a proceeding under § 30-2608. The Court of Appeals raised concerns that "such persons or entities could be subject to supervision by two separate courts concerning their responsibilities." 4 Neb. App. at 731, 548 N.W.2d at 22.

The Court of Appeals was not persuaded that these problems would be resolved in counties where the same judge presides over both the juvenile proceeding and the guardianship proceeding under § 30-2608:

> We realize that in most counties the county judge is also the juvenile judge, but this is not true in all counties. In addition, it appears quite possible that the children could be living in a different county when the guardianship proceeding would be attempted than the county the juveniles lived in at the time the juvenile proceeding was commenced. It is therefore possible that different county courts could have jurisdiction over the same juvenile.

*In re Guardianship of Alice D. et al.*, 4 Neb. App. 726, 731, 548 N.W.2d 18, 22 (1996). For these reasons, the Court of Appeals held that "when a minor has been adjudicated a juvenile as defined under § 42-247(3) and the juvenile court retains jurisdiction, a probate court cannot appoint a guardian of that juvenile without the consent of the juvenile court." 4 Neb. App. at 732, 548 N.W.2d at 22.

In *In re Guardianship of Alice D. et al., supra*, DHHS argued that the appointment of a guardian was a proper method of end-

ing the juvenile court's jurisdiction. The Court of Appeals concluded, however, that DHHS "should not be allowed to use the probate court as a means of ignoring the juvenile court, and we are confident that the Legislature did not intend for the probate court to interfere with the juvenile court's work." *Id.* at 733, 548 N.W.2d at 23.

In the present cases, the guardian ad litem argues that the case plan adopted by the juvenile court calling for guardianship with the grandparents constitutes the juvenile court's consent to the guardianship proceeding under § 30-2608. The Court of Appeals also addressed a situation in which the county court judge presided over both a juvenile adjudication and an appointment of guardians under § 30-2608 in *In re Interest of Justin C. et al.*, 7 Neb. App. 251, 581 N.W.2d 437 (1998).

In *In re Interest of Justin C. et al.*, the Court of Appeals held that the rule announced in *In re Guardianship of Alice D. et al., supra*, was applicable and that, therefore, the county court was without jurisdiction to appoint guardians even though the same judge presided in the juvenile proceedings. *In re Interest of Justin C. et al., supra*. The Court of Appeals noted the confusion caused in appellate review by the county court, sitting as a probate court, taking judicial notice of a body of proceedings from the juvenile case, "the breadth of which is unknowable on appeal and which technique has been criticized, especially in juvenile cases." *Id.* at 261, 581 N.W.2d at 443. In addition, the Court of Appeals was concerned by the inconsistent roles the guardian ad litem performed by appearing in both of these proceedings. *Id.*

We agree with the policy considerations raised by the Court of Appeals. We recognize that Neb. Rev. Stat. § 24-517 (Cum. Supp. 2000) was amended after these Court of Appeals cases to give concurrent jurisdiction to county courts and separate juvenile courts over guardianship proceedings. See § 24-517 ("[e]ach county court shall have . . . (2)[e]xclusive original jurisdiction in all matters relating to the guardianship of a person, except if a separate juvenile court already has jurisdiction over a child in need of a guardian, concurrent original jurisdiction with the separate juvenile court in such guardianship"). However, this amendment must be considered in the context of changes that were made to the juvenile code as part of the same bill.

[10] The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *State ex rel. AMISUB v. Buckley, ante* p. 596, 618 N.W.2d 684 (2000); *Alegent Health Bergan Mercy Med. Ctr. v. Haworth, ante* p. 63, 615 N.W.2d 460 (2000).

We note that both §§ 24-517 and 43-247 were amended as part of L.B. 1041. Subsection (9) was added to § 43-247, which gives exclusive jurisdiction to juvenile courts for "[t]he adoption or guardianship proceedings for a child over which the juvenile court already has jurisdiction under another provision of the Nebraska Juvenile Code." See 1998 Neb. Laws, L.B. 1041.

Allowing county courts to preside over guardianship proceedings under § 30-2608 for adjudicated minors defeats the legislative intent of § 43-247(9). Nebraska case law had already recognized the exclusive jurisdiction of juvenile courts in guardianship proceedings even before these amendments. Before 1998, county courts had exclusive jurisdiction over guardianship matters under § 24-517. See § 24-517 (Reissue 1995). We nonetheless recognized that a county court, sitting as a juvenile court, has exclusive jurisdiction to appoint guardians for adjudicated minors. See *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996) (rejecting argument that exclusive jurisdiction of county court, sitting as juvenile court, denies noncustodial parent of any method through which to seek custody of adjudicated minor).

[11] When legislation is enacted which makes related preexisting law applicable thereto, it is presumed that the Legislature acted with full knowledge of the preexisting law and judicial decisions of the Supreme Court construing and applying it. *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998). Thus, the statutory provision that county courts and separate juvenile courts have concurrent jurisdiction over guardianship matters reflects a legislative intent that a county court's jurisdiction will yield to the juvenile court's exclusive jurisdiction over a guardianship proceeding once a minor is adjudged to be within its jurisdiction.

In addition to the policy considerations raised by the Court of Appeals for upholding the juvenile court's exclusive jurisdiction, we note that a court must apply a different standard for a guardianship appointment under the juvenile code than the standard required under § 30-2608. Under § 30-2608, a court must find that the parent has lost custody rights due to unfitness or forfeiture before making a guardianship appointment.

Under the juvenile code, once a juvenile has been adjudged to be within the juvenile court's jurisdiction, the juvenile court, when entering a disposition order that places the juvenile outside of the home, must make a written determination that "continuation in the home would be contrary to the health, safety, or welfare of such juvenile *and* that reasonable efforts to preserve and reunify the family have been made if required under section 43-283.01." (Emphasis supplied.) Neb. Rev. Stat. § 43-284 (Reissue 1998).

The "fitness" standard applied in guardianship appointment under § 30-2608 is analogous to a juvenile court finding that it would be contrary to a juvenile's welfare to return home. See *In re Interest of Amber G. et al., supra* (applying fitness standard to disposition order under juvenile code to place children in custody of Department of Social Services). The second requirement under the juvenile code, however, potentially causes a conflict with concurrent county court jurisdiction. A juvenile court must also make an additional finding that reasonable efforts at reunification have been made.

[12] Both the guardian ad litem in the guardianship petitions and the court in its orders state that Sandra had lost her parental right to custody by circumstances or prior court order under § 30-2608. Applying the § 30-2608 standard, however, permits a court to evade the juvenile code requirement that the court also find reasonable efforts at reunification have been made if required. See § 43-284. Neb. Rev. Stat. § 43-283.01(2) and (4) (Reissue 1998) require those efforts to be made unless there are aggravating circumstances. Thus, we conclude that when a minor is adjudged to be within the jurisdiction of the juvenile court, a guardianship appointment must be made pursuant to the juvenile code.

## CONCLUSION

In the juvenile case No. S-99-1265, we conclude that the September 24, 1999, order was not a final order affecting a substantial parental right and, thus, dismiss the appeal in that case. In cases Nos. S-99-1262, S-99-1263, and S-99-1264, we conclude that once there has been an adjudication under a juvenile proceeding, in either a separate juvenile court or a county court sitting as a juvenile court, guardianship proceedings must be brought in a juvenile proceeding and not under § 30-2608. Therefore, we vacate the decisions in the guardianship cases and dismiss the appeals.

JUDGMENTS IN NOS. S-99-1262, S-99-1263, AND S-99-1264 VACATED, AND APPEALS DISMISSED.
APPEAL IN NO. S-99-1265 DISMISSED.

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STATE OF NEBRASKA, APPELLEE,
V. DUANE D. DALLMANN, APPELLANT.
621 N.W.2d 86

Filed December 22, 2000. No. S-99-1411.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous.
2. **Motions to Suppress: Miranda Rights: Appeal and Error.** In reviewing a motion to suppress statements to determine whether an individual was in custody for purposes of *Miranda*, findings of fact as to the circumstances surrounding the interrogation are reviewed for clear error, and the determination of whether or not a reasonable person would have felt that he or she was free to leave is reviewed de novo.
3. **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.
4. **Jurisdiction: Notice: Fees: Time: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000), an appellate court generally does not acquire jurisdiction of an appeal unless a notice of appeal is filed and the docket fee is paid within 30 days of the final order.

5. **Courts: Jurisdiction: Affidavits: Notice: Appeal and Error.** If a request to proceed in forma pauperis is granted by the district court, an appellate court obtains jurisdiction when the notice of appeal is timely filed, and any failure of the affidavit to state the nature of the action or that the affiant is entitled to redress under Neb. Rev. Stat. § 25-2301.01 (Cum. Supp. 2000) will not divest the court of jurisdiction.
6. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
7. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** If an officer has probable cause to stop a violator, the stop is objectively reasonable, and any ulterior motivation on the officer's part is irrelevant.
8. **Constitutional Law: Search and Seizure: Waiver.** The right to be free from an unreasonable search and seizure, as guaranteed by the 4th and 14th Amendments to the U.S. Constitution and by article I, § 7, of the Nebraska Constitution, may be waived by the consent of the citizen.
9. **Search and Seizure.** In order for a consent to search to be effective, it must be a free and unconstrained choice and not the product of a will overborne.
10. **Search and Seizure: Duress.** A consent to search must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological.
11. **Constitutional Law: Search and Seizure.** The Fourth Amendment does not require that a lawfully seized defendant be advised that he or she is legally "free to go" before the defendant's consent to search will be recognized as voluntary.
12. **Search and Seizure: Police Officers and Sheriffs.** An officer need not give any warning to a citizen that he or she may freely refuse a request to search.
13. **Search and Seizure: Police Officers and Sheriffs: Arrests: Motor Vehicles.** When a police officer has made a lawful custodial arrest of the occupant of a vehicle, the officer may, as a contemporaneous incident of the arrest, search the passenger compartment of that vehicle and examine the contents of any containers found within the passenger compartment.
14. **Constitutional Law: Miranda Rights: Self-Incrimination.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), prohibits the use of statements stemming from the custodial interrogation of a defendant unless the prosecution demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.
15. ___: ___: ___. In order to safeguard an uncounseled individual's Fifth Amendment privilege against self-incrimination, suspects interrogated while in police custody must be told that they have a right to remain silent, that anything they say may be used against them in court, and that they are entitled to the presence of an attorney, either retained or appointed, at the interrogation.
16. **Constitutional Law: Miranda Rights.** *Miranda* warnings are required only where there has been such a restriction on one's freedom as to render one "in custody."
17. **Constitutional Law: Miranda Rights: Evidence.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), does not require that volunteered statements be suppressed in the absence of warnings, and any statement given freely and voluntarily without compelling influences is admissible in evidence.
18. **Constitutional Law: Arrests: Miranda Rights: Words and Phrases.** One is in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), when there is a formal arrest or a restraint on one's freedom of movement of the degree associated with such an arrest.

19. **Constitutional Law: Miranda Rights: Police Officers and Sheriffs.** Two inquiries are essential to the determination of whether an individual is in custody for *Miranda* purposes: (1) an assessment of the circumstances surrounding the interrogation and (2) whether a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave.
20. **Miranda Rights.** What is dispositive in determining whether *Miranda* warnings should have been given is whether a reasonable person would have felt free to leave under the circumstances.
21. **Miranda Rights: Investigative Stops: Motor Vehicles.** An individual temporarily detained pursuant to an investigatory traffic stop is not in custody for purposes of *Miranda*.
22. **Criminal Law: Miranda Rights.** *Miranda* warnings are not required for general on-the-scene questioning as to facts surrounding a crime.
23. **Miranda Rights: Police Officers and Sheriffs: Investigative Stops: Motor Vehicles.** When a person is detained pursuant to a traffic stop, there must be some further action or treatment by the police to render the driver in custody and entitled to *Miranda* warnings.
24. **Search and Seizure: Miranda Rights.** A brief, voluntary pat-down search generally does not constitute custody for purposes of *Miranda*.
25. **Miranda Rights: Police Officers and Sheriffs.** Where police officers use no coercion or threat of force and any continued detention is at the consent of the suspect, *Miranda* warnings are not required.
26. **Miranda Rights: Arrests.** It is where a suspect is detained only to an extent analogous to an arrest that *Miranda* warnings are required.
27. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.
28. ___: ___. An abuse of discretion occurs when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Kristi J. Egger Brown for appellant.

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

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

CONNOLLY, J.

The appellant, Duane D. Dallmann, was convicted of possession of a controlled substance. On appeal, Dallmann argues that police officers stopped his vehicle as a pretext to search for

drugs, that various searches violated his Fourth Amendment rights, that he was not given *Miranda* warnings, and that his sentence is excessive.

Although the substantive issues raised on appeal are significant, this appeal also requires us to address whether a poverty affidavit that fails to state the nature of the action and that the appellant is entitled to redress is sufficient under Neb. Rev. Stat. § 25-2301.01 (Cum. Supp. 2000) to vest this court with jurisdiction. When Dallmann filed his notice of appeal, he also filed a motion for leave to proceed in forma pauperis. In the poverty affidavit filed in support of the motion, Dallmann stated that he was unable to pay the costs of appeal but did not list the nature of the action or that he believed he was entitled to redress. We determine these requirements are not jurisdictional. We further determine that Dallmann's assignments of error are without merit. Accordingly, we affirm.

## ASSIGNMENTS OF ERROR

Dallmann assigns, rephrased, that the district court erred in (1) overruling his motions to suppress, (2) finding that the evidence was sufficient to find Dallmann guilty beyond a reasonable doubt, and (3) imposing an excessive sentence.

## BACKGROUND

On June 14, 1999, an information was filed charging Dallmann with possession of a controlled substance, a Class IV felony. Dallmann filed motions to suppress evidence and statements he made to various police officers. A hearing was held on the motions, and three police officers testified.

Jeff Bliemeister, a deputy sheriff and narcotics investigator, testified that on May 13, 1999, he and another investigator, Forrest Dean Dalton, Jr., were on their way to conduct surveillance on the residence of Nancy Thurman. Neither investigator was in uniform, and they were driving an unmarked vehicle. On the way to the residence, the investigators saw Thurman in a car leaving the area. The investigators then followed Thurman to a convenience store, where she parked her car. The investigators parked in a church parking lot across the street and observed Thurman. Thurman sat in her car and did not enter the convenience store. A few minutes later, another car pulled into the con-

venience store parking lot. A man, later identified as Dallmann, got out of the car, put the hood up, and stood there for a couple of seconds. Thurman then got out of her car and met Dallmann in between the two cars. The investigators observed Thurman and Dallmann walk to the passenger side of Dallmann's vehicle and talk. The two talked for less than 5 minutes, then returned to their cars. Dallmann and Thurman remained in their cars for about 30 seconds, then they both got out of the cars again, met briefly, and left. The investigators did not observe any objects change hands between Thurman and Dallmann and did not see anything dropped or picked up by either of them. During the time Dallmann and Thurman were talking, the investigators radioed for a uniformed police unit to come into the area.

Based on the investigators' suspicions that a drug transaction had taken place, they decided to follow Dallmann. In Bliemeister's police report, he wrote that the officers planned to stop Dallmann. As Dallmann pulled out of the convenience store, the investigators observed that he was driving without the headlights of his vehicle on. It was approximately 9 p.m. and completely dark. The investigators informed the uniformed unit that Dallmann was driving without his headlights on. One of the uniformed officers, Danny Reitan, then stopped Dallmann about three blocks away.

Reitan asked Dallmann to step out of the vehicle. After Dallmann had exited the vehicle, Reitan asked him if he had any weapons. Dallmann replied, "No." Reitan asked if he could check, and Dallmann replied, "Yes." At approximately the same time, Bliemeister asked Dallmann if he could search the car for weapons, and Dallmann said, "Go ahead. Yes." Reitan conducted a pat-down search and did not find any weapons. Reitan next asked Dallmann if he had any narcotics. Dallmann replied, "No." When asked by Reitan if he could search, Dallmann said, "Yes." During the search, Reitan pulled a cigarette package out of Dallmann's pocket. Dallmann stated that he did not know what was in it. When Reitan opened it, he found cigarettes and a small amount of cash. Dallmann then stated, "Oh, that's what's in there."

Reitan began to search Dallmann's pockets and pant cuffs and then asked if he could search Dallmann's shoes. Dallmann

replied, "Yes." Dallmann was wearing leather moccasin-type shoes and was able to simply lift his feet out of them. As Dallmann lifted his left foot out of the shoe, he tried to kick it under the car and then, using his foot, pulled it back toward Reitan. Reitan then observed a white napkin in the bottom of the shoe. Reitan asked Dallmann what was in the shoe, and Dallmann replied, "That just fell out of the tire." Dalton then came over and removed the napkin from the shoe. Inside the napkin was a clear plastic baggie containing an off-white substance. Believing the substance to be methamphetamine, Reitan placed Dallmann under arrest and led him back to the police cruiser. After the drugs were found, Bliemeister expanded the scope of his search of the car for not only weapons, but contraband and drugs. No drugs were found in the car, but an address book was found containing several names and telephone numbers of people Bliemeister and Dalton had arrested in the past on narcotics-related charges or who were currently being investigated. The address book was found in the pocket of a denim jacket in the back seat.

After learning that drugs had likely been found, Bliemeister attempted to talk to Dallmann. Dallmann, however, refused to talk to Bliemeister and stated that he wanted an attorney. Bliemeister stopped questioning Dallmann at that point. Bliemeister testified that he did not read Dallmann *Miranda* warnings because Dallmann had invoked his right to counsel. The record also indicates that none of the investigating officers advised Dallmann of his *Miranda* rights at any time. The substance that was found was then pretested, and a positive result was obtained. After the substance tested positive, Dallmann was handcuffed and placed in the back of Reitan's cruiser. As Bliemeister was writing a citation for Dallmann to sign, he told Dallmann that the charge was for possession of methamphetamine. Dallmann then stated that the methamphetamine was not for him, that the officers could "piss test" him, and that he was just going to sell the drugs to make a little extra money. Bliemeister testified that Dallmann's statements were unsolicited.

Dallmann was charged by information with possession of a controlled substance pursuant to Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 1998). Dallmann filed a motion to suppress state-

ments because he had not been advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Dallmann also filed a motion to suppress evidence on the bases that the investigators did not have probable cause to stop his vehicle and conduct searches, that the searches were not incident to a lawful arrest, and that there was no valid consent to search. A hearing was held, and the motions were overruled. In overruling the motions, the district court found that Dallmann's consents to search were made freely and voluntarily. The court further found that any expansion of the search of the vehicle was a search incident to arrest. The court found that Dallmann was not in custody when he made statements about the napkin in his shoe and the contents of his package of cigarettes. The court determined that Dallmann was in custody when he made the statement that he had planned to sell the drugs. However, the court determined that the statement was not the product of any police interrogation, but, instead, was volunteered.

After a stipulated trial consisting of the suppression hearing testimony and a laboratory report, at which Dallmann preserved his objections to the evidence, Dallmann was convicted. The district court sentenced Dallmann to not less than 18 months' nor more than 36 months' incarceration, with credit given for 209 days already served. The sentence was to run consecutively to any other sentence that Dallmann was already serving.

Dallmann appealed. Along with his notice of appeal, Dallmann also filed a motion for leave to proceed in forma pauperis and an affidavit in support of the motion. The affidavit stated that Dallmann was unable to pay the costs of appeal but did not state the nature of the action or state that Dallmann believed he was entitled to relief. The record contains an order of the district court sustaining Dallmann's motion to proceed in forma pauperis. The State filed a motion for summary dismissal because the affidavit failed to include statements required by § 25-2301.01.

## STANDARD OF REVIEW

[1] A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to

be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000).

[2] In reviewing a motion to suppress statements to determine whether an individual was in custody for purposes of *Miranda*, findings of fact as to the circumstances surrounding the interrogation are reviewed for clear error, and the determination of whether or not a reasonable person would have felt that he or she was free to leave is reviewed de novo. See *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000).

[3] 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. Lara*, 258 Neb. 996, 607 N.W.2d 487 (2000); *State v. Bartholomew*, 258 Neb. 174, 602 N.W.2d 510 (1999).

## ANALYSIS

### Motion for Summary Dismissal Because of Lack of Jurisdiction

The State has filed a motion for summary dismissal because the poverty affidavit in support of Dallmann's motion to proceed in forma pauperis failed to include statements required by § 25-2301.01. Specifically, Dallmann provided a motion and affidavit stating that he was unable to pay the cost of the appeal, but did not provide a statement of the nature of the action or a statement that he believed was entitled to redress. The State contends that because the poverty affidavit serves as a substitute for the docket fee, the failure to strictly comply with all statutory provisions governing poverty affidavits is jurisdictional.

[4] This court generally does not acquire jurisdiction of an appeal unless a notice of appeal is filed and the docket fee is paid within 30 days of the final order. See Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000). Under § 25-2301.01, an indigent appellant can avoid paying the docket fee by requesting to proceed in forma pauperis. Section 25-2301.01 states in part:

> An application to proceed in forma pauperis shall include an affidavit stating that the affiant is unable to pay the fees

> and costs or give security required to proceed with the case, the nature of the action, defense, or appeal, and the affiant's belief that he or she is entitled to redress.

Before August 28, 1999, Neb. Rev. Stat. § 29-2306 (Reissue 1995), which pertains specifically to in forma pauperis criminal appeals, stated only that the affiant must state that "he or she is unable by reason of poverty to pay the costs" of the appeal. Section 29-2306 did not require that the affiant state the nature of the action, defense, or appeal, and the belief that he or she was entitled to redress. Effective August 28, 1999, however, § 29-2306 was amended and provides:

> If a defendant in a criminal case files, within thirty days after the entry of the judgment, order, or sentence, an application to proceed in forma pauperis in accordance with sections 25-2301 to 25-2310 with the clerk of the district court, then no payment of the docket fee shall be required of him or her unless the defendant's application to proceed in forma pauperis is denied. The clerk of the district court shall forward a certified copy of such application, including the affidavit, to the Clerk of the Supreme Court. *If an application to proceed in forma pauperis is filed and granted, the Court of Appeals or Supreme Court shall acquire jurisdiction of the case when the notice of appeal is filed with the clerk of the district court.* In cases in which an application to proceed in forma pauperis is granted, the amount of the costs shall be endorsed on the mandate and shall be paid by the county in which the indictment was found.

(Emphasis supplied.) § 29-2306 (Cum. Supp. 2000). Thus, under the amended version of § 29-2306, a request to proceed in forma pauperis in a criminal appeal must be filed in accordance with § 25-2301.01.

Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2000), a new statutory section that was also effective August 28, 1999, provides in part:

> (1) An application to proceed in forma pauperis shall be granted unless there is an objection that the party filing the application: (a) Has sufficient funds to pay costs, fees, or security or (b) is asserting legal positions which are

> frivolous or malicious. The objection to the application shall be made within thirty days after the filing of the application. Such objection may be made by the court on its own motion or on the motion of any interested person. The motion objecting to the application shall specifically set forth the grounds of the objection. An evidentiary hearing shall be conducted on the objection unless the objection is by the court on its own motion on the grounds that the applicant is asserting legal positions which are frivolous or malicious. If no hearing is held, the court shall provide a written statement of its reasons, findings, and conclusions for denial of the applicant's application to proceed in forma pauperis which shall become a part of the record of the proceeding. If an objection is sustained, the party filing the application shall have thirty days after the ruling or issuance of the statement to proceed with an action or appeal upon payment of fees, costs, or security notwithstanding the subsequent expiration of any statute of limitations or deadline for appeal.

We have never addressed whether all the exact requirements of the former version of § 25-2301.01, see Neb. Rev. Stat. § 25-2301 (Reissue 1995), had to be met in order to vest this court with jurisdiction over an appeal. However, in *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995), we held that a poverty affidavit must assert that the defendant is unable by reason of poverty to pay the costs of the appeal in order to vest jurisdiction with an appellate court. We have also dismissed for lack of jurisdiction when the appellant failed to properly sign the poverty affidavit under oath. *In re Interest of T.W. et al.*, 234 Neb. 966, 453 N.W.2d 436 (1990); *State v. Hunter*, 234 Neb. 567, 451 N.W.2d 922 (1990); *In re Interest of K.D.B.*, 233 Neb. 371, 445 N.W.2d 620 (1989).

In *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996), we addressed a case in which the district court had denied the appellant's motion to proceed in forma pauperis, stating that if the poverty affidavit is not sufficient to meet the statutory requirements of § 25-2301 or is found to be untrue, the appeal has not been perfected. Thus, in *In re Interest of Noelle F. & Sarah F.*, we held that an in forma pauperis affi-

davit which is found by the trial court to be not well taken is insufficient to perfect an appeal on the merits.

Under the amended statutes, however, we now conclude that the plain language of § 29-2306, as amended, and §§ 25-2301.01 and 25-2301.02 make clear that the absence of language in a poverty affidavit stating the nature of the action and that the affiant is entitled to redress will not divest this court of jurisdiction. Section 29-2306 clearly states that if in forma pauperis status is sought and granted, the Nebraska Court of Appeals or Supreme Court shall acquire jurisdiction of the case when the notice of appeal is filed with the clerk of the district court. Under § 29-2306, when a request to proceed in forma pauperis is granted, the amount of the costs "shall be paid by the county in which the indictment was found." With the exception of the 30-day filing requirement, § 29-2306 does not make any exceptions for in forma pauperis status that may have been improperly granted or granted in error. Thus, in a criminal case, once in forma pauperis status has been granted by the district court, the appellate court will be entitled to receive the docket fee.

Section 25-2301.02 makes clear that challenges to the ability of a defendant to proceed in forma pauperis are to occur in the district court and that the district court is charged with the responsibility of granting or denying the motion to proceed in forma pauperis. We have previously stated:

> We have uniformly held that lower courts are divested of subject matter jurisdiction over a particular case when an appeal of that case is perfected. . . . [W]e [have] held that an in forma pauperis appeal is perfected when the appellant timely filed a notice of appeal and an affidavit of poverty.
>
> Although jurisdiction is vested in the appellate court upon timely filing of a notice of appeal and an affidavit of poverty, some duties are still required of the lower court. . . . For example, the lower court must forward to the appellate court the notice of appeal, requests for the transcript and the bill of exceptions, and the docket fee or poverty affidavit. Sections 25-2301 and 25-2308 require the lower court to act if it determines that the allegations of poverty

> are untrue or if it determines that the appeal is not taken in good faith.
>
> Generally, appellants are entitled to the benefits of an in forma pauperis appeal when the affidavit of poverty and notice of appeal are filed and stand uncontradicted and unobjected to. If there is no hearing on the poverty affidavit and the appeal, or when there is a hearing and the evidence is uncontradicted, the trial court has a duty to allow the appellant to proceed in forma pauperis.

*Flora v. Escudero*, 247 Neb. 260, 264-65, 526 N.W.2d 643, 646-47 (1995). It is not a function of this court to determine whether an affidavit to proceed in forma pauperis contains specific language stating the nature of the case and that the affiant is entitled to redress. These determinations must be made by the district court. Thus, any objection that the poverty affidavit fails to state the nature of the action, defense, or appeal, and the belief that the affiant is entitled to redress, must also be raised in the district court. As indicated in *Flora, supra*, such objections may be waived.

[5] Accordingly, we determine that if a request to proceed in forma pauperis is granted by the district court, this court obtains jurisdiction when the notice of appeal is timely filed, and any failure of the affidavit to state the nature of the action or that the affiant is entitled to redress under § 25-2301.01 will not divest this court of jurisdiction. In Dallmann's case, the record contains an order from the district court sustaining his motion to proceed in forma pauperis. Thus, Dallmann was granted in forma pauperis status, and we have jurisdiction over the appeal.

## STOP OF VEHICLE

Dallmann contends that the officers stopped his vehicle in violation of the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution. Dallmann contends that the investigators had decided, without probable cause, to follow and stop him before he left the convenience store and that the stop based on his failure to turn on his headlights was a pretext to obtain consent to search the vehicle. This contention is without merit.

In *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996), the Court addressed the argument that a

stop made pursuant to a traffic violation was actually a pretext for a search. The Court made clear that the standard to be applied is whether the officers had probable cause to stop the vehicle and that the constitutional reasonableness of a traffic stop does not depend on the actual motivations of the officers involved. The Court further explained that prior cases involving a pretext to search were cases in which the Court was addressing the validity of a search in the absence of probable cause.

[6,7] Based in part on *Whren, supra*, we recently held that a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Bartholomew*, 258 Neb. 174, 602 N.W.2d 510 (1999). If an officer has probable cause to stop a violator, the stop is objectively reasonable, and any ulterior motivation on the officer's part is irrelevant. *Id.*

The officers in this case stopped Dallmann because he was driving at night without headlights. Whether the officers would have had probable cause to stop Dallmann if he had not violated a traffic regulation is irrelevant. Thus, the district court was correct in concluding that the officers had probable cause to stop Dallmann's vehicle.

### SEARCH OF DALLMANN AND VEHICLE

Dallmann next contends that his consent to the search of his clothing and his vehicle was not voluntarily given. In particular, Dallmann argues that he was in a "custodial atmosphere," brief for appellant at 29, that he was unaware he had the right to refuse to consent, and that under the totality of the circumstances, his consent was the result of duress or coercion.

[8-12] The right to be free from an unreasonable search and seizure, as guaranteed by the 4th and 14th Amendments to the U.S. Constitution and by article I, § 7, of the Nebraska Constitution, may be waived by the consent of the citizen. *State v. Ready*, 252 Neb. 816, 565 N.W.2d 728 (1997). In order for a consent to search to be effective, it must be a free and unconstrained choice and not the product of a will overborne. *Id.*; *State v. Prahin*, 235 Neb. 409, 455 N.W.2d 554 (1990). The consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological. *Id.* The Fourth Amendment, however, does not require that a

lawfully seized defendant be advised that he or she is legally "free to go" before the defendant's consent to search will be recognized as voluntary. *Ready, supra*, citing *Ohio v. Robinette*, 519 U.S. 33, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996). In addition, an officer need not give any warning to a citizen that he or she may freely refuse a request to search. *State v. Aguirre-Rojas*, 253 Neb. 477, 571 N.W.2d 70 (1997).

We agree with the district court that under the totality of the circumstances, Dallmann's consent to search his clothing for drugs and his vehicle for weapons was voluntary. Nothing in the record indicates that the investigating officers used coercion or threats of force, either express or implied, to obtain Dallmann's consent. The officers were not required to inform Dallmann that he had a right to refuse the request to search.

[13] Although Dallmann consented to a search of his vehicle for weapons, the address book was found in a place where a weapon could be concealed. In addition, the expanded scope of the search of the vehicle took place when Dallmann was placed under arrest. When a police officer has made a lawful custodial arrest of the occupant of a vehicle, the officer may, as a contemporaneous incident of the arrest, search the passenger compartment of that vehicle. The officer may also examine the contents of any containers found within the passenger compartment. *State v. Roth*, 213 Neb. 900, 331 N.W.2d 819 (1983). We conclude that the evidence was obtained through lawful searches. Thus, the district court did not err in overruling Dallmann's motion to suppress evidence.

### Motion to Suppress Statements

Dallmann contends that his statements to the officers should have been suppressed because he was not advised of his *Miranda* rights.

[14,15] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), prohibits the use of statements stemming from the custodial interrogation of a defendant unless the prosecution demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995); *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995). Thus, in order to safeguard an uncoun-

seled individual's Fifth Amendment privilege against self-incrimination, suspects interrogated while in police custody must be apprised of certain rights. Specifically, suspects must be told that they have a right to remain silent, that anything they say may be used against them in court, and that they are entitled to the presence of an attorney, either retained or appointed, at the interrogation. *State v. Veiman*, 249 Neb. 875, 546 N.W.2d 785 (1996).

[16,17] *Miranda* warnings are required only where there has been such a restriction on one's freedom as to render one "in custody." *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000). Further, *Miranda* does not require that volunteered statements be suppressed in the absence of the warnings. Any statement given freely and voluntarily without compelling influences is admissible in evidence. *State v. Taylor*, 221 Neb. 114, 375 N.W.2d 610 (1985), citing *Miranda, supra*. See, also, *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000) (volunteered statement admissible in evidence). Thus, an in-custody statement voluntarily made without the benefit of *Miranda* warnings is admissible if it is not the product of interrogation. *Taylor, supra*.

[18] In this case, Dallmann was under arrest when he stated that he was not going to use the drugs himself, but had planned to sell them. One is in custody for *Miranda* purposes when there is a formal arrest or a restraint on one's freedom of movement of the degree associated with such an arrest. See *Burdette, supra*. Dallmann, however, did not make the statement in response to any questions or actions on the part of the investigating officers. The record shows that Dallmann spontaneously made the statement. Thus, we agree with the district court that the statement was volunteered. Because the statement was volunteered, it was admissible into evidence even though it was made without Dallmann's having been advised of his *Miranda* rights.

[19,20] The district court concluded that Dallmann's statements about the item in his shoe and the contents of his cigarette package were made when he was not in custody and, thus, were admissible on that basis. Two inquiries are essential to the determination of whether an individual is in custody for *Miranda* purposes: (1) an assessment of the circumstances surrounding the interrogation and (2) whether a reasonable person would have felt that he or she was not at liberty to terminate the inter-

rogation and leave. *Burdette, supra.* What is dispositive in determining whether *Miranda* warnings should have been given is whether a reasonable person would have felt free to leave under the circumstances. *Id.*

[21-23] We have held that an individual temporarily detained pursuant to an investigatory traffic stop is not in custody for purposes of *Miranda*. *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996); *State v. Holman*, 221 Neb. 730, 380 N.W.2d 304 (1986). See, also, *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) (drawing analogy between stop under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and traffic stop and indicating that *Terry* stops are not subject to dictates of *Miranda*); *U.S. v. Sullivan*, 138 F.3d 126 (4th Cir. 1998); *U.S. v. Boucher*, 909 F.2d 1170 (8th Cir. 1990). Further, *Miranda* warnings are not required for general on-the-scene questioning as to facts surrounding a crime. *U.S. v. Klein*, 13 F.3d 1182 (8th Cir. 1994). When a person is detained pursuant to a traffic stop, there must be some further action or treatment by the police to render the driver in custody and entitled to *Miranda* warnings. *Bowers, supra.*

[24-26] A brief, voluntary pat-down search generally does not constitute custody for purposes of *Miranda*. See, e.g., *U.S. v. Wyatt*, 179 F.3d 532 (7th Cir. 1999); *State v. Graca*, 142 N.H. 670, 708 A.2d 393 (1998). Further, the detainment of an individual during the consensual search of his or her vehicle has also been held not to constitute custody for *Miranda* purposes. See, e.g., *May v. Commonwealth*, 3 Va. App. 348, 349 S.E.2d 428 (1986) (person not in custody when he consented to search of trunk of his vehicle). Although courts have indicated that *Miranda* warnings may be required under some circumstances before a suspect is actually arrested, where police officers use no coercion or threat of force and any continued detention is at the consent of the suspect, *Miranda* warnings are not required. See *U.S. v. Richie*, 35 F.3d 1477 (10th Cir. 1994) (*Miranda* warnings not required when suspect consented to search of his home by multiple police officers). Compare *U.S. v. Perdue*, 8 F.3d 1455 (10th Cir. 1993) (*Miranda* warnings required where police forced suspect out of vehicle at gunpoint and held him face down on the ground at gunpoint during questioning, while

police helicopters hovered overhead). Thus, it is where a suspect is detained only to an extent analogous to an arrest that *Miranda* warnings are required. See *Sullivan, supra.*

In this case, Dallmann was initially stopped for a traffic violation and then consented to a search of his vehicle for weapons and a search of his clothing for drugs. Although there were multiple police officers present, the officers used no threats of force or coercion to obtain Dallmann's consent to search. Nothing in the record indicates that Dallmann believed he was under arrest when he consented to the searches or that Dallmann was not free to leave. We conclude that under the circumstances of this case, Dallmann was not in custody when he made the statement that the item in his shoe fell out of the tire and when he made the statement about the contents of the cigarette package. Accordingly, the officers were not required to advise Dallmann of his *Miranda* rights before these statements were made. The district court did not err in overruling Dallmann's motion to suppress statements. Furthermore, the evidence was sufficient beyond a reasonable doubt to sustain the conviction.

## SENTENCING

[27,28] Dallmann contends that the district court erred in imposing an excessive sentence. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Wells*, 257 Neb. 332, 598 N.W.2d 30 (1999). An abuse of discretion occurs when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.*

Dallmann was convicted of a Class IV felony. See § 28-416. A Class IV felony carries a statutory maximum of 5 years' imprisonment, a $10,000 fine, or both, and no minimum. Dallmann's sentence was within the statutory limits, and we conclude that the district court did not abuse its discretion when sentencing Dallmann. Accordingly, Dallmann's assignment of error regarding sentencing is without merit.

## CONCLUSION

We determine that an appellate court acquires jurisdiction of an in forma pauperis criminal appeal when the notice of appeal is filed. When a request to proceed in forma pauperis has been

granted, the failure of the affidavit to state the nature of the action or a statement that the affiant is entitled to redress will not divest the appellate court of jurisdiction. We conclude that Dallmann's assignments of error are without merit. Accordingly, we affirm.

AFFIRMED.

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## CYNTHIA M. BROWN, NOW KNOWN AS CYNTHIA M. MORALES, APPELLANT, V. DWIGHT E. BROWN, JR., APPELLEE.

621 N.W.2d 70

Filed December 22, 2000. No. S-99-1444.

1. **Child Custody: Visitation: Appeal and Error.** Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial judge, and although reviewed de novo on the record, the trial judge's determination will normally be affirmed absent an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or 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.
3. **Child Custody.** In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her.
4. **Child Custody: Words and Phrases.** Joint legal custody is joint authority and responsibility for making major decisions regarding the child's welfare.
5. ___: ___. Joint physical custody is joint responsibility for minor day-to-day decisions and the exertion of continuous physical custody by both parents over a child for significant periods of time.
6. **Child Custody.** Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.
7. **Modification of Decree: Child Custody: Proof.** The party seeking modification of a decree of dissolution bears the burden of showing a material change of circumstances affecting the best interests of a child.
8. **Modification of Decree: Child Custody.** Removal of a child from the state, without more, does not amount to a change of circumstances warranting a change of custody. Nevertheless, when considered in conjunction with other evidence, such a move may well be a change of circumstances that would warrant a modification of the decree.
9. **Child Custody: Intent.** In cases of joint legal and physical custody, a legitimate reason for leaving the state, taken together with an expressed intent to do so, may con-

stitute a material change in circumstances affecting the best interests of a child, sufficient to require examination of the best interests of the child.

10. **Modification of Decree: Child Custody: Proof: Intent.** Proving an intent to leave the state does not necessitate that physical custody be modified, but the intent to move illustrates the likelihood that there is a need for considering some sort of modification that would reflect the new circumstances.
11. **Child Custody: Proof.** Under Nebraska law, the burden has been placed on the custodial parent to satisfy the court that he or she has a legitimate reason for leaving the state and to demonstrate that it is in the child's best interests to continue living with him or her.
12. ___: ___. Because the burden of proof in relocation cases is already placed on the parent seeking leave to relocate, it is unnecessary to reallocate that burden in cases of joint legal and physical custody.
13. **Child Custody.** A custodial parent's firm offer of employment with a flexible schedule in close proximity to the custodial parent's extended family constitutes a legitimate reason to leave the state in a removal case.
14. **Child Custody: Visitation.** There are three broad considerations ordinarily to be employed in determining whether removal to another jurisdiction is in a child's best interests: (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation arrangements.
15. **Child Custody.** In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children, an appellate court should consider several pertinent factors, including: (1) the emotional, physical, and developmental needs of the children; (2) the children's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the children and each parent; (7) the strength of the children's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties.
16. ___. The list of factors to be considered in determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children should not be misconstrued as setting out a hierarchy of factors. Depending on the circumstances of a particular case, any one factor or combination of factors may be variously weighted.
17. ___. A child's racial identity is one factor among several that may be considered in making custody determinations.
18. **Child Support: Visitation.** As a general rule, the custodial parent's right of support and the noncustodial parent's right of visitation are entitled to separate enforcement.

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

James M. Kelley, of Berry, Kelley, Hansen & Reiman, for appellant.

Terrance A. Poppe and Joseph E. Dalton, of Morrow, Poppe, Otte, Watermeier & Phillips, P.C., for appellee.

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

GERRARD, J.

## I. NATURE OF CASE

Cynthia M. Brown, now known as Cynthia M. Morales, appeals the district court's denial of her request to be granted sole custody of her minor children and for leave of the court to relocate with the children from Lincoln, Nebraska, to Suffolk County, New York. The primary question presented in this appeal is whether the procedures and criteria articulated by this court in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), apply to a situation in which the parties share joint legal and physical custody of the children.

## II. PROCEDURAL BACKGROUND

Two children were born of the marriage of Cynthia and her former husband, Dwight E. Brown, Jr. (Dwight): Dwight III, born May 27, 1993, and Jasmine, born February 3, 1995. The parties were divorced in 1997, and the divorce decree entered by the district court on February 19, 1997, provided that the parties would share joint legal and physical custody of the children. The decree required Dwight to pay child support in the amount of $120 per month.

On September 14, 1998, Dwight filed a petition to modify the decree, seeking a reduction of his child support obligation. On October 6, Cynthia filed a cross-petition to modify the decree. Cynthia alleged that a material change in circumstances had occurred in the following particular respects: (1) Cynthia had graduated from nursing school, (2) Cynthia had secured employment in New York, (3) Dwight had remarried, and (4) Cynthia's income would increase when she began her employment at her new job in New York. Cynthia sought to have sole legal and physical custody of the children placed with her and

asked the district court to grant leave for her to relocate with the children to New York.

Dwight filed an amended petition to modify the decree on November 4, 1998. In addition to seeking a reduction of his child support obligation, Dwight alleged that Cynthia's lifestyle and living arrangements were inappropriate for the children and that Cynthia did not provide for the daily needs of the children. Dwight alleged that it would not be in the best interests of the children to be separated from Dwight. Dwight prayed that custody of the children be granted to him and that the district court order child support to be paid by Cynthia.

Trial was had on September 7, 1999, and on November 22, the district court entered an order modifying the decree such that Cynthia would be required to pay child support in the amount of $155 per month and Dwight's obligation to pay child support would be terminated. Neither party has appealed the child support modification. The district court determined that it was not in the best interests of the children to set aside the arrangement of joint custody. The district court found that Dwight was the physical custodian of the children no less than 50 percent of the time and that in some areas, such as health care and school, Dwight had been the primary custodian. The district court found that under the standards set forth in *Farnsworth v. Farnsworth, supra*, the quality of life would not be improved for the children in New York and that the best interests of the children did not favor such a move. The district court dismissed Cynthia's cross-petition to modify and dismissed Dwight's request to modify custody. Cynthia timely appeals. Dwight has not cross-appealed.

## III. FACTUAL BACKGROUND

Cynthia testified at the hearing in the district court that she had graduated from nursing school in May 1998 and had been working since graduation as a registered nurse. She testified that she was earning $17 per hour and working approximately 72 hours during each 2-week pay period at Madonna Rehabilitation Hospital in Lincoln.

Cynthia testified that at the time of hearing, she had been offered employment at the New York University Medical Center (NYU) in New York City. She would be working full time as a

registered nurse on the evening shift, from 3 to 11 p.m., and would earn a base salary of $25 to $30 per hour, plus approximately $7,000 annually in shift and experience differentials. Cynthia further testified that her pay would increase with advanced experience and education. Cynthia stated that the NYU job would be a professional advancement because NYU is a teaching hospital.

Cynthia testified that the NYU job would also include other benefits, such as insurance for herself and the children. Cynthia stated that NYU would pay for her to complete her master's degree and that the children would be able to obtain a free college education at NYU. Cynthia admitted that the children would be able to receive the free education at NYU regardless of whether or not the children lived in New York. Cynthia testified that she would not be able to take this particular job with NYU if she did not report for work on September 21, 1999, but that she would be able to take another available position with NYU after that date. Cynthia stated that she would not move to New York if she was not allowed to take the children with her.

Cynthia testified that she had arranged for temporary housing with her cousin in Suffolk County, on Long Island. Cynthia stated that she had located affordable housing for herself and the children in Suffolk County and that the schools in Suffolk County would be adequate for the children. Cynthia admitted that housing in Suffolk County would be more expensive than comparable housing in Lincoln. Cynthia stated that her cousin would be able to care for the children while Cynthia was at work.

Cynthia also testified that her extended family, including her parents, lived on the east coast and that Dwight's extended family also lived on the east coast. Dwight testified that some of his extended family, including his mother and some of his siblings, lived on the east coast, but that Dwight's remaining extended family, including his father and other siblings, lived in Nebraska.

Both parties testified that Cynthia and Dwight had divided their time with the children on a 50-50 basis. Dwight testified that the usual division of time was such that Dwight picked up the children from Cynthia at 3:30 p.m. every Sunday, and kept them until 3:30 p.m. on Wednesday or Thursday of alternate

weeks, such that each party would have the children 4 days one week and then 3 days during the next week. Cynthia testified that if granted full custody and leave to relocate, she was willing to give Dwight visitation during summers, holidays, and spring breaks, and would be willing to pay for air travel so that Dwight could have visitation. Dwight testified that it would be financially difficult for him to travel to New York for visitation.

Cynthia testified that the New York area had many family activities that the children would enjoy, "from baseball games to art museums to beaches." Cynthia testified that both children were bright and adaptable. Cynthia admitted that she had not taken the children to museums or art galleries available in Lincoln. Dwight testified that he was aware of cultural opportunities in New York and in Lincoln, but that "[a]ny time you spend with a child is beneficial, it doesn't matter where you take them." Dwight testified that he had taken the children to the "Elephant Hall" museum, and Dwight's wife, Shelley Brown, testified that they participated in many family activities, including visiting the zoo and parks, going for ice cream, visiting Elephant Hall and the children's museum, and going to children's movies.

Cynthia also testified regarding her belief that the children, as members of a racial minority, would be better off in New York because the area is more racially diverse. Cynthia stated that her children had not been taunted or discriminated against in Lincoln, but did mention that they were "stared at" on the street. Dwight testified that Dwight III's school in Lincoln was racially diverse.

Dwight testified that he had remarried, that he and Shelley had one additional child, and that Shelley was pregnant at the time of the hearing. Dwight testified that he was working 15 to 20 hours a week at the Lighthouse's youth recreation center and part time as a licensed minister. Dwight testified regarding his plans to attend seminary and become an ordained minister. Dwight also testified that he had recently accepted a promotion that would result in his working more hours. Dwight testified that he had opportunities to move from Lincoln but that he had decided to stay because he believed Lincoln was the best environment for the children.

Dwight testified that Cynthia's proposed move to New York was the "driving force" behind his request for a change in custody. Dwight stated that he believed that the joint custody arrangement was best for the children but that he believed that it would be best for the children to remain with him if Cynthia moved to New York. Dwight stated that he always put his children first but that Cynthia often put herself first, ahead of the children. Dwight testified that he had concerns that Cynthia did not feed the children properly. Dwight admitted that he had a child support arrearage of $1,577.

Dwight III's kindergarten teacher testified that she saw Dwight at school frequently; Dwight was a volunteer crossing guard and often had lunch at school with Dwight III and his classmates. The kindergarten teacher stated that Dwight was an active and attentive parent to both children. The teacher testified that Cynthia also frequently came to the school for lunch and to help in class. Dwight III's teacher testified that he had progressed well in school and was a very well-adjusted child. Dwight testified that he was planning to enroll Jasmine in preschool. Dwight testified that Cynthia had taken the children to the doctor once, but that he was primarily responsible for their medical and dental care.

Cynthia admitted that Dwight is a good father and stated that she had no concerns about Shelley's also caring for the children. Cynthia stated that Dwight had a positive relationship with the children and that she had no concerns about Dwight adequately providing for the needs of the children. Shelley testified that Dwight had a very close relationship with his children. The executive director of the Lincoln Council on Alcoholism and Drugs, a friend and former coworker of Dwight, testified that Dwight was a model father and that she had asked Dwight to mentor her stepson, who is a single parent. The executive director of the Lighthouse also testified that Dwight was a model parent.

## IV. STANDARD OF REVIEW

[1,2] Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial judge, and although reviewed de novo on the record, the trial judge's determination will normally be affirmed absent an abuse

of discretion. *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). 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. *Weinand v. Weinand, ante* p. 146, 616 N.W.2d 1 (2000).

## V. EFFECT OF JOINT LEGAL AND PHYSICAL CUSTODY

### 1. Material Change in Circumstances

[3] We have stated that in order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her. *Jack v. Clinton, supra*; *Farnsworth v. Farnsworth, supra*. Dwight argues, however, that this standard should not apply where the parent seeking removal is not the sole "custodial parent," but instead shares joint legal and physical custody.

[4,5] We defined the concepts of legal and physical custody, in the context of child support, in *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999). We stated:

> Joint legal custody has been generally defined as joint "'authority and responsibility for making "major" decisions regarding the child's welfare'" . . . . In contrast, joint physical custody has been described as "joint 'responsib[ility] for "minor" day-to-day decisions' and the exertion of continuous physical custody by both parents over a child for significant periods of time."

(Citations omitted.) *Id.* at 898, 601 N.W.2d at 544. There is no dispute that the instant case is one of joint legal and physical custody.

[6,7] Dwight argues that because Cynthia seeks a modification of the custody arrangements, as well as leave to move to New York, Cynthia must first prove a material change in circumstances affecting the best interests of the children.

Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996). The party seeking modification of a decree of dissolution bears the burden of showing a material change of circumstances affecting the best interests of a child. *Parker v. Parker*, 234 Neb. 167, 449 N.W.2d 553 (1989). See, also, *Smith-Helstrom v. Yonker, supra.*

We agree that Cynthia, in seeking to modify the custody arrangement from joint legal and physical custody to sole custody, bears the burden of showing a material change in circumstances such that the best interests of the children require such action. We also determine, in accordance with long-established principles, that in order to further prevail on a motion to remove the minor children from the state, the relocating parent must first satisfy the court that she or he has a legitimate reason for leaving the state *and then* demonstrate that it is in the children's best interests to live with that parent in the new location. *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000). As a practical matter, the existence of a joint physical custody relationship is likely to make it more difficult for the relocating parent to meet these burdens. Nonetheless, whether we are considering a modification of custody or a proposed removal from the state, the best interests of the children are the paramount considerations in our determination. *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999).

[8,9] Despite the children's best interests being the central concern, it is helpful to set forth appropriate factors to consider in analyzing the children's best interests in a proposed removal from Nebraska under joint custody circumstances. We have stated that removal of a child from the state, without more, does not amount to a change of circumstances warranting a change of custody. *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994), *overruled on other grounds, Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999). Nevertheless, when considered in conjunction with other evidence, such a move may well be a change of circumstances that would warrant a modification of the decree. *Marez v. Marez*, 217 Neb. 615, 350 N.W.2d 531

(1984). We hold that in cases of joint legal and physical custody, a legitimate reason for leaving the state, taken together with an expressed intent to do so, may constitute a material change in circumstances affecting the best interests of a child, sufficient to require examination of the best interests of the child.

To require that a parent, seeking leave to remove a child from the state, must prove a material change of circumstances beyond a legitimate reason and intent to move would (1) deny a parent with joint legal and physical custody the opportunity to seek leave to relocate prior to some change in another, unrelated circumstance and (2) would have the effect of sentencing such a parent to immobilization. See *Harder v. Harder*, 246 Neb. 945, 524 N.W.2d 325 (1994) (award of custody not to be interpreted as sentence to immobilization). Furthermore, such a rule would encourage parents to change the circumstances by moving without permission, presenting the court with a fait accompli demanding consideration of the issue. See *Jack v. Clinton, supra* (discouraging temporary relocation prior to ruling on permanent removal).

[10] For these reasons, we conclude that the better rule is that a parent sharing joint legal and physical custody must first prove a material change in circumstances affecting the best interests of a child by evidence of a legitimate reason to leave the state, together with an expressed intention to do so. See, e.g., *Blaich v. Blaich*, 114 Nev. 1446, 971 P.2d 822 (1998); *McQuade v. McQuade*, 901 P.2d 421 (Alaska 1995); *Osteraas v. Osteraas*, 124 Idaho 350, 859 P.2d 948 (1993); *Voit v. Voit*, 317 N.J. Super. 103, 721 A.2d 317 (1998). Proving such an intent does not necessitate that physical custody be modified, but the intent to move illustrates the likelihood that there is a need for considering some sort of modification that would reflect the new circumstances. See *Osteraas v. Osteraas, supra*.

Once the party seeking modification has met this threshold burden, the separate analyses of whether custody should be modified and whether removal should be permitted necessarily become intertwined. In order to prevail on her motion to modify physical custody, Cynthia must show that such a modification is in the best interests of the children, and we cannot consider those best interests without considering the effect on the chil-

dren of the move to New York that Cynthia proposes to make. In short, because Cynthia seeks modification of custody so that she can move to New York, the questions whether modification is in the best interests of the children and whether the move to New York is in the best interests of the children inevitably merge into the single question whether the best interests of the children are furthered by Cynthia's obtaining sole physical custody and moving the children to New York.

### 2. Burden of Proof

We next consider the issue of what burden of proof should be applied where the party seeking removal does not have sole custody, but shares joint legal and physical custody. Generally, courts that have addressed shared physical custody cases treat them differently than cases involving a primary residential parent. See Janet Leach Richards, *Children's Rights v. Parents' Rights: A Proposed Solution to the Custodial Relocation Conundrum*, 29 N.M. L. Rev. 245 (1999). In such cases, courts are particularly reluctant to allow one parent to relocate with the children. Edwin J. Terry et al., *Relocation: Moving Forward, or Moving Backward?*, 10 J. Am. Acad. Matrim. Law. 167 (1998).

Several courts have held that when one party files a removal motion in a joint physical custody situation, neither party bears the burden of proving that relocation of the child is either favorable or detrimental to the child's best interests. Rather, each party carries an equal burden to prove that the new custody arrangement proposed by that party should be adopted by the court. *Id.* See, e.g., *In re Marriage of Burgess*, 13 Cal. 4th 25, 913 P.2d 473, 51 Cal. Rptr. 2d 444 (1996); *Ayers v. Ayers*, 508 N.W.2d 515 (Minn. 1993); *Jaramillo v. Jaramillo*, 113 N.M. 57, 823 P.2d 299 (1991); *In re Marriage of Chester*, 907 P.2d 726 (Colo. App. 1995). In those cases, an existing presumption in favor of allowing relocation of a custodial parent was deemed inappropriate in instances of joint physical custody. See *id.*

At least one court has determined that an existing presumption in favor of a custodial relocating parent should be reversed where joint physical custody is concerned, so that the relocating parent bears the burden of proving the benefits of the relocation.

See *Voit v. Voit*, 317 N.J. Super. 103, 721 A.2d 317 (1998). Other jurisdictions continue to apply a single test for relocation regardless of whether the parties have operated under a joint custody arrangement. See Terry et al., *supra*. See, also, e.g., *Blaich v. Blaich*, 114 Nev. 1446, 971 P.2d 822 (1998) (same burden placed on relocating parent regardless of joint custody); *McQuade v. McQuade*, 901 P.2d 421 (Alaska 1995) (best interests test applied de novo regardless of joint custody); *In re Marriage of Creedon*, 245 Ill. App. 3d 531, 615 N.E.2d 19, 185 Ill. Dec. 724 (1993) (statute establishing best interests test applied to all relocation cases).

[11,12] Under Nebraska law, the burden has been placed on the custodial parent to satisfy the court that he or she has a legitimate reason for leaving the state and to demonstrate that it is in the child's best interests to continue living with him or her. See, *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). Because the burden of proof in relocation cases is already placed on the parent seeking leave to relocate, it is unnecessary for us to reallocate that burden in cases of joint legal and physical custody. See *Blaich v. Blaich, supra*.

As noted earlier, as a practical matter, the existence of a joint physical custody relationship is likely to make it more difficult for a joint physical custodian to meet the burden associated with relocation. Compare *In re Marriage of Creedon*, 245 Ill. App. 3d at 537, 615 N.E.2d at 24, 185 Ill. Dec. at 729 ("to the extent that an order of joint custody actually reflects a closer than customary relationship between the noncustodian and the child, the existence of a joint custody order may be considered in determining whether removal is in a child's best interests"). This fact, however, is not attributed to a heightened burden of proof, but simply to the unavoidable practical consequences of joint legal and physical custody, and it is considered in the context of whether a proposed move is in the best interests of the child.

## VI. APPLICATION OF LAW TO FACTS

As previously stated, in order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate rea-

son for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her. *Jack v. Clinton, supra*; *Farnsworth v. Farnsworth, supra*. As determined above, this standard applies to the instant case despite the fact that Cynthia and Dwight share joint legal and physical custody and are thus both custodial parents.

1. Legitimate Reason for Leaving State

By determining this case on the basis of the best interests of the children, the district court implicitly determined that Cynthia had satisfied the threshold question whether she had a legitimate reason for leaving the state. See *Jack v. Clinton, supra* (emphasizing that parent seeking relocation must *first* satisfy court of legitimate reason for leaving state).

[13] We have little difficulty concluding, in our de novo review, that the district court did not abuse its discretion in making this determination. We have concluded that a custodial parent's " 'firm offer of employment with a flexible schedule in close proximity to [the custodial parent's] extended family constitutes a legitimate reason' " in a removal case. *Jack v. Clinton*, 259 Neb. at 206, 609 N.W.2d at 334, quoting *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000). In this case, Cynthia presented evidence of a firm offer of employment at NYU that would enhance her career and evidence that her extended family lived in the New York area, thus meeting her burden of showing a legitimate reason to leave the state.

2. Best Interests of Children

[14] We have set forth three broad considerations ordinarily to be employed in determining whether removal to another jurisdiction is in a child's best interests: (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation arrangements. *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). We will

address each of these considerations in turn, as appropriately tailored to the present circumstance of joint legal and physical custody.

(a) Each Parent's Motives

In the district court, there was no evidence presented which would allow us to conclude that either party was seeking to frustrate the custodial rights of the opposing party, or otherwise acting in bad faith. While Cynthia argues on appeal that Dwight is simply attempting to "dominate" the lives of the children, and Dwight argues that Cynthia does not really believe that her life would be improved by the NYU job, these arguments are unsupported by the evidence presented in the district court. Rather, the record depicts two parents who both care about their children and are trying to do what they believe is best for the children. We are unpersuaded by the interpretations of the record offered by the parties' counsel and conclude, in our de novo review, that each parent has quite valid reasons for taking their respective positions on the removal of the children from Nebraska. See *Farnsworth v. Farnsworth, supra.*

(b) Quality of Life

[15,16] In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children, we have previously considered several pertinent factors, including: (1) the emotional, physical, and developmental needs of the children; (2) the children's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the children and each parent; (7) the strength of the children's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties. See, *Jack v. Clinton, supra*; *Farnsworth v. Farnsworth, supra.* This list should not be misconstrued as setting out a hierarchy of factors. Depending on the circumstances of a particular case, any one factor or combina-

tion of factors may be variously weighted. *Farnsworth v. Farnsworth, supra.*

Not surprisingly, the parties have each chosen to emphasize different factors in applying the *Farnsworth* analysis to this case. Generally, Cynthia's argument rests upon the third, fourth, and fifth factors, as she urges this court to consider the benefits of the NYU employment offer and the advantages to the children of living in New York. Dwight relies more upon the sixth and seventh factors and argues that the advantages of the move, to the extent that they are present, are outweighed by the harm of separating the children from Dwight.

*(i) Enhancement of Income or Employment*

With regard to the third factor, the extent to which Cynthia's income or employment will be enhanced, we note that Cynthia presented substantial evidence that the employment opportunity at NYU would offer her increased salary and benefits from her current position. Evidence was also adduced, however, that some of those benefits might be offset by the higher cost of living in the New York area, particularly with respect to the cost of obtaining adequate housing.

Although no evidence was presented showing that similar compensation would not be available in Nebraska, Cynthia did testify at length about her current and previous employment, and we conclude, in our de novo review, that Cynthia has presented evidence that her income and employment will be enhanced by the move to New York. This factor would weigh in favor of granting leave to relocate the children if Cynthia were granted sole custody, as the living conditions and employment opportunities for the mother are interwoven with the well-being of the custodial parent. See *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999).

*(ii) Improvement of Housing or Living Conditions*

a. Housing

With regard to the fourth factor, the degree to which housing or living conditions would be improved, Cynthia's testimony was essentially unrebutted that adequate housing would be available in New York, comparable to the quality of the chil-

dren's current residences. As previously noted, however, Cynthia admitted that such housing was likely to be more expensive than in Lincoln. Available housing does not weigh in favor of or against the relocation and does not factor into our de novo review.

b. Living Conditions—Cultural Opportunities

Cynthia argues that the metropolitan area of New York City, as compared to Lincoln, would present "virtually unlimited" educational, cultural, and entertainment opportunities. Cynthia thus argues that relocation to New York would improve the quality of life for the children. The essence of Cynthia's argument seems to be that New York City, culturally speaking, is the center of the universe.

We confronted a similar argument in *Farnsworth v. Farnsworth, supra*, in which the mother, seeking leave to relocate from Omaha, Nebraska, to Denver, Colorado, argued that Denver would offer access to a wider variety of outdoor activities and professional sporting events. We concluded that although access to such activities was commendable, the quality and quantity of access to such events was not significantly greater in Denver than in Omaha, and did not weigh this factor significantly in our de novo review. *Id.* See, also, *Carraher v. Carraher*, 9 Neb. App. 23, 33, 607 N.W.2d 547, 556 (2000) (declining to "put this court's 'Chamber of Commerce' seal of approval on residing in the mountains").

Although the evidence presented in the district court was sparse, we cannot disagree with the contention that New York has more museums, theaters, and other cultural and social activities than does Lincoln. The flaw in Cynthia's argument, however, is the conclusion that such opportunities suffice to improve the living conditions for the children. In the first place, Dwight adduced testimony that Cynthia had not taken advantage of the cultural and social opportunities available in Lincoln, and therefore, Dwight argues, we cannot assume that the availability of cultural activities in New York means that Cynthia will allow the children to take advantage of them.

Second, the dispositive question is not where the children will have more fun, but where the living conditions will further their

best interests. Simply put, the considerations one includes when choosing a vacation destination are not necessarily the same as those included when deciding where to raise a child. While Cynthia testified that New York offers more cultural and entertainment opportunities than does Lincoln, that testimony does not allow us to conclude that New York is, ipso facto, a better place to raise a child. See *Carraher v. Carraher, supra* (concluding that Estes Park, Colorado, and Wahoo, Nebraska, are undoubtedly different places, but declining to state that one is "better" than the other).

c. Living Conditions—Racial Diversity

Cynthia further argues that the children, as members of a racial and ethnic minority, would be better off in the diverse population of New York than the less diverse community of Lincoln. The record does not specifically state to which minority group the children belong.

We have not previously discussed the degree to which racial identity might be weighed in the context of custody determinations. The Nebraska Court of Appeals, however, recently confronted a similar question in *Ebirim v. Ebirim*, 9 Neb. App. 740, 620 N.W.2d 117 (2000). In that child custody dispute, the father argued that his son's biracial heritage should be considered in determining custody and that the child should have been placed with him because he lived in the racially diverse community of Omaha, while the mother lived in Brownville, Nebraska, which the mother testified had no African-American children. *Id.*

The Court of Appeals determined that "the collected cases indicate that [race] is generally considered as one factor among several in evaluating the best interests of the child," *id.* at 743, 620 N.W.2d at 121, and concluded that the race of the child could be considered as "one factor among several . . . in custody determinations," *id.* at 744, 620 N.W.2d at 121, citing Annot., 10 A.L.R.4th 796 et seq. (1981). Accord *J.H.H. v. O'Hara*, 878 F.2d 240 (8th Cir. 1989), *cert. denied* 493 U.S. 1072, 110 S. Ct. 1117, 107 L. Ed. 2d 1024 (1990). Compare *Palmore v. Sidoti*, 466 U.S. 429, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984) (finding Equal Protection Clause violated where race of child was *sole factor* in making custody determination).

[17] We agree with the Court of Appeals and likewise conclude that a child's racial identity is one factor among several that may be considered in making custody determinations. In the instant case, we conclude that the relative racial diversity of Lincoln and New York is an appropriate consideration in evaluating the living conditions for the children.

Based on the evidence presented to the district court, however, we do not find that racial identity and diversity should be given significant weight in our de novo review. Cynthia admitted that the children had not been taunted or otherwise discriminated against in Lincoln, and Dwight testified that Dwight III's school was racially diverse. While Cynthia testified that the "New York City metropolitan area" was more racially diverse than Lincoln, no evidence was adduced regarding the schools or neighborhoods of Suffolk County, where Cynthia planned to live, nor was any evidence presented regarding the general state of race relations, or instances of racial discrimination, in New York City. The record indicates that with respect to diversity, the living conditions of the children are satisfactory in Lincoln, given that there is no evidence of discrimination and that their local school is ethnically diverse. Based on the record presented, we cannot conclude that the greater racial diversity of the New York City metropolitan area would improve the living conditions for the children.

*(iii) Educational Advantages*

With respect to the fifth factor, the existence of educational advantages for the children, Cynthia testified generally that the schools in Suffolk County, New York, would be adequate for the needs of the children. No evidence was adduced that the primary and secondary schools in New York were any better or worse than the schools in Lincoln. Cynthia argues that the availability of a free education at NYU is an educational advantage for the children, although she conceded that this opportunity would be available to the children regardless of whether or not they lived with her in New York. Because Cynthia testified that she would not take the NYU job unless allowed to take the children with her, we must assume that the opportunity to attend NYU for free would be lost to the children if Cynthia was denied leave to take

them to New York. Nonetheless, we cannot conclude that such a factor should be given significant weight in our de novo review, given the current age of the children and the consequent remoteness and unpredictability of their possible postsecondary education.

*(iv) Quality of Relationship Between Children and Parents*

The sixth factor, the quality of the relationship between the children and each parent, is relied upon by Dwight in his opposition to relocation. Although each party pointed to flaws of the opposing party in district court, the parties' consistent testimony established that both parents are actively involved in the lives of their children. It is uncontested that the children spend approximately half their time with each parent and that both parents have been intimately involved in all aspects of raising the children.

[18] Cynthia relies on the fact that Dwight was, at the time of hearing, behind in his child support payments. We have stated, however, that as a general rule, the custodial parent's right of support and the noncustodial parent's right of visitation are entitled to separate enforcement. *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994). Although stated in terms of visitation, the principle is equally applicable to custodial determinations. While we consider Dwight's child support arrearage in our de novo review, we do not consider it as a significant reason to modify custody from Dwight to Cynthia under the circumstances of this case.

Testimony from several witnesses established that Dwight has very close relationships with both children. While moving to New York would preserve the relationship of the children with Cynthia, the move would, as discussed in more detail later in this opinion, detrimentally affect the close relationship between Dwight and the children. We also note that Cynthia's proposed schedule at NYU, working the evening shift, would seem to interfere, especially during the school year, with Cynthia's own ability to maintain her relationship with the children.

Overall, this factor in our de novo review weighs significantly against relocation of the children.

*(v) Ties to Community and Extended Family*

The evidence adduced in the district court indicated that living in New York would place the children closer to Cynthia's extended family and some of Dwight's extended family, who live generally in the New York City and Philadelphia metropolitan areas. Dwight also testified, however, that his remaining extended family lives in the Lincoln area. No evidence was adduced regarding the ties of the children in the community, other than some brief testimony regarding Dwight III's friends at school.

Members of the extended family of the children live in both Lincoln and New York. Furthermore, we note that although Cynthia had no other children, Dwight and Shelley had another child, and Shelley was pregnant at the time of the hearing. In considering the familial relationships of the children, we would be remiss if we did not consider the relationship of the children to their younger siblings. Allowing the children greater contact with members of Cynthia's and Dwight's extended families must be balanced against contact with Dwight's remaining extended family and, perhaps most importantly, the children's siblings. In balance, we conclude that this factor does not weigh significantly for or against permitting relocation of the children.

*(vi) Remaining Factors*

There is little dispute over the remaining factors. Both parents essentially concede that the emotional, physical, and developmental needs of the children can be met by either party. There is no evidence which would allow us to determine if allowing or denying the move would antagonize hostilities between the parties, given that, aside from the dispute over relocation, the parties seem to have established a relatively positive and commendable relationship where the welfare of the children is concerned.

*(vii) Quality of Life—Conclusion*

In our de novo review, we conclude that while Cynthia presented evidence that the quality of life for the children might be improved by certain aspects of living in New York, this improvement would be offset, if not outweighed, by the effect of dimin-

ishing the relationship between Dwight and the children. The district court did not abuse its discretion in finding that the quality of life would not be improved for the children by the move to New York.

(c) Impact of Move on Contact Between Dwight and Children

The final consideration is the impact of relocation upon Dwight's ability to maintain a meaningful relationship with his children. See, *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000); *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). Cynthia's testimony in the district court established that she was willing to permit Dwight extensive visitation during summer and school holidays and to pay some of Dwight's travel expenses.

Nonetheless, it cannot be questioned that the move to New York would dramatically affect Dwight's contact with the children. As we stated in *Kalkowski v. Kalkowski*, 258 Neb. at 1047, 607 N.W.2d at 527:

> 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.

The instant case presents similar considerations. Although the availability of travel connections is greater between Lincoln and New York, the distance, expense, and time involved in such travel is appropriately considered in evaluating the degree to which the move would affect Dwight's contact, and relationship, with his children.

Although Cynthia made substantial and commendable concessions on the issue of visitation, it cannot be reasonably questioned that such visitation would allow Dwight significantly less contact with the children and would make it nearly impossible for him to maintain the relationship that he currently enjoys. Cynthia's proposed visitation schedule, while generous, would nonetheless be a poor substitute for the daily interaction Dwight and the children now share. This consideration is significant in our de novo review, given the context of joint legal and physical custody.

(d) Best Interests—Conclusion

After our de novo review of the record, detailed above, we cannot conclude that the district court abused its discretion in finding that it was not in the best interests of the children to permit Cynthia to relocate with them to New York. Although Cynthia has a legitimate reason for leaving the state, and certain aspects of living in New York would improve the quality of life for the children, the district court did not abuse its discretion in determining that those facts were outweighed by the detrimental effect that the move would have on the relationship of the children with Dwight. Cynthia's sole assignment of error is without merit.

## VII. CONCLUSION

The evidence reveals two loving parents actively involved in the lives of two well-adjusted children operating under a commendable joint legal and physical custody arrangement. 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 determining that Cynthia did not show the best interests of the children would be served by modifying custody and granting her leave to move with the children to New York. We therefore affirm the judgment of the district court. The parties' respective motions for attorney fees on appeal are denied.

AFFIRMED.

WRIGHT, J., concurring in the result.

I concur in the result. In my opinion, where the parties have joint legal and physical custody, the burden of proof is upon the party seeking to relocate to first show there has been a material change in circumstances that would justify a change in the cus-

tody arrangement. Custody is the first issue that must be decided. Obviously, relocation of the children would amount to a modification of custody by transferring physical custody to the parent who desires to relocate. Therefore, I would require the parent who desires to relocate to prove that the new custody arrangement should be adopted by the court.

CONNOLLY, J., joins in this concurrence.

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## STATE OF NEBRASKA, APPELLEE, V. CHAD A. HOLECEK, APPELLANT.

621 N.W.2d 100

Filed December 22, 2000. No. S-00-169.

1. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion.
2. ___: ___. An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
3. **Criminal Law: Restitution: Damages.** Neb. Rev. Stat. § 29-2280 et seq. (Reissue 1995) vests trial courts with the authority to order restitution for actual damages sustained by the victim of a crime for which a defendant is convicted.
4. ___: ___: ___. Pursuant to Neb. Rev. Stat. § 29-2281 (Reissue 1995), before restitution can be properly ordered, the trial court must consider: (1) whether restitution should be ordered, (2) the amount of actual damages sustained by the victim of a crime, and (3) the amount of restitution a criminal defendant is capable of paying.
5. **Sentences: Restitution.** Restitution ordered by a court pursuant to Neb. Rev. Stat. § 29-2280 et seq. (Reissue 1995) is a criminal penalty imposed as punishment for a crime and is part of the criminal sentence imposed by the sentencing court. As such, the certainty and precision prescribed for the criminal sentencing process applies to criminal sentences containing restitution ordered pursuant to § 29-2280.
6. **Restitution: Insurance.** A court may order a defendant to pay restitution to an insurance company which has compensated the victim of a criminal act.

Appeal from the District Court for Sarpy County: RANDALL L. REHMEIER, Judge. Affirmed.

Thomas J. Garvey, Sarpy County Public Defender, and Gregory A. Pivovar for appellant.

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

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

MCCORMACK, J.

## NATURE OF CASE

Chad A. Holecek pled no contest in the district court for Sarpy County to one count of criminal mischief, more than $300, a Class IV felony, in violation of Neb. Rev. Stat. § 28-519(1) and (2) (Reissue 1995), and one count of burglary, a Class III felony, in violation of Neb. Rev. Stat. § 28-507 (Reissue 1995). In relation to the criminal mischief, more than $300 conviction, Holecek was sentenced to 60 months' probation and restitution was ordered as part of the probationary sentence. It is from the restitution portion of the sentence that Holecek appeals. On our own motion, we removed this matter to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals.

## BACKGROUND

As a result of a plea agreement, Holecek pled no contest to a charge of criminal mischief, more than $300, and a charge of burglary. The charges resulted from Holecek's involvement in vandalism to the Platteview junior and senior high schools, located in South Sarpy School District No. 46, in which Holecek and four others caused approximately $80,000 in damages to the two schools. Holecek has raised no assignments of error regarding his plea, and that part of the record is not before this court.

A restitution hearing was held on Holecek's sentencing date. Holecek appeared with two other defendants involved in the vandalism to the schools, and the issue of restitution was taken up in a joint fashion. The State offered five exhibits as evidence regarding the losses sustained by the school district. All exhibits were admitted with no objection. It was agreed by the parties that the school was responsible only for a $500 deductible to its insurance company and that all other damages were covered by and paid by the school district's insurance company. The record also shows that the trial court had before it the presentence investigation report (PSI). The PSI included the probation officer's signed and dated report showing that Holecek had stated that due

to his employment and lack of other obligations, he could afford to pay $500 per month restitution. The sentencing court referred to the contents of the PSI, and at the sentencing hearing, Holecek did not object thereto. The trial court sentenced Holecek to 60 months' probation, and as a condition of probation, Holecek was ordered to pay restitution to the school district in the amount of $500, less any sums paid by his codefendants. Holecek was also ordered to pay restitution to Sedgwick of Nebraska, Inc., an insurer of the school district, in the amount of $6,000, the payments to be made in 60 monthly installments of $100 each. Holecek appeals from the restitution portion of his sentence.

## ASSIGNMENTS OF ERROR

Holecek assigns that the trial court erred in finding that (1) Holecek has the ability to pay the restitution it ordered and (2) Holecek should pay restitution to the school district's insurer who suffered a loss as a result of its contractual relationship to the school district.

## SCOPE OF REVIEW

[1,2] Sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion. *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000); *State v. Lobato*, 259 Neb. 579, 611 N.W.2d 101 (2000); *State v. Burkhardt*, 258 Neb. 1050, 607 N.W.2d 512 (2000). An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000); *State v. Lobato, supra*; *State v. Wells*, 257 Neb. 332, 598 N.W.2d 30 (1999).

## ANALYSIS

Holecek claims generally that the trial court erred in ordering him to pay restitution of $100 per month for 60 months. Holecek specifically claims that the record is insufficient to demonstrate that the trial court meaningfully considered Holecek's ability to pay this amount of restitution. We do not agree.

[3] Neb. Rev. Stat. § 29-2280 et seq. (Reissue 1995) vests trial courts with the authority to order restitution for actual damages sustained by the victim of a crime for which a defendant is

convicted. *State v. Wells, supra*; *State v. McLain*, 238 Neb. 225, 469 N.W.2d 539 (1991); *State v. Yost*, 235 Neb. 325, 455 N.W.2d 162 (1990). In imposing restitution, § 29-2281 provides, in part, the following parameters:

> To determine the amount of restitution, the court may hold a hearing at the time of sentencing. The amount of restitution shall be based on the actual damages sustained by the victim and shall be supported by evidence which shall become a part of the court record. The court shall consider the defendant's earning ability, employment status, financial resources, and family or other legal obligations and shall balance such considerations against the obligation to the victim.

[4] Pursuant to § 29-2281, before restitution can be properly ordered, the trial court must consider: (1) whether restitution should be ordered, (2) the amount of actual damages sustained by the victim of a crime, and (3) the amount of restitution a criminal defendant is capable of paying. *State v. Wells, supra*; *State v. McLain, supra*; *State v. Yost, supra*.

In *State v. Yost, supra*, the defendant raised as his sole assignment of error the propriety of the entry of a judgment, including an order of restitution, "without the submission of evidence and the opportunity for a separate hearing." *Id.* at 327, 455 Neb. at 163. In *Yost*, we stated:

> [W]e have serious concerns whether, without an evidentiary hearing, the bare statements contained in the PS[I] are sufficiently reliable to meet § 29-2281, which requires that "[t]he amount of restitution shall be based on the actual damages sustained by the victim and shall be supported by evidence which shall become part of the court record."

235 Neb. at 329, 455 N.W.2d at 164. In vacating the restitution order, we went on to say that "[i]n any event, it is clear from the record that the sentencing court did not meaningfully consider the defendant's earning ability, employment status, financial resources, and family or other legal obligations, nor did the trial court balance these considerations against the obligation to the victims." *Id.*

In *State v. Yost*, 235 Neb. at 329, 455 N.W.2d at 165, we held that "although the sentencing judge did not abuse his discretion

in ordering defendant to pay restitution, he did err in failing to consider the factors set forth in § 29-2281 [regarding defendant's ability to pay] once he made the decision to order restitution."

The cases since *Yost* have relied upon it, inter alia, for the proposition that an evidentiary hearing is required to support a restitution order under § 29-2281. See, *State v. Wells*, 257 Neb. 332, 598 N.W.2d 30 (1999); *State v. McLain, supra*; *State v. Roche, Inc.*, 2 Neb. App. 445, 511 N.W.2d 195 (1994), *reversed on other grounds* 246 Neb. 568, 520 N.W.2d 539; *State v. McGinnis*, 2 Neb. App. 77, 507 N.W.2d 46 (1993).

*State v. McLain*, 238 Neb. 225, 469 N.W.2d 539 (1991), involved the issue of the adequacy of the record establishing the victim's damages. In *McLain*, we vacated the challenged restitution award and noted that the only evidence of the victim's damages of lost wages in the record was his "unsworn, uncorroborated statements offered at the sentencing hearing and the handwritten [victim impact] note contained in the PS[I], which note is neither signed nor dated." *Id.* at 229, 469 N.W.2d at 541. We concluded in *McLain* that the record therein "lack[ed] sufficient documentation of [the victim's] lost earnings and fail[ed] to comport with the requirement prescribed in § 29-2281 that the victim's actual damages be supported by evidence in the record." 238 Neb. at 229, 469 N.W.2d at 541.

*State v. Wells, supra*, involved a record containing no evidence of the defendant's ability to pay the restitution ordered by the trial court. In *Wells*, we vacated the sentence of restitution and noted that the vacation of the restitution order was due to "[t]he absence from the record of sworn and meaningful information regarding [defendant's] ability to pay and the trial court's resultant inability to meaningfully consider the statutory factors regarding [defendant's] ability to pay." *Id.* at 342, 598 N.W.2d at 38. In *Wells*, we stated that the language of § 29-2281 and the cases required evidence to support both the actual damages sustained by the victim and the defendant's ability to pay. In this regard, we note that § 29-2281 reads in part that "[t]o determine the award of restitution, the court may hold a hearing at the time of sentencing. The amount of restitution shall be based on the actual damages sustained by the victim and shall be supported by evidence which shall become a part of the court

record." Reading these two sentences together and because of the use of the word "and" rather than "which" in the second sentence, we read § 29-2281 to mean that restitution shall be ordered after a hearing and should be based on evidence of both actual damages and the defendant's ability to pay.

[5] In connection with our conclusion that the record must demonstrate both the actual damages suffered by the victim and the defendant's ability to pay by way of meaningful evidence or sworn proof, we note that it has been observed that "restitution ordered by a court pursuant to § 29-2280 is a criminal penalty imposed as punishment for a crime and is part of the criminal sentence imposed by the sentencing court." *State v. McGinnis*, 2 Neb. App. at 83, 507 N.W.2d at 50. See, also, *State v. Duran*, 224 Neb. 774, 401 N.W.2d 482 (1987). As such, "the certainty and precision prescribed for the criminal sentencing process applies to criminal sentences containing restitution ordered pursuant to § 29-2280." *State v. McGinnis*, 2 Neb. App. at 83, 507 N.W.2d at 50.

The record in the instant case supports the trial court's determination that Holecek had the ability to pay the restitution ordered. Unlike the records in *State v. Wells, supra*, and *State v. Yost*, 235 Neb. 325, 455 N.W.2d 162 (1990), which were devoid of evidence of the defendant's ability to pay, the sentencing court in this case had ample information relating to Holecek's ability to pay. The sentencing court had before it the PSI, in which Holecek stated that he had been employed as a night stocker at Baker's Supermarket for 10 months, where his gross pay was $1,100 per month and where he was still employed at the time of sentencing. In the PSI, Holecek admitted to the probation officer that he could afford to pay $500 a month toward restitution. The PSI indicates that Holecek's financial obligations at the time of the sentencing were car insurance of $400 quarterly and fines and costs associated with his legal matters, which Holecek stated he would have no problems paying. The PSI also indicates that Holecek is not married and has no dependents. At the time of sentencing, which included the hearing on restitution, the trial court referred repeatedly to the PSI, which included the above facts and is in the record, and Holecek did not take exception thereto.

The statements by Holecek regarding his financial condition are Holecek's own statements and would be allowable evidence against him under the Nebraska Evidence Rules. See Neb. Rev. Stat. § 27-801(4)(b)(i) (Reissue 1995). As such, Holecek's statements contained in the PSI meet the requirement that a restitution award be supported by evidence which shall become part of the record. We conclude that Holecek's assignment of error that the record failed to demonstrate that he had the ability to pay the restitution ordered by the court is without merit, and we therefore conclude that the trial court did not abuse its discretion in ordering restitution.

Holecek next argues that §§ 29-2280 and 29-2283 do not provide for the payment of restitution to the insurer of a victim of a criminal act. Therefore, Holecek contends that the trial court erred in ordering Holecek to pay $6,000 in restitution to Sedgwick of Nebraska, the school district's insurance company. Section 29-2280 provides in part that "[a] sentencing court may order the defendant to make restitution for the actual physical injury or property damage or loss sustained by the victim as a direct result of the offense for which the defendant has been convicted." Section 29-2283 provides in part that "[t]he court shall not impose restitution for a loss for which the victim has received compensation, except that the court may order payment by the defendant to any person who has compensated the victim to the extent that such compensation has been provided." Holecek contends that because § 29-2283 states that the court may order payment by the defendant to any *person* who has compensated the victim, the trial court could not order Holecek to pay restitution to the school district's insurance company because an insurance company is not a person. Neb. Rev. Stat. § 28-109(16) (Reissue 1995), under the criminal code, states, "Person shall mean any natural person and where relevant a corporation or an unincorporated association." Under this statute, therefore, the school district's insurer, Sedgwick of Nebraska, is a "person," and as such, Holecek's claim to the contrary is without merit.

Although this court has never directly addressed the issue presented by Holecek, in *State v. Stueben*, 240 Neb. 170, 481 N.W.2d 178 (1992), we indicated that ordering a defendant to

pay restitution to an insurance company which has paid damages to the victim caused by the defendant is allowed under § 29-2283. In *Stueben*, the defendant was convicted of assault and part of his sentence included $15,000 in restitution. The court's order itemized how the $15,000 was to be allotted: $1,050 to the victim for medical treatment of his injuries, $2,750 to the victim as reimbursement for lost wages, and $11,200 to the insurance company which covered most of the victim's medical expenses. Although the defendant in *Stueben* did not specifically contest the payment of restitution to the insurance company, this court noted that § 29-2283 authorizes a court to order the defendant to make reparation payments directly to any person who has compensated the victim, to the extent that such compensation has been provided. This court thereby recognized in *Stueben* that when an insurance company compensates a victim, the court may order payment by the defendant to the insurance company pursuant to § 29-2283.

[6] We agree with the acknowledgment made in *State v. Stueben, supra*, that an insurance company which makes payments to a victim is included under the term "person" found in § 29-2283. Therefore, a court may order a defendant to pay restitution to an insurance company which has compensated the victim of a criminal act. The trial court did not abuse its discretion in ordering Holecek to pay $6,000 in restitution to Sedgwick of Nebraska, an insurer of the school district.

## CONCLUSION

The trial court did not err in finding that Holecek had the ability to pay the restitution it ordered, nor did it err in finding that Holecek should pay restitution to the school district's insurance company.

AFFIRMED.

# IN RE INTEREST OF MARIE E., A CHILD UNDER 18 YEARS OF AGE. COUNTY OF LANCASTER, APPELLANT, V. OFFICE OF JUVENILE SERVICES, A BRANCH OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES OF THE STATE OF NEBRASKA, APPELLEE.

621 N.W.2d 65

Filed December 22, 2000. No. S-00-440.

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. **Juvenile Courts: Jurisdiction.** A juvenile court has jurisdiction to resolve a dispute between a county and the Department of Health and Human Services regarding the costs of care for an adjudicated juvenile who is detained in a county facility pending evaluation by the department.
3. **Statutes: Intent.** In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.
4. **Juvenile Courts: Statutes: Intent.** The purpose of Neb. Rev. Stat. § 43-413(4) (Reissue 1998) is to make the State responsible for the costs incurred in evaluating a juvenile under § 43-413(1).
5. **Juvenile Courts: Minors.** In the absence of the immediate physical delivery of a juvenile upon adjudication into an evaluation program, detention is an unavoidable precursor of evaluation and is, therefore, part of the evaluation process under Neb. Rev. Stat. § 43-413 (Reissue 1998), the cost of which is the responsibility of DHHS.

Appeal from the Separate Juvenile Court of Lancaster County: THOMAS B. DAWSON, Judge. Reversed and remanded with directions.

Gary E. Lacey, Lancaster County Attorney, and David W. Johnson, Jr., for appellant.

Samuel G. Kaplan, of the Office of Juvenile Services, Nebraska Department of Health and Human Services, for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

Lancaster County, Nebraska, appeals from the March 27, 2000, order of the separate juvenile court of Lancaster County,

which overruled the county's motion for assessment of costs against the Nebraska Department of Health and Human Services (DHHS). Marie E., a juvenile, was adjudicated under Neb. Rev. Stat. § 43-247(1) and (2) (Reissue 1998) and placed in the custody of DHHS for evaluation. In its motion, the county sought an order assessing costs against DHHS for the period of time between the adjudication and the time when DHHS took physical custody of Marie, during which period Marie was housed in a county facility. For the reasons stated below, we conclude that DHHS was responsible for the costs of care of Marie following the adjudication which placed Marie in the custody of DHHS for evaluation. Accordingly, we reverse the juvenile court's order and remand the cause with directions to grant the county's motion and to assess the costs at issue against DHHS.

## STATEMENT OF FACTS

On April 13, 1999, the juvenile court adjudicated Marie, whose date of birth is October 15, 1983, a juvenile under § 43-247(1) and (2). The record shows that Marie had committed acts which would constitute a misdemeanor and a felony under Nebraska state law. The juvenile court found that Marie had (1) falsely endorsed a check written on her grandmother's checking account in an amount more than $75 but less than $300, in violation of Neb. Rev. Stat. § 28-603(1) and (3) (Reissue 1995), a Class IV felony, and (2) falsely endorsed a check written on a third party's checking account, in an amount equal to or less than $75, in violation of § 28-603(1) and (4), a Class I misdemeanor. In the April 13 adjudication order, the juvenile court "committed" Marie to the "custody" of DHHS, Office of Juvenile Services, for a residential evaluation. Such a placement for purposes of evaluation prior to disposition is authorized under Neb. Rev. Stat. § 43-413(1) and (3) (Reissue 1998). We interpret the juvenile court's use of the word "committed" to mean "placed," in accordance with § 43-413(1), which provides, inter alia, that a court may "place a juvenile" with DHHS for "an evaluation to aid the court in the disposition."

The Office of Juvenile Services (OJS) is an office within DHHS. See Neb. Rev. Stat. § 43-403 (Reissue 1998). For pur-

poses of this opinion, we generally refer to both OJS and DHHS as "DHHS."

In its April 13, 1999, order the juvenile court further ordered that after DHHS had completed its residential evaluation of Marie, Marie would again be brought before the court for final disposition. At the time of the adjudication hearing, Marie was physically in the county's custody and was being detained at the Jennie B. Harrel Attention Center for Youth in Lincoln (the attention center).

Although Marie was adjudicated on April 13, 1999, DHHS did not take physical custody of her until April 26, and accordingly, from April 13 to 26, Marie was physically detained at the attention center. On May 4, the county sent a statement to DHHS in the amount of $2,298.66, seeking payment for the county's costs in detaining Marie from April 13 to 26. DHHS declined to pay the statement.

On March 7, 2000, the county filed a motion for the assessment of costs in Marie's juvenile proceeding. In the motion, the county sought an order from the juvenile court assessing the county's costs in detaining Marie from April 13 to 26, 1999, against DHHS. According to the affidavit of Dennis Banks, the director of the attention center, submitted in support of the county's motion, until DHHS accepted physical custody of Marie, she remained at the attention center, at the cost of $176.82 per day, for a total cost of $2,298.66.

On March 9, 2000, a hearing was held on the county's motion. On March 23, the juvenile court overruled the county's motion. The juvenile court found that at the time of the April 13, 1999, adjudication order, DHHS did not have adequate space available to perform Marie's residential evaluation, and as a result, DHHS "hous[ed]" Marie until it could locate evaluation space. The juvenile court reasoned that under § 43-413(4), DHHS did not have any responsibility for Marie until she was physically at its facility undergoing an evaluation.

In support of its order, the juvenile court distinguished prior precedent of this court addressing the issue of which entity is responsible for the maintenance costs of juveniles, and interpreted those cases as relevant solely to juveniles adjudicated under § 43-247(3)(a) (neglect) and not relevant to juveniles

adjudicated, as was Marie, under § 43-247(1) or (2) (law violation). The juvenile court thus concluded that the county was responsible for the postadjudication detention costs and declined to order DHHS to pay such costs. The county appeals.

## ASSIGNMENT OF ERROR

On appeal, the county assigns two errors which combine to form one. The county claims that under the controlling statutes, the juvenile court erred in overruling its motion to assess costs against DHHS.

## STANDARD 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. *Sharkey v. Board of Regents, ante* p. 166, 615 N.W.2d 889 (2000).

## ANALYSIS

[2] As an initial matter, we note that DHHS claims that the juvenile court, as a statutory tribunal, did not have jurisdiction to resolve the dispute regarding costs in the instant case. DHHS cites no legal authority in its brief for this proposition. This issue has been resolved against DHHS in our previous cases. See, e.g., *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999); *In re Interest of Aaron K.*, 250 Neb. 489, 550 N.W.2d 13 (1996); *In re Interest of Lisa O.*, 248 Neb. 865, 540 N.W.2d 109 (1995). This claim has no merit.

This case presents the issue of whether DHHS should be ordered to reimburse the county for the costs incurred by the county in detaining Marie after an adjudication order placing Marie in the custody of DHHS for an evaluation pending DHHS' taking physical custody of Marie for purposes of the court-ordered residential evaluation. Given the terms of the adjudication order and the relevant statutes, and by reference to precedent of this court, we conclude that DHHS is responsible for the costs incurred as a result of the detention of Marie. Accordingly, we reverse the juvenile court's order denying the county's motion for assessment of costs against DHHS and remand the cause with directions to assess such costs against DHHS.

In accordance with 1996 Neb. Laws, L.B. 1044, changes were made in several executive branch departments of the state government. One such change was to transfer OJS, which had been a part of the Department of Correctional Services, to DHHS for administrative purposes. See *In re Interest of David C.*, 6 Neb. App. 198, 572 N.W.2d 392 (1997). In 1998, the Nebraska Legislature passed the Health and Human Services, Office of Juvenile Services Act, Neb. Rev. Stat. §§ 43-401 to 43-423 (Reissue 1998 & Cum. Supp. 2000). Section 43-413(1) of the Health and Human Services, Office of Juvenile Services Act provides, inter alia, that "[a] court may, pursuant to section 43-281, place a juvenile with the Office of Juvenile Services or the Department of Health and Human Services for an evaluation to aid the court in the disposition." Section 43-413(4) provides that "[a]ll costs incurred during the period in which the juvenile is being evaluated at a state facility or a program funded by the Office of Juvenile Services are the responsibility of the state unless otherwise ordered by the court pursuant to section 43-290." In this appeal, DHHS admits that under § 43-413(4), during the period when the juvenile is being evaluated, DHHS is to pay all costs. Thus, there is no dispute in the instant case that under § 43-413(4), the statute's use of the term "state" means DHHS. Compare *Muir v. Nebraska Dept. of Motor Vehicles, ante* p. 450, 618 N.W.2d 444 (2000).

At issue in this case is the responsibility for the costs incurred after the juvenile has been placed in the custody of DHHS for evaluation but prior to DHHS' taking physical custody of the juvenile. The statutes are silent as to what person or entity is responsible for maintenance costs during this time period.

[3-5] In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose. *In re 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). By its language, the purpose of § 43-413(4) is to make the state responsible for the costs incurred in evaluating a juvenile under § 43-413(1). We conclude that in the absence of the immediate

physical delivery of the juvenile upon adjudication into an evaluation program, detention is an unavoidable precursor of evaluation and is, therefore, part of the evaluation process under § 43-413, the cost of which is the responsibility of DHHS. Pursuant to § 43-413(4), the costs of the detention are the responsibility of DHHS.

Our interpretation of § 43-413(4) is supported by similar prior decisions of this court under the general provisions of the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-247 (Reissue 1998). In *In re Interest of Aaron K.*, 250 Neb. 489, 550 N.W.2d 13 (1996), pursuant to a petition filed by the Scotts Bluff County Attorney, Aaron was adjudicated a juvenile under § 43-247(1). At the adjudication hearing, the county court, sitting as a juvenile court, ordered the Department of Social Services (the department), the predecessor to DHHS, to conduct an investigation and prepare a report for submission at Aaron's dispositional hearing. Pending the dispositional hearing, the juvenile court ordered Aaron detained at the Panhandle Juvenile Detention Center. Thereafter, a dispositional hearing was held and the juvenile court granted the department legal custody of Aaron in order to place him in an adolescent perpetrator program as soon as space became available. Pending physical placement in such program, the juvenile court ordered that Aaron continue to be detained at the Panhandle Juvenile Detention Center. Ultimately, Aaron was placed in a program in accordance with the juvenile court's dispositional order.

Following physical placement of Aaron in the adolescent perpetrator program in *In re Interest of Aaron K.*, the county attorney filed a motion seeking to establish responsibility for the costs incurred in detaining Aaron pending his physical placement in the adolescent perpetrator program. After a series of hearings, the juvenile court determined that any costs which were not paid by Aaron's mother were the responsibility of the department.

On appeal to this court, the department argued that under Neb. Rev. Stat. § 43-290 (Reissue 1993), it was responsible for costs related to a juvenile's "support, study, and treatment," 250 Neb. at 493, 550 N.W.2d at 16, but because detention costs were not enumerated under the statute, the county of Scotts Bluff was responsible for the costs in detaining Aaron.

On appeal, we affirmed the order of the juvenile court. We rejected the department's argument and held that the department was responsible for the costs incurred in detaining Aaron until he could be physically placed in the program. We determined that because at least one purpose of detaining Aaron "was to facilitate [his] placement into a treatment program, the detention constituted treatment of a juvenile as that term is used in § 43-290." 250 Neb. at 495, 550 N.W.2d at 17. We noted that under § 43-290, the department was responsible for costs incurred in treating juveniles in its "care and custody," and, therefore, we held that the department was responsible for the costs incurred in detaining Aaron until he could be placed in a treatment program. See, also, *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999) (when DHHS has custody of juvenile, DHHS is responsible for costs incurred in caring for juvenile); *In re Interest of Lisa O.*, 248 Neb. 865, 540 N.W.2d 109 (1995) (detention is part of treatment, and pursuant to § 43-290, DHHS is responsible for costs of treatment).

In the instant case, the juvenile court placed Marie with DHHS for purposes of a residential evaluation. Pursuant to § 43-413(4), the State is responsible for "[a]ll costs incurred during the period in which the juvenile is being evaluated . . . ." The record shows that Marie was detained at the attention center pending her physical delivery to a DHHS facility. It is thus apparent that one of the purposes served in detaining Marie at the attention center was to facilitate her placement in a residential evaluation program. In the absence of DHHS' having immediate space in an evaluation program, Marie's detention was an inevitable precursor of her evaluation, necessary to ensure her participation in the residential evaluation. We determine that the detention of Marie constituted "evaluation" of the juvenile as that term is used in § 43-413(4). Accordingly, DHHS was responsible for the costs incurred in detaining Marie at the attention center. The juvenile court erred in concluding otherwise.

As a final matter, we observe that the juvenile court in the instant case declined to assess the detention costs against DHHS on the understanding that Marie was adjudicated under § 43-247(1) and (2) and that prior decisions of this court that assigned juvenile costs against DHHS were limited solely to

juveniles who had been adjudicated under § 43-247(3). The juvenile court misperceived our prior decisions. As we stated in *In re Interest of Jeremy T.*, 257 Neb. at 743-44, 600 N.W.2d at 754, regardless of "whether a juvenile is adjudged to be under § 43-247(1) or § 43-247(3)(a)—the Department remains responsible for the costs of placing and caring for juveniles within its custody." Accordingly, where as here the juvenile was placed in the custody of DHHS for evaluation and given the language of § 43-413(1) and (4), DHHS was responsible for the detention costs for Marie, a juvenile who had been adjudicated under § 43-247 (1) and (2).

## CONCLUSION

For the reasons set forth herein, we reverse the decision of the juvenile court overruling the county's motion to assess costs and remand the cause with directions to grant the county's motion and assess the costs for Marie's care at the attention center from April 13 to 26, 1999, against DHHS.

REVERSED AND REMANDED WITH DIRECTIONS.

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# IN RE OF ESTATE OF LILLIAN M. TVRZ, DECEASED. SANDRA TVRZ, PERSONAL REPRESENTATIVE OF THE ESTATE OF LILLIAN M. TVRZ, DECEASED, APPELLANT, V. AUGUST T. "TED" TVRZ ET AL., APPELLEES.

620 N.W.2d 757

Filed January 5, 2001. No. S-98-1127.

1. **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.
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. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute.

Petition for further review from the Nebraska Court of Appeals, HANNON, MUES, and INBODY, Judges, on appeal thereto

from the County Court for Lancaster County, LAURIE J. YARDLEY, Judge. Judgment of Court of Appeals affirmed.

Douglas W. Hand, of Frey & Hand Law Offices, for appellant.

Don Stenberg, Attorney General, Royce N. Harper, and Gerald W. Pankonin, Special Assistant Attorney General, for appellee State.

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

STEPHAN, J.

In its disposition of this appeal from a judgment of the county court for Lancaster County, the Nebraska Court of Appeals held, as a matter of first impression, that the State of Nebraska's claim against an estate for recovery of medical assistance benefits pursuant to Neb. Rev. Stat. § 68-1036.02 (Reissue 1996) arose at or after death of the recipient of such benefits and was therefore governed by the limitations provision of Neb. Rev. Stat. § 30-2485(b)(2) (Reissue 1995). *In re Estate of Tvrz*, 9 Neb. App. 98, 608 N.W.2d 226 (2000). The State of Nebraska, through the Department of Health and Human Services Finance and Support (DHHS), has petitioned for further review, citing cases from other jurisdictions holding that statutory claims of this nature arose prior to death when the benefits were received. We granted the petition for further review because we deem this legal issue to be one of significant public interest.

## BACKGROUND

The pertinent facts are undisputed. Lillian M. Tvrz died testate in Lancaster County, Nebraska, on January 2, 1998, at the age of 88. From August 1993 until February 1997, she received medical assistance payments (Medicaid) from the State of Nebraska, administered by DHHS pursuant to Neb. Rev. Stat. § 68-1018 et seq. (Reissue 1996 & Supp. 1997).

On February 6, 1998, Sandra Tvrz filed an "Application for Informal Probate of Will and Informal Appointment of Personal Representative" in the county court for Lancaster County,

Nebraska. On the same day, the registrar issued a written "Registrar's Statement of Informal Probate" and named Sandra as the personal representative of Lillian's estate. Claim day was designated as April 17, 1998, and notice was scheduled for publication on February 17 and 24 and March 3. Pursuant to Neb. Rev. Stat. § 25-520.01 (Reissue 1995), the personal representative mailed notice to parties she believed had a direct legal interest in the proceeding, but did not mail notice to DHHS.

Sharon Butts, a DHHS employee whose duties included estate recovery, read the published notice of claim day in a legal newspaper and prepared a claim against the estate in the amount of $79,955.01, representing the aforementioned medical assistance benefits which the State had paid to Lillian. Butts mailed the claim to the Lancaster County Court on April 14, 1998, but for an unknown reason, it was never received by the court. When Butts discovered on July 13 that the claim was not on file with the court, she then refiled the claim, and DHHS filed a "Petition for Allowance of Claim" on July 21, 1998. In response, the personal representative filed a "Notice of Disallowance of Claim" and an answer asserting the claim was untimely.

Following a hearing, the county court determined that because notice had not been mailed to DHHS, the claim was timely filed within 3 years after the death of the decedent pursuant to § 30-2485(a)(2). The personal representative then perfected this appeal. The Court of Appeals reversed, and remanded with directions to disallow the claim as untimely. It reasoned that because § 68-1036.02 created a claim against the *estate* of the recipient of medical assistance benefits, the claim necessarily arose at or after the recipient's death and therefore could only be filed within 4 months thereof pursuant to § 30-2485(b)(2).

## ASSIGNMENT OF ERROR

In DHHS' petition for further review, it contends that the Court of Appeals erred in holding that its claim against the estate was not timely filed.

## SCOPE OF REVIEW

[1] In connection with questions of law and statutory interpretation, an appellate court has an obligation to reach an inde-

pendent conclusion irrespective of the decision made by the court below. *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000); *Zoucha v. Henn*, 258 Neb. 611, 604 N.W.2d 828 (2000).

## ANALYSIS

Medicaid is a joint federal-state program which provides medical assistance and other benefits to qualified recipients. It was established by title XIX of the Social Security Act of 1965. See Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965). Nebraska and other states accepting federal Medicaid funds are required to designate a single state agency to administer and supervise the program. See 42 U.S.C. § 1396a(a)(5) (1994). As noted above, DHHS administers the Medicaid program in Nebraska pursuant to § 68-1018 et seq.

In order to qualify for federal funds, state Medicaid programs must meet certain requirements, including compliance with federal statutes governing estate recovery programs which permit a state to recoup benefits paid from a recipient's estate under certain circumstances. 42 U.S.C. § 1396a(a)(18). Courts and commentators have discussed the purpose of estate recovery statutes. For example, the California Supreme Court has observed that estate recovery programs serve the purpose of permitting a state to assist those in need, while easing the financial burden of doing so by recouping benefits from a recipient's estate, thereby preventing heirs of the recipient "from unfairly benefitting [sic] from the program." *Kizer v. Hanna*, 48 Cal. 3d 1, 6, 767 P.2d 679, 681, 255 Cal. Rptr. 412, 414 (1989). The Minnesota Supreme Court has characterized the Medicaid estate recovery program as a means "whereby money paid to qualified individuals for health care purposes may be recovered and reused to help other similarly situated persons." *In re Estate of Turner*, 391 N.W.2d 767, 770 (Minn. 1986). A commentator has noted that "[t]he foremost consideration behind estate recovery is the reduction of the overall cost of Medicaid to states by recouping some portion of Medicaid expenditures." Jon M. Zieger, *The State Giveth and the State Taketh Away: In Pursuit of a Practical Approach to Medicaid Estate Recovery*, 5 Elder L.J. 359, 374 (1997).

Although each state is free to design its own statutory estate recovery program, such statutes must comply with the requirements of 42 U.S.C. § 1396p, which provides in pertinent part:

> **(b) Adjustment or recovery of medical assistance correctly paid under a State plan**
>
> (1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:
>
> . . . .
>
> (B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate, but only for medical assistance consisting of—
>
> (i) nursing facility services, home and community-based services, and related hospital and prescription drug services, or
>
> (ii) at the option of the State, any items or services under the State plan.
>
> . . . .
>
> (2) Any adjustment or recovery under paragraph (1) may be made only after the death of the individual's surviving spouse, if any, and only at a time—
>
> (A) when he has no surviving child who is under age 21, or (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1382c of this title[.]

As noted, the estate recovery provisions of Nebraska's Medicaid plan are codified at § 68-1036.02. In complying with the federal requirements, § 68-1036.02 provides in part:

> (1) The estate of a decedent who has received medical assistance benefits under the medical assistance program established under section 68-1018 shall be indebted to the

> Department of Health and Human Services Finance and Support for the total amount paid for medical assistance on behalf of the decedent if:
>
> (a) The decedent was fifty-five years of age or older at the time the medical assistance was provided; or
>
> (b) The decedent resided in a medical institution and, at the time of institutionalization or application for medical assistance, whichever is later, the department determines that the decedent could not have reasonably been expected to be discharged and resume living at home. For purposes of this section, medical institution shall mean a skilled nursing facility, intermediate care facility, intermediate care facility for the mentally retarded, nursing facility, or inpatient hospital.
>
> (2) No debt to the department shall exist if the decedent is survived (a) by a spouse or (b) by a child who either is under twenty-one years of age or is blind or totally and permanently disabled as defined by the Supplemental Security Income criteria.

We are presented with two competing theories regarding when claims arise under § 68-1036.02 for the purposes of this state's nonclaim statute, § 30-2485. DHHS urges us to conclude that such claims arise before the death of the recipient, and as such, under § 30-2485(a)(1), it has 3 years to file a claim when it has not been presented with the required notice. In contrast, the Court of Appeals determined that such claims arise " 'at or after' the death" of the recipient, thus making the claim subject to the 4-month limitations period set forth in § 30-2485(b)(2). *In re Estate of Tvrz*, 9 Neb. App. 98, 104, 608 N.W.2d 226, 230 (2000). We review this question of law de novo.

DHHS relies heavily upon *Matter of Estate of Hooey*, 521 N.W.2d 85 (N.D. 1994), a case which it cites for the first time in its brief in support of the petition for further review. In that case, the Supreme Court of North Dakota determined that a claim under that state's estate recovery statute arose prior to the recipient's death and therefore could be filed within 3 years after death pursuant to a limitations provision similar to § 30-2485(a)(2). The North Dakota estate recovery statute provided in pertinent part:

> On the death of any recipient of medical assistance who was fifty-five years of age or older when the recipient received the assistance, and on the death of the spouse of the deceased recipient, the total amount of medical assistance paid on behalf of the recipient following the recipient's fifty-fifth birthday must be allowed as a preferred claim against the decedent's estate . . . .

N.D. Cent. Code § 50-24.1-07(1) (1999). The statute further provided:

> No claim must be paid during the lifetime of the decedent's surviving spouse, if any, nor while there is a surviving child who is under the age of twenty-one years or is blind or permanently and totally disabled, *but no timely filed claim may be disallowed because of the provisions of this section.*

(Emphasis supplied.) N.D. Cent. Code § 50-24.1-07(2). The court reasoned that although the ability of the state to enforce the obligation to repay benefits was tolled during the recipient's lifetime, the obligation arose upon the receipt of benefits and thus arose prior to death.

In reaching this conclusion, the North Dakota Supreme Court relied on *Department of Public Welfare v. Anderson*, 377 Mass. 23, 384 N.E.2d 628 (1979). *Anderson* involved the issue of whether a Medicaid recovery claim arose prior or subsequent to the death of the recipient for limitations purposes. The Massachusetts estate recovery statute interpreted by the court provided:

> "There shall be no adjustment or recovery of medical assistance correctly paid, except from the estate of an individual who was sixty-five years of age or older when he received such assistance, and then only after the death of his surviving spouse, if any, and only at a time when he has no surviving child who is under age twenty-one or is blind or permanently and totally disabled."

*Anderson*, 377 Mass. at 24, 384 N.E.2d at 630. The Supreme Judicial Court of Massachusetts concluded that this statutory language did not contemplate a claim arising after death, but, rather, one arising during the recipient's lifetime but subject to provisions delaying the state's enforcement right. The court concluded that the purpose of the statutory language was "simply to

avoid imposition of an obligation to repay while the recipient or certain members of his family may yet require governmental assistance, and not to prevent the obligation from ever coming into existence." *Id.* at 31-32, 384 N.E.2d at 634.

[2,3] As noted above, however, the Medicaid estate recovery statutes enacted by various states are not identical. Whether a claim under § 68-1036.02 arises before or after the death of a Medicaid recipient depends upon the statutory language used by the Nebraska Legislature. 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. *Big John's Billiards v. Balka, ante* p. 702, 619 N.W.2d 444 (2000); *Sack v. State*, 259 Neb. 463, 610 N.W.2d 385 (2000). Likewise, a court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute. *Pfizer v. Lancaster Cty. Bd. of Equal., ante* p. 265, 616 N.W.2d 326 (2000); *A & D Tech. Supply Co. v. Nebraska Dept. of Revenue*, 259 Neb. 24, 607 N.W.2d 857 (2000).

Applying these familiar principles, the Court of Appeals determined that the plain and unambiguous language of § 68-1036.02 imposed an obligation upon the estate of a Medicaid recipient but created "no indebtedness so long as the recipient is alive." *In re Estate of Tvrz*, 9 Neb. App. 98, 104, 608 N.W.2d 226, 230 (2000). This reasoning is supported by that of the California Supreme Court in *Kizer v. Hanna*, 48 Cal. 3d 1, 767 P.2d 679, 255 Cal. Rptr. 412 (1989), in which the court concluded that California's Medicaid estate recovery statute could not be applied retroactively to permit recovery of benefits received prior to its enactment. The California statute in question was similar to § 68-1036.02, providing in part:

> "[T]he department may claim against the estate of the decedent, or against any recipient of the property of that decedent by distribution or survival an amount equal to the payments for the health care services received. The department may not claim where the eligible person was under 65 when services were received, or where there is a sur-

> viving spouse, or where there is a surviving child who is under age 21 or who is blind or permanently and totally disabled[.] . . ."

*Kizer*, 48 Cal. 3d at 4 n.2, 767 P.2d at 680 n.2, 255 Cal. Rptr. at 413 n.2. The court held:

> The plain language of the statute dictates that the Department's right to reimbursement is against the recipient's *estate*. Consequently, the Department's right to reimbursement arises, if at all, at the time of the recipient's death and is dependent on conditions existing at such time.
>
> Equally clear from the language of [the California statute] is the fact that no liability to reimburse the Department arises until the Medi-Cal recipient's death.

(Emphasis in original.) *Kizer*, 48 Cal. 3d at 8, 767 P.2d at 683, 255 Cal. Rptr. at 416. The court concluded that the payment of "Medi-Cal" benefits did not create a debt because the department can seek reimbursement only after the recipient's death and then only if the conditions mentioned in the statute are met. *Id.*

We conclude that this reasoning is sound and applicable to the language of § 68-1036.02. Moreover, in contrast to the North Dakota statute examined in *Matter of Estate of Hooey*, 521 N.W.2d 85 (N.D. 1994), we find no language in § 68-1036.02 describing a claim which is in existence but held in abeyance during the lifetime of the recipient. Unlike the North Dakota statute, the Nebraska statute focuses on one point in time, i.e., the death of the recipient, and requires a determination of whether the recipient's estate is obligated to reimburse DHHS as of that point. The statute specifically provides that "[n]o debt to the department shall exist" if the recipient is survived by a spouse or by a child who is under the age of 21, blind, or totally and permanently disabled. § 68-1036.02(2). Thus, under this statutory scheme, the *existence* of indebtedness on the part of a recipient's estate depends upon factors which can be determined only after the recipient's death.

Based upon our independent review of the plain and unambiguous language of § 68-1036.02, we conclude that the reimbursement claim at issue in this case arose at or after the death of Lillian and was therefore subject to the limitations imposed in § 30-2485(b)(2). Since the claim was presented to the per-

sonal representative more than 4 months after the death of Lillian, it was time barred.

## CONCLUSION

For the reasons discussed, we conclude that the Court of Appeals did not err in determining that a Medicaid reimbursement claim under § 68-1036.02 necessarily arises at or after the death of the Medicaid recipient and that the claim at issue here was not filed within the applicable limitations period. We therefore affirm the judgment of the Court of Appeals which reversed, and remanded to the county court with directions to disallow the claim as untimely.

AFFIRMED.

HENDRY, C.J., not participating.

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## STATE OF NEBRASKA EX REL. GUS LAMM AND AUDREY LAMM, APPELLANTS, V. NEBRASKA BOARD OF PARDONS ET AL., APPELLEES.

620 N.W.2d 763

Filed January 5, 2001. No. S-99-251.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to 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. **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.
6. **Moot Question: Appeal and Error.** An appellate court may review an otherwise moot case if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.
7. ___: ___. 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.

8. **Constitutional Law: Legislature.** A constitutional provision is not self-executing if such provision merely indicates a line of policy or principles without supplying the means by which such policy or principles are to be carried into effect, if the language of the constitutional provision is directed to the Legislature, or if the language of a constitutional provision indicates that subsequent legislation is contemplated or necessary for effectuation of such provision.
9. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is a court's power to hear a case.
10. **Jurisdiction: Appeal and Error.** When a lower court lacks authority to exercise its subject matter jurisdiction so as to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
11. **Jurisdiction.** The question of a court's subject matter jurisdiction does not turn solely on the court's authority to hear a certain class of cases; it also involves determining whether a court is authorized to address a particular question that it assumes to decide or to grant the particular relief requested.

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

Paula B. Hutchinson for appellants.

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

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

WRIGHT, J.

## NATURE OF CASE

Gus Lamm and Audrey Lamm appeal from an order of the Lancaster County District Court which denied and dismissed their petition for writ of mandamus. The petition sought an order directing the Nebraska Board of Pardons (Board) and its individual members to accord the Lamms the right to make an oral or written statement at a proceeding of the Board concerning the application for commutation of sentence of Randolph K. Reeves. At that time, Reeves was facing the death penalty for the first degree murders of Janet Mesner and Victoria Lamm. Gus Lamm is the widower of Victoria Lamm, and Audrey Lamm is Victoria's daughter.

## SCOPE OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Prucha v. Kahlandt, ante* p. 366, 618 N.W.2d 399 (2000).

## FACTS

In their petition for writ of mandamus, the Lamms claimed that at the Board's January 11, 1999, meeting, it considered whether to grant a hearing on the commutation application filed by Reeves. The Board voted to deny Reeves' request for a hearing and then considered and denied his commutation application. At no time during this proceeding did the Board permit the Lamms to make an oral or written statement.

On January 12, 1999, the Lamms filed a petition for writ of mandamus in Lancaster County District Court, alleging, inter alia, that Neb. Const. art. I, § 28, provided the Lamms the right to be informed of, be present at, and make an oral or written statement at the commutation proceedings. The Lamms claimed that the Board had refused to allow them to make an oral or written statement. They asserted that when they attempted to make such statement at the commutation proceeding, the chairman of the Board ruled that their statements were out of order and refused to hear or consider such statements.

The Lamms alleged that Neb. Rev. Stat. § 20-148 (Reissue 1997) provides a civil remedy for violations of the Nebraska Constitution, including article I, § 28. The Lamms further alleged that the execution of Reeves prior to the Lamms' being given an opportunity to address the Board would render the Lamms' constitutional rights meaningless. The Lamms claimed that they had no adequate remedy at law and therefore requested that the district court issue a writ of mandamus directing the Board to allow the Lamms to make an oral or written statement at commutation proceedings in connection with the Reeves case.

The district court denied and dismissed the Lamms' petition on the basis that the court lacked subject matter jurisdiction. The Lamms timely appealed.

## ASSIGNMENTS OF ERROR

The Lamms assert that the district court erred (1) in holding that it lacked subject matter jurisdiction based on its legal conclusion that § 20-148 does not contemplate actions against state actors; (2) in holding that the Lamms were not entitled to relief based on its conclusion that the Board has the discretion to deny a hearing to an applicant for commutation of sentence; (3) in holding that the Lamms were not entitled to relief based on the fact that the Legislature has not provided a remedy under article I, § 28; (4) in holding that the Lamms were not entitled to relief based on its finding that they are not victims as defined in Neb. Rev. Stat. § 29-119 (Cum. Supp. 2000); and (5) in finding that the Lamms were attempting to assert their rights under article I, § 28, on behalf of Reeves, in contravention of the express language of article I, § 28.

## ANALYSIS

[2,3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. McCracken, ante* p. 234, 615 N.W.2d 902 (2000). 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. *Hron v. Donlan*, 259 Neb. 259, 609 N.W.2d 379 (2000). Thus, we must first determine whether our decision in *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000), has rendered this appeal moot.

[4,5] 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. *Prucha v. Kahlandt, ante* p. 366, 618 N.W.2d 399 (2000). 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. *Id.* As a general rule, a moot case is subject to summary dismissal. *Hron v. Donlan, supra.*

The Lamms are seeking a writ of mandamus directing the Board to allow them to make an oral or written statement at Reeves' commutation proceeding. However, in *Reeves*, we vacated the death sentences imposed upon Reeves for both of the counts of which he remains convicted. Since Reeves has not

been resentenced, his commutation application, which sought to commute his death sentence to a life sentence, is no longer applicable. Thus, we cannot grant the relief requested by the Lamms in their petition for writ of mandamus. Accordingly, this case is moot.

[6,7] However, an appellate court may review an otherwise moot case if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. *Hron v. Donlan, supra.* 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. See *Hauser v. Hauser*, 259 Neb. 653, 611 N.W.2d 840 (2000).

We determined that the public interest exception applied in *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998). In *Woods*, we found that an authoritative construction of the statute at issue was necessary to guide public officials, resolve public concerns, and prevent a recurrence of the uncertainty that was evident from the case at hand. Accordingly, we proceeded to the merits of an otherwise moot issue. Applying such considerations to the case at bar, we conclude that the public interest exception applies.

In its order, the district court determined that the Legislature had not provided for the implementation of the rights granted in article I, § 28, and that, therefore, there was no remedy available to the Lamms. We conclude that this determination was correct and therefore affirm the district court's denial and dismissal of the petition for writ of mandamus. Accordingly, we do not address or consider the other issues raised or determined by the district court.

This action was brought to enforce rights alleged to exist under article I, § 28, which provides:

> (1) A victim of a crime, as shall be defined by law, or his or her guardian or representative shall have: The right to be informed of all criminal court proceedings; the right to be present at trial unless the trial court finds sequestration necessary for a fair trial for the defendant; and the right to be informed of, be present at, and make an oral or written

statement at sentencing, parole, pardon, commutation, and conditional release proceedings. This enumeration of certain rights for crime victims shall not be construed to impair or deny others provided by law or retained by crime victims.

(2) The Legislature shall provide by law for the implementation of the rights granted in this section. There shall be no remedies other than as specifically provided by the Legislature for the enforcement of the rights granted by this section.

(3) Nothing in this section shall constitute a basis for error in favor of a defendant in any criminal proceeding, a basis for providing standing to participate as a party to any criminal proceeding, or a basis to contest the disposition of any charge.

A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Prucha v. Kahlandt, ante* p. 366, 618 N.W.2d 399 (2000). We therefore proceed to independently analyze the determination made by the district court.

The Board argues that since the Legislature has not specifically provided for implementation of the rights granted in article I, § 28, the district court was correct in concluding that it lacked subject matter jurisdiction to entertain the Lamms' cause of action. The Lamms argue that either § 20-148 or a writ of mandamus under Neb. Rev. Stat. § 25-2156 (Reissue 1995) should be used as a remedy to cure the violation of their rights under article I, § 28.

Section 20-148 provides:

(1) Any person or company, as defined in section 49-801, except any political subdivision, who subjects or causes to be subjected any citizen of this state or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the United States Constitution or the Constitution and laws of the State of Nebraska, shall be liable to such injured person in a civil action or other proper proceeding for redress brought by such injured person.

> (2) The remedies provided by this section shall be in addition to any other remedy provided by Chapter 20, article 1, and shall not be interpreted as denying any person the right of seeking other proper remedies provided thereunder.

The Board contends that §§ 20-148 and 25-2156 were not specifically enacted to enforce the rights created by article I, § 28.

The language of article I, § 28, is clear and unambiguous. The Legislature is required to provide for the implementation of the rights set forth therein. Moreover, unless the Legislature specifically so provides, there are no remedies for enforcement of the rights granted by article I, § 28.

Clearly, §§ 20-148 and 25-2156 were both available prior to June 25, 1996, the effective date of article I, § 28. Section 20-148 was adopted by the Legislature in 1977, and § 25-2156 was established by Rev. Stat. § 645 (1867). Since neither § 20-148 nor § 25-2156 was specifically provided by the Legislature as a means for enforcement of the rights granted by article I, § 28, neither of them can be asserted as a means for such enforcement.

[8] A constitutional provision is not self-executing if such provision merely indicates a line of policy or principles without supplying the means by which such policy or principles are to be carried into effect, if the language of the constitutional provision is directed to the Legislature, or if the language of a constitutional provision indicates that subsequent legislation is contemplated or necessary for effectuation of such provision. *Indian Hills Comm. Ch. v. County Bd. of Equal.*, 226 Neb. 510, 412 N.W.2d 459 (1987). For example, in *Patteson v. Johnson*, 219 Neb. 852, 857, 367 N.W.2d 123, 127 (1985), we held that Neb. Const. art. V, § 22, which provides that " '[t]he state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought' " was not self-executing. We stated that legislative action was necessary to make such provision available. See, also, *Gentry v. State*, 174 Neb. 515, 118 N.W.2d 643 (1962).

We also applied this principle in *Wiseman v. Keller*, 218 Neb. 717, 358 N.W.2d 768 (1984). In *Wiseman*, we stated that the legislative history of § 20-148 indicated that the major focus of the statute was to wipe out private acts of discrimination by private

employers, thus excluding the state. Accordingly, we concluded that § 20-148 does not waive the sovereign immunity of the State of Nebraska as to actions brought in federal court under 42 U.S.C. § 1983 (Supp. IV 1998) to protect rights under the Contract Clause in article I, § 10, of the U.S. Constitution and property interests protected under the 14th Amendment to the U.S. Constitution.

By analogy, we conclude that article I, § 28, is not self-executing. Article I, § 28, requires that the Legislature provide for the implementation of the rights granted therein and that there should be no remedies other than those specifically provided by the Legislature for the enforcement of those rights. Since the Legislature has not specifically enacted any laws to implement the rights granted in article I, § 28, with respect to commutation proceedings before the Board, there are no remedies available for enforcement of such rights.

[9-11] Subject matter jurisdiction is a court's power to hear a case. *Ferguson v. Union Pacific RR. Co.*, 258 Neb. 78, 601 N.W.2d 907 (1999). When a lower court lacks authority to exercise its subject matter jurisdiction so as to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *Id.* The question of a court's subject matter jurisdiction does not turn solely on the court's authority to hear a certain class of cases, such as dissolution of marriage or accounting actions; it also involves determining whether a court is authorized to address a particular question that it assumes to decide or to grant the particular relief requested. *Ryan v. Ryan*, 257 Neb. 682, 600 N.W.2d 739 (1999). Because the district court could not grant the particular relief requested by the Lamms, the court correctly determined that it lacked subject matter jurisdiction over this matter.

## CONCLUSION

For the reasons set forth herein, we affirm the judgment of the district court.

AFFIRMED.

## STATE OF NEBRASKA, APPELLEE, V. JOHN GUTIERREZ, APPELLANT.

620 N.W.2d 738

Filed January 5, 2001. No. S-00-092.

1. **Criminal Law: Motions for Continuance: Appeal and Error.** A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.
2. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of discretion.
3. **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.
4. **Indictments and Informations.** A district court in its discretion may before trial permit the county attorney to amend a criminal information, provided the amendment does not change the nature or identity of the offense charged.
5. **Trial: Witnesses: Indictments and Informations.** A trial court may allow witnesses to be endorsed after an information is filed when doing so does not prejudice the defendant in the preparation of his or her defense.
6. **Appeal and Error.** Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
7. **Trial: Juries: Evidence.** When a jury makes a request to rehear certain evidence, the common-law rule requires that the trial court discover the exact nature of the jury's difficulty, isolate the precise testimony which can solve it, and weigh the probative value of the testimony against the danger of undue emphasis. The rereading of such evidence is to be done in open court in the presence of the parties or their counsel or under other strictly controlled procedures of which the parties have been notified.
8. **Criminal Law: Appeal and Error.** A defendant in a criminal case may not take advantage of an alleged error which the defendant invited the trial court to commit.
9. **Sentences: Appeal and Error.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.

Appeal from the District Court for Garden County: BRIAN SILVERMAN, Judge. Affirmed.

Kirk E. Naylor, Jr., and, on brief, Gary J. Krajewski, of Krajewski Law Office, for appellant.

Don Stenberg, Attorney General, and Donald J.B. Miller for appellee.

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

WRIGHT, J.

## NATURE OF CASE

John Gutierrez was charged in the district court for Garden County with two counts of sexual assault in the first degree. A jury convicted him on one count but was unable to reach a verdict as to the other. The district court sentenced Gutierrez to 35 to 50 years' imprisonment, and Gutierrez appeals.

## SCOPE OF REVIEW

[1] A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999).

[2] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of discretion. *State v. Rieger, ante* p. 519, 618 N.W.2d 619 (2000).

## FACTS

Between April 1997 and January 1998, the alleged victims in this case, S.C. and J.P., lived with Ken P., their stepfather and father, respectively, along with three other siblings. In January 1998, Ken reported alleged sexual abuse of the children by two of their uncles and their grandparents. Gutierrez is married to S.C. and J.P.'s maternal grandmother.

After being interviewed by a state patrol investigator, the children were driven to Denver, Colorado, where they were physically examined by a physician. The examination of S.C. revealed that she had been recently abused both vaginally and anally. There were no physical signs of abuse on any of the other children, although the physician was concerned by some redness near J.P.'s anus.

At trial, S.C. testified that Gutierrez had forced her to perform oral sex acts on him at his house. However, she admitted that she had twice changed her story, and she later stated that she had lied about the allegations because she was mad at Gutierrez. She also testified that her stepfather had sexually abused her. At trial, J.P. testified that Gutierrez would "[s]tick his privates up me . . . [i]n my butt." He stated that this had happened 10 or 12 times.

A number of witnesses, including a former employer, friends, and family members, testified on behalf of Gutierrez that they had witnessed normal interaction between Gutierrez and various children who were related to him, including S.C. and J.P. There was also testimony about S.C.'s fear of her stepfather. In addition, there was testimony by a neighbor about his suspicion that he had witnessed the stepfather sexually abusing S.C. in November 1997. Gutierrez testified at length and denied having ever sexually abused either S.C. or J.P. or otherwise inappropriately touching them.

The case was submitted to the jury on October 22, 1999. On October 25, the jury found Gutierrez guilty of sexual assault in the first degree on J.P. but was unable to reach a verdict on the charge regarding S.C. Gutierrez was sentenced to 35 to 50 years' imprisonment.

## ASSIGNMENTS OF ERROR

Gutierrez assigns as error the district court's (1) denying a continuance after the State filed a second amended information and endorsed a new witness on the day of trial, (2) allowing the court reporter to go into the jury room without the presence of counsel to read back testimony during deliberations, (3) not granting a new trial after possible juror contact by the prosecutor during the trial and deliberations, (4) sustaining a motion in limine prohibiting Gutierrez from introducing evidence of his character at trial, (5) sustaining a motion in limine prohibiting Gutierrez from introducing evidence that another person may have committed these acts, (6) denying Gutierrez' motion for a directed verdict of not guilty, and (7) sentencing Gutierrez to 35 to 50 years' imprisonment.

## ANALYSIS

[3] Gutierrez argues that the district court erred in denying his motion for a continuance. A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (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. Kula, ante* p. 183, 616 N.W.2d 313 (2000).

In the original information, Gutierrez was charged with four counts of sexual assault in the first degree (one count each for four different grandchildren), kidnapping, and false imprisonment in the first degree. The kidnapping and false imprisonment charges were later dismissed. On the day of trial, the State moved to further amend the information by eliminating two counts of sexual assault in the first degree. Gutierrez requested that the district court dismiss these counts with prejudice, and the court so ordered. Gutierrez then moved for a continuance because of the amendment and the State's endorsement of a new witness. The district court denied the motion, finding that there would be no prejudice to Gutierrez by proceeding with the trial.

Gutierrez asserts that he was prejudiced by being forced to proceed to trial on the amended information. He claims that "[b]y removing two of the possible victims in this case, the [S]tate eliminated two Counts wherein victims had changed their stories a number of times and had most recently told the State that [Gutierrez] was not the perpetrator." Brief for appellant at 10.

The State argues that proceeding to trial on the second amended information was not prejudicial to Gutierrez in light of the fact that the State merely dismissed two of the four counts previously charged after the alleged victims recanted their reports of molestation. The State is essentially arguing that Gutierrez had notice of the remaining two counts and that further notice was therefore unnecessary.

[4] A district court in its discretion may before trial permit the county attorney to amend a criminal information, provided the amendment does not change the nature or identity of the offense charged. *State v. Thielen*, 216 Neb. 119, 342 N.W.2d 186 (1983). Here, the nature or identity of the two remaining counts was not changed. Gutierrez received the benefit of having two felony counts dismissed with prejudice.

Just prior to the start of trial, the State also moved to endorse as an additional witness the booking officer on duty when Gutierrez was arrested, who was to testify as to Gutierrez' age.

The district court sustained the State's motion to endorse over Gutierrez' objection.

[5] A trial court may allow witnesses to be endorsed after an information is filed when doing so does not prejudice the defendant in the preparation of his or her defense. *State v. Cebuhar*, 252 Neb. 796, 567 N.W.2d 129 (1997). It is clear that the late endorsement of the booking officer did not prejudice Gutierrez. She was endorsed only for the purpose of identifying his age, and her testimony was so limited. Further, Gutierrez himself testified as to his age at trial.

We conclude that the district court did not abuse its discretion in denying Gutierrez' motion for a continuance. The district court properly found that Gutierrez would not be prejudiced by proceeding on the second amended information or by the endorsement of the witness.

Gutierrez next argues that the district court erred in allowing the court reporter to go into the jury room without the presence of counsel to read back testimony during deliberations. During the course of deliberations, the jury requested transcripts of the testimony of S.C. and J.P. The district court discussed the matter with counsel and proposed that the court reporter be allowed to go into the jury room to read back the testimony, but insisted that the entirety of their testimony be read back. Counsel for both sides had no objection to this procedure. The court reporter ended up reading back S.C.'s testimony three times; J.P.'s testimony was reread two times, with some portions being reread a third time; and Gutierrez' testimony was reread once.

[6] At oral argument before this court, Gutierrez' counsel asserted that this conduct was plain error. Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Hansen*, 259 Neb. 764, 612 N.W.2d 477 (2000).

We reiterate that allowing a jury to rehear only portions of the evidence after the jury has commenced deliberations is not to be encouraged. See *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000). In *Dixon*, the defendant objected to the jury's request to

play back portions of a tape recording that the jury had listened to at trial. We held that previously played portions of tape recordings, like testimony of an actual witness at trial, generally should not be reheard by jurors. Jurors must rely upon their memory of what they heard the witness say, be it from a live witness or a tape recording. *Id.* In *Dixon*, we also noted that we do not ordinarily stray from the common-law rule that a trial court should not allow unrestricted review of previously played portions of a tape recording, any more than a court would allow unrestricted rereading of the testimony of an actual witness at trial, citing *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998).

[7,8] When a jury makes a request to rehear certain evidence, the common-law rule requires that the trial court discover the exact nature of the jury's difficulty, isolate the precise testimony which can solve it, and weigh the probative value of the testimony against the danger of undue emphasis. See *State v. Dixon, supra*. The rereading of such evidence is to be done in open court in the presence of the parties or their counsel or under other strictly controlled procedures of which the parties have been notified. *Id.* Because Gutierrez assented to this method of reading back the testimony to the jury, he has waived any objection to it on appeal. We therefore decline to find plain error in this case. A defendant in a criminal case may not take advantage of an alleged error which the defendant invited the trial court to commit. *State v. Trackwell*, 250 Neb. 46, 547 N.W.2d 471 (1996).

Gutierrez also argues that the district court erred in sentencing him to 35 to 50 years' imprisonment, which he contends is excessive and an abuse of discretion. Gutierrez was convicted of violating Neb. Rev. Stat. § 28-319 (Reissue 1995), which is a Class II felony. The permissible penalty range for a Class II felony is 1 to 50 years' imprisonment. Neb. Rev. Stat. § 28-105 (Reissue 1995).

[9] Neb. Rev. Stat. § 29-2308 (Reissue 1995) authorizes this court to reduce a sentence that is considered excessive and render an appropriate sentence. However, sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of discretion. *State v. Rieger, ante* p. 519, 618 N.W.2d 619 (2000). An abuse of discretion takes place when the sentencing court's reasons or rul-

ings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.*

In sentencing Gutierrez, the district court noted that the crime committed caused serious harm to J.P., who is afraid of his family, Gutierrez, his grandmother, and his uncles. He hurts himself and anyone else with whom he comes in contact. He spreads his feces on the walls and anywhere he can when he is left alone. He victimizes his younger sister and mutilates his toys.

The district court found that this crime was committed for Gutierrez' own gratification and that Gutierrez did not act under strong provocation. The district court concluded that there were no grounds tending to excuse or justify the crime, that Gutierrez indicated no remorse, and that there was a possibility that the crime could reoccur. The district court found that due to the nature of the crime, a lesser sentence would promote disrespect for the law and depreciate the seriousness of the offense. We find no abuse of discretion in the sentence imposed.

Gutierrez' remaining assignments of error concern possible juror contact, excluded evidence, and the denial of his motion for a directed verdict. We conclude that these assignments of error are without merit. The district court found that there was no improper juror contact, and we agree. We also conclude that the district court did not err in excluding certain evidence referred to by Gutierrez and did not err in denying the motion for a directed verdict. The evidence was sufficient to sustain the conviction. We decline to discuss these assignments of error in detail.

## CONCLUSION

For the reasons set forth herein, we affirm the judgment and sentence imposed.

AFFIRMED.

HENDRY, C.J., not participating.

STEPHAN, J., concurring.

I write separately only to state my position with respect to the references to *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000), in the majority opinion. My partial dissent in that case was based upon my conclusion that because the tape-recorded telephone conversations at issue were not testimonial in nature,

the trial court did not abuse its discretion in providing playback equipment to the jury for unrestricted review of the tapes during its deliberation. In the present case, however, the evidence reread to the jury was clearly testimonial in nature, and for that reason I agree that the principles stated in *Dixon* would apply if Gutierrez had not waived objection by assenting to the rereading of testimony to the jury by the court reporter.

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AMY WEISS, APPELLEE, V. GARY WEISS, APPELLANT.
620 N.W.2d 744

Filed January 5, 2001. No. S-00-105.

1. **Divorce: Appeal and Error.** Appeals in domestic relations matters are heard de novo on the record.
2. **Judgments: Evidence: 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. **Motions for Continuance: Appeal and Error.** Generally, a motion for a continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
4. **Judges: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Reversed and remanded for a new trial.

Jeffery R. Kirkpatrick and Mary Kay Hansen, of McHenry, Haszard, Hansen & Roth, for appellant.

Amie C. Martinez, of Anderson, Creager & Wittstruck, P.C., for appellee.

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

STEPHAN, J.

Gary Weiss appeals from an order of the district court for Lancaster County, Nebraska, denying his motion for new trial following a decree dissolving his marriage to Amy Weiss, now

known as Amy Svoboda, and awarding custody of the parties' minor child to Svoboda. The principal issue on appeal is whether the district court erred in denying Weiss' pro se motion for a continuance filed 10 days after his attorney was given leave to withdraw from the case and 16 days prior to the commencement of trial. We conclude that the district court erred in not granting the continuance and therefore reverse, and remand for a new trial.

## BACKGROUND

In Svoboda's petition for dissolution filed on September 18, 1998, she prayed for custody of the parties' son, born on September 30, 1994, as well as child support, alimony, and an equitable division of marital assets. On October 28, the court entered an order awarding the parties temporary joint custody of the child and requiring Weiss to pay temporary child support. Weiss' counsel filed a pretrial memorandum on April 19, 1999, designating child custody as one of the issues in dispute. At a pretrial conference on June 18, the case was scheduled for trial commencing on September 20 and concluding on the following day. Upon Weiss' realizing that the trial was scheduled to commence on a religious holiday which he observed, he requested a change in the commencement date, as a result of which the first day of trial was moved forward to September 16.

On August 18, 1999, Weiss' counsel filed a motion for leave to withdraw from the case. Following a hearing, the motion was granted and a notice of withdrawal was filed on August 23. According to Weiss' affidavit submitted in support of his motion for new trial, the withdrawal resulted from his disagreement with his attorney regarding trial strategy. On August 19, Weiss consulted a Lincoln attorney, who explained that he no longer litigated dissolution cases but referred him to other attorneys who would be qualified to represent him. Weiss contacted one of these attorneys on the same day and scheduled an appointment for August 23 to discuss possible representation. At this meeting, the attorney expressed reservation about his ability to rearrange his schedule to enable him to prepare for trial beginning on September 16 and requested 3 days in order to determine whether he could do so. On August 26, the attorney advised Weiss that he could not accept the case because he would not

have adequate time for preparation. Weiss was unable to make contact with another attorney to whom he had been referred.

In a letter dated August 30, 1999, which was jointly addressed to Weiss and counsel for Svoboda, the trial judge indicated his understanding that a continuance would be requested by Weiss and stated it likely would not be granted because Weiss had had sufficient time to obtain alternate counsel following the withdrawal of his original attorney. This letter was received by Weiss on August 31, 1 day after he had filed his motion for continuance of the trial date. In that motion, Weiss recited in detail the specific nature of his disagreement with his former attorney as well as his unsuccessful efforts to retain new counsel. He further stated: "The only significant disputed issue is custody of the parties' minor child. This entire matter is far too important for Respondent to proceed to trial with unprepared counsel or, worse yet, no representation at all."

The motion for continuance was noticed for hearing on September 16, 1999, the first day of trial. According to Weiss' uncontested affidavit, this was the earliest hearing date he was able to obtain from the bailiff. Weiss appeared on that date pro se and argued the motion, outlining again in detail the circumstances leading to the withdrawal of his attorney and his unsuccessful efforts to retain new counsel. Svoboda, through her attorney, resisted the motion. Immediately following argument, the court ruled from the bench as follows:

> It appears that this case has been pending for some time and that it was scheduled to start trial on June 18th — a two day trial, June 18th of this year, and it was moved. The second time it was scheduled for was September 20th and 21st of this year, which was again changed at the respondent's request. For that reason the motion to continue is denied, and the case will proceed to trial this morning.

Trial began immediately thereafter and was concluded on September 21. Weiss appeared pro se throughout the 2-day trial.

In the district court's decree entered on December 1, 1999, it awarded custody of the parties' child to Svoboda and visitation rights to Weiss. It further required Weiss to pay child support in the amount of $849 per month, as well as a proportion of daycare and medical expenses and the entire cost of the child's

health insurance coverage. The decree also included provisions regarding the division of marital assets and restoration of Svoboda's inheritance and maiden name, but did not specifically address a division of debts incurred during the marriage.

Weiss filed a timely motion for new trial through his present counsel, asserting an irregularity in proceedings allegedly depriving him of a fair trial and an assertion that the judgment was not sustained by sufficient evidence and was contrary to law. Following an evidentiary hearing focused primarily upon the denial of Weiss' motion for continuance prior to trial, the court overruled the motion for new trial. Weiss perfected this timely appeal, which we removed to our docket on our own motion pursuant to our authority to regulate the dockets of the appellate courts. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

## ASSIGNMENTS OF ERROR

Weiss assigns as error that the district court abused its discretion in (1) denying his motion for continuance, (2) failing to equitably divide and apportion marital debts, (3) computing child support incorrectly by not taking into consideration the fact that Weiss was supporting a child from a previous marriage, and (4) failing to award custody of the minor child to Weiss.

## STANDARD OF REVIEW

[1,2] Appeals in domestic relations matters are heard de novo on the record. *Brunges v. Brunges, ante* p. 660, 619 N.W.2d 456 (2000). 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. *Brunges v. Brunges, supra*; *Weinand v. Weinand, ante* p. 146, 616 N.W.2d 1 (2000).

[3] Generally, a motion for a continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. *Adrian v. Adrian*, 249 Neb. 53, 541 N.W.2d 388 (1995); *Grady v. Visiting Nurse Assn.*, 246 Neb. 1013, 524 N.W.2d 559 (1994).

## ANALYSIS

[4] As an initial matter, we conclude that Weiss' pro se motion for continuance was in substantial compliance with Neb. Rev.

Stat. § 25-1148 (Reissue 1995). As noted above, we review a trial court's denial of a continuance for abuse of discretion. An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Talkington v. Womens Servs.*, 256 Neb. 2, 588 N.W.2d 790 (1999). Thus, abuse of discretion turns on the actions of the district court as applied to a given set of circumstances. In a dissolution proceeding such as this, our review of those circumstances is made de novo on the record. See *Brunges v. Brunges, supra.*

Our analysis of this issue is aided by our opinion in *Adrian v. Adrian, supra*, a case in which a father requested the district court to modify its decree of dissolution by transferring custody of two minor children from their mother to him. The mother, who was enrolled in a training program to become a registered nurse, sought and obtained a continuance of the initially scheduled hearing date on the ground that it conflicted with a class. She obtained a second continuance after new allegations by the father necessitated the appointment of a guardian ad litem. Six days before the rescheduled hearing, her attorney again requested a continuance on the ground that the mother was required to make up a class, which she had missed because of the death of her mother, in order to complete her training program. The district court denied the motion on grounds that it was untimely and that the mother had previously been given " 'several continuances.' " *Adrian v. Adrian*, 249 Neb. at 57, 541 N.W.2d at 390. The hearing proceeded in the mother's absence, with her interests being represented by her attorney. The court granted the requested modification of custody, and on the mother's appeal, the Nebraska Court of Appeals held that the trial court had not abused its discretion in denying the motion for continuance. After granting further review, we reversed, and remanded for a new trial based upon our conclusion that under the circumstances, the denial of the mother's requested continuance constituted an abuse of discretion for three basic reasons. First, based upon our de novo review of the record, we concluded that the mother had not been granted "several continuances" as stated by the trial court, but, rather, "only two continuances." *Id.* Second, we noted the importance of the issue of

child custody in that "[t]he relationship between parent and child is constitutionally protected." *Id.* at 58, 541 N.W.2d at 391, citing *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 385 N.W.2d 448 (1986). Third, we concluded that the record did not indicate that the mother sought the continuance for a frivolous reason or a dilatory motive.

Applying the same analytical factors to the circumstances presented in this case, we initially conclude on the basis of our de novo review of the record that the district court was mistaken in stating that the trial was initially scheduled to begin on June 18, 1999, and continued at the request of Weiss. The record contains no order setting trial for this date, and the representation in Weiss' affidavit that the initial trial dates of September 20 to 21 were set during a *pretrial conference* on June 18 was confirmed by counsel for both the parties during oral argument. Although Weiss subsequently requested a change in the first scheduled day of trial because it fell on a religious holiday, this did not result in a continuance, but, rather, an acceleration of the first day of trial and did not affect the original scheduling of the second day. Thus, the record reflects no continuances, either requested or granted, prior to Weiss' motion for continuance filed on August 30.

As in *Adrian v. Adrian*, 249 Neb. 53, 541 N.W.2d 388 (1995), the trial of this case involved the constitutionally protected relationship between parent and child. While there is no recognized right to counsel in marriage dissolution proceedings, it is certainly understandable that a parent untrained in the law would desire and benefit greatly from legal representation in a proceeding in which his custody rights will be adjudicated. And, as in *Adrian*, we discern no intent on the part of Weiss to unnecessarily delay the proceedings. From our de novo review of the record, it appears that the discharge and subsequent withdrawal of Weiss' counsel was not motivated by any intent to delay the proceedings, but, rather, by a good faith disagreement between attorney and client regarding trial strategy. The record further reflects that Weiss acted promptly and diligently in attempting to secure new counsel and that he requested a continuance only after those efforts proved unsuccessful. The fact that the motion was not heard until the day on which trial was scheduled to com-

mence was apparently the result of the court's crowded docket and does not reflect any lack of diligence on Weiss' part. When his motion was denied, Weiss was immediately thrust into the unenviable position of defending his own interests in a complex dissolution proceeding without the assistance of counsel. The record clearly reflects the understandable fact that he was ill-prepared for this task and was prejudiced thereby in attempting to present evidence on his behalf. See *Dolen v. State*, 148 Neb. 317, 323, 27 N.W.2d 264, 268 (1947) (stating principle that "[e]ven in a civil case this court has recognized the necessity for time for the proper preparation of a case"). See, also, *Richelieu v. Union P. R. Co.*, 97 Neb. 360, 149 N.W. 772 (1914) (articulating proposition that when district court refuses to allow defendant continuance and defendant is thereby prevented from presenting his or her theory of defense to court, action of court is abuse of discretion).

For these reasons, we conclude that the district court abused its discretion in denying the motion for continuance. Because this issue is dispositive of the appeal, we do not address the other assignments of error.

## CONCLUSION

The district court abused its discretion in denying the motion for continuance and therefore erred in denying the motion for new trial. Accordingly, we reverse, and remand for a new trial on all issues.

REVERSED AND REMANDED FOR A NEW TRIAL.

HENDRY, C.J., not participating.

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STATE OF NEBRASKA, APPELLEE,
v. MATINA L. CAMPBELL, APPELLANT.
620 N.W.2d 750

Filed January 5, 2001. No. S-00-178.

1. **Trial: Convictions: Appeal and Error.** A conviction in a bench trial of a criminal case is sustained if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. In making this determination, an appellate court does not resolve conflicts in evidence, pass on credibility of wit-

nesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition.

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. **Affidavits: Appeal and Error.** As long as the poverty affidavit itself includes some indication that a defendant is requesting or applying for in forma pauperis status, Neb. Rev. Stat. § 25-2301.01 (Cum. Supp. 2000) does not require that a separate application be filed in addition to the poverty affidavit.
4. **Courts: Jurisdiction: Affidavits: Notice: Appeal and Error.** If a district court grants leave to proceed in forma pauperis, an appellate court obtains jurisdiction when the notice of appeal is filed, and failure of the affidavit to state the nature of the action or that the affiant is entitled to redress does not divest an appellate court of jurisdiction.
5. **Constitutional Law: Jurisdiction: Appeal and Error.** Jurisdiction is vested in an appellate court through the state Constitution and the Legislature, Neb. Const. art. V, § 2, and Neb. Rev. Stat. § 24-204 (Reissue 1995).
6. **Rules of the Supreme Court: Jurisdiction: Appeal and Error.** Although failure to comply with the Nebraska Supreme Court rules may in some instances result in its not considering an issue raised on appeal, failure to comply with Neb. Ct. R. of Prac. 9D(1)c (rev. 2000) is not jurisdictional and does not divest the court of jurisdiction.
7. **Trial: Expert Witnesses.** Whether a witness is qualified as an expert is a preliminary question for the trial court.
8. **Trial: Expert Witnesses: Appeal and Error.** A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal.
9. **Trial: Expert Witnesses.** A person may qualify as an expert by virtue of either formal training or actual practical experience in the field.
10. **Police Officers and Sheriffs: Testimony.** A law enforcement officer who has practical experience, received training, or participated in drug investigations involving the identification of marijuana may testify as to whether a substance in question is marijuana.
11. **Police Officers and Sheriffs: Convictions: Evidence.** Evidence showing that a defendant resisted handcuffing, struggled with an officer, and continued to resist restraint are alone sufficient to sustain a conviction for obstructing a peace officer.

Appeal from the District Court for Sarpy County, WILLIAM B. ZASTERA, Judge. Affirmed.

Thomas J. Garvey, Sarpy County Public Defender, and Gregory A. Pivovar for appellant.

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

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

HENDRY, C.J.

## INTRODUCTION

Matina L. Campbell was convicted in Sarpy County District Court of second degree trespass; possession of marijuana, less than 1 ounce; resisting arrest; and obstructing a peace officer. Campbell appeals, claiming there was insufficient evidence to convict her. 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 May 21, 1999, Campbell was arrested for driving under the influence of alcoholic liquor and her car was towed to "Sterrett's Tow Lot Towing" in Bellevue, Nebraska. On Saturday, May 22, Campbell's friend, Rowena Novy, drove Campbell to the tow lot to retrieve Campbell's car. Upon arriving at the tow lot, Alvin Mitchell, a Sterrett's Tow Lot Towing employee, informed Campbell that she could not retrieve her car without obtaining the proper paperwork from the Bellevue Police Department. Mitchell told Campbell that she would not be able to get this paperwork until Monday. Campbell became upset and began shouting at Mitchell. Mitchell then told Campbell that she needed to leave. However, Campbell locked herself in her car and refused to leave. Campbell was unable to drive her car away from the tow lot because a tow truck was parked in front of her car.

Mitchell and Novy tried to convince Campbell to get out of the car, but Campbell refused. Mitchell then called police. Sgt. David Rech arrived at the tow lot and attempted to talk Campbell into getting out of her car. Rech told Campbell that she would not be arrested if she left the premises peacefully, but Campbell refused to exit the car. Rech called for backup, and Officer Mark Brazda arrived at the scene shortly thereafter.

Eventually, Campbell got out of the car. Rech told Campbell she was under arrest. Campbell then attempted to give her purse to Novy, but the officers did not allow her to do so. The two officers attempted to handcuff Campbell to take her into custody, but Campbell resisted. Campbell began screaming, swinging her

arms, thrashing violently, and trying to break away from the officers. Brazda then performed a maneuver called a "straight arm bar take down," which resulted in Campbell's and both officers' falling to the ground. While the officers continued in their efforts to handcuff Campbell, Rech realized his finger was injured and that he could no longer assist in handcuffing Campbell. The officers then began to lose control of Campbell as she attempted to get up. Rech sprayed Campbell with pepper spray, and eventually Brazda was able to handcuff Campbell.

A rescue squad was called. Photographs taken at the scene depict Rech's severely dislocated finger and cuts and scrapes to Rech's knees which he suffered as a result of the scuffle.

Campbell was taken to the Sarpy County jail. While conducting a search of Campbell's effects, Brazda found a marijuana cigarette and some "Zig-Zag" rolling papers in Campbell's purse. During an interview conducted by Brazda at the jail, Campbell stated that she was upset about not being able to get her car out of impound but that she did not intend to injure Rech.

Campbell was charged with third degree assault on a police officer under Neb. Rev. Stat. § 28-931 (Cum. Supp. 2000); second degree trespass under Neb. Rev. Stat. § 28-521 (Reissue 1995); possession of marijuana, less than 1 ounce under Neb. Rev. Stat. § 28-416(13) (Cum. Supp. 1998); drug paraphernalia under Neb. Rev. Stat. § 28-441 (Reissue 1995); resisting arrest under Neb. Rev. Stat. § 28-904 (Cum. Supp. 2000); and obstructing a peace officer under Neb. Rev. Stat. § 28-906 (Reissue 1995). Campbell pled not guilty to all counts. Trial was to the court without a jury on December 1 and 3, 1999.

At trial, Mitchell testified that before Campbell got inside her car and locked the door, he told Campbell that she needed to leave the tow lot. Novy also testified that Mitchell told Campbell to leave, but Campbell refused and instead locked herself in her car.

There was some dispute in the testimony as to when Campbell was first informed that she was under arrest. Rech testified that Campbell got out of the car and that he told her she was under arrest. Rech testified that Campbell then got back in the car, slammed the door, and locked herself in again. Rech further stated that Campbell then got back out of the car. At that

time, he again informed her that she was under arrest and a scuffle then ensued. Brazda and Novy testified that Campbell got out of the car on only one occasion and was then told she was under arrest. The testimony is not disputed, however, that Campbell was told prior to the officers' attempts to handcuff her that she was under arrest. Both officers testified that during the scuffle, they told Campbell to stop resisting. However, Novy testified she did not recall hearing the officers tell Campbell to stop resisting.

During his testimony, Brazda described the specialized training he had received regarding the detection of controlled substances, including marijuana. Brazda testified that he had received 24 weeks of basic training, which included detection of controlled substances violations. He also had received "DEA schooling," which dealt with basic apprehension and detection of controlled substances violations, attended a "drug interdiction and criminal interdiction school" instructed by the Nebraska State Patrol, and attended a "drug interdiction and criminal interdiction course" instructed by the Nebraska Office of Highway Safety. Marijuana was one of the controlled substances covered by each of these programs. Brazda further testified that he had acted as an undercover narcotics officer for 6 months, during which time he purchased controlled substances on a day-to-day basis. Brazda testified that through his training and experience, he had smelled marijuana, had seen marijuana, and had observed the manner in which marijuana is used. Brazda testified that the cigarette found in Campbell's purse was marijuana. Campbell objected to this testimony, asserting that Brazda lacked foundation to testify that the substance was in fact marijuana. The court overruled the objection.

The court found Campbell guilty of second degree trespass; possession of marijuana, less than 1 ounce; resisting arrest; and obstructing a peace officer. The court found Campbell not guilty of third degree assault on a police officer and possession of drug paraphernalia, determining that the State had not met its burden of proof as to those charges.

On January 28, 2000, Campbell was sentenced to 90 days in jail for trespassing, 270 days in jail for resisting arrest, 270 days in jail for obstructing a peace officer, and a $100 fine for mari-

juana possession, plus costs. The jail sentences were to be served concurrently.

On February 16, 2000, Campbell filed a notice of appeal and a poverty affidavit stating that "she is indigent and cannot pay the costs on appeal." Campbell's affidavit did not include a statement of the nature of the action, defense, or appeal, or a statement that she believed she was entitled to redress. The district court granted Campbell leave to proceed in forma pauperis.

## ASSIGNMENT OF ERROR

Campbell claims, restated, that the district court erred in determining that the evidence was sufficient to find her guilty beyond a reasonable doubt on each of the four counts.

## STANDARD OF REVIEW

[1] A conviction in a bench trial of a criminal case is sustained if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. *State v. Lara*, 258 Neb. 996, 607 N.W.2d 487 (2000); *State v. Blackman*, 254 Neb. 941, 580 N.W.2d 546 (1998). In making this determination, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. *Blackman, supra.*

## ANALYSIS

### JURISDICTION

[2] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. McCracken, ante* p. 234, 615 N.W.2d 902 (2000). The State claims this court lacks jurisdiction over Campbell's appeal. The State asserts that although Campbell filed an affidavit, she failed to file an "application" as required by Neb. Rev. Stat. § 25-2301.01 (Cum. Supp. 2000), which states:

> Any county or state court, except the Nebraska Workers' Compensation Court, may authorize the commencement, prosecution, defense, or appeal therein, of a civil or criminal case in forma pauperis. An application to proceed in forma pauperis shall include an affidavit stating that the

affiant is unable to pay the fees and costs or give security required to proceed with the case, the nature of the action, defense, or appeal, and the affiant's belief that he or she is entitled to redress.

[3] The only requirement of an "application" to proceed in forma pauperis is that such application "include an affidavit stating that the affiant is unable to pay the fees and costs or give security required to proceed with the case, the nature of the action, defense, or appeal, and the affiant's belief that he or she is entitled to redress." § 25-2301.01. We determine that as long as the poverty affidavit itself includes some indication that a defendant is requesting or applying for in forma pauperis status, § 25-2301.01 does not require that a separate application be filed in addition to the poverty affidavit. Campbell's affidavit includes both a statement that Campbell "cannot pay the costs on appeal," and a statement that she "requests that the costs of the appeal be borne by Sarpy County, Nebraska." Thus, this court does not lack jurisdiction due to Campbell's failure to file an application separate from the affidavit.

[4] The State additionally claims that the poverty affidavit Campbell filed is insufficient because it did not include a statement of the nature of the action, defense, or appeal, or a statement that she believes she is entitled to redress. The State claims that Campbell's failure to comply with these additional requirements of § 25-2301.01 prevents the court from obtaining jurisdiction. In *State v. Dallmann, ante* p. 937, 621 N.W.2d 86 (2000), we determined that if a district court grants leave to proceed in forma pauperis, this court obtains jurisdiction when the notice of appeal is filed and that failure of the affidavit to state the nature of the action or that the affiant is entitled to redress does not divest this court of jurisdiction. The State's contention is without merit.

[5,6] The State next claims this court lacks jurisdiction over Campbell's appeal because Campbell's brief does not contain a statement of the basis of jurisdiction as required by Neb. Ct. R. of Prac. 9D(1)c (rev. 2000). Jurisdiction is vested in this court through the state Constitution and the Legislature, Neb. Const. art. V, § 2, and Neb. Rev. Stat. § 24-204 (Reissue 1995). Although failure to comply with court rules may in some

instances result in this court's not considering an issue raised in the appeal, see *State v. Feiling*, 255 Neb. 427, 585 N.W.2d 456 (1998) (court will not consider claim that statute is unconstitutional when party failed to file notice required by rule 9E), failure to comply with rule 9D(1)c is not jurisdictional and therefore does not divest this court of jurisdiction. The State's claim that this court lacks jurisdiction due to Campbell's failure to include a jurisdictional statement in her brief is also without merit.

## Sufficiency of Evidence

Having determined that Campbell's appeal is properly before this court, we now address Campbell's claim that the district court erred in determining that the evidence was sufficient to find her guilty beyond a reasonable doubt. Campbell first contends that no one told her she was to leave the tow lot premises and that therefore there is insufficient evidence to support the trespassing conviction. However, since both Mitchell and Novy testified that Mitchell told Campbell to leave the premises and that Campbell refused, the evidence was sufficient to find Campbell guilty of trespass.

[7-9] With regard to the possession charge, Campbell asserts there was insufficient foundation for Brazda to testify that the substance he found in Campbell's purse was marijuana. This argument is also without merit. Whether a witness is qualified as an expert is a preliminary question for the trial court. *State v. Stahl*, 240 Neb. 501, 482 N.W.2d 829 (1992). A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal. *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000). See, also, *Stahl, supra*. A person may qualify as an expert by virtue of either formal training or actual practical experience in the field. *Stahl, supra*.

[10] A law enforcement officer who has practical experience, received training, or participated in drug investigations involving the identification of marijuana may testify as to whether a substance in question is marijuana. *Stahl, supra*; *State v. Hoxworth*, 218 Neb. 647, 358 N.W.2d 208 (1984). Brazda testified that he had received specialized training in detection of con-

trolled substances and had acted as an undercover narcotics officer, both of which involved the identification of marijuana. Through Brazda's training and experience, he had observed marijuana and had observed the manner in which marijuana is used. The trial court's determination that there was sufficient foundation for Brazda to testify that the cigarette found in Campbell's purse was marijuana was not clearly erroneous.

On the charge of resisting arrest, Campbell claims that "the testimony is in conflict as to the timing of the announcement of the Appellant's arrest." Brief for appellant at 9. Campbell further claims Novy testified that "she did not hear the officers once tell the Appellant to stop resisting." *Id.* These claims are also meritless. Both Novy and the two officers testified that Campbell was told prior to the officers' attempts to handcuff Campbell that she was under arrest. Furthermore, Novy did not testify as to whether the officers told Campbell to stop resisting; she simply testified that she was not sure what the officers said to Campbell because "there was a lot of yelling."

Contrary to Campbell's assertions, the evidence clearly shows that Campbell resisted handcuffing and struggled with the officers after she had been informed that she was under arrest. This evidence is sufficient to support Campbell's conviction for resisting arrest. See *State v. Blair*, 230 Neb. 775, 433 N.W.2d 518 (1988) (evidence that defendant struggled, resisted handcuffing, and that it took 10 to 15 minutes to arrest defendant is sufficient to support conviction for resisting arrest).

[11] Finally, Campbell claims that because the officers' conduct instigated Campbell's conduct, Campbell cannot be found guilty of obstructing a peace officer. Evidence showing that a defendant resisted handcuffing, struggled with an officer, and continued to resist restraint are alone sufficient to sustain a conviction for obstructing a peace officer. *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986). In the present case, undisputed evidence shows that Campbell resisted being handcuffed and struggled with the officers. Such evidence is sufficient to sustain Campbell's conviction.

There was sufficient evidence to find Campbell guilty beyond a reasonable doubt on all four counts, and Campbell's claims to the contrary are without merit.

## CONCLUSION

For the above-stated reasons, Campbell's convictions on all counts are affirmed.

AFFIRMED.

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STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. MARK D. KRATINA, RESPONDENT.

620 N.W.2d 748

Filed January 5, 2001. No. S-00-1095.

Original action. Judgment of reprimand.

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

PER CURIAM.

The Committee on Inquiry of the Second Disciplinary District of the Nebraska State Bar Association (Committee) charged respondent, Mark D. Kratina, on October 20, 2000, with violating his oath of office as an attorney and the following provisions of the Code of Professional Responsibility, Canon 1, DR 1-102(A)(1) and (5), and Canon 9, DR 9-102, which provide as follows:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.
>
> . . . .
>
> DR 9-102 Preserving Identity of Funds and Property of a Client.
>
> (A) All funds of clients paid to a lawyer or law firm shall be deposited in one or more identifiable bank or savings and loan association accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay account charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

On November 22, 2000, respondent filed with this court a conditional admission of guilt as to the formal charges to which relator stipulated.

Respondent was duly admitted to the practice of law in the State of Nebraska on July 2, 1976. Since that time, and at all times relevant to these proceedings, respondent was engaged in the practice of law in Omaha, Nebraska, and maintained a trust account at the First National Bank of Omaha.

In May 1999, the Counsel for Discipline received a complaint regarding respondent's trust account. The Counsel for Discipline filed charges with the Committee on April 17, 2000, alleging four counts of violating DR 1-102(A)(1) and (6) and DR 9-102(A). The Committee held a hearing on July 19 and subsequently determined that it would file formal charges in connection with one of the four counts. The disposition of the other three counts is not before this court. On October 20, 2000, the Committee filed formal charges with this court, alleging that Kratina had failed to maintain a balance in his trust account equal to or greater than his obligation to a client whose funds had been deposited in the account. The formal charges state that settlement proceeds from the client's case were subsequently disbursed from Kratina's trust account. We note that although the formal charges allege that Kratina failed to retain adequate funds in his trust account, there was no allegation that Kratina's client suffered a loss.

Respondent filed a conditional admission of charges with this court on November 22, 2000. In his conditional admission, respondent states as follows:

> [During the relevant time period] Respondent believed he had adequate funds in his trust account to cover all obli-

> gations to his clients and their health care providers but does acknowledge what the bank records show. As mitigating factors, Respondent submits that: he maintained a trust account as required; all his clients' funds were deposited into the trust account; he maintained a trust account ledger which identified these funds; at the conclusion of each case Respondent provided his client with an itemized settlement sheet; all clients and health care providers were paid as indicated on the settlement sheets; Respondent did not receive any fees before they were earned; Respondent did not receive any reimbursement for costs before he was entitled to them; Respondent has demonstrated that subsequent clients' funds were not used to satisfy the obligations owing to [the client] or other clients; and that the records show his bank is not infallible in that it had over-charged Respondent ($1,200.00 for a $12.00 service charge as reflected in the June, 1999 bank statement). Respondent, in November of 1999, installed a computer system to monitor his trust account which will insure there will never be an imbalance in this trust account in the future.
>
> [Relator] states that Respondent has cooperated fully with its investigation of his trust account.

The conditional admission includes a stipulation between respondent and the Counsel for Discipline regarding the proper discipline to be imposed in this case. Respondent and relator agreed in the stipulation that in view of the fact that no misappropriations had been shown and the discrepancy in the account occurred due to mere negligence, the appropriate discipline in this case should be a public reprimand and order that respondent retain, at his expense, an accountant to audit his trust account every 6 months, for a period of 2 years, and submit the result of those audits to the Counsel for Discipline. Compare *State ex rel. NSBA v. Gleason*, 248 Neb. 1003, 540 N.W.2d 359 (1995).

Based on the conditional admission of respondent and the recommendation of the Counsel for Discipline, this court finds by clear and convincing evidence that respondent has violated DR 1-102(A)(1) and (6) and DR 9-102(A) and that respondent should be publicly reprimanded and ordered to retain, at his

expense, an accountant to audit his trust account every 6 months, for a period of 2 years, and submit the result of those audits to the Counsel for Discipline. Thus, respondent is hereby publicly reprimanded for conduct in violation of the Code of Professional Responsibility and his oath of office as a member of the Nebraska State Bar Association and is hereby ordered to retain, at his expense, an accountant to audit his trust account every 6 months, for a period of 2 years from this date, and submit the result of those audits to the Counsel for Discipline.

JUDGMENT OF REPRIMAND.

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