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LEONARD GREEN ET AL., APPELLANTS, V. MARILYN LORE, BOX BUTTE COUNTY ASSESSOR, APPELLEE.

640 N.W.2d 673

Filed March 22, 2002. No. S-01-156.

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 of the decisions made by the lower courts.
2. **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.
3. ____. As a general rule, a moot case is subject to summary dismissal.
4. **Moot Question: Appeal and Error.** An appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.
5. ____: ____. The public interest exception to the mootness doctrine 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.
6. ____: ____. An application of the public interest exception to the mootness doctrine is inappropriate when the issue presented on appeal does not inherently evade appellate review.
7. **Taxation: Valuation.** A taxpayer concerned about an overvaluation of his or her property may file a protest with the county board of equalization.

Appeal from the District Court for Box Butte County: ROBERT O. HIPPE, Judge. Appeal dismissed.

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

Dennis D. King, of Smith, King & Freudenberg, P.C., for appellee.

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

CONNOLLY, J.

The appellants, Leonard Green, Kent Green, and Edna Fisher, sought a writ of mandamus. The writ sought to compel Marilyn Lore, the Box Butte County assessor, to implement a resolution passed by the Box Butte County Board of County Commissioners, acting as the Box Butte County Board of Equalization (Board). Under the resolution, assessed values for

all subclassifications of agricultural land in the county would be equalized using the lowest value of any subclass of agricultural land for each market area. Lore refused to implement the resolution because she did not believe the Board had the authority to adjust a class or subclass of property and appealed the resolution to the Tax Equalization and Review Commission (TERC). While Lore's appeal was pending, the appellants filed a petition for mandamus, which the district court denied. We dismiss because the issue is moot.

BACKGROUND

For the 2000 tax year, real property in Box Butte County was assessed by using a sales comparison approach and the establishment of market areas. The use of market areas is an appraisal technique in which the appraising officer determines market value based on the location of real property within the county. Lore testified that she began using market areas in her assessments after receiving a directive from TERC and input from the state Property Tax Administrator regarding the quality of assessment of agricultural land in the county.

On July 17, 2000, the Board passed resolution No. 2000-19, finding that the market areas used for assessing property for subclasses of agricultural land involved the drawing of arbitrary lines. The Board also found that market areas are not a proper class or subclass of land for purposes of assessment. The resolution stated that the market areas resulted in assessments for agricultural land that were not uniformly and proportionately valued in conformance with Neb. Const. art. VIII, § 1, and Neb. Rev. Stat. § 77-1501 (Cum. Supp. 2000). As a result, the Board ordered that assessed values for all subclassifications of agricultural land in the county be equalized using the lowest value of any subclass of agricultural land for each market area.

After the resolution was passed, the Board filed a petition with TERC requesting a change to the valuation of subclasses of agricultural land in the county. At the hearing before TERC, the Box Butte County Attorney stated that the Board requested that the values be adjusted by a percentage for each subclass of land to put those values at approximately what they had been the previous year. At an August 3, 2000, hearing on the issue, the Board

moved to withdraw the petition. TERC allowed the petition to be withdrawn, and because the deadline for filing petitions to adjust values by class or subclass for tax year 2000 had passed on July 26, the action was dismissed with prejudice.

Lore refused to implement the Board's resolution and on August 3, 2000, filed an appeal of the resolution to TERC. While Lore's appeal was pending, on August 25, the appellants filed a petition seeking mandamus to compel Lore to implement the resolution. The record shows that Leonard Green also filed a protest with the Board concerning the valuation of a portion, but not all, of his property and that he was granted relief. The record shows that the other appellants did not file protests. The district court concluded that Lore did not have a clear duty to implement the Board's resolution and denied mandamus.

ASSIGNMENT OF ERROR

The appellants assign that the district court erred in failing to grant a peremptory writ of mandamus.

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 of the decisions made by the lower courts. *Ruzicka v. Ruzicka*, 262 Neb. 824, 635 N.W.2d 528 (2001); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

ANALYSIS

Because the tax year at issue has already passed, we first address whether the appeal is moot. At oral argument, the appellants conceded that the case is moot but argued that this court should hear the appeal under the "public interest exception."

[2,3] 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. *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999). As a general rule, a moot case is subject to summary dismissal. *Id.*

[4-6] But, under the public interest exception, we may choose to 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. *Wilcox v. City of McCook*, 262 Neb. 696, 634 N.W.2d 486 (2001). This exception 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. *Id.* We have held that an application of the public interest exception is inappropriate when the issue presented on appeal does not inherently evade appellate review. *Id.*, citing *Putnam v. Fortenberry, supra.*

[7] Whether Lore was required to implement the resolution of the county board does not inherently evade appellate review. Lore filed an appeal of the Board's resolution to TERC, and that appeal is still pending. Furthermore, a taxpayer concerned about an overvaluation of his or her property may file a protest with the Board. See, Neb. Rev. Stat. § 77-1502 (Cum. Supp. 2000); *Olson v. County of Dakota*, 224 Neb. 516, 398 N.W.2d 727 (1987). The action of the Board upon the protest may be appealed to TERC, which in turn may be appealed to the Nebraska Court of Appeals. See Neb. Rev. Stat. §§ 77-1504 and 77-5019 (Cum. Supp. 2000). As discussed, Leonard Green did indeed file a protest and was granted relief. Because the issue presented on appeal does not inherently evade appellate review, we do not apply the public interest exception to this case. We do not reach the merits of the appeal and dismiss.

APPEAL DISMISSED.

JANET L. SHAUL, GARDEN COUNTY ASSESSOR, APPELLEE,
v. CATHERINE D. LANG, PROPERTY TAX
ADMINISTRATOR, APPELLANT.
640 N.W.2d 668

Filed March 22, 2002. No. S-01-248.

1. **Taxation: Appeal and Error.** Appellate review of a decision by the Tax Equalization and Review Commission shall be conducted for error on the record of the commission.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

3. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there.
4. ____. 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.

Appeal from the Nebraska Tax Equalization and Review Commission. Reversed and remanded with directions.

Don Stenberg, Attorney General, and Michael J. Goodwillie, Special Assistant Attorney General Counsel, for appellant.

Phillip E. Pierce, Garden County Attorney, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Catherine D. Lang, Property Tax Administrator (the PTA), appeals from a decision of the Tax Equalization and Review Commission (TERC). TERC found the selling price of certain transactions of real property should be adjusted before being included in a qualified agricultural sales roster because the buyer owned adjoining land. We find that no such adjustment is permissible and therefore reverse the decision of TERC and remand the cause with directions.

BACKGROUND

The Department of Property Assessment and Taxation maintains the qualified agricultural sales roster (hereinafter the sales file), a database of all arm's-length sales of real property in Nebraska transacted over a 3-year period. The data gathered and compiled to form the sales file provides statistical information regarding the level and quality of assessment by county and school district for any class or subclass of real property. This information is used for a variety of purposes, such as measuring assessment uniformity in each county, analyzing intracounty and intercounty comparisons, and determining school-adjusted values for state aid to education.

In 2000, Janet L. Shaul, Garden County assessor, filed protests with the PTA over the PTA's inclusion in the sales file of 19 sales

transactions of agricultural real property. Shaul requested that several of the transactions be excluded entirely from the sales file because they were not arm's-length transactions. Shaul requested that the sales prices of several other transactions be reduced by $25 per acre because (1) the buyer owned adjoining property and therefore paid more than market value for the land or (2) the significant number of acres purchased rendered these transactions atypical of Garden County. The PTA denied all of Shaul's protests, who appealed the PTA's decisions to TERC.

TERC released its findings regarding the 19 transactions in five separate orders, only one of which is at issue in this appeal. That order, filed on February 1, 2001, addressed six sales of property identified as cases Nos. 00PT-16, 00PT-17, 00PT-18, 00PT-20, 00PT-28, and 00PT-30. In that order, TERC reversed the PTA and held that the sales prices of the six aforementioned parcels of agricultural real property should be reduced by $25 per acre before inclusion in the sales file. TERC found that

> professionally accepted mass appraisal methodologies allow for an adjustment in the sale price to account for the acquisition of adjoining land. Nebraska state law also recognizes this principle, and specifically expands the principle to allow for the acquisition of land located within one-mile of the buyer's existing property. Neb. Rev. Stat. §77-1371(2000 Cum. Supp.).

The PTA filed a petition for review, pursuant to Neb. Rev. Stat. § 77-5019 (Cum. Supp. 2000), of TERC's decision to the Nebraska Court of Appeals, and we moved the case to our docket pursuant to our authority to regulate the caseloads of the Court of Appeals and this court.

ASSIGNMENT OF ERROR

The PTA assigns, restated, that (1) TERC misapplied several statutes when ordering an adjustment to the selling price of the six parcels and (2) TERC's findings were unsupported by the evidence.

STANDARD OF REVIEW

[1,2] Section 77-5019(5) provides that appellate review of a decision by TERC shall be conducted for error on the record of TERC. When reviewing a judgment for errors appearing on the

record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *County of Douglas v. Nebraska Tax Equal. & Rev. Comm.*, 262 Neb. 578, 635 N.W.2d 413 (2001).

ANALYSIS

In her first assignment of error, the PTA argues that adjusting the selling price of property before inclusion in the sales file is contrary to the statutes governing the sales file, none of which allow for such an adjustment.

Neb. Rev. Stat. § 77-1372 (Cum. Supp. 2000) provided for the compilation and contents of the sales file as follows:

> All transactions of real property for which the statement required in section 76-214 is filed shall be available for development of a sales file for analysis of level of value and quality of assessment for purposes of section 77-5027 and for use by assessing officials in establishing assessed valuations. All transactions with stated consideration of more than one hundred dollars or upon which more than one dollar and seventy-five cents in documentary stamp taxes are paid shall be considered sales. All sales shall be deemed to be arm's length transactions unless determined to be otherwise. The Department of Property Assessment and Taxation shall not overturn a determination made by a county assessor regarding the qualification of a sale unless the department reviews the sale and determines through the review that the determination made by the county assessor is incorrect.

We note that § 77-1372 was repealed by the Legislature, effective April 5, 2001, and was recodified at Neb. Rev. Stat. § 77-1327(2) (Supp. 2001). See 2001 Neb. Laws, L.B. 170.

The real property transactions eligible for inclusion in the sales file are those transactions for which the statement required by Neb. Rev. Stat. § 76-214 (Cum. Supp. 2000) is filed. This statement is filed with the register of deeds, and its contents are prescribed by the PTA. Among the information required to be in this statement is the total consideration paid for the property. § 76-214(1). It is thus apparent that for those transactions initially eligible for inclusion in the sales file, the price to be included in

the sales file is the total consideration paid as listed on the statement described in § 76-214(1).

Shaul argues that the six transactions at issue here are "atypical" of Garden County because of the large number of acres purchased. Brief for appellee at 21. While that may be true, whether a transaction is made at arm's length is not dependent upon the number of acres purchased. Both the PTA and Shaul agree that these six transactions should be included in the sales file. Thus, both parties concede that the transactions are arm's-length transactions.

Shaul argues that TERC correctly found statutory authority for ordering an adjustment to the sale prices in Neb. Rev. Stat. § 77-1371 (Cum. Supp. 2000), which provides in pertinent part:

> When using comparable sales in any method of determining actual value provided in section 77-112, the following guidelines shall be considered in determining what constitutes a comparable sale:
>
> . . . .
>
> (3) For sales of agricultural land or horticultural land as defined in section 77-1359, whether a premium was paid to acquire nearby property. Land within one mile of currently owned property shall be considered nearby property.

We determine that TERC's determination does not conform to the law because § 77-1371(3) pertains to determining actual value for purposes of taxation when a comparable sales methodology is used. Section 77-1371(3) does not pertain to a compilation of a sales file under § 77-1372.

[3,4] It is not within the province of the courts to read a meaning into a statute that is not there. *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000). 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. *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001).

Based on the record in this case, we determine that the decision of TERC to adjust the value of the land by lowering the same $25 per acre did not conform to the law.

CONCLUSION

For the reasons set forth above, we reverse the decision of TERC and remand the cause to TERC with directions to reinstate the decision of the PTA to include the sales price of the real estate in question in the sales file without the adjustments made by Shaul.

REVERSED AND REMANDED WITH DIRECTIONS.

GAYLE A. DAVIS, APPELLANT, V. EDWARD D. WIMES, DIRECTOR OF NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

641 N.W.2d 37

Filed March 29, 2002. No. S-00-284.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order entered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Statutes: Appeal and Error.** Interpretation of statutes presents a question of law, and an appellate court is obligated to reach an independent conclusion, irrespective of the decision made by the court below, with deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent.
4. **Trial: Waiver: Appeal and Error.** A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Affirmed.

David E. Veath for appellant.

Don Stenberg, Attorney General, and, on brief, Kyle C. Dahl for appellee.

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

McCORMACK, J.

NATURE OF CASE

Gayle A. Davis appeals from an order of the district court for Sheridan County affirming the decision and order of revocation entered by the director of the Nebraska Department of Motor Vehicles following an administrative license revocation hearing. We affirm the district court.

BACKGROUND

On November 22, 1998, State Patrol Trooper Clint W. Bruhn was dispatched to the scene of a reported car accident in Sheridan County. Upon arriving at the scene of the one-car accident, Bruhn contacted Davis, who was the driver of the vehicle. Bruhn was able to detect the smell of alcohol on Davis' breath and asked Davis to perform field sobriety tests. Davis did not satisfactorily complete the tests, and she also failed a preliminary breath test performed at the scene.

Davis was arrested pursuant to Neb. Rev. Stat. § 60-6,196 (Reissue 1998) and was read a postarrest chemical test advisement form. This form informed Davis that she was required to submit to a chemical test of her blood, breath, or urine and that "[r]efusal to submit to such test or tests is a separate crime for which you may be charged." Davis agreed to submit to the chemical test, and the test results indicated an alcohol concentration of 0.228 grams per 210 liters of breath.

Davis subsequently petitioned for a hearing before the director of the department to contest the revocation of her driver's license. Davis was notified that the hearing would be held on December 15, 1998, and would be conducted using teleconference hearing procedures. The hearing was later continued to January 4, 1999, on Davis' motion. Once again, Davis was notified that the January 4 hearing would be held using teleconference hearing procedures.

At the outset of the hearing, the hearing officer acknowledged on the record that Davis and Bruhn were participating in the hearing by telephone, although the record does not conclusively reflect the location of the participants. After several exhibits were received into evidence, but before any testimony was received, Davis objected to the "telephonic nature" of the

hearing. Davis argued that the hearing was required to be conducted by videoconference if technically feasible to do so and that Davis "believe[d]" several sites in the area offered such technical capabilities.

During her cross-examination of Bruhn, Davis also objected to the offer of the department's "Notice/Sworn Report/Temporary License" (sworn report), which contained the results of the chemical test. Bruhn testified that he did not know if the individual who administered the test to Davis possessed a valid permit to administer the test under the Nebraska Department of Health and Human Services Regulation and Licensure rules and regulations. Davis' objection was overruled, and the sworn report was received into evidence.

Following the hearing, Davis' driver's license was revoked by the director. Davis timely appealed the revocation to the district court. The district court affirmed the revocation, and this appeal followed.

ASSIGNMENTS OF ERROR

Davis assigns, rephrased, that the district court erred in (1) finding that her license revocation hearing was held in accordance with Neb. Rev. Stat. § 60-6,205(6)(a) (Reissue 1998); (2) finding that her license revocation hearing was held in accordance with Neb. Rev. Stat. § 84-913.03 (Reissue 1999); (3) finding that the department established sufficient foundation to receive the sworn report into evidence; and (4) finding that the postarrest advisement form provided sufficient notice of the consequences of failing the chemical test.

STANDARD OF REVIEW

[1,2] A judgment or final order entered 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. *Father Flanagan's Boys' Home v. Agnew*, 256 Neb. 394, 590 N.W.2d 688 (1999). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3] Interpretation of statutes presents a question of law, and an appellate court is obligated to reach an independent conclusion, irrespective of the decision made by the court below, with deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent. *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 571 N.W.2d 53 (1997).

ANALYSIS

Location of Hearing

Davis argues that her license revocation hearing was not held in accordance with § 60-6,205(6)(a), which provides in pertinent part: "The hearing shall be conducted in the county in which the arrest occurred or in any other county agreed to by the parties." The record before us does not conclusively establish the location of the hearing officer, Davis, or Bruhn at Davis' license revocation hearing.

The above-quoted portion of § 60-6,205(6)(a) was the subject of our decision in *Muir v. Nebraska Dept. of Motor Vehicles*, 260 Neb. 450, 618 N.W.2d 444 (2000). In that case, we held that § 60-6,205(6)(a) is a venue statute and that generalized objections directed to the method by which the hearing was being held were not objections to venue. See, also, *Reiter v. Wimes, ante* p. 277, 640 N.W.2d 19 (2002).

At the outset of her hearing, Davis objected to "the proceedings by way of telephone conference" and to "the telephonic nature of this hearing." These objections did not address the location or venue of the hearing, as required by *Muir*, but, rather, the method of the hearing. Davis' improper objections and subsequent participation in the hearing without objecting to the hearing location constituted a waiver of any objection she may have had. See *Muir v. Nebraska Dept. of Motor Vehicles, supra*. Accordingly, this assignment of error is without merit.

§ 84-913.03

Davis argues that if a hearing is held by teleconference pursuant to § 84-913.03, the hearing officer must first find that it is not technically feasible to hold the hearing using videoconference hearing procedures. Section 84-913.03 provides:

> The hearing officer may conduct all or part of the prehearing conference and the hearing by telephone, television, or other electronic means if each participant in the conference or hearing has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

[4] A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal. *Hawkins v. City of Omaha*, 261 Neb. 943, 627 N.W.2d 118 (2001). Davis was notified well in advance that her hearing would be conducted by telephone, providing her with ample opportunity to request that the department conduct her hearing via videoconference. However, the record contains no evidence that Davis ever made such a request or ever objected to the use of the teleconference hearing procedures until after the hearing began. Thus, Davis has waived her right to assert this alleged error on appeal.

Sworn Report

In her third assignment of error, Davis argues the sworn report should not have been received into evidence because of a lack of foundation for the chemical test result reported on the sworn report. Davis claims that *McGuire v. Department of Motor Vehicles*, 253 Neb. 92, 568 N.W.2d 471 (1997), stands for the proposition that a minimal amount of foundation must be made so as to reasonably confirm that the chemical tests have been conducted in accordance with the Nebraska Department of Health and Human Services Regulation and Licensure rules and regulations, 177 Neb. Admin. Code, ch. 1, §§ 001 through 010 (1998).

We have held that the department makes a prima facie case once it establishes that the arresting officer provided his or her sworn report to the director containing the required recitations. *McGuire v. Department of Motor Vehicles, supra*; *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995). Thereafter, the burden is on the defendant to prove that one or more of the recitations on the sworn report were false. *Id.*

In her brief, Davis characterizes the issue as one of foundation for the sworn report. In his argument at the conclusion of the license revocation hearing, Davis' counsel stated, "There's nothing [in the sworn report] that says that . . . the test was done

in compliance with Title 177," and "we believe we've met the sufficient rebuttal and did so by a preponderance of the evidence and as a result she should not have her license revoked."

In *McGuire v. Department of Motor Vehicles, supra*, we held that the defendant met his burden of disproving the truth of the sworn report when he elicited testimony that the arresting officer did not have the required permit to conduct the chemical test. No such evidence was adduced by Davis. At the license revocation hearing, Davis' arresting officer testified that he did not know if the individual who administered the chemical test to Davis possessed a valid permit to conduct such a test, in accordance with the Nebraska Department of Health and Human Services Regulation and Licensure rules and regulations. Rather than disproving the contents of the sworn report, Davis merely proved that a possibility existed that the contents of the sworn report were not true. Davis did not carry her burden of rebutting the department's prima facie case, and the district court did not err in affirming on this ground.

POSTARREST ADVISEMENT FORM

In her final assignment of error, Davis argues that the advisement form is deficient because it did not inform her that refusing to submit to the chemical test subjected her to license revocation procedures under Neb. Rev. Stat. § 60-6,197(4) (Reissue 1998). She argues that "the spirit of Smith [*v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995)] and its progeny and fundamental fairness" require that additional notice of the license revocation procedures be given. Brief for appellant at 19.

In *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995), we affirmed a district court's order finding that the defendant was not fully advised of the consequences of submitting to a chemical test as required by § 60-6,197(10) (Reissue 1993). At the time *Smith* was decided, § 60-6,197(10) read as follows:

> Any person who is required to submit to a preliminary breath test or to a chemical blood, breath, or urine test or tests pursuant to this section shall be advised of (a) the consequences of refusing to submit to such test or tests and (b) the consequences if he or she submits to such test and the test discloses the presence of a concentration of alcohol in

> violation of subsection (1) of section 60-6,196. Refusal to submit to such test or tests shall be admissible in any action for a violation of section 60-6,196 or a city or village ordinance enacted pursuant to such section.

This section was amended by the Legislature in 1996 with the enactment of L.B. 939. Since February 27, 1996, and thus at the time of Davis' arrest, § 60-6,197(10) (Reissue 1998) has stated that "[a]ny person who is required to submit to a chemical blood, breath, or urine test or tests pursuant to this section shall be advised that refusal to submit to such test or tests is a separate crime for which the person may be charged." This case provides us with our first opportunity to measure the sufficiency of an advisement form against the current language of § 60-6,197(10).

When *Smith v. State, supra*, was decided, § 60-6,197(10) required that an arresting officer advise a person of the "consequences" of their decision to submit to a test. Our holding in *Smith* was based on the fact that the advisement form read to the defendant did inform him of *some* of the consequences of his decision, but did not inform him of *all* the consequences of his decision. For that reason, the defendant was not properly advised, and the decision to revoke his license was reversed.

With the enactment of the current version of § 60-6,197(10), the Legislature has essentially determined that an individual must be advised of only one of the consequences of their decision to submit to a chemical test, i.e., that refusal to submit to the test is a crime for which they may be charged. That is exactly what Davis was advised of. We find no error where the arresting officer complied with the exact requirement of the statute.

CONCLUSION

Finding no errors on the record before us, we affirm the decision of the district court affirming the order of revocation of the Nebraska Department of Motor Vehicles.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BILLY RAY BILLUPS, APPELLANT.

641 N.W.2d 71

Filed March 29, 2002. No. S-00-631.

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: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the state or federal Constitution.
3. ____: ____: ____. An evidentiary hearing is not required when a motion for postconviction relief alleges only conclusions of fact or law.
4. ____: ____: ____. When a motion for postconviction relief properly alleges an infringement of a defendant's constitutional rights, an evidentiary hearing should still be denied when the records and files affirmatively show that the defendant is entitled to no relief.
5. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his defense.
6. **Postconviction: Effectiveness of Counsel: Proof.** In determining whether counsel's performance was deficient, the standard is whether an attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the defense of a criminal case.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Amie C. Martinez, of Anderson, Creager & Wittstruck, P.C., for appellant.

Don Stenberg, Attorney General, and Susan J. Gustafson for appellee.

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

WRIGHT, J.

NATURE OF CASE

This appeal arises from Billy Ray Billups' request for postconviction relief pursuant to Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995). Billups alleged that his conviction violated his

right not to be placed in jeopardy twice for the same offense and that he received ineffective assistance of counsel. The district court denied postconviction relief without an evidentiary hearing, and Billups appeals.

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. Curtright*, 262 Neb. 975, 637 N.W.2d 599 (2002).

FACTS

On August 22, 1994, prior to the filing of any criminal charges, the State filed a petition for disposition of seized property. The petition alleged that Billups was the owner of $3,376 in currency and $186 in food stamps. Billups' answer admitted that he owned the currency, but he claimed no ownership in the food stamps. After a hearing, the Lancaster County District Court entered an order on September 14, 1995, denying both the State's petition for forfeiture and Billups' claim to the currency. The court found that the State had failed to prove beyond a reasonable doubt that the seized property was used in violation of the law and that Billups had failed to prove by a preponderance of the evidence that he had an interest in the property.

On October 10, 1994, Billups was charged with three counts of the "Unlawful Manufacture/Distribution of Controlled Substance," a Class II felony, in violation of Neb. Rev. Stat. § 28-416(1) (Cum. Supp. 1994). An amended information was filed on July 3, 1995, which added charges of being an habitual criminal to all three counts. After Billups pled guilty to one count and the other two counts were dismissed, he was sentenced to a term of 20 to 30 years in prison. Billups appealed, and the Nebraska Court of Appeals sustained the State's motion for summary affirmance. See *State v. Billups*, 4 Neb. App. lii (No. A-96-010, Aug. 13, 1996).

In his motion for postconviction relief, Billups asserted that his constitutional rights had been violated and that he had received ineffective assistance of counsel when he entered a guilty plea to the criminal charge on the advice of counsel because he had previously been placed in jeopardy by the forfeiture action. In

support, Billups cited *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999), *cert. denied* 528 U.S. 968, 120 S. Ct. 407, 145 L. Ed. 2d 317, and *State v. Spotts*, 257 Neb. 44, 595 N.W.2d 259 (1999). Billups claimed that a plea in bar to the information should have been filed rather than a plea of guilty and that, therefore, he did not knowingly, voluntarily, and intelligently waive his right against double jeopardy.

The district court found that Billups was procedurally barred from raising a double jeopardy claim and that although Billups knew his property had been subject to forfeiture, he failed to raise a double jeopardy claim at any time during the criminal prosecution or on direct appeal. The court noted that because this court did not apply the Double Jeopardy Clause to forfeiture proceedings until 1999 in *Franco*, trial counsel "had no reasonable basis upon which to make a double jeopardy challenge." It rejected Billups' contention that *Franco* and *Spotts* should be applied retroactively, because such an application would have a disruptive effect on the administration of justice. For these reasons, the court denied Billups' motion for an evidentiary hearing.

ASSIGNMENTS OF ERROR

Billups assigns as error that the district court erred in taking judicial notice of the trial record in the forfeiture proceeding and in overruling his motion for an evidentiary hearing.

ANALYSIS

We first address Billups' argument that the district court erred when it took judicial notice of the trial record in the forfeiture proceeding. At the hearing on the motion for an evidentiary hearing, the State asked the court to "take judicial notice of the files and records of the court . . . in the matter found at Docket 517, Page 175," which was the forfeiture action involving Billups. Billups objected to the court's taking judicial notice because that "was a separate case and a separate judge." This objection was overruled.

We find no merit to Billups' argument. He has not advised us how the district court erred when it took judicial notice of the trial record or how this prejudiced Billups in the present action. In *State v. Dandridge*, 255 Neb. 364, 370, 585 N.W.2d 433, 437 (1998), we stated:

> The existence of court records and certain judicial acts reflected in a court's record are in accordance with § 27-201(2)(b)—facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. A court may, therefore, judicially notice the existence of its records and the records of another court, but judicial notice of facts reflected in a court's records is subject to the doctrine of collateral estoppel or of res judicata.

Next, Billups argues that the district court erred in denying him an evidentiary hearing. 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. Curtright*, 262 Neb. 975, 637 N.W.2d 599 (2002). Billups' argument is not so much that he is entitled to postconviction relief but that he is entitled to an evidentiary hearing to determine whether he is entitled to postconviction relief.

Billups asserts that in order to prove that his right against double jeopardy was violated, an evidentiary hearing must be held to establish that both the forfeiture action and the criminal prosecution arose out of the same set of facts. He also desires an opportunity to offer evidence to establish why he pled guilty, as opposed to going to trial, and to present information concerning his counsel's advice prior to entry of the plea.

[2-4] Billups was represented by the same counsel at trial and on direct appeal, and therefore, he is not procedurally barred from asserting a claim of ineffective assistance of counsel. The question presented is whether Billups should have received an evidentiary hearing in order to determine whether his counsel was ineffective. An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the state or federal Constitution. *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000). An evidentiary hearing is not required when the motion alleges only conclusions of fact or law. *Id.* Further, when the motion properly alleges an infringement of the defendant's constitutional rights, an evidentiary hearing should still be denied when the records

and files affirmatively show that the defendant is entitled to no relief. *Id.*

[5,6] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his defense. See *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001). In determining whether counsel's performance was deficient, the standard is whether an attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the defense of a criminal case. See *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991).

Billups argues that his counsel should have raised the double jeopardy issue, even though the proceedings in the forfeiture action and the criminal case were brought in 1994 and this court's decisions in *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999), *cert. denied* 528 U.S. 968, 120 S. Ct. 407, 145 L. Ed. 2d 317, and *State v. Spotts*, 257 Neb. 44, 595 N.W.2d 259 (1999), were not issued until 1999. Billups suggests that his trial counsel either should have anticipated the holdings in *Franco* and *Spotts* or should have raised the issue to preserve it for later review. He also asserts that based upon our decision in *State v. One 1987 Toyota Pickup*, 233 Neb. 670, 447 N.W.2d 243 (1989), *overruled, State v. Spotts, supra*, his counsel should have known in 1994 that Billups had been subjected to double jeopardy. In *One 1987 Toyota Pickup*, we held that the forfeiture statute, Neb. Rev. Stat. § 28-431 (Reissue 1995), was criminal in character and that double jeopardy principles applied.

In *One 1987 Toyota Pickup*, the defendant had been found guilty of unlawful manufacture and distribution of a controlled substance and possession of marijuana weighing more than 1 pound. Subsequently, his pickup was condemned in a forfeiture action brought by the State pursuant to § 28-431. The defendant appealed from both determinations, and the appeals were consolidated. We affirmed the criminal convictions, reversed the forfeiture, and remanded the cause for a new trial.

It was not until *Franco* that we addressed whether a prosecution for possession of a controlled substance with intent to

deliver, in violation of § 28-416(1)(a), and a separate forfeiture action under § 28-431 violated the defendant's double jeopardy protection as set forth in the 5th and 14th Amendments to the U.S. Constitution and article I, § 12, of the Nebraska Constitution. The trial court denied Franco's plea in bar because it concluded that the two proceedings involved two separate offenses under the test enumerated in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Franco asserted that the trial court erred in denying his plea in bar because the Double Jeopardy Clauses prohibited the State from bringing a criminal proceeding against him after jeopardy had attached in a forfeiture action arising from the same set of facts. We reversed the trial court's denial of the plea in bar and remanded the cause with directions to dismiss. Prior to *Franco*, we had not decided whether a criminal drug charge and a forfeiture proceeding arising from the same factual occurrence could be tried as separate offenses in separate proceedings.

In *Parker v. Bowersox*, 188 F.3d 923 (8th Cir. 1999), *cert. denied, Parker v. Luebbers*, 529 U.S. 1038, 120 S. Ct. 1534, 146 L. Ed. 2d 348 (2000), the defendant, in seeking a writ of habeas corpus, argued that his trial counsel was ineffective in failing to object to a jury instruction which the Missouri Supreme Court later determined to be incorrect. The U.S. Court of Appeals for the Eighth Circuit held that counsel did not provide ineffective assistance by failing to anticipate the change in the law.

Several criminal defendants have sought habeas corpus relief based on their trial counsel's failure to object to jury composition under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). In *Batson*, the U.S. Supreme Court held that peremptory challenges cannot be used to exclude individuals from a jury on the basis of race. The Eighth Circuit has held that although the theory behind *Batson* may have been known to counsel at the time jury selection occurred, no ineffective assistance of counsel could be found when *Batson* itself had not been decided. "[C]ounsel need not 'anticipate a change in existing law' to render constitutionally effective assistance of counsel." *Carter v. Hopkins*, 92 F.3d 666, 670 (8th Cir. 1996), *cert. denied* 520 U.S. 1107, 117 S. Ct. 1113, 137 L. Ed. 2d 314 (1997). See, also, *Ruff v. Armontrout*, 77 F.3d 265 (8th Cir. 1996) (failure to

anticipate change in existing law does not amount to ineffective assistance of counsel), *cert. denied* 519 U.S. 889, 117 S. Ct. 226, 136 L. Ed. 2d 158; *Johnson v. Armontrout*, 923 F.2d 107 (8th Cir. 1991), *cert. denied* 502 U.S. 831, 112 S. Ct. 106, 116 L. Ed. 2d 75; *Horne v. Trickey*, 895 F.2d 497 (8th Cir. 1990).

In *Horne*, the court noted that defense attorneys had justifiably relied on the standard established by a case decided before *Batson*.

> As a reviewing court, we must make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time," indulging a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."

Horne, 895 F.2d at 499, quoting *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

We conclude that Billups' trial counsel was not ineffective for failing to assert a double jeopardy challenge to the criminal charges based upon the fact that jeopardy attached when the State previously brought a forfeiture action against the $3,376 which Billups claimed he owned. Billups' counsel was not ineffective because he did not anticipate this court's decisions in *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999), *cert. denied* 528 U.S. 968, 120 S. Ct. 407, 145 L. Ed. 2d 317, and *State v. Spotts*, 257 Neb. 44, 595 N.W.2d 259 (1999).

Since Billups has not shown any basis upon which this court could conclude that his counsel's performance was deficient, he has not sustained the first part of the test required under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Billups has not established any basis for postconviction relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. See *State v. Curtright*, 262 Neb. 975, 637 N.W.2d 599 (2002).

An evidentiary hearing was not necessary to establish whether the forfeiture action was factually related to the criminal prosecution or to determine why Billups pled guilty. Therefore, the district court was not clearly wrong in denying an evidentiary hearing on Billups' motion for postconviction relief.

CONCLUSION

The district court did not err in taking judicial notice of the forfeiture action, nor did it err in denying Billups' motion for an evidentiary hearing. The judgment of the district court is affirmed.

AFFIRMED.

BRIAN ALTAFFER, APPELLEE, V. MAJESTIC ROOFING, LLC, AND DENNIS JONES, APPELLANTS, AND DANIEL J. TAYLOR, APPELLEE.

641 N.W.2d 34

Filed March 29, 2002. No. S-00-773.

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: Records: Affidavits: Depositions: Appeal and Error.** In order to receive consideration on appeal, any affidavits or depositions used on a motion for summary judgment must have been offered in evidence in the trial court and preserved in and made a part of the bill of exceptions.

Appeal from the District Court for Red Willow County: JOHN J. BATTERSHELL, Judge. Reversed and remanded for further proceedings.

Tim W. Thompson and Kimberli D. Dawson, of Kelley, Scritsmier & Byrne, P.C., for appellants.

Ryan R. Wilcox for appellee Brian Altaffer.

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

WRIGHT, J.

NATURE OF CASE

The Red Willow County District Court granted summary judgment in favor of Brian Altaffer and against Majestic Roofing, LLC (Majestic), and Dennis Jones in the amount of $36,500 plus postjudgment interest and costs. Majestic and Jones timely filed this appeal.

SCOPE OF REVIEW

[1] 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. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001).

FACTS

On October 29, 1999, Altaffer filed a petition against Majestic, Jones, and Daniel J. Taylor, alleging breach of contract, fraudulent misrepresentation, slander, and other claims. The petition asserted that Majestic was a limited liability company licensed to operate in Colorado and that Jones was the registered agent. Jones filed a responsive pleading on December 16 entitled "Answer to Summons." Jones stated: "We either Deny, Dispute the allegations or have a counter claim [sic]."

On May 9, 2000, Altaffer filed a motion for summary judgment and an affidavit in support of the motion. Jones appeared without counsel at the hearing on the motion for summary judgment on June 16. At the hearing, Altaffer moved for a default judgment, claiming that a proper answer had not been filed. The district court overruled this motion, finding that Jones' pleading, although not in proper form, was a sufficient answer.

The district court then heard Altaffer's motion for summary judgment. Altaffer asked the court to take judicial notice of the court file, which contained the affidavit in support of his motion for summary judgment, and the court stated it would take judicial notice of the affidavit. Jones offered no evidence. The court then entered summary judgment against Majestic and Jones in the amount of $36,500. Taylor, an alleged manager for Majestic, was not mentioned in the summary judgment order. Majestic and Jones have appealed.

ASSIGNMENT OF ERROR

Majestic and Jones assign as error that the district court erred in finding that there was no genuine issue of material fact and that Altaffer was entitled to a judgment as a matter of law.

ANALYSIS

Majestic and Jones claim the district court erred in considering Altaffer's affidavit. They assert that because the affidavit was not offered and received as an exhibit at the summary judgment hearing, the district court should not have considered it as evidence.

[2] Altaffer's affidavit was filed with the clerk of the district court, but it was never offered into evidence and was not made a part of the bill of exceptions. This court has long held that an affidavit in support of a motion for summary judgment must be offered as an exhibit and must be made part of the bill of exceptions. See *Peterson v. George*, 168 Neb. 571, 96 N.W.2d 627 (1959). In *Peterson*, we stated:

> The fact that an affidavit used as evidence in the district court was filed in the office of the clerk of the district court and made a part of the transcript is not important to a consideration and decision of an appeal in the cause to this court. If such an affidavit is not preserved in a bill of exceptions, its existence or contents cannot be known by this court.

168 Neb. at 577, 96 N.W.2d at 631. In order to receive consideration on appeal, any affidavits or depositions used on a motion for summary judgment must have been offered and received in evidence in the trial court and preserved in and made a part of the bill of exceptions. *Rodriguez v. Nielsen*, 259 Neb. 264, 609 N.W.2d 368 (2000); *DeCosta Sporting Goods, Inc. v. Kirkland*, 210 Neb. 815, 316 N.W.2d 772 (1982).

A trial court cannot take judicial notice of disputed allegations. *In re Interest of N.M. and J.M.*, 240 Neb. 690, 484 N.W.2d 77 (1992). See Neb. Rev. Stat. § 27-201(2) (Reissue 1995). "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (a) generally known within the territorial jurisdiction of the trial court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id.*

The problem here is that a party cannot place an affidavit in the court file and then request the court to take judicial notice of the facts contained in the affidavit. In an action for summary judgment, the proponent of the affidavit must mark and offer it as an exhibit and make it a part of the bill of exceptions. Unless

the affidavit is marked, offered, and accepted, it does not become part of the record and cannot be considered by the trial court as evidence in the case. In the case at bar, the district court erred in taking judicial notice of the affidavit in the court file. An affidavit must be marked, offered, received, and preserved in the bill of exceptions.

Altaffer argues that Majestic and Jones suffered no detriment because they were able to view the affidavit prior to the summary judgment hearing. This is not relevant to the question of whether the affidavit was included in the bill of exceptions. 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. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001). The affidavit was not offered at the hearing, and therefore, it cannot be considered by this court. Since there was no evidence before the district court upon which to render a judgment, the court erred in sustaining Altaffer's motion for summary judgment.

CONCLUSION

The district court erred in granting summary judgment in favor of Altaffer. Therefore, the judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MIKE SALKIN, ASSIGNEE, APPELLEE, V. TERRY JACOBSEN, APPELLANT.

641 N.W.2d 356

Filed March 29, 2002. No. S-00-872.

1. **Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Attorney Fees.** As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.

3. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
4. ____. 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.
5. **Judgments: Costs.** An award of costs in a judgment is considered a part of the judgment.
6. **Attorney Fees: Case Disapproved.** A motion for attorney fees pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1995) must be made prior to the judgment of the court in which the attorney's services were rendered. To the extent that dicta in *Nebraska Pub. Emp. v. City of Omaha*, 244 Neb. 328, 506 N.W.2d 686 (1993), and *Millard v. Hyplains Dressed Beef*, 237 Neb. 907, 468 N.W.2d 124 (1991), suggest otherwise, that language is expressly disapproved.
7. **Rules of the Supreme Court: Courts.** Neb. Ct. R. of Prac. 9F (rev. 2001) is a rule of the Nebraska Supreme Court which also applies to the Nebraska Court of Appeals pursuant to Neb. Ct. R. of Prac. 2A (rev. 2000). It has no application to the district court, even when that court is sitting as an intermediate appellate court.

Appeal from the District Court for Douglas County, GERALD E. MORAN, Judge, on appeal thereto from the County Court for Douglas County, JOSEPH P. CANIGLIA, Judge. Judgment of District Court affirmed.

Michael J. Matukewicz and John G. Liakos, of Liakos & Associates, for appellant.

Patrick M. Ford for appellee.

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

STEPHAN, J.

Neb. Rev. Stat. § 25-824 (Reissue 1995) authorizes a court, on its own motion or that of a party, to order a party or attorney who asserts a frivolous or bad faith claim or defense in a civil action to pay the opposing party's reasonable attorney fees and court costs. The statute does not however specify the time in which a motion for such an order must be made. That issue is presented in this appeal as a matter of first impression.

BACKGROUND

Mike Salkin, as the assignee of Trustland Company, brought this action in the county court for Douglas County against Terry Jacobsen to recover a real estate commission in the amount of

$2,098.60, which Jacobsen allegedly owed to Trustland. The county court sustained Jacobsen's demurrer and dismissed the action with prejudice in its order filed on May 21, 1996. Salkin perfected a timely appeal to the district court for Douglas County.

While the appeal was pending, Jacobsen filed a motion in the county court seeking attorney fees pursuant to § 25-824, based upon allegations that the lawsuit was frivolous. The county court declined to consider the motion based upon its determination that it lacked jurisdiction because of the pending appeal. On October 11, 1996, the district court affirmed the judgment of dismissal and issued its mandate directing the county court to enter judgment in accordance with its decision.

On November 22, 1996, Jacobsen filed another motion for attorney fees in the county court. It is this motion which is the subject of this appeal. In his motion, Jacobsen again sought an award of attorney fees and costs against Salkin and his attorney pursuant to § 25-824 on grounds that the action was frivolous and interposed solely for the purpose of harassment. In an affidavit filed with the motion, Jacobsen's attorney stated that he and members of his firm had devoted 44.8 hours to the case and related proceedings from June 2, 1994, through August 12, 1996, which, at an hourly rate of $90, resulted in a fee of $4,032. The attorney also claimed to have advanced unspecified costs in the amount of $79.09.

Salkin filed a special demurrer challenging the jurisdiction of the county court to adjudicate the motion following the mandate of the district court affirming the county court's prior judgment of dismissal. The county court overruled the demurrer and, based upon its determination that Salkin "acted in a frivolous manner," entered an order granting the motion without specifying the amount of the fee awarded. Salkin appealed this order to the district court and moved the county court to set an "amount in controversy" so that he could secure a cost bond. The county court entered an order stating that "the amount in controversy regarding attorney's fees assessed against the Plaintiff by prior Order of this Court shall not exceed $4300.00."

On August 1, 1997, the district court entered an order in which it concluded, based upon *Nebraska Pub. Emp. v. City of Omaha*, 244 Neb. 328, 506 N.W.2d 686 (1993), that the county

court had jurisdiction to entertain a motion pursuant to § 25-824 following appellate affirmance of its judgment of dismissal and that the total fee request of $4,111.09 was fair and reasonable. However, because the fees were incurred in this and other related cases, the district court remanded the case to the county court for allocation of the fee award to each of the cases. Salkin appealed this order to the Nebraska Court of Appeals. In a memorandum opinion, that court reversed the order and remanded the cause with directions to dismiss the appeal based upon its determination that the order of the county court had not specified the amount of attorney fees to be awarded and was therefore not a final, appealable order. *Salkin v. Jacobsen*, 7 Neb. App. xvi (No. A-97-921, Dec. 18, 1998).

Following remand to the county court, Jacobsen moved for an order setting the amount of the attorney fees and costs to be awarded in this action pursuant to the court's prior order. In ruling on the motion, the county court awarded Jacobsen $1,535.09. Salkin appealed this order to the district court, and the appeal was heard by a judge who had not heard the prior appeal. Following oral argument, the district court concluded that Jacobsen's motion for attorney fees was untimely and vacated the order of the county court. The district court reasoned that Jacobsen had failed to move for attorney fees prior to the judgment of dismissal in the county court and had further failed to request the district court on appeal, "in accordance with Nebraska Supreme Court Rule 9F," to make a finding which would have permitted the county court to entertain a motion pursuant to § 25-824 on remand. Jacobsen perfected this timely appeal, which we removed to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Jacobsen assigns, restated and summarized, that the district court erred in concluding (1) that his request for attorney fees under § 25-824 was untimely, (2) that the county court had no jurisdiction to award attorney fees after the district court had issued its mandate, and (3) that he was required to comply with Neb. Ct. R. of Prac. 9F (rev. 2001) to recover legal fees related to the county court proceedings.

STANDARD OF REVIEW

[1] When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000); *White v. Board of Regents*, 260 Neb. 26, 614 N.W.2d 330 (2000).

ANALYSIS

[2] As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. *In re Guardianship & Conservatorship of Donley*, 262 Neb. 282, 631 N.W.2d 839 (2001); *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). Jacobsen sought attorney fees and related costs pursuant to § 25-824, which provides in pertinent part:

> (2) . . . [I]n any civil action commenced or appealed in any court of record in this state, the court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.
>
> . . . .
>
> (4) The court shall assess attorney's fees and costs if, upon the motion of any party or the court itself, the court finds that an attorney or party brought or defended an action or any part of an action that was frivolous or that the action or any part of the action was interposed solely for delay or harassment.

[3,4] This statute does not specify the time in which a party may move for attorney fees pursuant thereto, and we have not previously been required to address this issue. Nevertheless, familiar standards of statutory interpretation guide our analysis. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001); *Brunken v. Board of Trustees*, 261 Neb. 626, 624 N.W.2d 629 (2001). 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. *In re Interest of Sabrina K.*, 262 Neb. 871, 635 N.W.2d 727 (2001); *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001).

[5] We deem it significant that § 25-824(2) authorizes a court to award attorney fees "as part of its judgment and in addition to any other costs" when it determines that an action or defense is frivolous or made in bad faith. This is consistent with our case law, which generally treats attorney fees, where recoverable, as an element of court costs. See, *Nebraska Nutrients, supra*; *Brodersen v. Traders Ins. Co.*, 246 Neb. 688, 523 N.W.2d 24 (1994). An award of costs in a judgment is considered a part of the judgment. *In re Application of SID No. 384*, 256 Neb. 299, 589 N.W.2d 542 (1999); *Muff v. Mahloch Farms Co., Inc.*, 186 Neb. 151, 181 N.W.2d 258 (1970).

It logically follows that a party seeking an award of attorney fees pursuant to § 25-824 for services rendered in a trial court must make such request prior to the judgment in order for the award of fees, if deemed appropriate, to be made a part thereof. We recognize, however, that dicta in two of our cases suggest otherwise. In *Nebraska Pub. Emp. v. City of Omaha*, 244 Neb. 328, 506 N.W.2d 686 (1993), the appellee made its first request for both appellate and trial-related attorney fees before this court on appeal. We held that the appeal was frivolous and then indicated that we would award the appellee attorney fees for legal services on appeal if it filed the appropriate motion and supporting affidavit under rule 9F. We added:

> The Union asks us to "remand" this cause to the district court for a determination of an attorney fee for legal services in the district court proceedings. The record does not disclose that the district court has made any determination regarding an attorney fee. Therefore, this appeal presents nothing for us to review concerning an attorney fee allowable in the district court. *Of course, after issuance of the mandate in this proceeding, the Union may ask the district court to consider allowance of an attorney fee. In light of our decision and § 25-824 concerning allowance of an attorney fee, the district court, after issuance of the mandate*

> *in this cause and on appropriate request, may consider whether an attorney fee should be awarded to the Union's lawyer for services in the district court.*

(Emphasis supplied.) *Id.* at 336-37, 506 N.W.2d at 692. Similarly, in *Millard v. Hyplains Dressed Beef*, 237 Neb. 907, 915-16, 468 N.W.2d 124, 130 (1991), we stated:

> Not before us at this time is the question of the timing of a motion for attorney fees. We note only for future reference that in the federal system a motion for allowance of attorney fees is a collateral and independent claim and, as such, need not be filed within the 10-day period for motions to alter or amend the judgment. The U.S. Court of Appeals for the Eighth Circuit has suggested a 21-day time limit. The court also noted that the time for appeal of a judgment on the merits runs from the entry of judgment and that subsequent consideration of an attorney fee claim does not toll the time for appealing the judgment on the merits. *Obin v. Dist. No. 9 of Intern. Ass'n, Etc.*, 651 F.2d 574 (8th Cir. 1981).

[6] These dicta are inconsistent with our treatment of statutory attorney fees as an element of costs and the plain language of § 25-824(2) that such fees, when appropriate, shall be awarded "as part of [a] judgment and in addition to any other costs." We therefore hold that a motion for attorney fees pursuant to § 25-824 must be made prior to the judgment of the court in which the attorney's services were rendered. To the extent that dicta in *Nebraska Pub. Emp., supra*, and *Millard, supra*, suggest otherwise, that language is expressly disapproved. We further hold that when a motion for attorney fees under § 25-824 is made prior to the judgment, the judgment will not become final and appealable until the court has ruled upon that motion. See, *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000); *In re Application of SID No. 384*, 256 Neb. 299, 589 N.W.2d 542 (1999).

In concluding that a motion for attorney fees pursuant to § 25-824 must be made prior to the judgment of the court in which the claimed fees were incurred, we have considered and reject Jacobsen's argument that language in Neb. Rev. Stat. § 25-2729 (Reissue 1995) and our holding in *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994), compel a contrary holding. In

Ventura, we held that an administrative agency had no authority to reconsider its order after an appeal of the underlying case had been filed. We stated: "In civil appeals, after an appeal to this court has been perfected, a lower court is without jurisdiction to hear a case involving the same matter between the same parties." *Id.* at 133-34, 517 N.W.2d at 380. Jacobsen argues that the words "this court" in the quoted portion of the *Ventura* opinion suggest that a lower court is divested of its jurisdiction only when a case is appealed to the Nebraska Supreme Court. Jacobsen cites no authority from this jurisdiction or any other to support this argument, and we find it to be unpersuasive.

In a similar vein, Jacobsen argues that § 25-2729, which governs appeals from county courts to district courts, preserves the power of the county court to award attorney fees in connection with a judgment which has been appealed. Section 25-2729 provides, in pertinent part: "(2) Satisfaction of the requirements of subsection (1) of this section shall perfect the appeal and give the district court jurisdiction *of the matter appealed.*" (Emphasis supplied.) Jacobsen contrasts this language with the language of Neb. Rev. Stat. § 25-1912(3) (Reissue 1995), now found under § 25-1912(4) (Cum. Supp. 2000) and governing appeals from the district court, which provided in pertinent part that "an 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 . . . ." (Emphasis supplied.) Jacobsen argues that there is a principled difference between the phrase "of the matter appealed" in § 25-2729(2) and the phrase "of the cause" in § 25-1912(3). He contends that because district courts, pursuant to § 25-2729(2), only obtain jurisdiction "of the matter appealed," the county court is free to consider those matters not directly on appeal, including attorney fees. By contrast, Jacobsen suggests that the phrase "of the cause," as used in appeals from a district court under § 25-1912(3), completely strips the district court of all jurisdiction. Jacobsen cites no authority in support of this argument, and we find it to be premised upon a semantic distinction without a difference.

In this case, all of the services for which attorney fees were requested were rendered prior to the county court's judgment of

dismissal filed on May 21, 1996. The motion pursuant to § 25-824 was not made until after that judgment had been affirmed on appeal. Accordingly, the district court correctly determined that the motion was untimely and the award of attorney fees and costs should be vacated.

[7] We disagree, however, with the observation of the district court that Jacobsen could have preserved his claim for attorney fees incurred in the county court pursuant to § 25-824 by invoking rule 9F to request a finding during the pendency of the appeal in the district court. Rule 9F is a rule of this court which also applies to the Nebraska Court of Appeals pursuant to Neb. Ct. R. of Prac. 2A (rev. 2000). It has no application to the district court, even when that court is sitting as an intermediate appellate court. Moreover, rule 9F is clearly limited to requests for attorney fees "for services in the appellate court."

CONCLUSION

The district court correctly concluded that Jacobsen's motion for attorney fees and costs pursuant to § 25-824 was not made prior to the final judgment of the county court dismissing Salkin's action and was thus untimely. We therefore affirm the judgment of the district court vacating the award of fees and costs entered by the county court.

AFFIRMED.

GLADYS HABER, APPELLANT AND CROSS-APPELLEE, V. V & R JOINT VENTURE, A GENERAL PARTNERSHIP, APPELLEE AND CROSS-APPELLANT.

641 N.W.2d 31

Filed March 29, 2002. No. S-00-930.

1. **Statutes.** Statutory interpretation presents a question of law.
2. ____. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Motions for New Trial: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2000), a notice of appeal filed before the trial court has completely disposed of a motion for new trial is of no effect.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Appeal dismissed.

Norman Denenberg for appellant.

Frank Meares for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Gladys Haber filed a declaratory judgment action in the district court for Douglas County. V & R Joint Venture (V&R) filed a cross-petition based on assumpsit. Following trial, the district court found generally in favor of V&R, concluding that Haber had validly assigned proceeds from a personal injury action to V&R in satisfaction of a debt Haber owed V&R. Haber appeals the district court's denial of her motion for new trial. V&R cross-appeals, challenging the district court's denial of its motion for new trial. Because Haber's notice of appeal was filed prior to the complete disposition of V&R's motion for new trial, the notice of appeal was premature and this court lacks appellate jurisdiction. Accordingly, we dismiss the appeal and cross-appeal.

STATEMENT OF FACTS

Haber was injured in an automobile accident on May 31, 1995. In an unrelated matter, on July 5, 1996, V&R recovered a judgment in the amount of $6,813.88 against Haber and another individual for rent due under a lease. In an effort to satisfy V&R's judgment, Haber signed a document entitled "Assignment," which by its terms assigned to V&R a portion of the proceeds from her personal injury settlement as a result of the May 31, 1995, automobile accident. The assignment provided in pertinent part as follows:

> The undersigned, Gladys Haber, assigns all her right and interest in and to a personal injury action . . . to V&R Joint Venture up to the amount of rent due on the certain lease . . . at the time of settlement. I direct my attorney . . . after deduction of his attorney fee, to pay the then balance due in accordance with the terms of the rental agreement.

V&R notified Metropolitan Property and Casualty Insurance Company and Affiliates (Metropolitan), the insurance carrier handling Haber's personal injury claim, of the assignment. Haber settled her claim with Metropolitan. In 1997, Metropolitan mailed a settlement check to Haber's attorney, made payable to Haber, her attorney, and the attorney for V&R, in the amount of $5,737.46.

On March 2, 1998, Haber filed a declaratory judgment action, seeking a declaration that the assignment in favor of V&R was "void, illegal and a nullity because a tort claim for bodily injury is not assignable." On May 27, V&R filed an "Answer and Cross Petition." V&R's cross-petition sounded in assumpsit "for money had and received in the sum of $5737.46" and other relief.

The matter was tried to the district court on June 19, 2000. In an order filed June 28, the district court concluded that Haber had validly assigned proceeds from the personal injury action to V&R and that the assignment was enforceable. Although V&R was successful in its cross-petition with respect to the money owed, the district court denied the remainder of the relief V&R sought in its cross-petition.

The parties filed cross-motions for new trial which came on for hearing on August 9, 2000. In an order filed August 18, the district court overruled Haber's motion for new trial. In its August 18 order, the district court also overruled a portion of V&R's motion for new trial and set the remainder for hearing on September 27. Thus, in its August 18 order, the district court did not completely dispose of V&R's motion for new trial.

On September 5, 2000, Haber filed her notice of appeal. Thereafter, on September 27, following a hearing, the district court filed its order, finally disposing of all of the issues raised in V&R's new trial motion. No new notice of appeal was filed by either Haber or V&R subsequent to the district court's September 27 order.

ASSIGNMENTS OF ERROR

In her appeal, Haber assigns as error the district court's conclusion that the assignment of her personal injury cause of action was valid and enforceable. In its cross-appeal, V&R assigns four errors, claiming the district court erred (1) in failing to award attorney fees pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1995),

(2) in failing to assess all costs against Haber, (3) in failing to award V&R prejudgment interest, and (4) in ordering that the check which was the subject of V&R's cross-petition in assumpsit be filed with the clerk of the district court.

STANDARDS OF REVIEW

[1,2] Statutory interpretation presents a question of law. *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001); *Hatcher v. Bellevue Vol. Fire Dept.*, 262 Neb. 23, 628 N.W.2d 685 (2001). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001).

ANALYSIS

[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. *Wilcox v. City of McCook*, 262 Neb. 696, 634 N.W.2d 486 (2001).

Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2000) governs the running of the time for filing a notice of appeal when a motion for new trial has been filed. The statute was amended effective July 13, 2000, and as amended provides, in pertinent part, as follows:

> (3) The running of the time for filing a notice of appeal shall be terminated as to all parties (a) by a timely motion for a new trial under section 25-1144.01 . . . and the full time for appeal fixed in subsection (1) of this section commences to run from the entry of the order ruling upon the motion filed pursuant to subdivision (a) . . . of this subsection. When any motion terminating the time for filing a notice of appeal is timely filed by any party, a notice of appeal filed before the court announces its decision upon the terminating motion shall have no effect, whether filed before or after the timely filing of the terminating motion. A new notice of appeal shall be filed within the prescribed time after the entry of the order ruling on the motion.

In this case, Haber filed a notice of appeal on September 5, 2000, which was prior to the order resolving V&R's terminating motion and was, thus, of no effect. The record shows that in its order filed on August 18, the district court overruled Haber's new trial motion in its entirety and ruled in part and reserved ruling in

part on V&R's motion for new trial. The district court set the hearing on the remainder of V&R's motion for new trial for September 27, upon which date, the district court completely disposed of V&R's motion for new trial. Thus, the district court had not finally disposed of V&R's motion for new trial at the time Haber filed her notice of appeal on September 5.

[4] Pursuant to § 25-1912(3), Haber's September 5, 2000, notice of appeal was of "no effect." Further, neither Haber nor V&R filed a new notice of appeal as required by § 25-1912(3), which provides that a "new notice of appeal shall be filed within the prescribed time *after* the entry of the order ruling on the [terminating] motion." (Emphasis supplied.)

This court has previously stated that "[i]t is axiomatic that for an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders." *State ex rel. Fick v. Miller*, 252 Neb. 164, 165, 560 N.W.2d 793, 795 (1997). In this case, the August 18, 2000, order, disposing of one but not both new trial motions, did not entirely dispose of the terminating motion. See § 25-1912(3). The August 18 order was not a final, appealable order.

In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001). Under a plain reading of § 25-1912(3), Haber's notice of appeal filed on September 5, 2000, before complete disposition of V&R's motion for new trial, was of "no effect." Contrary to § 25-1912(3), neither party filed a new notice of appeal after the district court completely disposed of V&R's new trial motion, and this court did not acquire jurisdiction over the appeal. See *State ex rel. Fick v. Miller, supra.*

CONCLUSION

The district court's August 18, 2000, order did not completely dispose of V&R's motion for new trial and was not a final, appealable order. Pursuant to § 25-1912(3), Haber's notice of appeal filed September 5 was of "no effect." Contrary to § 25-1912(3), neither Haber nor V&R filed a new notice of appeal following the district court's September 27 order, which completely disposed of V&R's motion for new trial. Because Haber's notice of appeal

was premature and no notice of appeal was filed by either party subsequent to the complete resolution of the motions for new trial, this court lacks jurisdiction to entertain the appeal and cross-appeal.

APPEAL DISMISSED.

JILL S. MCCARSON, NOW KNOWN AS JILL S. AMORUSO, APPELLANT, V. KEVIN S. MCCARSON, APPELLEE.

641 N.W.2d 62

Filed March 29, 2002. No. S-00-1145.

1. **Judgments: Collateral Estoppel: Res Judicata.** The applicability of the doctrines of collateral estoppel and res judicata is a question of law.
2. **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.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Appeal and Error.** An issue not presented to the trial court may not be raised on appeal.
5. **Jurisdiction: Service of Process: Parties.** For purposes of personal jurisdiction, the voluntary appearance of a party is equivalent to service of process.
6. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
7. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, a petition is to be construed liberally; if, as so construed, the petition states a cause of action, the demurrer is to be overruled.
8. **Res Judicata.** Under the traditional rule of res judicata, any rights, facts, or matter in issue directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated by the parties and privies.
9. **Child Support: Paternity.** A fundamental fact necessary to sustain an order of child support is paternity by the man judicially obligated to pay such support.
10. **Divorce: Paternity: Judgments.** The paternity findings in a dissolution decree constitute a final judgment.
11. **Summary Judgment.** If a genuine issue of fact exists, summary judgment may not properly be entered.

12. **Courts: Judgments: Fraud: Proof.** In order to set aside a judgment after term on the ground of fraud practiced by the successful party, as provided for in Neb. Rev. Stat. § 25-2001(4) (Cum. Supp. 1998), the petitioning party must prove that due diligence was exercised by him or her at the former trial and that the failure to secure a just decision was not attributable to his or her fault or negligence.
13. **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.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed and remanded with directions.

Margaret M. Zarbano for appellant.

Richard K. Lydick for appellee.

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

GERRARD, J.

NATURE OF CASE

Kevin S. McCarson filed a petition for modification of the decree dissolving his marriage to Jill S. McCarson, now known as Jill S. Amoruso, claiming that the minor child born during the McCarsons' marriage is not Kevin's child as represented in the decree. The district court granted Kevin's motion for summary judgment and terminated Kevin's child support obligation. Jill now appeals, claiming that Kevin's petition is barred by res judicata pursuant to our decision in *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994), in which this court concluded that the finding of paternity in a dissolution decree precludes the parties from relitigating paternity.

BACKGROUND

Jill and Kevin were married on March 26, 1988. One child was born during the marriage on April 16, 1995. On June 1, 1995, Kevin filed a petition for dissolution of marriage, in which Kevin alleged that the child was not his and he should not have to pay child support. The district court eventually dismissed Kevin's petition on May 2, 1996, for lack of prosecution.

Jill filed a petition for dissolution of marriage on April 10, 1998. Kevin entered a voluntary appearance on the same day.

On June 11, the district court entered a decree of dissolution; at that time, Kevin was an active member of the U.S. Air Force stationed at Kadena Air Force Base in Japan. The decree stated that "one child has been born of said marital union" and granted permanent joint legal custody of the minor child to Jill and Kevin, with Jill as the primary custodial parent. The court ordered Kevin to pay $323 per month as child support. Both parties signed the consent decree; Kevin was not represented by counsel at the time.

Kevin filed a "Petition to Modify Decree" on May 6, 1999, alleging that, prior to the entry of the decree, Jill had represented to Kevin that the minor child was the product of their marital union, but later acknowledged to Kevin that he was not the father of the minor child. Thus, Kevin requested that the decree be modified to terminate his child support payments.

Jill filed a motion for leave to file pleadings out of time on July 16, 1999, and a demurrer on the basis of res judicata on July 26. After a hearing on the demurrer, the district court ordered that the clerk of the district court sequester and hold child support payments made by Kevin on the minor child's behalf. Jill appeared at the hearing with her attorney. Although attorneys for both parties agreed that Kevin was not the minor child's father, Jill argued that Kevin's child support obligation continued because the district court determined Kevin to be the minor child's father in the decree of dissolution. The district court overruled Jill's demurrer. Jill subsequently filed a responsive pleading and preserved the issue raised in her demurrer.

Kevin filed a motion for summary judgment on October 19, 1999. On November 16, Jill filed a cross-application for modification of decree, alleging a change in circumstances and asking that the district court (1) grant her sole custody of the minor child subject to reasonable visitation by Kevin, (2) increase Kevin's child support obligation, (3) change the minor child's last name, and (4) require Kevin to contribute to Jill's attorney fees and costs.

After a hearing on November 30, 1999, the district court determined that because both parties agreed that Kevin was not the minor child's father, no material issue of fact existed to preclude summary judgment. In response to a request for admission, Jill

acknowledged that she knew at the time of the entry of the decree that the child was not Kevin's child. Thus, the district court found that Jill knew Kevin was not the minor child's father prior to the filing of her petition for dissolution and the entry of the order of dissolution. The court concluded that Jill perpetrated a fraud upon the court by representing that Kevin was the minor child's father in her petition for dissolution and that she admitted this fact in her responses to Kevin's requests for admission.

Although Jill urged that the doctrine of res judicata applied to the adjudication of the child's parentage pursuant to *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994), the district court, citing *Carlson v. Zellaha*, 240 Neb. 432, 435, 482 N.W.2d 281, 283 (1992), concluded that "[a] consent judgment is subject to collateral attack when the facts demonstrate that the judgment or settlement was entered into fraudulently, collusively, or in bad faith." Because the district court found that Jill had admitted that she knew at the time of the decree that the child was not Kevin's, the district court did not apply the doctrine of res judicata to the issue of the minor child's paternity. Thus, the district court sustained Kevin's motion for summary judgment, declared that Kevin was not the child's father, and terminated Kevin's child support obligation. Additionally, the district court dismissed Jill's cross-application for modification of decree.

Jill now appeals from the judgment of the district court. Pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals, we moved this appeal to our docket.

ASSIGNMENTS OF ERROR

Jill assigns that the district court erred in (1) finding that it had jurisdiction over the proceedings, as Kevin did not properly serve Jill with his petition for modification; (2) overruling Jill's demurrer; (3) sustaining Kevin's motion for summary judgment; and (4) dismissing Jill's cross-application for modification of decree.

STANDARD OF REVIEW

[1] The applicability of the doctrines of collateral estoppel and res judicata is a question of law. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001).

[2,3] 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. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

PERSONAL JURISDICTION

[4,5] Jill first assigns that the district court lacked personal jurisdiction over her because Kevin did not meet the statutory requirements for service of process. Jill did not raise the issue of improper service before the district court, and we will not consider it for the first time on appeal. An issue not presented to the trial court may not be raised on appeal. *V.C. v. Casady*, 262 Neb. 714, 634 N.W.2d 798 (2001). Additionally, Jill has already voluntarily appeared before the court and invoked its power on an issue other than jurisdiction. For purposes of personal jurisdiction, the voluntary appearance of a party is equivalent to service of process. *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001). Jill filed a motion to file pleadings out of time, a demurrer, and appeared personally at the hearing on the demurrer. Therefore, Jill's first assignment of error is without merit; her voluntary actions to invoke the power of the court on issues other than the court's jurisdiction waived her right to contest personal jurisdiction.

DEMURRER

[6,7] Second, Jill assigns that the district court erred in overruling her demurrer to Kevin's petition for modification. In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.

Northwall v. State, ante p. 1, 637 N.W.2d 890 (2002). In determining whether a cause of action has been stated, a petition is to be construed liberally; if, as so construed, the petition states a cause of action, the demurrer is to be overruled. *Malone v. American Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001).

[8] Jill alleges that res judicata bars revisiting the issue of paternity, as the decree of dissolution already determined Kevin to be the minor child's father; therefore, the district court erred by not sustaining her demurrer. This court addressed a similar set of facts in *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994). In *DeVaux*, the mother of a minor child sought modification of a dissolution decree based on conclusive blood tests establishing that her ex-husband was not the child's father. The ex-husband opposed the modification. This court concluded that under the doctrine of res judicata, a finding of paternity in a dissolution decree prevents the parties to the decree from relitigating paternity. In our most recent phrasing, we stated that under the traditional rule of res judicata, any rights, facts, or matter in issue directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated by the parties and privies. *Gruber v. Gruber*, 261 Neb. 914, 626 N.W.2d 582 (2001).

[9,10] In analyzing Jill's res judicata claim, we first recognize that resolution of the divorce litigation necessarily involved the question of the minor child's paternity, as the decree required Kevin to pay child support. " 'A fundamental fact necessary to sustain an order of child support is paternity by the man judicially obligated to pay such support.' " *Cross v. Perreten*, 257 Neb. 776, 781, 600 N.W.2d 780, 784 (1999). See, also, *DeVaux, supra*. Second, the district court was competent to render the dissolution decree. See, Neb. Rev. Stat. § 42-351 (Reissue 1998); *DeVaux, supra*. Third, the paternity findings in a dissolution decree constitute a final judgment, so the dissolution order in this case qualifies as a final judgment. *DeVaux, supra*. Finally, the district court, in entering the dissolution decree, reached the merits of the parties' cause (namely, their dissolution) rather than disposing of the matter on procedural or jurisdictional grounds.

Thus, absent a "fraud upon the court," res judicata should apply to the litigation of paternity under *DeVaux, supra.*

Unlike *DeVaux*, however, we face here an allegation that at least one of the parties knew, at the time of the decree, that the decree did not reflect the true paternity of the minor child. Kevin argues that he has a remedy pursuant to Neb. Rev. Stat. § 25-2001(4) (Cum. Supp. 1998), which allows the district court to modify the dissolution decree after term on the basis of fraud by the successful party. Section 25-2001 states that "[a] district court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made . . . (4) for fraud practiced by the successful party in obtaining the judgment or order." Under Neb. Rev. Stat. § 25-2008 (Reissue 1995), proceedings to vacate or modify a judgment or order for the causes mentioned in § 25-2001(4) must be commenced within 2 years after the judgment was rendered or made; Kevin filed his petition for modification on May 6, 1999, less than 2 years after the decree for dissolution was entered on June 11, 1998.

In reviewing the district court's ruling on Jill's demurrer, we are required to accept as true all the facts which are well pled in Kevin's petition and the proper and reasonable inferences of law and fact which may be drawn therefrom. See *Northwall v. State, ante* p. 1, 637 N.W.2d 890 (2002). In determining whether a cause of action has been stated, we must construe Kevin's petition liberally; if, as so construed, the petition states a cause of action, the demurrer is to be overruled. See *Malone v. American Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001). Kevin pled that the dissolution decree should be modified because the minor child was not his, and, in reviewing the demurrer, we must accept this fact as true. Further, a liberal construction of Kevin's petition provides him with a potential remedy based on his allegation of Jill's fraud in obtaining the judgment. Therefore, the district court did not err in overruling Jill's demurrer.

Summary Judgment

Next, Jill assigns that the district court erred in sustaining Kevin's motion for summary judgment, as genuine issues of material fact remained regarding representations made by Kevin

and Jill about knowledge of the child's paternity. Under Neb. Rev. Stat. § 25-1332 (Reissue 1995), "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

[11] 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. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001). If a genuine issue of fact exists, summary judgment may not properly be entered. *Daniels v. Allstate Indemnity Co.*, 261 Neb. 671, 624 N.W.2d 636 (2001).

Although Kevin's petition for modification states that he did not know at the time of the decree that he was not the minor child's father, Jill argues that she offered evidence at the summary judgment hearing to demonstrate that Kevin knew, prior to dissolution, that he was not the minor child's father. Thus, Jill claims that Kevin is not entitled to summary judgment because genuine issues of material fact remain regarding Kevin's knowledge of the minor child's paternity prior to entry of the decree. Kevin argues that the only issue before the district court was whether Jill represented to Kevin that he was the minor child's father prior to dissolution, but that issue disappeared when Jill admitted that she knew at the time of dissolution that Kevin did not father her minor child. Kevin bases his "fraud upon the court" allegation on Jill's concealment from the district court of the minor child's true paternity.

[12] As discussed above, § 25-2001(4) provides Kevin with a potential legal remedy: the court can vacate or modify an order or judgment after term for fraud by the successful party, in this case, Jill's alleged fraud upon the court. However, in order to set aside a judgment after term on the ground of fraud practiced by the successful party, as provided for in § 25-2001(4), the petitioning party must prove that due diligence was exercised by him or her at the former trial and that the failure to secure a just decision was not attributable to his or her fault or negligence.

Caddy v. Caddy, 218 Neb. 582, 358 N.W.2d 184 (1984). In *Caddy*, 218 Neb. at 584, 358 N.W.2d at 186, this court concluded that because "[t]he respondent chose to proceed without adequate representation and with at least a general knowledge of the underlying facts, and made no effort to bring before the court the correct information," the district court properly denied the respondent's petition to vacate under § 25-2001(4). Therefore, in order for Kevin to obtain a modification of the 1998 decree under § 25-2001(4), it must be clear that the alleged failure to secure a just decision was attributable only to Jill's misrepresentation, and not to any fault or negligence by Kevin.

Jill offered an affidavit in which she stated that while the parties were both serving in the U.S. Air Force, Kevin initiated a punishment proceeding against Jill for adulterous conduct. Jill's affidavit asserts that Kevin told her numerous times during the pendency of their dissolution that he knew the minor child was not, and could not be, his child. Jill states in her affidavit that when she questioned Kevin's desire to pay child support even though the minor child was not Kevin's child, Kevin responded that he thought of the child as his own and that the child was probably the only child he would ever have. Further, Jill's affidavit avers that Kevin did not contest paternity during dissolution proceedings. During the summary judgment hearing, the district court received into evidence Kevin's previously dismissed petition for dissolution, filed on June 1, 1995, shortly after the child's birth on April 16, 1995, in which Kevin alleges that he is not the father of the minor child.

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. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001). Viewed in a light most favorable to Jill, the evidence at least presents an issue of material fact as to whether Kevin knew that he was not the minor child's father prior to the entry of the dissolution decree, which Kevin signed and in which he was not represented by counsel.

[13] In fact, the evidence offered by Jill reveals that Kevin at least suspected the minor child's true paternity prior to the

dissolution, and Kevin did not present evidence to contest this fact. 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. *Daniels v. Allstate Indemnity Co.*, 261 Neb. 671, 624 N.W.2d 636 (2001). Kevin failed to demonstrate that he did not know that he was not the minor child's father at the time the decree was entered. Kevin offered no evidence to refute Jill's allegation that Kevin knew, or should have known, that he was not the minor child's father prior to the entry of the decree. Based upon Kevin's allegations in his earlier dismissed petition for dissolution, a court could conclude that Kevin did not exercise the diligence required by § 25-2001(4) and *Caddy v. Caddy*, 218 Neb. 582, 358 N.W.2d 184 (1984), to set aside a judgment after term on the ground of fraud practiced by the successful party. Thus, the district court erred in entering summary judgment in favor of Kevin. Jill did not file a cross-motion for summary judgment; therefore, it is necessary to remand this matter to the district court for further proceedings consistent with this opinion.

Cross-Petition for Modification

Jill's fourth assignment of error alleges that the district court erred in dismissing her cross-petition for modification, which requested, inter alia, sole custody of the minor child, an increase in child support, a change of the minor child's last name, and attorney fees. The district court did err in dismissing Jill's cross-petition for modification at this stage of the proceedings based on the reasons stated above. However, because the district court did not consider any evidence concerning the merits of Jill's cross-petition, she could not present any argument regarding the merits of her modification action, and as a practical matter, we cannot consider this assignment of error at the present time. Upon remand, the district court shall consider the merits of Jill's cross-petition and render judgment accordingly.

CONCLUSION

The district court erred in sustaining Kevin's motion for summary judgment, as Kevin was not entitled to judgment as a matter of law. Therefore, we reverse the judgment of the district court

and remand the cause to the district court with directions to conduct further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

DOUGLAS COUNTY BOARD OF COMMISSIONERS ET AL., APPELLEES, V. CIVIL SERVICE COMMISSION OF DOUGLAS COUNTY, NEBRASKA, APPELLANT.

641 N.W.2d 55

Filed March 29, 2002. No. S-00-1155.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **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: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 25-1901 (Cum. Supp. 2000), only orders made in the exercise of judicial functions by a board or tribunal inferior to the district court are reviewable by proceedings in error.
4. **Standing.** In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy.
5. **Civil Service: Administrative Law: Legislature: Statutes.** The Civil Service Commission of Douglas County is a statutorily created tribunal established by the Legislature. As a statutorily created entity, the commission has only such authority as has been conferred on it by statute.
6. **Civil Service: Administrative Law: Public Officers and Employees: Appeal and Error.** Neb. Rev. Stat. § 23-2510 (Reissue 1997) authorizes a civil service commission to hear employee appeals from decisions where the employee is discharged, suspended, or demoted in rank or compensation by his department head by a written order which shall specifically state the reasons therefor.
7. **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.
8. **Civil Service: Administrative Law: Legislature: Appeal and Error.** The Legislature has authorized a civil service commission to hear only those appeals which meet the requirements of Neb. Rev. Stat. § 23-2510 (Reissue 1997).

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Steven J. Riekes and Harold M. Zabin, of Marks, Clare & Richards, for appellant.

Soren S. Jensen and Karl von Oldenburg, of Erickson & Sederstrom, P.C., for appellees.

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

HENDRY, C.J.

INTRODUCTION

In an order dated April 6, 2000, the Civil Service Commission of Douglas County (Commission) ordered the Douglas County Board of Commissioners (Board) to increase its portion of health insurance premium payments for all "nonbargaining unit employees" employed by the county, effective January 1, 2000. The Board appealed the Commission's order to the Douglas County District Court, which vacated the order. The Commission appeals.

FACTUAL BACKGROUND

On December 14, 1999, the Board ratified an employment agreement between the Board and the Douglas County Health Department Employees Association (Association). The Association is the bargaining unit for health department union employees. The agreement provided in part that the Board would pay an increased percentage of health insurance premium payments for Association members. Some employees of the health department were Association members, while others were nonbargaining unit employees.

The agreement ratified by the Board became effective January 1, 2000. After the agreement went into effect, Association members paid a smaller percentage of their health insurance premiums than that being paid by nonbargaining unit employees.

Four registered nurses employed by the department of health as nonbargaining unit employees, acting pro se, appealed the Board's December 14, 1999, decision to the Commission. On April 6, 2000, the Commission held a hearing on the nurses' appeal. All four nurses were present at the hearing, but only one nurse testified. This nurse asked the Commission to find that the agreement ratified by the Board violated "Article 2, page 10," of the "Civil Service Personnel Policy Manual" by providing an "enhanced contribution benefit" for Association members.

At the conclusion of the nurse's testimony, the Commission unanimously passed a motion which provided, inter alia, that "the insurance premium be comparable to the bargaining unit-approved insurance premium payment for all Civil Service employees."

The Commission then issued an order dated April 6, 2000. The order states in pertinent part:

> In review of the testimony heard and evidence presented, the Commission finds that a disparate situation does exist with regards to Douglas County's enhanced payment of health insurance benefits relative to bargaining and non-bargaining unit employees. The Commission finds that it has the proper authority to provide for equitable treatment for all employees under it's [sic] jurisdiction and that such disparate treatment is contrary to the Commission's rules.
>
> . . . .
>
> IT IS THEREFORE ORDERED, DECREED AND ADJUDGED that all non-bargaining employees under the jurisdiction of the Douglas County Civil Service Commission shall receive the enhanced health insurance payment plan currently provided to those employees covered by the extant labor agreement between the Douglas County Board of Commissioners and the Health Department Employee's Association which became effective January 1, 2000.
>
> IT IS FURTHER ORDERED, DECREED AND ADJUDGED that the Board of County Commissioners has until July 1, 2000, to implement this plan and to provide for any possible retroactive payments to the plan's participants.
>
> IT IS FINALLY ORDERED, DECREED AND ADJUDGED that the Douglas County Board of Commissioners shall timely effectuate and comply with the terms of this Order.
>
> An appeal from a final Order of the Commission shall be in a manner provided by Nebraska Revised Statutes §25-1901 to §25-1908.

On May 5, 2000, the Board filed a petition in error pursuant to Neb. Rev. Stat. § 25-1901 (Cum. Supp. 2000) in the Douglas County District Court. The Board asked the court to set aside and reverse the April 6 decision of the Commission because it exceeded the statutory authority granted to the Commission.

A hearing was held in the district court on September 12, 2000. At that hearing, the Commission argued the district court lacked jurisdiction over the appeal because the April 6 order was not a judicial or quasi-judicial decision appealable through the petition in error statutes. The Board argued that proceeding by petition in error was proper and asked that the April 6 order be vacated.

In its order filed October 6, 2000, the district court first determined that the April 6 order was appealable pursuant to Neb. Rev. Stat. §§ 25-1901 to 25-1908 (Reissue 1995 & Cum. Supp. 2000). The court found that the Commission "exercised a judicial function by receiving evidence and hearing arguments by the R.N.s on their appeal concerning allegedly disparate treatment practiced by the Douglas County Board." Furthermore, the district court noted that the April 6 order itself "Ordered, Decreed and Adjudged" that " '[a]n appeal from a final Order of the Commission shall be in a manner provided by Nebraska Revised Statutes §25-1901 to §25-1908.' "

The district court then determined that (1) the Commission lacked the statutory authority to hear the nurses' appeal pursuant to Neb. Rev. Stat. § 23-2510 (Reissue 1997), (2) the Commission lacked the statutory authority to order the Board to increase its portion of nonbargaining unit employee insurance premium payments pursuant to Neb. Rev. Stat. § 23-2507 (Reissue 1997), and (3) the April 6 order was in excess of the Commission's authority pursuant to Neb. Rev. Stat. § 23-2508 (Reissue 1997). The court then vacated the Commission's order.

The Commission appealed and filed a petition to bypass the Nebraska Court of Appeals, which this court granted.

ASSIGNMENTS OF ERROR

The Commission asserts, rephrased, that the district court erred in (1) finding the petition in error statutes were the proper vehicle to bring the appeal, (2) failing to find that the petitioners in error lacked standing to bring the appeal, and (3) finding that the Commission did not have the statutory authority to issue the April 6, 2000, order.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *In*

re Interest of Jaden H., ante p. 129, 638 N.W.2d 867 (2002); *Big John's Billiards v. Balka*, 254 Neb. 528, 577 N.W.2d 294 (1998).

[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. *In re Interest of S.B., ante* p. 175, 639 N.W.2d 78 (2002); *In re Guardianship & Conservatorship of Garcia*, 262 Neb. 205, 631 N.W.2d 464 (2001).

ANALYSIS

JURISDICTION

[3] In its first assignment of error, the Commission argues that the district court lacked jurisdiction to hear the Board's appeal because the April 6, 2000, order was not reviewable under the petition in error statutes. A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *In re Interest of Jaden H., supra*. Pursuant to § 25-1901, only "[o]rders made in the *exercise of judicial functions* by a board or tribunal inferior to the district court are reviewable by proceedings in error." *Hawkins v. City of Omaha*, 261 Neb. 943, 953, 627 N.W.2d 118, 127 (2001). A board or tribunal exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner. *Id.*

The Commission asserts that the April 6, 2000, order was merely an employee policy or regulation issued pursuant to the Commission's authority under § 23-2507(1)(e) and therefore not the exercise of a judicial function appealable as a final order in accordance with § 25-1901. Section 23-2507(1)(e) grants the Commission the authority to prescribe "regulations for use by all offices governed by sections 23-1501 to 23-2516 relating to such matters as employee benefits, vacation, sick leave and holidays." However, the April 6 order announced no new rule or regulation. Instead, the order found that "disparate treatment" existed regarding health insurance premium payments. The order further "Ordered, Decreed and Adjudged" that the Board must grant specific relief to nonbargaining unit employees by increasing the Board's portion of insurance premium payments. On its face, the April 6 order exercised judicial functions.

Despite the language utilized in the order, the Commission relies on *Kropp v. Grand Island Pub. Sch. Dist. No. 2*, 246 Neb. 138, 517 N.W.2d 113 (1994), to argue that the April 6, 2000, order was not an exercise of judicial functions. In *Kropp*, the school board applied the unambiguous terms of plaintiff's employment contract in determining that plaintiff's placement on the teachers' salary scale was correct. We held that this decision by the school board was not reviewable under the petition in error statutes because the "school board did not decide any dispute of adjudicative fact and was not statutorily required to act in a judicial manner." *Id.* at 144, 517 N.W.2d 117.

Unlike the school board in *Kropp*, however, the Commission is statutorily required to act in a judicial manner in hearing employee appeals. Neb. Rev. Stat. § 23-2511 (Reissue 1997) requires that "within two weeks after receipt of the notice" of an employee appeal, the Commission must "hold a public hearing thereon at which the employee shall be entitled to appear personally, be represented by counsel, cross-examine witnesses and produce evidence." Neb. Rev. Stat. § 23-2512 (Reissue 1997) also empowers the Commission to "subpoena witnesses, administer oaths, and compel the production of books and papers."

Because the Commission is statutorily required to act in a judicial manner in deciding employee appeals, and the April 6, 2000, order was clearly intended to exercise judicial functions, the April 6 order was properly appealed by the Board through the petition in error statutes. See *Hawkins, supra.*

STANDING

[4] The Commission's second assignment of error raises another alleged jurisdictional defect with the Board's petition in error. In this assignment of error, the Commission argues that the petition in error was not filed by the Board, but instead by the seven members of the Board in their individual capacity. The Commission then contends that because the members of the Board as individuals have no interest in the outcome of the appeal, the petitioners lack standing. In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy. *Hagan v. Upper Republican NRD*, 261 Neb. 312, 622 N.W.2d 627 (2001).

The caption to the petition in error reads:

> DOUGLAS COUNTY BOARD OF COMMISSIONERS, Mary Ann Borgeson, Chair, Board of Douglas County Commissioners, Michael Boyle, Douglas County Commissioner, Carole Woods Harris, Douglas County Commissioner, Kyle Hutchings, Douglas County Commissioner, Kathleen McCallister, Douglas County Commissioner, Carol Pirsch, Douglas County Commissioner, and Clare Duda, Douglas County Commissioner,
>
> Petitioners-In-Error,
>
> vs.
>
> CIVIL SERVICE COMMISSION OF DOUGLAS COUNTY, NEBRASKA[,]
>
> Respondent-In-Error.

The body of the petition states in pertinent part:

> COME NOW, Petitioners-In-Error, and for their cause of action against the Civil Service Commission of Douglas County, Nebraska, who responded in error, alleges and states as follows:
>
> 1. Petitioners-In-Error, are residents of Douglas County, Nebraska and at all material times herein have been duly elected Douglas County Commissioners.

The Commission argues in its brief that paragraph 1 of the petition conclusively demonstrates that "the Appellee-Petitioners are seven individuals, and only seven individuals [and therefore] [n]either Douglas County nor the Douglas County Board are named in the Petition as being parties to these error proceedings." Brief for appellant at 22. The Commission then contends that in determining this issue, this court should not consider the caption to the petition because it "is, at best, ambiguous" and "not controlling." *Id.* at 23. For the same reason, the Commission asserts that the signature block, which is identical to the caption, should also not be considered. Finally, the Commission contends that based on *Professional Collection Service v. Coble*, 200 Neb. 683, 264 N.W.2d 686 (1978), if this court were to consider the caption, the definition of the parties contained in the body of the petition should control over the definition in the caption.

We find these arguments unpersuasive for two reasons. First, the language in paragraph 1 of the petition does not state that the

petitioners are individuals. It describes them as residents of Douglas County, who are Douglas County Commissioners. A reasonable interpretation of this sentence is that the petitioners in error are the Douglas County Commissioners in their official capacity as Commissioners, not seven individuals. Second, the caption and signature block are not ambiguous or in conflict with the meaning of the body of the petition. The pleading in the present case does not present a question of which "definition" controls, because we find no conflict between the definition of the petitioners stated in the caption and in the body of the petition. We interpret both the caption and the body as referring to the Board. Accordingly, this assignment of error is without merit.

COMMISSION'S STATUTORY AUTHORITY

In its third and final assignment of error, the Commission argues the district court erred in finding that the Board did not possess the statutory authority to issue the April 6, 2000, order. 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 re Interest of S.B., ante* p. 175, 639 N.W.2d 78 (2002); *In re Guardianship & Conservatorship of Garcia*, 262 Neb. 205, 631 N.W.2d 464 (2001).

[5] The Commission is a statutorily created tribunal established by the Legislature. As a statutorily created entity, the Commission has only such authority as has been conferred on it by statute. See *In re Interest of Jaden H., ante* p. 129, 638 N.W.2d 867 (2002).

[6] Section 23-2510 authorizes the Commission to hear employee appeals from decisions where the employee is "discharged, suspended, or demoted in rank or compensation *by his department head* by a written order which shall specifically state the reasons therefor." (Emphasis supplied.) See, e.g., *Ashby v. Civil Serv. Comm.*, 241 Neb. 988, 492 N.W.2d 849 (1992) (appeal of order suspending employee). The nurses in the present case were attempting to appeal a decision of the Board, not an order issued by a department head.

Neb. Rev. Stat. § 23-2502(3) (Reissue 1997) defines a department head as "an officer holding an elected office, an officer

holding office by appointment of the Governor, the chief deputy of any office or the deputy if there is not more than one deputy, and such other persons holding positions as are declared to be department heads by the county board." The Commission does not argue in its brief that the Board is a department head pursuant to § 23-2502(3). Instead, the Commission contends that the Commission's authority over department heads impliedly extends to the Board because "the statutory scheme regarding County employees is not under the total domination of the County Board." Brief for appellant at 30.

[7,8] 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. *Sydow v. City of Grand Island, ante* p. 389, 639 N.W.2d 913 (2002). The Legislature has authorized the Commission to hear only those appeals which meet the requirements of § 23-2510. Because the nurses' appeal was not taken from a decision rendered by a department head as specified by § 23-2510, we determine that the Commission lacked the statutory authority to hear the appeal. In light of this determination, there is no need to consider the district court's other findings regarding the validity of the April 6, 2000, order. See *Baker v. Fabian, Thielen & Thielen*, 254 Neb. 697, 578 N.W.2d 446 (1998).

CONCLUSION

The decision of the district court vacating the Commission's order is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
BRUCE CANADY, APPELLANT.
641 N.W.2d 43

Filed March 29, 2002. No. S-00-1250.

1. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the

evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

2. **Pleadings: Evidence: Waiver: Words and Phrases.** A judicial admission, as a formal act done in the course of judicial proceedings, is a substitute for evidence and thereby waives and dispenses with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by an opponent is true.
3. **Juvenile Courts: Proof.** The State's burden of proof in a juvenile hearing to establish child abuse or child neglect is a preponderance of the evidence.
4. **Convictions: Proof.** To sustain a conviction based on information derived from an electronic or mechanical measuring device, there must be reasonable proof that the measuring device was accurate and functioning properly.
5. **Criminal Law: Evidence: Appeal and Error.** The erroneous admission of evidence in a criminal case is prejudicial error unless the State proves that the error was harmless.
6. **Criminal Law: Trial: Juries: Appeal and Error.** In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
7. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
8. **Trial: Photographs.** The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.
9. **Criminal Law: Motions to Dismiss: Evidence.** In determining whether a criminal defendant's motion to dismiss for insufficient evidence should be sustained, the State is entitled to have all of its relevant evidence accepted as true, the benefit of every inference that can reasonably be drawn from the evidence, and every controverted fact resolved in its favor.
10. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
11. **Directed Verdict.** If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed.
12. **Words and Phrases.** A serious bodily injury is one which involves a substantial risk of death or which involves substantial risk of serious permanent disfigurement or protracted loss or impairment of the function of any part or organ of the body.
13. **Criminal Law: Intent.** Intent may be inferred from the words and acts of the accused and from the facts and circumstances surrounding the conduct.
14. **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 judicial discretion.

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

Dennis R. Keefe, Lancaster County Public Defender, and Scott P. Helvie for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Bruce Canady was charged with and convicted of felony child abuse. He was sentenced to 10 to 20 years in prison with credit for 255 days served. Canady appeals the judgment of conviction and sentence.

SCOPE OF REVIEW

[1] In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998), *cert. denied* 525 U.S. 895, 119 S. Ct. 219, 142 L. Ed. 2d 180.

FACTS

On May 12, 2000, Canady was charged by information with child abuse, in violation of Neb. Rev. Stat. § 28-707 (Cum. Supp. 2000). The information alleged that Canady had knowingly and intentionally caused his daughter, Tiffany Canady, born November 30, 1996, to be placed in a situation that endangered her life or physical or mental health and knowingly or intentionally caused her serious bodily injury.

Prior to trial, Canady sought by a motion in limine to preclude the State from introducing the testimony of Dr. David Voigt regarding his opinion as to how Tiffany had sustained burns and whether the burns were the result of forceful immersion in water.

Canady alleged Voigt was not qualified as an expert in juvenile immersion burns and was not a forensic expert, which would qualify him to testify as an expert regarding the source of the burns. In a second motion in limine, Canady sought to exclude photographs of Tiffany following treatment. He alleged that the photographs did not accurately reflect any injury and were therefore prejudicial. Canady also moved to dismiss based on comments made by the State in a separate juvenile court proceeding. The district court overruled the motion to dismiss, and the evidence was admitted.

At trial, Staci Douglass testified that Canady had moved in with her and her three young children in November 1999. In March 2000, Tiffany had been living with Canady and Douglass for about 3 weeks. During that period, Canady and Douglass were trying to toilet train Tiffany.

On the morning of March 5, 2000, Douglass and Canady argued about telephone numbers Douglass had found on her telephone's caller I.D. The argument lasted 15 to 30 minutes. Douglass then went outside to clean out her car. All four children were playing outside, and Canady remained inside. During the morning, Douglass made several trips inside, and she and Canady continued to argue about the telephone numbers. Canady later came outside to call the children in for lunch, but only Tiffany went in.

When Douglass went inside, she heard Tiffany screaming and knew something was wrong. She went to the bathroom and saw Tiffany sitting in the bathtub with the water running. As she entered the bathroom, Tiffany stood up in the bathtub and reached out to Douglass. Canady, who was behind Douglass, told Tiffany, "'Sit your butt back down.'" Tiffany was screaming that the water was hot. Canady then yelled a profanity at Douglass and told her to get out of the bathroom. He said, "'This is my daughter, I'm handling this.'" Douglass said that when she entered the bathroom, she had slipped on Tiffany's soiled underwear.

At some point, Douglass felt the water, which was hot, and reached to turn on the cold water, but it was already running. She tried to "swish" the water to make it cool by Tiffany's legs and then noticed that Tiffany's legs were red. Douglass, who is a licensed practical nurse, told Canady to get Tiffany out of the

bathtub and that she was going to a drugstore to get something to treat Tiffany's legs. She did not take Tiffany out of the bathtub because she was scared and confused. By the time Douglass left for the drugstore, Canady had taken Tiffany out of the bathtub.

Douglass purchased a cream for burns because she was concerned about Tiffany. When Douglass returned, Tiffany was on the bed on her hands and knees. Her skin was red, and some of it had peeled off. Douglass said she dropped the sack containing the medicine; exclaimed, " 'Oh, my god' "; and told Canady that they needed to take Tiffany to the hospital. Canady dressed Tiffany in a pajama gown, and they drove to St. Elizabeth's Hospital.

Douglass testified that the faucet in the bathtub had a constant trickle of hot water and that when the faucet was turned on full force, the cold water did not come out with as much pressure as the hot water. She had called the landlord to complain because the water temperature was erratic. She did not see Canady physically restrain Tiffany in the bathtub, nor did he physically restrain Douglass from taking Tiffany out of the bathtub.

Investigator Cindi Arthur of the Lincoln Police Department testified that on the afternoon of March 5, 2000, she tested the water temperature in the home by using a candy thermometer purchased at a grocery store. Arthur first tested the temperature of the trickle of water from the bathtub faucet when both the hot and cold water were turned off. After she held the thermometer under the trickle for 3 minutes, the thermometer read 105 degrees Fahrenheit. The defense objected, arguing that the test was not reliable, had no probative value, and was speculative. The objection was overruled, and Arthur continued to testify. Running only the hot water, she filled the bathtub with 6½ inches of water. She placed the thermometer about 2 inches into the water for 3 minutes and measured the temperature at 112 degrees. She removed the thermometer and let it cool to below 100 degrees. She then put the thermometer on the bottom of the bathtub for 3 minutes. The thermometer measured 112 degrees. She let the thermometer cool and then held it under the running water, and it measured 120 degrees. Next, she held the thermometer under the cold running water, and it stayed below the 100-degree mark, which was the lowest measurement on the thermometer. She used 3 minutes as a measurement because she "figured that was a sufficient amount of time to

level out." She did not notice a significant difference in water pressure between the hot and cold water in the faucet.

Voigt, who treated Tiffany at the hospital on March 5, 2000, testified that he had treated more than 1,500 burn inpatients and that burns make up about 70 percent of his practice. When she was admitted, Tiffany had burns on her buttocks, perineum, and feet. Her injuries were consistent with an immersion scald, marked by a straight line called a tidemark.

The defense renewed its pretrial objection and conducted a foundational voir dire of Voigt in the presence of the jury. Voigt stated that he had treated approximately 300 scald burns and that approximately 40 of those had been in Nebraska. He has treated about 12 immersion scalds of juveniles while in Nebraska. Less than 1 percent of the time during his medical training was spent trying to determine the cause of a burn because that was not an objective of his treatment. The district court ruled that Voigt's testimony as to causation would be admitted and that he was qualified to testify.

Voigt stated that the tidemark on Tiffany's body indicated the level that the water had reached. He noted that 23 percent of Tiffany's body surface was burned and that about one-third of Tiffany's burns were full thickness burns, which require skin grafts. Tiffany underwent four operations which required anesthesia.

Voigt testified that when Tiffany was released from the hospital, she was stable, was eating a regular diet, and had begun walking without assistance from the physical therapist. In his opinion, to a reasonable degree of medical certainty, Tiffany's injuries were caused when she was placed in a hot liquid and held there for a period of time long enough to sustain a full thickness injury. Canady objected when Voigt was asked whether Tiffany could have sustained the injuries without being held in the water by someone. The objection was overruled, and Voigt stated that a neurologically intact child such as Tiffany would not voluntarily stand in a bathtub of hot liquid and then sit down. He could not determine the temperature of the water based on Tiffany's injuries.

Voigt stated it is generally recommended that a water heater be set at 120 degrees. An adult would have to be in 112-degree water

for about 10 hours to sustain a full thickness burn. Although he did not calculate the figure precisely, Voigt estimated that a child would need to be in 112-degree water for 3 hours to sustain a full thickness burn. In 120-degree water, a child could sustain a full thickness burn in a little more than 3 minutes. Voigt stated that Tiffany had a very low risk of dying from her burns but that she would suffer significant impairment, including pigment change, loss of sweat gland and oil function, mobility problems, and growth retardation in height and body stature.

Det. Sgt. Gregory Sorensen of the Lincoln Police Department testified that Canady told him that he was in the kitchen cooking when Tiffany soiled her underwear, so he took her into the bathroom. Canady turned on the hot and cold water in the bathtub, took off Tiffany's clothes, and put her in the bathtub. Canady then returned to the kitchen. When he heard Tiffany crying, he returned to the bathroom, where she said the water was too hot. He said he turned on more cold water and left the bathroom. When he heard Tiffany still crying, he returned to the bathroom at about the same time Douglass entered the bathroom. Douglass told him the water was too hot, and he removed Tiffany from the bathtub.

Canady was found guilty of felony child abuse and sentenced to a term of 10 to 20 years in prison. He appeals.

ASSIGNMENTS OF ERROR

Canady assigns 15 errors, which we summarize as follows: Canady alleges that the district court erred (1) in overruling his motion to dismiss based on Neb. Rev. Stat. § 7-107 (Reissue 1997) because the Lancaster County Attorney's office stated in a separate juvenile court proceeding that his acts were unintentional; (2) in overruling his objections to the testimony of Arthur regarding tests of the water temperature because the testimony lacked foundation and was irrelevant and unreliable; (3) in overruling his objections to the testimony of Voigt as to causation because the testimony lacked proper and sufficient foundation; (4) in failing to sustain his objections to certain photographs that were irrelevant, cumulative, and unfairly prejudicial; (5) in overruling his motion to dismiss at the close of the State's evidence; (6) in overruling his motion for directed verdict at the close of

the evidence; (7) in failing to find that the evidence was insufficient and was contrary to law; and (8) in abusing its discretion in imposing an excessive sentence.

ANALYSIS

Canady alleges several errors relating to the juvenile court proceedings that took place following this incident. The State filed a petition alleging that Tiffany was a child as defined by Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998) in that she lacked proper parental care by reason of the faults or habits of Canady. In closing arguments at the formal hearing, counsel for the State said:

> And I want to be clear that it is not my position that he decided he was going to punish his daughter, put hot water in the tub and then put her in the tub. I don't — That's not the State's position as to what happened. What more likely than not happened is he became angry. He turned the water on. He didn't pay attention to how hot it was, put some bubbles in it, couldn't see steam, if there was any steam rising from it, put her in. She was crying. He was angry. He was yelling, and he just didn't pay enough attention to hear that she was saying, "It's too hot," and she needed to get out. And that was his responsibility as a parent.

The State's attorney continued:

> Now, again, I want to be clear. I do not think — and the State's position is not that Bruce Canady intentionally put his daughter in that hot water, but he was so angry that he was just not paying sufficient attention to what he did. He turned on that water.

Canady moved to dismiss the criminal charges based on § 7-107, arguing that the above statements during the juvenile court proceedings constituted a judicial admission that he did not intentionally place Tiffany in the water and did not intentionally harm her. He asserted that this judicial admission was binding on the State. He also argued that the criminal prosecution violated his due process rights and fundamental fairness in that the State was allowed to proceed on two different theories of liability. The district court overruled the motion to dismiss at the pretrial hearing and again when it was renewed at the close of the evidence.

On appeal, Canady claims that the district court erred in overruling the motion to dismiss because pursuant to § 7-107, the

prosecutor was bound by statements made in the juvenile court proceedings asserting that Canady's acts were unintentional. Section 7-107 states in relevant part:

> An attorney or counselor has power: . . . (2) to bind his client by his agreement in respect to any proceeding within the scope of his proper duties and powers; but no evidence of any such agreement is receivable except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court[.]

Canady argues that pursuant to § 7-107, the State was bound by the admission in the juvenile court proceedings that Canady acted unintentionally and that the criminal charges alleging that he acted intentionally should have been dismissed. He claims the parties "agreed" in the juvenile court proceedings that Canady had acted unintentionally. We disagree.

[2,3] "[A] judicial admission, as a formal act done in the course of judicial proceedings, is a substitute for evidence and thereby waives and dispenses with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by an opponent is true." *Anderson v. Cumpston*, 258 Neb. 891, 897-98, 606 N.W.2d 817, 823 (2000). We do not adopt Canady's argument that the State's comments during closing arguments in a juvenile court proceeding bind the State to the same theory in a criminal proceeding. The State's burden of proof in a juvenile hearing to establish child abuse or child neglect is a preponderance of the evidence. *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001), citing Neb. Rev. Stat. § 43-279.01(3) (Reissue 1998). The petition brought in juvenile court was "brought on behalf of the child, not to punish" Canady. See *In re Interest of Constance G.*, 247 Neb. 629, 635, 529 N.W.2d 534, 539 (1995). Comments made by counsel during closing arguments in the juvenile court proceeding did not bind the State as a judicial admission or bar it from pursuing criminal charges. The statements merely set forth the State's position as to the juvenile court proceedings.

Canady next argues that the district court erred in allowing Voigt to testify about the causation of Tiffany's injuries and that this testimony was not helpful to the jury. Canady filed a pretrial

motion in limine to preclude Voigt from testifying regarding causation of the burns. The court deferred ruling on the motion pending foundation. At trial, Canady objected when Voigt began to address the causation issue and the court granted Canady an opportunity to conduct a foundational voir dire in the presence of the jury. After excusing the jury, the court heard arguments and ruled that Voigt was qualified to offer an opinion as to the cause of the burns. The State then proceeded to examine Voigt, and the following colloquy took place:

> Q[:] Doctor, based on your training and experience, do you have an opinion, to a reasonable degree of medical certainty, as to what was the cause of Tiffany Canady's burns?
>
> A[:] I do.
>
> Q[:] And what do you base that opinion on?
>
> A[:] I base that opinion on the burn pattern that she has.
>
> Q[:] Do you need any photographs to describe that?
>
> A[:] I don't think so. I mean, we've kind of pointed it out all along. The tide marks; the nice, straight lines; the areas underneath the knees that are spared, and the fact that the toes were not burned.
>
> Q[:] What is your opinion?
>
> A[:] My opinion is that she was placed in a hot liquid and held there for a period of time, long enough to sustain a full thickness injury.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. Neb. Rev. Stat. § 27-702 (Reissue 1995). Admissibility of expert testimony depends on whether specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996).

In determining whether an expert's testimony is admissible, the court must first determine whether the witness qualifies as an expert pursuant to § 27-702. See *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990), *disapproved on other grounds, State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). Voigt, a medical doctor, had treated more than 1,500 burn inpatients,

approximately 300 scald burns, and 12 immersion scalds of juveniles and was qualified to testify as an expert.

The cause of Tiffany's burns was not in dispute. Voigt stated that the burns were caused when Tiffany was placed in a hot liquid and held there for a period of time long enough to sustain a full thickness injury.

Canady concedes that Voigt was qualified as a medical expert to testify about the injuries, but he asserts that Voigt did not have a sufficient basis for offering an opinion about the causation of the injuries because he had treated only 12 cases of immersion scalds of juveniles. This claim is without merit.

Next, Canady argues that because Voigt's testimony indicated that Canady intentionally caused the injury, the testimony should not have been admitted. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Neb. Rev. Stat. § 27-704 (Reissue 1995). Voigt's testimony as to the source of Tiffany's injuries was admissible. It was obvious to Douglass that Tiffany did not want to be in the hot water when she reached out to Douglass. The burn marks indicated that Tiffany tried to keep her body out of the water. Voigt's testimony was highly relevant to the determination of whether Canady knowingly or intentionally caused or permitted Tiffany to be placed in a situation that endangered her health. See § 28-707(1)(a). We conclude that the district court did not err in the admission of this evidence.

Canady also asserts as error that the testimony of Arthur lacked foundation and was irrelevant and unreliable. Although the State argues that the objections were not preserved for appellate review because Canady did not object to the testimony, we find that a sufficient objection was made when defense counsel approached the bench and stated that the tests were not reliable, lacked probative value, and were based on speculation. The district court overruled the objection. On appeal, Canady argues that the testimony was unreliable, irrelevant, and lacked foundation. We therefore proceed to examine the objection based on the reliability of the tests.

The thermometer used to measure the water temperature was a candy thermometer purchased at a grocery store. Arthur did not testify that the precision of the thermometer was evaluated

in any manner prior to its use to test the water temperature. Thus, the district court erred in allowing Arthur to testify as to the exact temperature of the water because there was no proof that the thermometer was accurate.

[4-7] We have previously held that to sustain a conviction based on information derived from an electronic or mechanical measuring device, there must be reasonable proof that the measuring device was accurate and functioning properly. *State v. Chambers*, 233 Neb. 235, 444 N.W.2d 667 (1989). The erroneous admission of evidence in a criminal case is prejudicial error unless the State proves that the error was harmless. See *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000). In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *State v. Kula*, 260.Neb. 183, 616 N.W.2d 313 (2000). Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001).

In our consideration of whether the admission of Arthur's testimony was harmless error, we must also examine Voigt's testimony and other evidence that was presented at trial. In this examination, we are to keep in mind that the issue presented to the jury was whether Canady knowingly or intentionally caused or permitted Tiffany to be placed in a situation that endangered her health. See § 28-707(1)(a). Therefore, we consider whether the jury was materially influenced by Arthur's testimony in reaching its verdict that Canady acted knowingly or intentionally.

The evidence clearly established that Tiffany was placed in a hot liquid long enough to sustain a full thickness burn. Voigt testified that Tiffany's injuries were consistent with an immersion scald, marked by a straight line of burns called a tidemark, which indicated the level that the water had reached on Tiffany's body.

Voigt was asked whether Tiffany could have sustained the injuries without being held in the water by someone. He stated

that a neurologically intact child such as Tiffany would not voluntarily stand in a bathtub of hot liquid and then sit down. He testified concerning the amount of time required to cause full thickness burns in adults and children. He stated that Tiffany's burns could have occurred by immersion for a matter of seconds if the water was hot enough, or she could have been restrained for a longer period of time.

We conclude that Arthur's testimony about the tests made with the thermometer did not materially influence the jury to determine that Tiffany had knowingly been placed in a situation dangerous to her physical health. The admission of Arthur's testimony was error, but it was harmless. The evidence supports a finding that Tiffany did not voluntarily sit in the bathtub of hot water and that she attempted to get out of the bathtub but was not permitted by Canady to do so.

[8] Canady next argues that photographs of Tiffany's burns were unfairly prejudicial. Canady's objections on the basis of cumulativeness and relevancy were overruled. The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001). The district court did not receive every photograph offered by the State. It reviewed the photographs and admitted only some of them. The State charged Canady with child abuse as a Class III felony, which requires that the abuse result in serious bodily injury. See § 28-707. The photographs were necessary to demonstrate the serious nature of the injury to Tiffany, and this assignment of error is without merit.

[9-11] Canady next asserts that the State failed to prove beyond a reasonable doubt that he acted intentionally and knowingly and that, therefore, the district court erred in not granting his motion to dismiss or his motion for directed verdict. In determining whether a criminal defendant's motion to dismiss for insufficient evidence should be sustained, the State is entitled to have all of its relevant evidence accepted as true, the benefit of every inference that can reasonably be drawn from the evidence, and every controverted fact resolved in its favor. *State v. Clark*, 255 Neb. 1006, 588 N.W.2d 184 (1999). In a criminal case, a court can direct a

verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001). If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed. *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001).

[12] Accepting the State's relevant evidence as true and giving the State every reasonable inference, the motion to dismiss was properly overruled. See *State v. Clark, supra*. The evidence was sufficient to find beyond a reasonable doubt that Canady "knowingly, intentionally, or negligently cause[d] or permit[ted] a minor child to be: (a) Placed in a situation that endanger[ed] his or her life or physical or mental health." See § 28-707. The crime was charged as a Class III felony, which occurs "if the offense is committed knowingly and intentionally and results in serious bodily injury." See *id.* A serious bodily injury is one which involves a substantial risk of death or which involves substantial risk of serious permanent disfigurement or protracted loss or impairment of the function of any part or organ of the body. See Neb. Rev. Stat. § 28-109(20) (Reissue 1995).

Tiffany's injuries were consistent with an immersion scald and were caused when she was placed in hot water and held there for a period of time long enough to sustain a full thickness injury. A normal child would not have voluntarily remained in the hot water. The evidence established that Tiffany will suffer significant impairment, including pigment change, loss of sweat gland and oil function, mobility problems, and growth retardation in height and body stature.

[13] Intent may be inferred from the words and acts of the accused and from the facts and circumstances surrounding the conduct. *State v. Ramsay*, 257 Neb. 430, 598 N.W.2d 51 (1999). The jury heard and observed the witnesses and the evidence. It is not this court's role to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence. We are bound to sustain the verdict of the jury if, taking the view most favorable to the

State, there is sufficient evidence to support it. See *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998), *cert. denied* 525 U.S. 895, 119 S. Ct. 219, 142 L. Ed. 2d 180. The evidence is sufficient, and the verdict must be upheld.

[14] Finally, Canady complains that the district court abused its discretion in imposing an excessive sentence. Canady was convicted of a Class III felony, which is punishable by a sentence from 1 to 20 years in prison. See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2000). Canady was sentenced to a term of 10 to 20 years in prison. Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001). Canady's sentence does not demonstrate that the court abused its discretion. This assignment of error is without merit.

CONCLUSION

Finding no merit to any of Canady's assignments of error, we affirm the judgment of conviction and sentence of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
RONALD E. CANADAY, APPELLANT.
641 N.W.2d 13

Filed March 29, 2002. No. S-01-150.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Entrapment: Appeal and Error.** Facts constituting entrapment are ordinarily to be determined by the jury or trier of fact in each individual case, and findings will be disturbed on appeal only when the preponderance of the evidence against such findings is great and they clearly appear to be wrong, or when the findings are clearly contrary to law.
3. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light

most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

4. **Criminal Law: Sentences: Final Orders: Appeal and Error.** In a criminal case, the trial court must pronounce sentence before a criminal conviction constitutes a final, appealable order.
5. **Conspiracy.** Under the unilateral approach to the agreement element of conspiracy embodied in Neb. Rev. Stat. § 28-202 (Reissue 1995), only the defendant need agree with another person; the second party can feign agreement. This approach applies equally when the party who feigns agreement is a government agent.
6. **Criminal Law: Entrapment: Words and Phrases.** Entrapment is the governmental inducement of one to commit a crime not contemplated by the individual in order to prosecute that individual for the commission of the criminal offense.
7. **Criminal Law: Entrapment.** While artifice and stratagem may be employed to catch those engaged in criminal enterprises, government agents, in their zeal to enforce the law, may not implant in an innocent person's mind the disposition to commit a criminal act and then induce commission of the crime so that the government may prosecute.
8. **Criminal Law: Entrapment: Words and Phrases.** In Nebraska, entrapment is an affirmative defense consisting of two elements: (1) the government induced the defendant to commit the offense charged and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense.
9. **Entrapment: Evidence: Proof.** The burden of going forward with evidence of government inducement is on the defendant. In assessing whether the defendant has satisfied this burden, the initial duty of the court is to determine whether there is sufficient evidence that the government has induced the defendant to commit a crime. This determination is made as a matter of law, and the defendant's evidence of inducement need be only more than a scintilla to satisfy his or her initial burden.
10. **Entrapment: Evidence.** A defendant need not present evidence of entrapment; he or she can point to such evidence in the government's case in chief or extract it from the cross-examination of the government's witnesses.
11. **Entrapment: Evidence: Proof.** When the defendant produces sufficient evidence to raise the defense, the question of entrapment becomes one of fact. The burden is then on the State to prove beyond a reasonable doubt that the defendant was not entrapped.
12. **Entrapment: Evidence: Words and Phrases.** Inducement can be any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent representation, threats, coercive tactics, harassment, promise of reward, or pleas based on need, sympathy, or friendship. Inducement requires something more than that a government agent or informant suggested the crime and provided the occasion for it.
13. **Entrapment: Words and Phrases.** Inducement consists of an opportunity plus something else, such as excessive pressure by the government upon the defendant or the government's taking advantage of an alternative, noncriminal type of motive.
14. **Entrapment: Evidence: Proof.** Where the State has induced an individual to break the law, it must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by government agents.
15. **Criminal Law: Entrapment: Evidence.** Predisposition to commit the criminal act must be independent and not be the product of the attention of the government

directed at the defendant. This is not to say that statements made after the government's inducement can never be evidence of predisposition. If, after the government begins inducing a defendant, he or she makes it clear that he or she would have committed the offense even without the inducement, that would be evidence of predisposition. However, only those statements that indicate a state of mind untainted by the inducement are relevant to show predisposition.

16. **Entrapment: Circumstantial Evidence.** Predisposition may be shown by circumstantial evidence.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Reversed and remanded with direction to dismiss.

Thomas C. Riley, Douglas County Public Defender, and Gary D. Olson for appellant.

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

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

STEPHAN, J.

Following a bench trial in the district court for Douglas County, Ronald E. Canaday was convicted of conspiracy to commit first degree sexual assault on a child and sentenced to 5 years' probation. Canaday appeals, arguing there was insufficient evidence to convict him because the State failed to prove beyond a reasonable doubt that he was not entrapped.

I. BACKGROUND

In 1995 and again in the fall of 1997, Det. Steven J. Henthorn of the Omaha Police Department placed an advertisement in "Express Contact," an adult magazine with strong sexual content. The advertisement was part of a proactive investigation designed to identify persons with a sexual interest in children. The advertisement read: "Single mom looking for right man who likes kids and understands needs!" The advertisement listed a Council Bluffs, Iowa, post office box and the name "Lisa," which name we will use when referring to any correspondence or contact between the Omaha Police Department and Canaday. According to Henthorn, the advertisement was purposefully

worded so that it identified children in a manner that was vague and open to interpretation.

On August 10, 1998, Henthorn received a letter from Canaday addressed to Lisa at the identified post office box in Council Bluffs. In the letter, Canaday wrote that he had obtained Lisa's name and address from "a list of women seeking men," which also included the phrases " 'Plain Mates' " and " 'love starved- man hungry-women.' " The letter gave Canaday's physical description and requested similar information about Lisa. Canaday wrote, "Being cautious, since I'm not sure of your feelings, I'll just say I Like Sex!" He concluded with a request to visit Lisa.

Henthorn testified that based upon his training in proactive investigation of child sexual offenders, there was nothing significant in Canaday's initial letter. Posing as Lisa, Henthorn sent a responsive letter to Canaday on September 10, 1998. The entire text of the letter read:

> Dear Ronald
>
> Thank you for writing. I have gotten several reply's [sic]. For some reason, yours caught my eye. I hope I am not making a mistake.
>
> I am 29, divorced and have three children. We are a very close family. I am trying to find someone to help with my children's special education.
>
> Someone who does not let society's views stand in the way. I have tried to be both mother and father to my children, but there are some things I am just not equipped to do. I hesitate to say more until I am sure you share my views. I hope you understand.
>
> /s/ Lisa

Henthorn testified at trial that the term "special education" is often used by persons with a sexual interest in children, the reference to "society's views" was purposefully vague, and the reference to "not [being] equipped" was meant to signify the lack of a male sex organ by the fictitious mother, Lisa.

Canaday responded in a letter received by Henthorn on September 17, 1998. In this letter, Canaday inquired as to what portion of his first letter attracted Lisa's attention. He also questioned why she referred to making a mistake and specifically asked, "Tell me what you are looking for? A friend? A mate? A

partner? A Husband?" He inquired about the ages of Lisa's children and whether they were boys or girls. He asked, "What kind of help with their 'special education'? What 'special education'? Please explain?" Canaday further wrote that he was not too worried about "society's views," although more explicit information from Lisa would be helpful. He wrote, "Lisa, I'm not complaining but your letter is very vague. I'd really like to understand. Please write and tell me some specific things about all the thing [sic] you eluded [sic] to in your letter." Henthorn testified that the inquiry about Lisa's children was significant because the advertisement had been placed in an adult magazine with an audience of adults seeking sexual partners, not personal relationships.

Lisa responded in a September 24, 1998, letter. In this letter, she wrote, "I have read your letter several times and I am not sure if you understand what I am looking for or not." She expressed fear of losing her children and stated, "I am looking to find the best teacher I can for my sweethearts [sic] special education. I want them to have the same kind of special memories that I do. My sweethearts are 12, 10 & 7. I have two girls and one boy. We are a very close family." Lisa concluded, "If you do understand I would love to hear back from you. If not please destroy my letters." Henthorn testified that the references to the "teacher" and potential loss of the children were intended to make it clear that the "special education" was sexual education for the children so that Canaday could extricate himself if he understood and was not interested.

Canaday responded in a letter received by Lisa on October 29, 1998. In this letter, he stated that there was a communication problem and that it was difficult to know if they shared the same views because he did not know what her views were. He wrote, "Maybe this will help — I am not with law enforcement, a postal inspector, or a morally righteous fanatic. I'm just a regular guy. No entrapment or judging other people." He then asked, "Is this 'special education' you are talking about associated with sex? Please don't be offended if not. I'm just trying to figure this out." Canaday wrote that he understood about trying to find the right partner in life and that he did not understand why Lisa would be worried about losing her children. He continued, "As for sex — I think that if everyone is agreeable to happenings then it's safe,

fun, and fulfilling. I sure wish I knew if this is what you are talking about. . . . Maybe I've helped you be 'safe and comfortable' with me and we can actually discuss this." Henthorn testified that Canaday's reference to not being associated with law enforcement was significant because it indicated that he was contemplating an illegal activity as opposed to a consensual adult sexual relationship. Henthorn also deemed it significant that Canaday associated "special education" with sex and that his reference to sex being "fun for everyone" indicated no age restrictions.

Lisa responded in a November 10, 1998, letter. She expressed the "strong feeling that you do share my views." She agreed that things should be safe, fun, and fulfilling and asked if Canaday was "comfortable teaching someone the ages of my sweethearts" and what he would "be comfortable teaching." Henthorn testified that these inquiries were intended to determine if Canaday found sex with children to be offensive.

Canaday's next letter was received by Henthorn on November 24, 1998. In this letter, Canaday stated "this would be a whole lot easier if you weren't so mysterious." He then asked if Lisa was affiliated with law enforcement because he wanted to be "sure I'm not getting 'suckered' in to [sic] something." Canaday wrote, "For now — Yes I believe I would be comfortable teaching your children." He asked, "Are we talking about teaching by example (demonstration by you and I)? Are we talking about teaching by 'hands on' experience (me physically teaching and you also physically teaching your kids)?" He indicated his understanding that Lisa was being cautious because she did not want to risk losing her children. He promised he was "not that type of person" and suggested that they meet personally or talk on the telephone so that they would both be more at ease. Henthorn testified that these passages further indicated Canaday's concern about the legality of the situation. Henthorn testified that this letter was significant because Canaday expressed comfort with "teaching" children, knowing that the teaching involved sex, and made the initial suggestion of personal or telephone contact with Lisa.

In his next response, Henthorn mistakenly sent Canaday a letter intended for another person, named "Dale," with whom the police, posing as Lisa, were also corresponding. The salutation of the letter read, "Dear Dale." The writer, Lisa, stated, "You are

right that I am only looking for a male teacher" and that when "I see the look of wonder and excitement in [the children's] eyes . . . I know what I am doing is right. I want them to have very special memories. Society does not understand. I can only hope that you do."

In a responsive letter received by Henthorn on December 10, 1998, Canaday stated that he read Lisa's last letter several times and was confused until he realized that "you put Dale's letter in the envelope to me. I may be a little slow but I eventually overcome my confusion!" He again inquired,

> Are you looking for a male as a partner? As a teacher along with you to teach your children about Love and Sex? By just talking to them or by visual aid (meaning you and I having sex in front of them)? Are you looking for a male to teach them by personal experience (having sex with them or aiding them in having sex with each other)?

Canaday concluded that if Lisa could answer his questions, he would know what would be expected of him. He also requested a photograph of Lisa and her children. Henthorn testified that this letter was significant because Canaday again referred to "physically having sex with the children and raises no opposition to that and doesn't tell us that that is something that he would not do." Henthorn further testified that Canaday's request for photographs was also significant because it sought personal contact.

Lisa responded in a December 14, 1998, letter to Canaday in which she apologized for sending the wrong letter and stated, "You were much nicer then [sic] Dale about it." She stated, "My sweethearts have made it clear that anything between me and their man teacher would upset them. Their teacher would be for them." She then stated that Canaday was "very close" about why she was being so cautious because "[m]y sweethearts are my life." She stated, "Trying to find a man teacher for them is the hardest thing I have ever tried to do. If I did not know it was what they want and need I would not continue my search." Henthorn testified that this letter was intended to make it clear that Lisa was not interested in a sexual relationship with Canaday.

Canaday responded in a letter which Henthorn received on December 30, 1998. He inquired as to how many men Lisa was corresponding with and then stated:

> OK so I am a male teacher strictly for your children and will have no involvement with you. Correct? Could you maybe just give me a hint as to what I would teach them and how? I think we had established that sexual education was the goal. You still haven't told me how? I take it I would need to move to Council Bluffs. Right?

Later in the same letter, Canaday asked, "Wouldn't it be easier to get down to specifics and just be straight-forward and say exactly what would be expected of me if I am the 'man teacher' you select?" He also asked whether the children had any role in choosing their teacher. He asked Lisa to explain why the children would be upset if he and she were involved. He also asked, "Is this strictly a 'hands-on' situation with me and your children? . . . Am I to teach your children in the bedroom? Are you teaching your son?" Henthorn testified that these statements indicated that Canaday "finally understands that this is just between him and the children, and he just wants that to be affirmed." Henthorn interpreted this letter as a "clearer desire [on the part of Canaday] to teach the children in a sexual manner."

Lisa responded in a January 4, 1999, letter. She informed Canaday that she had been writing to two other men. She thanked him for understanding that there would be nothing between them and told him that the children were involved in picking the teacher. She informed him that he seemed to understand what he would be doing and stated he could use the bedroom or wherever he would be comfortable. She also stated that after her experience with the children's father, she did not want another man in her life. She concluded by asking if he was comfortable teaching one or all of her children and asked what he had in mind for the first lesson.

Canaday responded in a letter received on January 15, 1999. He stated that he really enjoyed Lisa's last letter and that he finally felt like they were getting somewhere and he was understanding things better. He asked whether the other two men were also going to be teaching her children. He stated that the logical place to start teaching was in the bedroom and that they should start with him getting to know the children and they him so that everyone felt comfortable. He wrote, "You ask — Would I be comfortable teaching your children? It would be new for me but

I think I could be comfortable with it if they are with me." He suggested that the first lesson would involve helping the children with their curiosities and making it informal and pleasurable so that they could learn to enjoy all aspects of sex. He gave his telephone number and indicated when he could be reached.

On January 20, 1999, Officer Teresa Thorson, posing as Lisa, placed a telephone call to Canaday. Henthorn was in the room with Thorson and listened to both sides of the telephone conversation, which was recorded on audiotape. In this conversation, Lisa informed Canaday that she wanted only one teacher for her children and repeatedly asked what lessons he had in mind. Canaday stated that he was "new at this too, as far as children" but that he wanted them to learn what they were curious about. At one point, Lisa said to Canaday, "If you're not comfortable, you just tell me." He replied that he could not state whether he was comfortable with something unless he tried it and further stated, "I've never tried it, so I can't tell ya for sure if I'm comfortable about it or not." Lisa told Canaday that he seemed to understand her and sounded like a good person. Although the conversation was initially somewhat vague, Canaday finally stated, "We're talking about sex here so let's just be honest." When Lisa asked him what kind of sex he would engage in with the children, Canaday suggested that the education would be "hands on" and asked whether the children would be comfortable with that. Lisa said that she had talked to the children about it and that they were "ready" and "excited." She asked if she could "watch" and requested that Canaday send her a written "lesson plan."

Canaday complied with this request in a letter received by Henthorn on January 26, 1999. He wrote that the most important thing was that "we are all comfortable with and can trust each other." He indicated that they would start by kissing and touching and eventually remove clothes. He indicated that this would be followed by oral sex and then intercourse.

Thorson, again posing as Lisa, placed a second tape-recorded telephone call to Canaday on January 27, 1999. In this conversation, Lisa asked whether Canaday "still want[ed] to teach my sweethearts" and whether he understood that this was reality and not a fantasy. He responded affirmatively. Lisa also confirmed that there would be no relationship between her and Canaday.

Canaday responded that he had received that impression from Lisa's letter, stating, "I don't quite understand it, but hey, whatever you want." When Canaday mentioned that he understood his role as providing "guidance" to the children, Lisa responded, "Ron, I am looking for a teacher, though." When asked how he wished to proceed, Canaday stated that he wanted all three children involved so that no one felt left out. Lisa told him that he seemed like an understanding person and that the children "all seem to be excited." Lisa stated that she was somewhat nervous and that she wanted to "make sure I am comfortable with choosing the right person." Canaday responded, "If you're not, you can say so, you know." Lisa replied that if Canaday was comfortable with the plan, she would be comfortable too. Canaday admitted that he was somewhat uncomfortable because "this is something new for me" and "if the wrong people found out, this is gonna be really bad." Lisa responded, "You're making me nervous. Maybe we shouldn't even do this." Canaday asked whether the children knew not to tell anyone, and Lisa responded, "They know that this is something that's just in the family" and that based upon her discussions with them, "they know what would happen if they told." She repeated that the children were "excited" and said "they think it's gonna be a—a wonderful experience." Lisa then said, "It's awful hard for me to believe that you haven't taught before because you just seem to understand so much." Canaday said that his first wife mentioned that he taught her a lot, but he thought they learned together. When Lisa asked if Canaday planned to "bring anything to help my sweethearts learn," Canaday asked what she was referring to and said that all he had were "some tapes" of "amateurs." Lisa asked if the tapes showed "children learning." Canaday said, "No . . . it's all adults." He said that he did not know what else he could bring, but that if Lisa had any ideas in this regard, she should let him know. Lisa then proposed a date for their meeting in a hotel room and told Canaday that her oldest daughter wanted to bake him a favorite food. Canaday suggested cheeseburgers. Lisa said she would call later in the week to confirm arrangements. Canaday stated that he was "not exactly rich" and asked who would pay for the hotel room. Lisa said that she would. She reiterated that the children were "excited" and "really looking forward to it."

Thorson, posing as Lisa, initiated another tape-recorded telephone conversation with Canaday on February 3, 1999. In this conversation, Lisa again stated that she was "nervous" and asked if Canaday still wanted to teach her "sweethearts." When Canaday said yes, she said that the children were excited and that she was excited for them. Lisa inquired whether he knew it was not just a fantasy, and he again responded affirmatively. When Lisa asked him if he wanted to start the lesson with her oldest daughter, Canaday said yes but expressed concern that if he was with her and Lisa was with her son, there was still one child left out. Lisa told him that she did not want to participate because this was to be a "special time" with him. Canaday stated he did not want anyone to have bad feelings but he was not comfortable having sexual relations with the boy, stating "I've never done that." Lisa again inquired whether Canaday knew that it was not a fantasy and that she was not interested in him sexually; he indicated that he understood. Canaday stated that he had never taught sex to children before and, when questioned by Lisa, further stated that he had never even thought about it before. He stated that once the idea was put to him, he was interested because helping someone else better understand their sexuality would make him feel good. When asked by Lisa to describe what acts he would engage in with the children so that she could discuss it with them, Canaday indicated that he would begin with kissing and touching, then oral sex and intercourse. During the conversation, Lisa frequently commented how "excited" the children were about the plan. Lisa told Canaday that the children had purchased new special underwear and that he should act surprised when he saw it. He replied that he would be surprised because "I'm still at a loss for any idea at all what you're exactly talking about." Lisa informed him that she had reserved a room at an Omaha hotel and made arrangements to meet him there.

Canaday met Thorson, posing as Lisa, at the hotel room on February 5, 1999. Their meeting was videotaped. Seated next to each other on a loveseat, Canaday and Lisa talked for approximately 45 minutes. Lisa informed Canaday that she was nervous but would feel better if he could tell her exactly what was going to go on with the children. Canaday responded that he intended to do the things he described in the letter. Canaday confessed that he

was concerned about the "wrong people" finding out and that he was nervous he was getting set up and would have to go to jail. Canaday asked Lisa if the children would be disappointed when they saw him, and she responded no because she had taught them that a person is what is inside the heart. He stated he asked because he was used to people being disappointed with his looks, and Lisa told him he was a beautiful person. After several questions by Lisa, Canaday stated that he planned to start with the oldest daughter and that the younger boy and girl could watch and then try things they saw on each other if they wanted to. He stated that the activities would involve kissing, touching, and removing clothes, and then progress to oral sex and intercourse. Lisa showed Canaday pictures of the children, which she said were taken during a summer vacation at a nudist camp. She told him she had some difficulty getting the pictures developed and asked if he knew where she could get more prints. Canaday replied that he had no idea. Lisa showed him a magazine which apparently depicted nude pictures of children, and Canaday stated he had never seen such a magazine before. Canaday told Lisa about his girl friend who was incarcerated in Oklahoma and whom he eventually planned to marry. The girl friend had two young daughters, and when Lisa asked if he might teach them, he stated they had never talked about that, but the mother was pretty open about such things. Lisa asked Canaday if he was aware that this was reality, and he said he knew it was. She gave him a key to a room where the children allegedly were. After the conversation ended, Canaday entered the room and was met and arrested by Henthorn.

Canaday consented to a search of his vehicle, which resulted in the discovery of a bottle of baby oil, an unopened box of condoms, and a Polaroid camera. After he was advised of his *Miranda* rights, Canaday stated that he learned about Lisa in a "swinging magazine" and that he was at the hotel to teach her children about sex.

Henthorn testified that he conducted a background check on Canaday after the third letter and found no criminal history. He stated that Canaday's home was searched after his arrest and that no evidence of child pornography was found. Henthorn denied that the letters from Lisa suggested the "lesson plan" must involve physical sex.

Testifying on his own behalf, Canaday stated that he responded to the magazine advertisement in order to meet Lisa, not with the intention of having sex with children. Canaday, who was 44 years old at the time of trial, testified that aside from his first sexual experience at the age of 20, which involved a female hitchhiker who told him she was 16 but was actually 13, he had no sexual encounters with minor children. He said that he responded in his letters as though he was willing to have sex with the children in order to meet Lisa.

On cross-examination, Canaday testified that after "guessing at it," he understood that Lisa's references to "special education" dealt with sex. He admitted that he was the first to suggest telephone and personal contact with Lisa. He testified that he was making her believe he would have sex with the children but that he did not think she was serious. He testified that he went into the hotel room where Lisa told him her children were in order to "see what game she was playing." Canaday further testified that the condoms and baby oil had been in his vehicle since the fall of 1998 and that the camera was in his overnight bag so that it would not get dirty. He testified that he thought Lisa was just using a different approach to screening people that she wanted to meet.

On November 3, 1999, following a bench trial, the district court found Canaday guilty of conspiracy to commit first degree sexual assault on a child, noting that the paraphernalia found in Canaday's car strongly influenced its decision. On December 29, Canaday was sentenced to 5 years' probation. Canaday filed this appeal. Although the notice of appeal was filed within 30 days of the December 29 sentencing order which is included in the record, the notice refers to a December 12 sentencing order imposing a term of 12 to 36 months' imprisonment for the crime of first degree sexual assault.

II. ASSIGNMENT OF ERROR

Canaday assigns that the State failed to prove beyond a reasonable doubt that he was not entrapped, and thus, there was insufficient evidence to find him guilty of the crime.

III. STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law,

which requires the appellate court to reach a conclusion independent of the lower court's decision. *State v. Ehlers*, 262 Neb. 247, 631 N.W.2d 471 (2001).

[2] Facts constituting entrapment are ordinarily to be determined by the jury or trier of fact in each individual case, and findings will be disturbed on appeal only when the preponderance of the evidence against such findings is great and they clearly appear to be wrong, or when the findings are clearly contrary to law. *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001).

[3] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Redmond*, 262 Neb. 411, 631 N.W.2d 501 (2001); *State v. Heitman, supra*.

IV. ANALYSIS

1. Appellate Jurisdiction

The State argues that we lack jurisdiction to hear this appeal because the notice of appeal refers to a sentencing order different from the sentencing order contained in the record. The record includes an order file stamped December 29, 2000, sentencing Canaday to 5 years' probation. The notice of appeal, file stamped January 26, 2001, is captioned, "The State of Nebraska, Plaintiff, vs. Ronald Canady [sic], Defendant" and includes the same docket number appearing on the sentencing order. However, it is clear that an error was made in preparing the notice of appeal because it recites a sentencing date, offense, and sentence which do not correspond to the order sentencing Canaday.

The statute governing the perfection of appeals, Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000), provides in pertinent part:

> (1) The proceedings to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court, including judgments and sentences upon convictions for felonies and misdemeanors, shall be by filing in the office of the clerk of the district court in which such judgment, decree, or final order was rendered, within thirty days after the entry of such judgment, decree,

> or final order, a notice of intention to prosecute such appeal signed by the appellant or appellants or his, her, or their attorney of record . . . .

[4] In a criminal case, the trial court must pronounce sentence before a criminal conviction constitutes a final, appealable order. *State v. Beyer*, 260 Neb. 670, 619 N.W.2d 213 (2000). Here, the notice of appeal was filed within 30 days of the final sentencing order in the record and, thus, meets the time restrictions of § 25-1912. The notice is signed by Canaday's attorney and in all other respects comports with the requirements of the statute. The notice reflects the same docket number as the sentencing order.

Although the erroneous information in the notice of appeal demonstrates the potential perils of careless word processing, we conclude that it does not defeat Canaday's right to appeal his conviction and sentence. It is clear from the record that the notice of appeal was timely filed on January 26, 2001, within 30 days from the valid final order of sentencing entered by the district court on December 29, 2000. It is equally clear that the notice was intended to effect an appeal from Canaday's conviction and sentence in this proceeding. Because the notice was timely filed and the erroneous reference to what was apparently a sentencing order in some other case is neither confusing nor prejudicial to the State, we conclude that we have jurisdiction to consider and resolve the appeal.

2. Entrapment

(a) General Principles

Canaday was charged with conspiracy to commit sexual assault on a child. Criminal conspiracy is defined in Neb. Rev. Stat. § 28-202 (Reissue 1995), which provides in pertinent part:

> (1) A person shall be guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a felony:
>
> (a) He agrees with one or more persons that they or one or more of them shall engage in or solicit the conduct or shall cause or solicit the result specified by the definition of the offense; and
>
> (b) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy.

[5] Under the unilateral approach to the agreement element of conspiracy embodied in § 28-202, only the defendant need agree with another person; the second party can feign agreement. *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001); *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995). This approach applies equally when the party who feigns agreement is a government agent. *State v. Heitman, supra*. See, also, *State v. John*, 213 Neb. 76, 328 N.W.2d 181 (1982).

Section 28-202 further provides: "A person prosecuted for a criminal conspiracy shall be acquitted if such person proves by a preponderance of the evidence that his or her conduct occurred in response to an entrapment."

[6,7] The only substantive issue presented in this appeal is whether the district court erred in rejecting Canaday's entrapment defense. Entrapment is the governmental inducement of one to commit a crime not contemplated by the individual in order to prosecute that individual for the commission of the criminal offense. *State v. Heitman, supra*. While " '[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises,' " government agents, in their zeal to enforce the law, may not "implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute." *Jacobson v. United States*, 503 U.S. 540, 548, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992), quoting *Sorrells v. United States*, 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413 (1932). See, also, *State v. Connely*, 243 Neb. 319, 499 N.W.2d 65 (1993).

[8-11] In Nebraska, entrapment is an affirmative defense consisting of two elements: (1) the government induced the defendant to commit the offense charged and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense. *State v. Heitman, supra*. The burden of going forward with evidence of government inducement is on the defendant. *Id.* In assessing whether the defendant has satisfied this burden, the initial duty of the court is to determine whether there is sufficient evidence that the government has induced the defendant to commit a crime. *State v. Graham*, 259 Neb. 966, 614 N.W.2d 266 (2000). This determination is made as a matter of law, and

the defendant's evidence of inducement need be only more than a scintilla to satisfy his or her initial burden. *State v. Heitman, supra*; *State v. Graham, supra*. A defendant need not present evidence of entrapment; he or she can point to such evidence in the government's case in chief or extract it from the cross-examination of the government's witnesses. *State v. Heitman, supra*. When the defendant produces sufficient evidence to raise the defense, the question of entrapment becomes one of fact. *Id.* The burden is then on the State to prove beyond a reasonable doubt that the defendant was not entrapped. *Id.*; *State v. Connely, supra*.

In finding Canaday guilty, the district court stated:

> The charge here is criminal conspiracy. And after reviewing all of the evidence, Mr. Canaday, I am left firmly convinced that you are guilty of criminal conspiracy. I need to explain my process — my thought process here for you. I don't have any enthusiasm for the efforts to find out whether folks might be disposed to commit crimes. And I must say that throughout the process here, both you and the investigators for the State were walking a very thin line. In the end, what resolved the matter for me was the meeting that you had with the investigator that — where you brought along the paraphernalia that were going to be, by my view, used in the encounter with the subjects.
>
> It isn't an easy process and it's not — I didn't — I didn't have any enthusiasm in working on this, because I do think that both you and the investigators were coming as close as you could without stepping over the line either with entrapment or an offer. But the — the meeting that you had with the investigator and the material that you brought with you over from Iowa did leave me firmly convinced that the State had met its burden of proof.

Our review of the entrapment issue is complicated by the fact that the district court did not make specific findings on the issues of inducement and predisposition. However, rejection of the defense could have resulted from only two alternative factual findings: either the district court determined that the State did not induce Canaday to commit the offense charged or the court found that there was inducement but that Canaday was predisposed to

commit the offense. Accordingly, we review the record to determine its sufficiency to support either of these findings.

(b) Inducement

[12,13] Inducement can be any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent representation, threats, coercive tactics, harassment, promise of reward, or pleas based on need, sympathy, or friendship. *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001). Inducement requires something more than that a government agent or informant suggested the crime and provided the occasion for it. *Id.* For example, we have held that a government agent's simple offer to purchase a controlled substance or inquiry about its availability for sale does not constitute an inducement of the person to whom the offer or inquiry was made. *State v. Graham*, 259 Neb. 966, 614 N.W.2d 266 (2000); *State v. Van Egmond*, 233 Neb. 834, 448 N.W.2d 569 (1989). Inducement consists of an opportunity plus something else, such as excessive pressure by the government upon the defendant or the government's taking advantage of an alternative, noncriminal type of motive. *State v. Heitman, supra.*

The pertinent inquiry with respect to the issue of inducement in this case is whether the State went beyond simply providing Canaday with an opportunity to commit the offense. Our recent decision in *State v. Heitman, supra*, is illustrative. In that case, Heitman, a 53-year-old man, initiated the events by giving a 14-year-old girl working at a fast-food restaurant an envelope containing a sexually suggestive letter, money, condoms, and his e-mail address. After exchanging numerous e-mail messages with a police officer who was posing as the girl and eventually agreeing to meet the girl for a sexual encounter, Heitman was charged with conspiracy to commit first degree sexual assault on a child. In considering whether he was induced to commit the crime, we noted that the police officer sent "numerous e-mail messages aimed at affecting his emotions and desires," including messages indicating that the man was one of the few people who understood the girl and that the girl was looking for a sexual teacher. *Id.* at 200, 629 N.W.2d at 555. We also noted that it was the officer, posing as the girl, who first requested descriptions of

the sexual activity the man wished to engage in and that it was the officer who first suggested meeting for the purpose of a sexual encounter. We held that these facts established inducement to commit the crime, notwithstanding the fact that the trial court had not made a specific finding in this regard.

In *Heitman*, we cited and relied upon *U.S. v. Poehlman*, 217 F.3d 692 (9th Cir. 2000), in resolving the issue of inducement. That case involved facts strikingly similar to those before us here. Poehlman, a divorced male, visited " 'alternative lifestyle' " discussion groups on the Internet in an effort to find a companion. *Id.* at 695. He responded to an ad from an undercover agent posing as a woman named "Sharon," who indicated that she was a mother looking for someone who understood her family's " 'unique needs.' " *Id.* Throughout the ensuing e-mail correspondence, Sharon indicated that she was looking for someone to help with the " 'special education' " of her children who would be understanding and would " 'not let society's views stand in the way.' " *Id.* She made it clear that there could not be " 'anything between me and my sweethearts [sic] special teacher.' " *Id.* at 697. Eventually, Poehlman perceived that Sharon was looking for a male sexual mentor for her three daughters, ages 7, 10, and 12. At Sharon's prompting, Poehlman detailed the sexual acts he would teach to the children. Sharon later made telephone contact and arranged for Poehlman to meet her in a hotel room in another state. When she escorted him to an adjoining room to meet and teach her "children," Poehlman was arrested by law enforcement officials and subsequently charged with crossing state lines for the purpose of engaging in sex acts with a minor.

In concluding that Poehlman was induced to commit the offense, the court noted that while Poehlman was originally interested in a relationship with Sharon, she made it increasingly clear that his agreement to serve as a sexual mentor for her children was a condition of her own continued interest in him. Noting Sharon's repeated requests that Poehlman provide her with lesson plans, the court found a clear implication that unless he did so, Sharon would discontinue contact and seek another mentor. The court reasoned that the "government thus played on Poehlman's obvious need for an adult relationship, for acceptance of his sexual

proclivities and for a family, to draw him ever deeper into a sexual fantasy world" involving imaginary children. *Id.* at 702. The court concluded that "[t]hrough its aggressive intervention, the government materially affected the normal balance between risks and rewards from the commission of the crime, and thereby induced Poehlman to commit the offense." *Id.* at 702-03.

In the instant case, there is ample evidence that the State went beyond simply providing Canaday with an opportunity to violate the law. State agents made the initial references to children and brought up the issues of "special education," "society's views," and "special memories." Throughout the correspondence, and particularly in the telephone and videotaped conversations, Lisa repeatedly made it clear that she had made a firm decision about taking an active role in her children's sexual education and repeatedly informed Canaday about how "excited" the children were that he was going to be their teacher. Lisa told Canaday that she felt like he really "understood" her and understood what the rest of society did not. The overall implication of Lisa's correspondence with Canaday was that she was seeking someone who would realize, as she supposedly did, the value and benefits of teaching children about sex in a manner that society in general and law enforcement in particular would find objectionable. In that regard, she played on his emotions and desires. There is also evidence in the record that Canaday continued to seek an adult relationship with Lisa. By this evidence, especially Lisa's repeated statements to Canaday about her decision that a sexual education would be beneficial to her "sweethearts" and that he understood her while others did not, the State materially affected the normal balance between risks and rewards from the commission of the crime and induced Canaday to commit the offense. See *U.S. v. Poehlman*, 217 F.3d 692 (9th Cir. 2000). Because the State did more than simply present the opportunity to commit the crime, we conclude that Canaday was induced to commit the offense of conspiracy, and any contrary finding would be clearly erroneous.

(c) Predisposition

[14-16] Where the State has induced an individual to break the law, it must prove beyond a reasonable doubt that the defendant

was disposed to commit the criminal act prior to first being approached by government agents. *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001), citing *Jacobson v. United States*, 503 U.S. 540, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992). See, also, *U.S. v. Poehlman, supra*. Predisposition to commit the criminal act must be independent and not be the product of the attention of the government directed at the defendant. *State v. Heitman, supra*; *State v. Connely*, 243 Neb. 319, 499 N.W.2d 65 (1993). As we stated in *Heitman*, this is not to say that statements made after the government's inducement can never be evidence of predisposition. If, after the government begins inducing a defendant, he or she makes it clear that he or she would have committed the offense even without the inducement, that would be evidence of predisposition. *U.S. v. Poehlman, supra*; *State v. Heitman, supra*. However, only those statements that indicate a state of mind untainted by the inducement are relevant to show predisposition. *Id.* Predisposition may be shown by circumstantial evidence. *State v. Heitman, supra*. See, also, *State v. Parks*, 212 Neb. 635, 324 N.W.2d 673 (1982).

The distinction between predisposition which defeats an entrapment defense and criminal intent formulated only after governmental inducement is demonstrated by contrasting the facts in *Heitman* with those presented in both *Jacobson v. United States, supra*, and *U.S. v. Poehlman, supra*. In *Heitman*, we stated that predisposition could not be established by statements made by Heitman in correspondence with undercover police officers subsequent to inducement when the statements were indicative of his state of mind and intent at only that time. However, there was also evidence that Heitman initiated contact with the 14-year-old girl by giving her a sexually suggestive letter, money, condoms, and his e-mail address prior to any governmental involvement. Because the trial court considered and relied upon this evidence, we determined that its finding of predisposition was not clearly erroneous and affirmed the conviction.

In *Jacobson v. United States, supra*, law enforcement officials discovered Jacobson's name on the mailing list of an adult bookstore from which he had legally ordered certain publications. Subsequent to the order, the purchase of such publications became illegal under a newly enacted federal law. After 2½ years

of receiving various mailings from governmental agents, Jacobson ordered a magazine depicting children engaged in sexual activities. Following his arrest, a search of his home revealed no pornographic materials other than those sent by the government and those he had purchased legally prior to the government's solicitations. Reversing Jacobson's conviction of receiving child pornography through the mail, the U.S. Supreme Court held that the government had failed, as a matter of law, to prove a predisposition which was independent from and not the product of the mailings it directed to the defendant. Similarly, in *U.S. v. Poehlman*, 217 F.3d 692, 704 (9th Cir. 2000), the court held that no inference of predisposition could be drawn from the defendant's vivid e-mail descriptions of what he would teach "Sharon's" children because such statements did not "differentiate his state of mind prior to the government's intervention from that afterwards."

The acts described by Canaday in response to Lisa's repeated questions and requests for detailed "lesson plans" reveal nothing with respect to his predisposition prior to the State's inducement. Contrary to the district court's view, the items discovered in Canaday's vehicle following his arrest likewise do not bear on predisposition. Statements which Canaday made during the extended period of correspondence and conversations with Lisa actually negate a predisposition toward sexual interest in children. After several months of correspondence, Canaday replied to Lisa's inquiry about whether he would be "comfortable" teaching her children that "[i]t would be new for me but I think I could be comfortable with it if they are with me." A few days later, in the first telephone conversation between Canaday and Lisa, Canaday remarked that he was "new at this too, as far as children," and that "I've never tried it, so I can't tell ya for sure if I'm comfortable about it or not." In the second telephone conversation, Canaday again admitted that he was somewhat uncomfortable because "this is something new for me" and because he knew what they were discussing was illegal. In response to Lisa's question about whether he intended to "bring anything to help my sweethearts learn," Canaday mentioned that he had "some tapes." When Lisa asked if the tapes showed "children learning," he replied that the tapes depicted only adults.

During the third telephone conversation, Canaday stated that he had never taught sex to children, and until becoming acquainted with Lisa, he had never even thought about it. During the videotaped personal meeting, when Lisa showed Canaday nude photographs of her "children," he remarked that he had never seen such photographs before. When she asked him if he knew where she could have more reprints made, he said he had no idea. He spent much of the time telling Lisa about his own failed adult relationships.

As noted, the search of Canaday's home subsequent to his arrest revealed no child pornography or other indication of a sexual interest in children. He had no prior criminal record. The only evidence of any sexual contact with a minor was Canaday's admission that his first sexual experience at the age of 20 involved a female hitchhiker whom he believed to be 16 but later learned was younger. This isolated incident, occurring more than 20 years before the offense with which Canaday was charged, is simply too remote in time and circumstance to support an inference of predisposition.

The State argues that predisposition was shown by the mere fact that Canaday responded to the advertisement placed by Henthorn, which stated, "Single mom looking for right man who likes kids and understands needs!" This argument is tenuous at best in light of Henthorn's testimony that the advertisement was intentionally left "very vague and open to different interpretations." Although Canaday testified that he "probably" had purchased a copy of the magazine in which the advertisement appeared in the summer of 1998, he was not asked to identify the copy which was received in evidence. The advertisement, which Henthorn testified was placed no later than the fall of 1997, is not referred to by Canaday in his first letter to Lisa received on August 10, 1998, or in any subsequent communication. In the first paragraph of Canaday's initial letter, he stated that he received Lisa's name from a "list of women seeking men" and that the list contained the phrases " 'Plain Mates' " and " 'love starved- man hungry-women.' " This language does not appear in the advertisement placed by Henthorn. Canaday's initial letter contains no reference to children, and Henthorn conceded that based upon his training, he found nothing about the letter to be

significant. Under these circumstances, no reasonable inference can be drawn that Canaday's initial contact with Lisa evidenced any predisposition to commit an unlawful act. Based upon our review of the entire record, we conclude that there is no evidence upon which a rational finder of fact could conclude that Canaday had a predisposition to commit the offense with which he was charged prior to and independent of the State's inducement.

V. CONCLUSION

The defense of entrapment serves to prevent law enforcement agencies from overstepping the "line between setting a trap for the 'unwary innocent' and the 'unwary criminal.'" *Jacobson v. United States*, 503 U.S. 540, 542, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992), quoting *Sherman v. United States*, 356 U.S. 369, 78 S. Ct. 819, 2 L. Ed. 2d 848 (1958). See, also, *State v. Connely*, 243 Neb. 319, 499 N.W.2d 65 (1993). Based upon our review of the record in this case, we conclude that the State crossed the line by inducing Canaday to commit an offense which he was not otherwise predisposed to commit. Because it was clearly erroneous to conclude from this record that the State disproved entrapment beyond a reasonable doubt, Canaday's judgment of conviction and sentence is reversed and the cause is remanded with direction to dismiss.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

ROLAND F. WAITE AND FRANK KREJCI, APPELLANTS, V. CITY OF OMAHA ET AL., APPELLEES.

641 N.W.2d 351

Filed March 29, 2002. No. S-01-193.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **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. ____: ____. Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
4. **Constitutional Law: Supreme Court: Jurisdiction: Appeal and Error.** Except in those cases wherein original jurisdiction is specially conferred by Neb. Const. art. V, § 2, the Nebraska Supreme Court exercises appellate jurisdiction, and such appellate jurisdiction can be conferred only in the manner provided by statute.
5. **Actions: Parties: Final Orders.** Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2000) is implicated only where multiple causes of action are presented or multiple parties are involved, and a final judgment is entered as to one of the parties or causes of action.
6. **Final Orders: Appeal and Error.** Neb. Rev. Stat. § 25-1902 (Reissue 1995) provides that an order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
7. **Injunction: Final Orders: Appeal and Error.** An order denying or dissolving a temporary injunction or restraining order is not a final order as defined in Neb. Rev. Stat. § 25-1902 (Reissue 1995).
8. **Jurisdiction: Final Orders: Appeal and Error.** In the absence of a judgment or order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal.

Petition for further review from the Nebraska Court of Appeals, HANNON, SIEVERS, and CARLSON, Judges, on appeal thereto from the District Court for Douglas County, SANDRA L. DOUGHERTY, Judge. Judgment of Court of Appeals affirmed.

James D. Sherrets and Michael S. Kennedy, of Sherrets & Boecker, L.L.C., for appellants.

Robert J. Hamer, Deputy City Attorney, for appellees.

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

GERRARD, J.

INTRODUCTION

The issue presented in this case is whether an order denying a temporary injunction and dissolving a temporary restraining order is a final, appealable order. Because it is not, we are without jurisdiction to consider the merits of this appeal.

BACKGROUND

On January 12, 2001, the plaintiffs, Roland F. Waite and Frank Krejci, filed a petition in the district court seeking a temporary restraining order, a temporary injunction, and a permanent

injunction against the City of Omaha and other city officials to prevent certain ordinances, passed on January 9, from going into effect. The ordinances at issue would close and vacate a street which the plaintiffs claim will impair access to and have the effect of devaluing their commercial property and will deter existing tenants and prospective tenants from renewing and accepting leases at the property. On January 12, the district court entered a temporary restraining order, finding that the plaintiffs had demonstrated that they may suffer irreparable damage by operation of the ordinances and enjoining the City of Omaha from acting upon the ordinances until further order of the court.

On February 1, 2001, the district court entered an order which denied the plaintiffs' request for a temporary injunction and dissolved the temporary restraining order. The district court determined that the plaintiffs had not shown by competent evidence that they were entitled to injunctive relief because the "evidence of Plaintiffs' prospective damage is not such that it can be said that their right is clear, their damage irreparable, and in particular that their remedy at law is inadequate to prevent a failure of justice." The district court further reasoned that the closing of the street could result in only a loss of income or value, which is compensable at law in Nebraska. Therefore, the district court concluded that the plaintiffs had not established every fact necessary to entitle them to injunctive relief and thus were not entitled to a temporary injunction. The district court did not, however, dispose of the plaintiffs' request for a permanent injunction.

The plaintiffs appealed from the district court's February 1, 2001, order. The Nebraska Court of Appeals summarily dismissed the plaintiffs' appeal for lack of jurisdiction on March 13, 2001. We granted the plaintiffs' petition for further review.

ASSIGNMENT OF ERROR

Summarized, the plaintiffs' petition for further review contends that the Court of Appeals erred in dismissing the appeal for lack of jurisdiction.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law,

which requires the appellate court to reach a conclusion independent of the lower court's decision. *In re Interest of Jaden H., ante* p. 129, 638 N.W.2d 867 (2002).

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. *Saunders County v. City of Lincoln, ante* p. 170, 638 N.W.2d 824 (2002). Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte. *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

[4-6] Except in those cases wherein original jurisdiction is specially conferred by Neb. Const. art. V, § 2, the Nebraska Supreme Court exercises appellate jurisdiction, and such appellate jurisdiction can be conferred only in the manner provided by statute. *Nebraska Dept. of Health & Human Servs. v. Struss*, 261 Neb. 435, 623 N.W.2d 308 (2001). The two statutes primarily relevant to the issue of appellate jurisdiction are Neb. Rev. Stat. §§ 25-1315(1) (Cum. Supp. 2000) and 25-1902 (Reissue 1995). See, generally, *Keef, supra*. Section 25-1315(1), however, is implicated only where multiple causes of action are presented or multiple parties are involved, and a final judgment is entered as to one of the parties or causes of action. *Keef, supra*. Because those conditions are not present in this case, our jurisdictional inquiry is limited to § 25-1902, which provides that an order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered. See *Keef, supra*.

[7] The plaintiffs in this case contend that although the district court has yet to rule on their request for a permanent injunction, the order denying a temporary injunction and dismissing the temporary restraining order is nonetheless a final, appealable order. This contention, however, is contrary to over 130 years of law establishing that an order denying or dissolving a temporary injunction or restraining order is not a final order as defined in § 25-1902. See, e.g., *Abramson v. Bemis*, 201 Neb. 97, 266 N.W.2d 226 (1978); *Young v. City of Albion*, 77 Neb. 678, 110

N.W. 706 (1906); *Meng v. Coffee*, 52 Neb. 44, 71 N.W. 975 (1897); *Manning v. Connell*, 47 Neb. 83, 66 N.W. 17 (1896); *Bartram v. Sherman*, 46 Neb. 713, 65 N.W. 789 (1896); *School Dist. No. 15 v. Brown*, 10 Neb. 440, 6 N.W. 770 (1880); *Scofield v. The State National Bank of Lincoln*, 8 Neb. 16 (1878); *Smith v. Sahler*, 1 Neb. 310 (1871); *O'Connor v. Kaufman*, 6 Neb. App. 382, 574 N.W.2d 513 (1998), *aff'd* 255 Neb. 120, 582 N.W.2d 350. See, also, *Guaranty Fund Commission v. Teichmeier*, 119 Neb. 387, 229 N.W. 121 (1930); *Barkley v. Pool*, 102 Neb. 799, 169 N.W. 730 (1918); *Einspahr v. Smith*, 46 Neb. 138, 64 N.W. 698 (1895); *Buda v. Humble*, 2 Neb. App. 872, 517 N.W.2d 622 (1994) (entry or continuance of temporary injunction is not final order).

The plaintiffs rely on *Airport Auth. of Village of Greeley v. Dugan*, 259 Neb. 860, 866, 612 N.W.2d 913, 918 (2000), in which we concluded that "the denial of a temporary injunction in the condemnation proceeding is an order that affects a substantial right and determines the action with regard to the request for equitable relief." In *Airport Auth. of Village of Greeley*, however, the appellant landowners sought both temporary and permanent injunctions to enjoin an airport authority from taking their property pursuant to condemnation proceedings, and the airport authority filed a petition for writ of assistance seeking that the landowners be ordered to give up possession of the condemned property. The district court's order generally denied the landowners' requests for temporary and permanent injunctions and granted the airport authority's petition for writ of assistance. It was from that order that the landowners in *Airport Auth. of Village of Greeley* appealed.

While it is well established that orders relating to temporary injunctions and restraining orders are not final orders, it is equally well established that orders entering or denying permanent injunctions, which leave no issues remaining to be determined by the trial court, are final orders within the meaning of § 25-1902. See, e.g., *Galstan v. School. Dist. of Omaha*, 177 Neb. 319, 128 N.W.2d 790 (1964), *overruled on other grounds, School Dist. of Waterloo v. Hutchinson*, 244 Neb. 665, 508 N.W.2d 832 (1993); *Rickards v. Coon*, 13 Neb. 419, 14 N.W. 162 (1882); *O'Connor, supra*; *Buda, supra*. Similarly, an order

granting a writ of assistance, where no other issues remain to be decided, is a final, appealable order. See *Escritt v. Michaelson*, 73 Neb. 640, 106 N.W. 1016 (1906).

Had the order in *Airport Auth. of Village of Greeley, supra*, merely denied a temporary injunction, without ruling on the other issues presented in the case, then that order would not have been final. However, since the order denied both temporary and permanent injunctions and granted the airport authority's petition for writ of assistance, it was a final order within the meaning of § 25-1902. To the extent that the language of *Airport Auth. of Village of Greeley, supra*, implies that the denial of a temporary injunction, standing alone, is a final order pursuant to § 25-1902, that implication was inadvertent, as that issue was not presented by the circumstances of that case.

[8] Dissolution of a temporary restraining order is not a final order within the meaning of § 25-1902. *Abramson v. Bemis*, 201 Neb. 97, 266 N.W.2d 226 (1978). The district court's February 1, 2001, order did not finally dispose of this case. In the absence of a judgment or order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal. *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

We also note that the plaintiffs' appellate brief assigns error to the district court's refusal to grant a stay or supersedeas pending disposition of the plaintiffs' appeal. The district court reasoned that the plaintiffs were not entitled to a supersedeas where a temporary restraining order had been granted ex parte, but upon hearing a temporary injunction had been denied and the temporary restraining order dissolved. See *State ex rel. Beck v. Associates Discount Corp.*, 161 Neb. 410, 73 N.W.2d 673 (1955) (distinguishing between temporary restraining order and temporary injunction and stating that dissolution of temporary restraining order cannot be superseded).

The proceedings in the district court relating to supersedeas, while reflected in our record on appeal, occurred entirely after the filing of the plaintiffs' notice of appeal, calling into question whether that issue is properly before this court on appeal. See Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2000). The effect of a supersedeas bond is to either maintain an order in force or prevent the execution of an order until a case is finally heard and

determined, but not to make the underlying order, if otherwise nonfinal, into a final and appealable order. See, *Horst v. Board of Supervisors of Dodge County*, 5 Neb. (Unoff.) 410, 98 N.W. 822 (1904); *Green v. Morse*, 57 Neb. 798, 78 N.W. 395 (1899). We have determined that the dissolution of the temporary restraining order is not a final order; we are also without jurisdiction to decide any issues regarding the denial of the supersedeas bond.

CONCLUSION

The Court of Appeals correctly concluded that it was without appellate jurisdiction to consider the merits of the plaintiffs' purported appeal. The judgment of the Court of Appeals, dismissing the plaintiffs' purported appeal, is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
KAMIL H. AL-ZUBAIDY, APPELLANT.
641 N.W.2d 362

Filed April 5, 2002. No. S-00-535.

1. **Actions: Judicial Notice: Records.** Where cases are interwoven and interdependent and the controversy involved has already been considered and decided by the court in a former proceeding involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.
2. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
3. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
4. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the state or federal Constitution. An evidentiary hearing is not required when the motion alleges only conclusions of fact or law. Further, when the motion properly alleges an infringement of a defendant's constitutional rights, an evidentiary hearing should still be denied when the records and files affirmatively show that the defendant is entitled to no relief.
5. **Constitutional Law: Criminal Law: Right to Counsel.** The Sixth Amendment to the U.S. Constitution gives one accused of a crime the right to the assistance of counsel.

6. **Effectiveness of Counsel: Proof.** In order to establish whether a defendant was denied effective assistance of counsel, he or she must ordinarily demonstrate that counsel was deficient; that is, counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. Moreover, the defendant must make a showing that he or she was prejudiced by the actions or inactions of his or her counsel; that is, the defendant must demonstrate with reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
7. **Trial: Effectiveness of Counsel: Presumptions.** In determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.
8. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** Trial counsel is afforded due deference to formulate trial strategy and tactics. When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.
9. **Postconviction: Effectiveness of Counsel: Proof.** The "prejudice" component of the test stated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), focuses on the question of whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.
10. **Effectiveness of Counsel: Proof.** In order to establish prejudice resulting from an alleged deficiency in the performance of counsel, it must be shown that but for counsel's deficient performance, the result of the proceeding would have been different.
11. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.
12. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** A motion for postconviction relief asserting ineffective assistance of trial counsel is procedurally barred where a different attorney represented a defendant on direct appeal and the alleged deficiencies in the performance of trial counsel were known or apparent from the record.
13. **Postconviction: Effectiveness of Counsel: Appeal and Error.** A determination of whether a defendant was prejudiced by appellate counsel's failure to argue ineffective assistance of trial counsel on direct appeal necessarily requires a court in a postconviction proceeding to consider whether trial counsel was ineffective under the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
14. **Effectiveness of Counsel: Proof.** The two prongs of the test for ineffective assistance of counsel claims enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), deficient performance and prejudice, may be addressed in either order; if it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed.
15. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
16. ____: ____: ____. Where the prosecution has offered uncontroverted evidence on an element necessary for a conviction of the greater crime but not necessary for the lesser offense, a duty rests on the defendant to offer at least some evidence to dispute this issue if he or she wishes to have the benefit of a lesser offense instruction.

17. **Postconviction: Right to Counsel.** Under the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 through 29-3004 (Reissue 1995), it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant.
18. ____: ____. Where the assigned errors in the postconviction petition before the district court are either procedurally barred or without merit, establishing that the postconviction action contained no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint appellate counsel for an indigent defendant.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Affirmed.

Michael J. Hansen for appellant and, on brief, Kamil H. Al-Zubaidy, pro se.

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

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

STEPHAN, J.

On December 10, 1994, Kamil H. Al-Zubaidy entered the home of Ann Brown (Brown) and inflicted knife wounds upon Brown and her daughter, Seana Brown (Seana). Following a jury trial, two appeals, and a plea agreement, Al-Zubaidy stands convicted of first degree assault in connection with the injuries to Brown and second degree assault and use of a weapon to commit a felony in connection with the injuries to Seana. Al-Zubaidy filed this motion for postconviction relief alleging he had received ineffective assistance from both trial and appellate counsel. The district court for Lancaster County denied the motion without an evidentiary hearing, and Al-Zubaidy appeals.

I. BACKGROUND

[1] Where cases are interwoven and interdependent and the controversy involved has already been considered and decided by the court in a former proceeding involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. *State v. Parmar, ante* p. 213, 639 N.W.2d 105 (2002); *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001); *State v. Suggs*, 259 Neb. 733, 613 N.W.2d 8 (2000). The

following facts are established by the record in the instant case and those from Al-Zubaidy's prior appeals:

Al-Zubaidy was originally charged with attempted first degree murder and use of a weapon to commit a felony in connection with the injuries to Brown and second degree assault and use of a weapon to commit a felony in connection with the injuries to Seana. At trial, the State contended that Al-Zubaidy, angered that Brown was providing shelter to his recently estranged wife, entered Brown's home and attacked her with a knife and then stabbed Seana when she came to her mother's rescue. Brown, Seana, Brown's son, and Al-Zubaidy's wife all testified on behalf of the State. Al-Zubaidy testified on his own behalf and claimed that upon entering Brown's home to deliver some items to his wife, he was attacked by several persons and used a knife to defend himself and escape.

At trial, Seana testified that she had recently moved to Michigan. At the conclusion of her testimony, Al-Zubaidy's attorney did not request that Seana remain subject to recall or otherwise indicate that she should remain in Nebraska, and she was excused by the trial court. During Al-Zubaidy's case, his counsel attempted to call John Ways for the purpose of impeaching Seana's testimony. At the time of trial, Ways was in custody on charges unrelated to this case, and he had met Al-Zubaidy while in custody. According to an offer of proof, Ways would have testified that Seana, with whom he was acquainted, told him prior to trial that Al-Zubaidy had been "jumped" by persons in Brown's home and that he had used the knife in self-defense, injuring Seana and Brown in the process. The State objected to Ways' testimony on the ground that Seana had not been given an opportunity to explain or deny the alleged prior inconsistent statement and could not be recalled for that purpose because she had left the jurisdiction. The trial court sustained the objection and did not permit Ways to testify.

Al-Zubaidy was convicted on all four counts in the original information. Thereafter, Al-Zubaidy perfected a direct appeal and moved for appointment of new counsel because he intended to challenge the effectiveness of his trial counsel on appeal. The district court granted the motion. In his appeal, Al-Zubaidy assigned and argued (1) that the trial court erred in failing to

instruct the jury on attempted second degree murder and attempted manslaughter as lesser-included offenses of attempted first degree murder and (2) that the trial court erred in refusing to allow Ways' testimony for the purpose of impeaching Seana. The Nebraska Court of Appeals found no merit in either assignment and affirmed. *State v. Al-Zubaidy*, 5 Neb. App. 327, 559 N.W.2d 774 (1997) (*Al-Zubaidy I*).

In its analysis of the first assignment of error, the Court of Appeals determined that the evidence did not warrant the giving of a lesser-included offense instruction. In resolving the second assignment of error, the court began by focusing on Neb. Evid. R. 613(2), Neb. Rev. Stat. § 27-613(2) (Reissue 1995), which provides in part that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require." The court then cited *State v. Price*, 202 Neb. 308, 275 N.W.2d 82 (1979), and *State v. Johnson*, 220 Neb. 392, 370 N.W.2d 136 (1985), *abrogated on other grounds, State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996), for the proposition that the foundational requirements of § 27-613 can be met by affording the impeached party an opportunity to explain or deny either before or after the introduction of impeaching evidence. Nevertheless, the Court of Appeals concluded that because Al-Zubaidy knew that Seana was not a resident of Nebraska at the time of her trial testimony, he was obligated to take some action to secure her continued presence for the purpose of explaining or denying the alleged statement to Ways, and because he had not done so, the extrinsic evidence of the statement was properly excluded. In addition, the Court of Appeals specifically determined that Al-Zubaidy had "not demonstrated that the interests of justice require dispensing with the foundational requirement of rule 613(2) in the present case." *Al-Zubaidy I*, 5 Neb. App. at 340, 559 N.W.2d at 782.

Al-Zubaidy petitioned for further review solely on the issue of whether a lesser-included offense instruction should have been given. We granted the petition, determined that the evidence warranted an instruction on attempted second degree murder as a lesser-included offense, reversed, and remanded for

a new trial. *State v. Al-Zubaidy*, 253 Neb. 357, 570 N.W.2d 713 (1997) (*Al-Zubaidy II*).

On remand, Al-Zubaidy took the position that our decision in *Al-Zubaidy II* reversed all four of his original convictions and required a new trial on all counts. The trial court determined that our decision required retrial on only counts I and II of the original information, the attempted murder and related weapons charge pertaining to Brown, and that Al-Zubaidy stood convicted of counts III and IV, the assault and weapons charge pertaining to Seana. A plea agreement was subsequently reached in which count I was amended to first degree assault and count II was dismissed in exchange for Al-Zubaidy's plea of no contest to count I, as amended. Al-Zubaidy was convicted on that count and sentenced to 10 years' imprisonment to be served consecutively to the other sentences he was serving. The plea agreement contained no waiver of rights with respect to counts III and IV. Al-Zubaidy moved for an absolute discharge on the ground that he had not been retried on those charges within the timeframe specified in Neb. Rev. Stat. § 29-1208 (Reissue 1995). The motion was denied, and Al-Zubaidy appealed. In *State v. Al-Zubaidy*, 257 Neb. 935, 602 N.W.2d 8 (1999) (*Al-Zubaidy III*), we held that the decision in *Al-Zubaidy II* did not affect Al-Zubaidy's convictions on counts III and IV, which pertained to the injuries inflicted upon Seana.

Subsequently, Al-Zubaidy filed a verified pro se motion for postconviction relief based upon ineffective assistance of counsel. In this motion, Al-Zubaidy alleged that his trial counsel was ineffective for failing to take the necessary steps to "ensure that extrinsic evidence which could impeach the credibility of Seana Brown would be admitted according to Nebraska Rules of Evidence" and for failing to request a lesser-included offense instruction with respect to the second degree assault charge. Al-Zubaidy also alleged that his appellate counsel was ineffective for not asserting ineffective assistance of trial counsel as an issue on direct appeal and for not seeking further review of the Court of Appeals' determination that there was no error in excluding Ways' testimony regarding the statement allegedly made by Seana.

The district court denied Al-Zubaidy's motion for postconviction relief without conducting an evidentiary hearing. The court

reasoned that all of Al-Zubaidy's claims based upon ineffective assistance of trial counsel could have been asserted on direct appeal and were therefore procedurally barred. The court further determined that appellate counsel's decision to approach the issue of foundation for the prior inconsistent statement as he did, rather than casting it as ineffective assistance of trial counsel, was a reasonable tactical decision which was not shown to be prejudicial.

Al-Zubaidy perfected this timely appeal, which we removed to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

II. ASSIGNMENTS OF ERROR

Al-Zubaidy assigns, restated, that the district court (1) erred in denying his postconviction motion without conducting an evidentiary hearing, (2) erred in not appointing counsel to represent him in this matter, and (3) abused its discretion in not permitting him to amend his motion for postconviction relief.

III. STANDARD OF REVIEW

[2,3] 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. Parmar, ante* p. 213, 639 N.W.2d 105 (2002); *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001). Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Parmar, supra*; *State v. Caddy, supra.*

IV. ANALYSIS

1. Scope of Postconviction Motion

Given the complex procedural history of the criminal proceeding to which this postconviction action relates, we begin by identifying the specific convictions to which the postconviction motion is addressed. Al-Zubaidy's convictions for second degree assault and use of a weapon to commit a felony in connection with the stabbing of Seana were affirmed on direct appeal and are specifically addressed by this motion for postconviction relief. However, we do not read the motion as seeking any relief with

respect to Al-Zubaidy's conviction resulting from the plea agreement following *Al-Zubaidy II*. He makes no claim of ineffective assistance on the part of the attorney who represented him at the time of his plea, and the record affirmatively shows that he was satisfied with that representation. Compare *State v. Bishop, ante* p. 266, 639 N.W.2d 409 (2002). Accordingly, we consider the postconviction motion with respect to only Al-Zubaidy's 1995 convictions for second degree assault and use of a weapon to commit a felony in connection with the stabbing of Seana.

2. Ineffective Assistance of Counsel Claims

(a) General Principles

[4] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the state or federal Constitution. *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000); *State v. Lyle*, 258 Neb. 263, 603 N.W.2d 24 (1999). An evidentiary hearing is not required when the motion alleges only conclusions of fact or law. *Id.* Further, when the motion properly alleges an infringement of a defendant's constitutional rights, an evidentiary hearing should still be denied when the records and files affirmatively show that the defendant is entitled to no relief. *Id.*

[5,6] Al-Zubaidy's postconviction motion is based upon an assertion that he was denied the effective assistance of counsel at his trial and on direct appeal. The Sixth Amendment to the U.S. Constitution gives one accused of a crime the right to the assistance of counsel. *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998); *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the U.S. Supreme Court articulated the two-part standard to be utilized by courts when evaluating the performance of counsel in a criminal case. We have frequently cited and applied this standard. In order to establish whether a defendant was denied effective assistance of counsel, he or she must ordinarily demonstrate that counsel was deficient; that is, counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. Moreover, the

defendant must make a showing that he or she was prejudiced by the actions or inactions of his or her counsel; that is, the defendant must demonstrate with reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Brunzo*, 262 Neb. 598, 634 N.W.2d 767 (2001); *State v. Tucker*, 257 Neb. 496, 598 N.W.2d 742 (1999).

[7-10] The *Strickland* standard has familiar corollaries. In determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably. *State v. Carlson*, 260 Neb. 815, 619 N.W.2d 832 (2000); *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000). Moreover, trial counsel is afforded due deference to formulate trial strategy and tactics. *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994). When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *State v. Buckman, supra*; *State v. Williams, supra*. The "prejudice" component of the test stated in *Strickland v. Washington, supra*, focuses on the question of whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999); *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997), *disapproved on other grounds, State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). In order to establish prejudice resulting from an alleged deficiency in the performance of counsel, it must be shown that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002); *State v. Ryan, supra*.

(b) Trial Counsel

[11,12] The district court determined that Al-Zubaidy's claims for postconviction relief based upon the alleged ineffectiveness of trial counsel could have been raised on direct appeal and were therefore procedurally barred. A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal. *State v. Suggs*, 259 Neb. 733, 613 N.W.2d 8 (2000); *State v. Williams, supra*. In applying this principle, we have held that a motion for postconviction

relief asserting ineffective assistance of trial counsel is procedurally barred where a different attorney represented a defendant on direct appeal and the alleged deficiencies in the performance of trial counsel were known or apparent from the record. *State v. Suggs, supra*; *State v. Williams, supra*; *State v. Bennett*, 256 Neb. 747, 591 N.W.2d 779 (1999). Because Al-Zubaidy was represented by different counsel on direct appeal, the district court correctly concluded as a matter of law that his postconviction claims based upon allegations of ineffective assistance of his trial counsel were procedurally barred.

(c) Appellate Counsel

[13,14] Al-Zubaidy argues that his appellate counsel was ineffective (1) in not arguing on direct appeal that trial counsel was ineffective in failing to secure Seana's presence so that she could be given an opportunity to explain or deny the prior inconsistent statement she allegedly made to Ways and (2) in not seeking further review of the Court of Appeals' determination in *Al-Zubaidy I* that Ways' testimony was properly excluded. We have recognized that a determination of whether a defendant was prejudiced by appellate counsel's failure to argue ineffective assistance of trial counsel on direct appeal necessarily requires a court in a postconviction proceeding to consider whether trial counsel was ineffective under the *Strickland* test. *State v. Bishop, ante* p. 266, 639 N.W.2d 409 (2002); *State v. Williams, supra.* We have also noted that the two prongs of the *Strickland* test for ineffective assistance of counsel claims, deficient performance and prejudice, may be addressed in either order; if it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed. *State v. Thomas, supra*; *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001).

The district court held that Al-Zubaidy was not prejudiced by appellate counsel's failure to argue that trial counsel was ineffective for failing to secure Seana's presence so Ways' testimony could be heard. Based upon our review of the trial record, we reach the same conclusion. We follow the approach to the prejudice inquiry outlined by the Court in *Strickland v. Washington*, 466 U.S. 668, 695-96, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

It is undisputed that the stabbings occurred in the kitchen of Brown's home where Al-Zubaidy's estranged wife and their child were staying and that Al-Zubaidy wielded the knife which inflicted the wounds. The jury heard two accounts of why Al-Zubaidy was present in the Brown home and what he did when he arrived. According to witnesses called by the State, Al-Zubaidy had been looking for his wife earlier in the evening and became angry when he learned that she was staying with Brown. One witness who had talked with Al-Zubaidy earlier that evening testified that Al-Zubaidy actually "insisted that he was going to kill Ann Brown." Al-Zubaidy's wife testified that she had a telephone call from Al-Zubaidy earlier in the night but hung up because his voice sounded "very angry." Witnesses testified that when Al-Zubaidy arrived at the Brown home, Brown attempted to call the 911 emergency dispatch service but was confronted by Al-Zubaidy entering the kitchen through the back door with a knife in his hand. Three of the State's witnesses testified that Al-Zubaidy repeatedly stabbed Brown in the chest, arm, and wrist, and then stabbed Seana in the shoulder when she came to Brown's aid. Photographs of the stab wounds sustained by the two women were received into evidence. The State's witnesses further testified that Brown's son and some of his friends,

who had been in the basement of the home, subdued Al-Zubaidy and chased him outside, where he departed in a vehicle.

Conversely, Al-Zubaidy testified that he went to the Brown home to deliver some of their child's belongings to his wife. He stated that after knocking on the door he was admitted to the home and, at the instigation of Brown, was immediately attacked by various persons. He testified that he picked the knife up from a table in the kitchen and used it only to defend himself and facilitate his escape, causing wounds to Brown and Seana in the process.

The jury clearly chose to believe the testimony and physical evidence offered by the State over Al-Zubaidy's version of how the stabbings occurred, and the record amply supports this finding. It is conceivable, but unlikely, that a jury would have given credence to Ways' account of a prior inconsistent statement made by Seana regarding the question of who instigated the attack. Nevertheless, Seana's testimony was generally consistent with that of four other witnesses who observed some or all of the altercation. The physical evidence is also consistent with the testimony of the State's witnesses. Viewing the record as a whole, we cannot conclude with reasonable probability that had Ways' testimony been received, there would have been a different result. Accordingly, we conclude that the district court did not err in determining that Al-Zubaidy was not prejudiced by the performance of his trial counsel, which he now challenges as deficient, and he therefore could not have been prejudiced by the fact that his appellate counsel did not raise this issue on appeal. Likewise, we conclude that Al-Zubaidy was not prejudiced by the fact that appellate counsel did not petition for further review of the Court of Appeals' disposition of the exclusion of Ways' testimony.

[15] Al-Zubaidy also argues that his appellate counsel should have argued that trial counsel was ineffective for failing to request an instruction on third degree assault as a lesser-included offense of second degree assault. A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting

the defendant of the lesser offense. *State v. Taylor*, 262 Neb. 639, 634 N.W.2d 744 (2001); *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001); *State v. Becerra*, 261 Neb. 596, 624 N.W.2d 21 (2001).

Neb. Rev. Stat. § 28-309 (Reissue 1995) defines the offense of second degree assault and reads in pertinent part: "(1) A person commits the offense of assault in the second degree if he or she: (a) Intentionally or knowingly causes bodily injury to another person *with a dangerous instrument*." (Emphasis supplied.) Neb. Rev. Stat. § 28-310 (Reissue 1995) defines the offense of third degree assault and reads in pertinent part: "(1) A person commits the offense of assault in the third degree if he: (a) Intentionally, knowingly, or recklessly causes bodily injury to another person[.]"

[16] As noted above, witnesses called by the State testified that Al-Zubaidy used a knife to inflict injury upon Seana. Where the prosecution has offered uncontroverted evidence on an element necessary for a conviction of the greater crime but not necessary for the lesser offense, a duty rests on the defendant to offer at least some evidence to dispute this issue if he or she wishes to have the benefit of a lesser-offense instruction. *State v. Howard*, 253 Neb. 523, 571 N.W.2d 308 (1997). Al-Zubaidy, however, admitted in his case in chief that he used a knife to stab Brown and Seana. Therefore, Al-Zubaidy was not entitled to a lesser-offense instruction on third degree assault because all of the evidence at trial indicated that he used a dangerous instrument, in this case a knife, to injure Seana. The fact that appellate counsel did not raise this lesser-included-offense issue on appeal did not constitute deficient performance because the argument had no merit.

3. Other Assignments of Error

(a) Refusal to Appoint Counsel

[17,18] Al-Zubaidy also contends the district court erred in not appointing counsel to represent him in this postconviction action. Under the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 through 29-3004 (Reissue 1995), it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant. *State v. Silvers*, 255 Neb. 702, 587

N.W.2d 325 (1998). Where the assigned errors in the postconviction petition before the district court are either procedurally barred or without merit, establishing that the postconviction action contained no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint appellate counsel for an indigent defendant. *Id.* Because the district court correctly determined that the files and records of this case demonstrate that Al-Zubaidy is not entitled to postconviction relief, the court did not abuse its discretion in declining his request for appointment of counsel.

(b) Amendment

Finally, Al-Zubaidy contends the district court erred in not granting him at least one opportunity to amend his petition. Al-Zubaidy's motion for postconviction relief was filed on November 16, 1999. The State filed a motion captioned "Response and Motion to Deny Evidentiary Hearing and Motion for Postconviction Relief" on December 17, 1999. A hearing on the State's motion was held in part on January 24, 2000, and then continued and finished on February 22. At the February 22 hearing, Al-Zubaidy was asked by the district court if he had any evidence or argument to add to the motion he had filed on November 16, 1999. Al-Zubaidy indicated he did not. Given that the February 22, 2000, hearing was held over 2 months after the State filed its motion, Al-Zubaidy had ample time to seek leave to amend his petition or be prepared to make further argument if he so desired. Neb. Rev. Stat. §§ 25-849, 25-850, and 25-852 (Reissue 1995). See, also, *State v. Silvers, supra.* Instead, he chose to stand on his original motion and cannot now complain that he was denied an opportunity to amend. See *State v. Whitmore*, 238 Neb. 125, 469 N.W.2d 527 (1991). This assignment is without merit.

V. CONCLUSION

For the reasons stated, we conclude that the district court did not err in denying Al-Zubaidy's motion for postconviction relief without conducting an evidentiary hearing. The judgment of the district court denying postconviction relief is affirmed.

AFFIRMED.

CEDRIC PONCE, APPELLEE, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLANT.

641 N.W.2d 375

Filed April 5, 2002. No. S-00-855.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Final Orders: Appeal and Error.** Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency.
4. **Administrative Law: Proof.** The standard of proof to sustain a charge of violating a Department of Correctional Services rule is substantial evidence.
5. **Evidence: Words and Phrases.** Substantial evidence is evidence which a reasoning mind would accept as sufficient to support a particular conclusion and consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Reversed and remanded with directions.

Don Stenberg, Attorney General, and Amber Fae Herrick for appellant.

Cedric Ponce, pro se.

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

WRIGHT, J.

NATURE OF CASE

A prison disciplinary committee determined that Cedric Ponce, an inmate at the Nebraska State Penitentiary, had failed to comply with his personalized program plan (plan), in violation of Nebraska Department of Correctional Services (DCS) rule 5-I-M. As a result, he lost 3 months' good time. Ponce appealed to the DCS Appeals Board (Board), which affirmed the imposition of loss of good time. The Lancaster County District Court reversed, and the DCS appeals.

SCOPE OF REVIEW

[1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Young v. Neth, ante* p. 20, 637 N.W.2d 884 (2002).

[2] When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

FACTS

On November 4, 1999, a DCS employee reviewed Ponce's plan. She determined that Ponce had failed to comply with the plan for the period of November 2, 1998, to November 2, 1999, because he had missed more than 13 days of work due to work restriction, disciplinary segregation, administrative confinement, or intensive management. Specifically, between September 9 and 30, 1999, Ponce had spent 21 days in disciplinary segregation, and as a result, he had missed 16 days of work. Disciplinary segregation was imposed on Ponce for the "use of threatening language or gestures/fighting." The DCS employee prepared a misconduct report concerning the missed work, noting that inmates in disciplinary segregation are not allowed to work.

At a hearing before the disciplinary committee, Ponce argued that he had not intentionally missed work and that the misconduct report violated double jeopardy. He stated that he would have attended "programming" if he had been allowed to do so. Upon consideration of Ponce's testimony, other evidence submitted, and the misconduct report, the disciplinary committee determined that Ponce was guilty of violating DCS rule 5-I-M because he had missed more than 13 days of work. As a sanction, the disciplinary committee imposed loss of 3 months' good time.

Ponce appealed to the Board. It found that the evidence supported the disciplinary committee's findings and that the penalty was proportionate to Ponce's offense and was necessary to deter him and other inmates from committing similar offenses in the future. Ponce timely filed a petition in error to the Lancaster County District Court.

After a telephonic hearing, the district court reversed the decision of the Board. The court found that Ponce did not intentionally violate his plan. It noted that the case presented an identical fact pattern to that found in Elrod v. Nebraska Dept. of Corr. Servs., Douglas County District Court, No. CI99-864. For the reasons expressed in Elrod, the court found that Ponce did not intentionally violate his plan in that he did not work because the DCS would not allow him to work, not because he refused to work.

ASSIGNMENT OF ERROR

The DCS assigns as error that the district court erred in reversing the decision of the Board.

ANALYSIS

[3] Ponce sought review in the district court of a final decision by the DCS, which is an administrative agency. Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. *Honda Cars of Bellevue v. American Honda Motor Co.*, 261 Neb. 923, 628 N.W.2d 661 (2001). 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. *Young v. Neth, ante* p. 20, 637 N.W.2d 884 (2002). The inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. See *id.*

Neb. Rev. Stat. § 83-1,107(1)(b) (Reissue 1999) provides in part:

> Intentional failure to comply with the department-approved personalized program plan by any committed offender as scheduled for any year, or pro rata part thereof, shall cause disciplinary action to be taken by the department resulting in the forfeiture of up to a maximum of three months' good time for the scheduled year.

The DCS argues that Ponce was informed in his plan that he could not miss more than 13 days of work without violating the plan. It asserts that Ponce intentionally breached a DCS rule, knowing that such violation could result in disciplinary segregation and a

violation of his plan. The DCS claims that Ponce was placed in disciplinary segregation as a result of his own actions and that, therefore, he intentionally failed to comply with the DCS-approved plan.

[4,5] The standard of proof to sustain a charge of violating a DCS rule is substantial evidence. Neb. Rev. Stat. § 83-4,122(9) (Reissue 1999). Substantial evidence is "'"[e]vidence which a reasoning mind would accept as sufficient to support a particular conclusion and consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance."'" *Dailey v. Nebraska Dept. of Corr. Servs.*, 6 Neb. App. 919, 925, 578 N.W.2d 869, 874 (1998), quoting *Wright v. State ex rel. State Real Estate Comm.*, 208 Neb. 467, 304 N.W.2d 39 (1981).

The issue presented is whether Ponce intentionally violated his plan. The district court decided in Elrod that a prisoner who was placed in segregation for misconduct could not intentionally violate his or her plan because DCS does not allow prisoners placed in segregation to work. That same rationale was adopted in the case at bar. The court concluded that Ponce could not work because the DCS would not let him and that his misconduct was not intentional.

A violation of DCS rule 5-I-M is defined as "[i]ntentional failure to comply with the department-approved personalized program plan." See 68 Neb. Admin. Code, ch. 5, § 005 (1998). The standard for determining a violation of a DCS rule is as follows:

> An inmate commits an offense only when he or she engages in conduct which fulfills all the necessary elements of the offense. The conduct must be voluntary and be intentional or reckless or grossly negligent. The accused must have had notice that the conduct was proscribed by the Code of Offenses or applicable statu[t]es.

68 Neb. Admin. Code, ch. 5, § 004 (1998).

When inmates are placed in disciplinary segregation, their participation in institutional activities may be suspended. See 68 Neb. Admin. Code, ch. 6, § 006.09 (1998). The plan signed by Ponce on February 3, 1999, set forth the following work assignment: "Do not miss more than 13 work days in a scheduled year due to any combination of work restriction, [d]isciplinary [s]egregation, [a]dministrative [c]onfinement or [i]ntense

[m]anagement." The plan also contained the statement: "I further understand that failure to comply with the [p]ersonalized [plan] may result in disciplinary action, charge 5-I-M."

Ponce was placed in disciplinary segregation from September 9 to 30, 1999, for "use of threatening language or gestures/fighting." The intentional conduct for which Ponce was sanctioned resulted in his being placed in disciplinary segregation, and inmates placed in disciplinary segregation are not permitted to work.

We conclude that the district court erred in finding that Ponce did not intentionally violate his plan. Ponce's failure to work was a direct result of his intentional "use of threatening language or gestures/fighting." Clearly a prisoner cannot voluntarily engage in conduct which places the inmate in disciplinary segregation and then claim that he or she cannot comply with the provisions of his or her plan because the prisoner has been placed in disciplinary segregation.

Ponce's plan specifically advised him that he could not miss more than 13 days in a scheduled year due to any combination of work restriction, disciplinary segregation, administrative confinement, or intense management. Since Ponce was given proper notice that his conduct could result in disciplinary segregation and that disciplinary segregation could prevent him from being able to participate in his plan, Ponce intentionally violated the plan.

For the reasons set forth herein, the judgment of the district court does not conform to the law. Therefore, we reverse the judgment of the district court and remand the cause with directions to reinstate the imposition of the loss of 3 months' good time credit.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE CHANGE OF NAME OF DAVENPORT. EDWARD M. DAVENPORT, MORE COMMONLY KNOWN AS EDWARD M. STANEK, BY AND THROUGH HIS GUARDIANS AND NEXT FRIENDS, FRANCIS E. STANEK AND SALLY A. STANEK, APPELLEE, V. RICKY R. DAVENPORT, APPELLANT.

641 N.W.2d 379

Filed April 5, 2002. No. S-00-969.

1. **Interventions.** Whether a party has the right to intervene in a proceeding is a question of law.
2. **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. **Interventions.** As a prerequisite to intervention under Neb. Rev. Stat. § 25-328 (Reissue 1995), the intervenor must have a direct and legal interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment that may be rendered in the action.
4. ____. An indirect, remote, or conjectural interest in the result of a suit is not enough to establish intervention as a matter of right.
5. **Interventions: Pleadings.** A person seeking to intervene in an action must allege facts showing that he or she possesses the requisite legal interest in the subject matter of the action.
6. **Interventions: Statutes.** The intervention statutes are to be liberally construed.
7. **Interventions: Pleadings.** For purposes of ruling on a motion for leave to intervene, a court must assume that the intervenor's factual allegations set forth in the petition are true.
8. **Parental Rights: Parent and Child: Names.** A noncustodial parent whose parental rights have not been terminated and who has been involved in his or her minor child's life has a direct and legal interest in such minor child's name-change proceeding.

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Reversed and remanded with directions.

Ricky R. Davenport, pro se.

Mark A. Klinker for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Edward M. Davenport, a minor, by and through his guardians and next friends, Francis E. Stanek and Sally A. Stanek, petitioned the district court for Douglas County to legally change his

surname from Davenport to Stanek. Appellant, Ricky R. Davenport, Edward's biological father and noncustodial parent, sought leave to intervene in the name-change proceeding. Leave was denied by the district court. Following a hearing on the merits, the district court entered an order changing Edward's surname from Davenport to Stanek. Ricky appeals. Because we conclude that the district court erred in denying Ricky leave to intervene, we reverse the decision of the district court and remand the cause with directions consistent with this opinion.

STATEMENT OF FACTS

Edward was born out of wedlock on July 29, 1985, to Cynthia Ann Stanek. There is no dispute in the record that Ricky is Edward's father and that Ricky is responsible for paying court-ordered child support for Edward. At the time of his birth, Edward was given Cynthia's surname, Stanek. Ricky's paternity was not noted on Edward's birth certificate.

On November 13, 1989, for reasons not explained in the record, the Douglas County Court appointed Francis and Sally as Edward's guardians, and Edward has lived with Francis and Sally since they became his court-appointed guardians. The record reflects that Edward's mother, Cynthia, is alive, but that she has infrequent interaction with Edward. The record also reflects that Ricky is incarcerated at the Nebraska State Penitentiary. According to the record, he would initially be eligible for parole in approximately 2007.

In March 1994, pursuant to Neb. Rev. Stat. § 71-630(4) (Reissue 1990), Ricky and Cynthia amended Edward's birth certificate to change his surname from Stanek to Davenport so that Edward could "start going by his real last name." In 1994, § 71-630(4) provided in part that "[u]pon request and receipt of a sworn acknowledgment of paternity of a child born out of wedlock signed by both parents, the Bureau of Vital Statistics, Department of Health, shall amend the certificate of birth to show such paternity if paternity is not shown on the birth certificate." For the sake of completeness, we note that § 71-630(4) was amended subsequent to March 1994, but such amendments have no bearing on the instant appeal.

The record in this appeal contains a certified copy of Edward's birth certificate, issued March 31, 1994, setting forth his name as

Edward Michael Davenport and identifying his father as Ricky. The birth certificate revised pursuant to § 71-630(4) does not reflect the fact that it has been amended.

On June 28, 2000, Edward, through his guardians, filed a petition seeking to change his surname from Davenport to Stanek, which surname he had continued to use despite the 1994 amendment to his birth certificate. On August 15, Ricky filed a petition to intervene in the name-change proceeding pursuant to the intervention statute, Neb. Rev. Stat. § 25-328 (Reissue 1995), which provides as follows:

> Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences.

In his petition to intervene, Ricky alleged, inter alia, that he was the biological father of the minor child Edward, that his parental rights had not been terminated, that he had an interest in the litigation, and that he opposed the name change sought by Edward.

On August 28, 2000, Ricky's petition to intervene came on for telephonic hearing before the district court for Douglas County. In an order filed August 29, the district court denied Ricky leave to intervene. The court found that Ricky was Edward's noncustodial parent, that he was incarcerated at the Nebraska State Penitentiary, and that his "primary interest in attempting to intervene in this case [was] to keep Edward from changing his surname." The court concluded that Ricky "ha[d] no right to intervene in this case" and denied Ricky's petition in intervention.

On August 31, 2000, the district court held an evidentiary hearing on the substance of Edward's petition to change his surname. Edward, Francis, and Cynthia testified at the hearing. Ricky was not present and did not participate in the hearing. In

an order filed September 5, the district court granted Edward the relief sought in his petition and changed his surname from Davenport to Stanek. Ricky appealed.

ASSIGNMENTS OF ERROR

Ricky assigns three errors. We need not address each of Ricky's assignments of error because our decision on Ricky's claim that the district court erred in denying him leave to intervene in Edward's name-change proceeding resolves the appeal.

STANDARDS OF REVIEW

[1,2] Whether a party has the right to intervene in a proceeding is a question of law. See *Ruzicka v. Ruzicka*, 262 Neb. 824, 635 N.W.2d 528 (2001). See, also, *In re Interest of Kayle C. & Kylee C.*, 253 Neb. 685, 574 N.W.2d 473 (1998). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Ruzicka, supra*; *In re Estate of Mecello*, 262 Neb. 493, 633 N.W.2d 892 (2001).

ANALYSIS

[3-7] In considering Ricky's first assignment of error, we are guided by the rules governing intervention. See, *In re Interest of Destiny S., ante* p. 255, 639 N.W.2d 400 (2002); *Ruzicka, supra*. Ricky seeks to intervene pursuant to § 25-328. As a prerequisite to intervention under § 25-328, the intervenor must have a direct and legal interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment that may be rendered in the action. *In re Interest of Destiny S., supra*; *Ruzicka, supra*. An indirect, remote, or conjectural interest in the result of a suit is not enough to establish intervention as a matter of right. *Colman v. Colman Foundation, Inc.*, 199 Neb. 263, 258 N.W.2d 128 (1977). A person seeking to intervene in an action under § 25-328 must allege facts showing that he or she possesses the requisite legal interest in the subject matter of the action. *In re Interest of Destiny S., supra*; *Ruzicka, supra*; *In re Interest of Kayle C. & Kylee C., supra*. The intervention statutes are to be liberally construed. *Ruzicka, supra*; *Wightman v. City of Wayne*, 146 Neb. 944, 22 N.W.2d 294 (1946). For purposes of ruling on a motion for leave to intervene, a court must

assume that the intervenor's factual allegations set forth in the petition are true. *Ruzicka, supra*; *In re Interest of Kayle C. & Kylee C., supra.*

In the instant case, Ricky seeks leave to intervene in Edward's name-change proceeding, claiming that he has an interest in the proceeding because he is the biological father of the minor child Edward and that his parental rights have not been terminated. The district court concluded that Ricky's status as Edward's father gave him "no right to intervene in this case." We disagree and conclude as a matter of law that the district court erred in denying Ricky's petition for leave to intervene.

This court has previously recognized the substantial interest a parent has in his or her child's surname. *Cohee v. Cohee*, 210 Neb. 855, 317 N.W.2d 381 (1982). The reason often given for a child's retention of the parental surname is the need to preserve the parent-child bond. *In re Change of Name of Andrews*, 235 Neb. 170, 454 N.W.2d 488 (1990). While we have recognized that in dissolution proceedings, "patrimonial control of surnames has virtually disappeared," *Cohee*, 210 Neb. at 857, 317 N.W.2d at 382, we have also been reluctant to approve name changes which result in the abolition of the biological parent's surname. See *Spatz v. Spatz*, 199 Neb. 332, 258 N.W.2d 814 (1977) (rejecting mother's request to change her children's surname from their father's surname to her subsequent husband's surname).

[8] It is undisputed in the instant case that Ricky is the biological father of the minor child Edward. Although he is a noncustodial parent, his parental rights have not been terminated. The record reflects Ricky's involvement in Edward's life despite his incarceration. There is an indication in the record that he writes to Edward, talks with him on the telephone, and sends him presents. Ricky's interest in Edward's name change is not indirect, remote, or conjectural. See *Colman, supra.* Rather, as Edward's biological father, Ricky has a demonstrable direct and legal interest of such character that he will lose or gain by the direct operation and legal effect of the judgment that may be rendered in the action. See *In re Interest of Destiny S., ante* p. 255, 639 N.W.2d 400 (2002). Accordingly, Ricky should be afforded the opportunity to participate in his minor child Edward's name-change proceeding and present evidence as to

why the requested name change may or may not be in Edward's best interests. See *In re Change of Name of Andrews, supra* (whether child's surname may be changed depends on and is determined by best interests of child).

To be granted intervention under § 25-328, an intervenor must have a direct and legal interest in the matter in the litigation. Ricky has such an interest in the instant case. "The language of the intervention statute is clear, and the right to intervene under it is " 'absolute.' " *Ruzicka v. Ruzicka*, 262 Neb. 824, 836, 635 N.W.2d 528, 537 (2001) (quoting *Wightman v. City of Wayne*, 146 Neb. 944, 22 N.W.2d 294 (1946)). The district court erred in denying Ricky's petition to intervene.

CONCLUSION

Edward's biological father, Ricky, has a direct and legal interest entitling him to intervene pursuant to § 25-328 in his minor child Edward's name-change proceeding. The district court's denial of Ricky's petition to intervene was error. We reverse the district court's orders denying intervention and granting a name change and remand the cause with directions to grant Ricky leave to intervene in the name-change proceeding to be conducted with Ricky as a party.

REVERSED AND REMANDED WITH DIRECTIONS.

WILLIAM COATES AND APRIL RUGGLES, APPELLANTS, V. FIRST MID-AMERICAN FINANCE COMPANY, L.L.C., APPELLEE.

641 N.W.2d 398

Filed April 5, 2002. No. S-00-999.

1. **Evidence: Records: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.
2. **Rules of the Supreme Court: Records: Waiver.** The official court reporter shall in all instances make a verbatim record of the evidence offered at trial or other evidentiary proceeding, including but not limited to objections to any evidence and rulings thereon, oral motions, and stipulations by the parties. This record may not be waived.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Order vacated, and cause remanded with directions.

Daniel J. Thayer, of Lauritsen, Brownell, Brostrom, Stehlik, Thayer & Myers, for appellants.

Amie C. Martinez, of Anderson, Creager & Wittstruck, P.C., for appellee.

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

WRIGHT, J.

NATURE OF CASE

William Coates and April Ruggles sought a declaratory judgment as to the status of a lien given by them to First Mid-American Finance Company, L.L.C. (First Mid-American). The district court determined that the lien was valid, and Coates and Ruggles timely appealed.

FACTS

Apparently, the district court made a ruling based upon stipulated facts. However, the stipulation was not marked, offered, or received in evidence, and it was not filed by the clerk of the district court until December 15, 2000, which was after the filing of the notice of appeal on September 20. The record contains seven exhibits, but there is no transcription of a hearing, and there is no bill of exceptions which would show whether the exhibits were offered or received. No court reporter was present to record the proceedings, which were held in chambers.

Coates and Ruggles claim that the lien given to First Mid-American was discharged in bankruptcy. In their petition, Coates and Ruggles allege they entered into a retail installment contract with First Mid-American through Horizon Motors for the purchase of a 1986 Pontiac Grand Am. The vehicle was subsequently involved in a collision and was considered a total loss. First Mid-American commenced suit for the amount owed on the vehicle, $4,660.62. Coates and Ruggles granted a lien to First Mid-American for $4,660.62 plus interest of $2.17 per diem on any personal injury proceeds received as a result of the accident. Coates and Ruggles then filed chapter 7 bankruptcies, which were approved, and the debt owing to First Mid-American was discharged.

Coates' personal injury action was settled for $10,500, and the check issued by Liberty Mutual listed First Mid-American as a payee pursuant to the lien on the proceeds. Coates and Ruggles assert that the lien on the personal injury proceeds is invalid because the debt was discharged in bankruptcy.

The district court found that the bankruptcy had enjoined collection against Coates and Ruggles personally but that a creditor may still enforce a valid lien against the property. The district court stated that "[u]nder 11 U.S.C. §524(a) the lien entered into by [Coates and Ruggles] voluntarily is passed through the bankruptcy." The parties were ordered to pay their own costs and fees. Coates and Ruggles timely filed this appeal.

ANALYSIS

We first address the record in this case. There are seven exhibits in the record, but because no court reporter was present to record the proceedings, there is no record of whether these exhibits were offered or received. A stipulation of facts was filed with the district court and is included in the transcript, but it is not contained in the bill of exceptions.

[1] A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered. *Huddleson v. Abramson*, 252 Neb. 286, 561 N.W.2d 580 (1997). Here, there is no evidence for this court to examine to determine whether the district court erred in reaching its decision. Without a bill of exceptions to verify whether the exhibits were received in evidence or whether the stipulation was properly presented to the district court, there is no record for this court to consider.

We recently addressed the absence of a court reporter at a hearing on a motion for summary judgment in *Presle v. Presle*, 262 Neb. 729, 634 N.W.2d 785 (2001). We vacated the order and remanded the cause for a new evidentiary hearing. The same reasoning applies to the case at bar.

[2] Pursuant to Neb. Ct. R. of Prac. 5A(1) (rev. 2000), "The official court reporter shall in all instances make a verbatim record of the evidence offered at trial or other evidentiary proceeding, including but not limited to objections to any evidence and rulings thereon, oral motions, and stipulations by the parties. This record may not be waived."

Here, although the court reporter prepared a "Bill of Exceptions Certificate" and attached it to an envelope purporting to be a bill of exceptions, this does not comply with our rules because the court reporter was not present when the proceedings were held. A bill of exceptions could not be prepared without the district court certifying what was offered and received in evidence. Rule 5B(3)c provides:

> If the reporter is unable to prepare and certify a bill of exceptions, or if a bill of exceptions cannot be prepared and certified under provisions contained elsewhere in these rules, the bill of exceptions shall be prepared under the direction and supervision of the trial judge and shall be certified by the judge and delivered to the clerk of the district court.

CONCLUSION

In accordance with our decision in *Presle*, the order of the district court is vacated, and the cause is remanded for a new evidentiary hearing.

ORDER VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
TIMMY ALLEN TIMMENS, APPELLANT.
641 N.W.2d 383

Filed April 5, 2002. No. S-01-448.

1. **Trial: Evidence: Appeal and Error.** Because overruling a motion in limine is not a final ruling on the admissibility of evidence and therefore does not present a question for appellate review, a question concerning the admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection during trial.
2. **Trial: Evidence: Motions to Suppress: Waiver: Appeal and Error.** A failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and that party will not be heard to complain of the alleged error on appeal.
3. **Sentences: Appeal and Error.** An appellate court will not disturb sentences within statutory limits, unless the district court abused its discretion in establishing the sentences.

4. **Trial: Evidence.** When a court overrules a motion in limine to exclude evidence, the movant must object when the evidence sought to be excluded by the motion is offered during trial.
5. **Trial: Evidence: Juries.** A motion in limine is but a procedural step to prevent prejudicial evidence from reaching the jury. It is not the office of such a motion to obtain a final ruling upon the ultimate admissibility of the evidence. Rather, its office is to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the matter to the jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself.
6. **Criminal Law: Trial: Pretrial Procedure: Motions to Suppress: Appeal and Error.** In a criminal trial, after a pretrial hearing and order denying a motion to suppress, the defendant must object at trial to the admission of evidence sought to be suppressed to preserve an appellate question concerning the admissibility of that evidence.
7. **Trial: Evidence: Appeal and Error.** On appeal, a defendant may not assert a different ground for his objection to the admission of evidence than was offered to the trier of fact.
8. ____: ____: ____. An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.
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.
10. **Sentences.** In imposing a sentence, a judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
11. ____. In considering a sentence, the sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life.

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

Scott H. Trusdale, of Trusdale & Trusdale, P.C., for appellant.

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

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

MCCORMACK, J.

NATURE OF CASE

Timmy Allen Timmens lived with his girl friend Tracy Giugler in Overton, Nebraska, and on July 23, 2000, Giugler was found

dead by investigators in the basement of the home she shared with Timmens. An autopsy revealed that Giugler died from blunt trauma to the head, chest, abdomen, and upper and lower extremities, with hemorrhaging and rib fractures. Timmens was arrested and charged with second degree murder. He filed a motion in limine to prohibit the introduction of evidence of his alleged flight while en route to meet investigators at his home and a motion to suppress certain statements he made to law enforcement officials while in custody. The trial court denied the motions, and a jury found Timmens guilty of second degree murder. He was sentenced to serve a term of 45 years' to life imprisonment, and now he appeals his conviction and sentence. We affirm the order of the trial court.

BACKGROUND

On July 22, 2000, Giugler's son went to Timmens' home in Overton to visit her. Timmens told Giugler's son that Giugler was not home, yet her car was at the house. The son notified Giugler's mother, Janice Ferguson. Ferguson left work and met with one of her daughters and a niece; they decided to call the 911 emergency dispatch service. Deputy Brad Sherman of the Dawson County sheriff's office was dispatched to Overton and spoke with Ferguson and her daughter. They told Sherman that they were worried about Giugler because of their mistrust of Timmens.

That same afternoon, Sherman spoke to Timmens at his residence. Timmens stated that he had not seen Giugler that day. He gave Sherman permission to look around the house to see if Giugler may have taken anything with her. Sherman went through every room on the main floor and saw that the doorway to the basement in the kitchen was covered by a sheet, which was nailed to each corner and pulled very tightly. Timmens told Sherman that they did not use the basement and seemed to watch Sherman's every move while Sherman was near the basement doorway. Sherman did not check the basement at that time out of concern for his safety.

Sherman went back to the sheriff's office and spoke to Investigator Jeff Schwarz. Jeff Schwarz then went to the Overton Family Center and talked to Timmens, who was attending the wedding reception of one of Timmens' sisters. Jeff Schwarz

notified Timmens of his desire to look in Timmens' basement. Timmens agreed to meet the investigators at his home and was to get a ride from another of his sisters, Donna Kay Shaffer.

After arriving at Timmens' residence, Jeff Schwarz observed Shaffer arrive alone. Shaffer, visibly disturbed, told Jeff Schwarz that while she was driving Timmens to his home, he jumped out of the vehicle. Shaffer testified that she agreed to drive Timmens to his house to meet the investigators. While en route, he stated, " 'I'm sorry, I don't know what happened' "; jumped out of the vehicle while it was still moving; and started running across a field. She tried following him, but he kept going. Timmens never returned to his home that evening.

A former girl friend of Timmens testified that on July 24, 2000, she and Timmens were at her home in Kearney, Nebraska, watching the news report of Giugler's murder when Timmens said, " 'I guess I did do it.' "

Jeff Schwarz obtained a search warrant for Timmens' home. He and Investigator Paul Schwarz found Giugler's body lying full length on a couch in Timmens' basement, covered by a quilt. Paul Schwarz pulled the quilt back far enough to uncover Giugler's face. He identified her and determined that she was dead.

Dr. Jerry W. Jones performed an autopsy which revealed that Giugler was beaten over her entire body from head to toe and front to back. Jones opined that the cause of Giugler's death was blunt trauma to the head, chest, abdomen, and upper and lower extremities, with hemorrhaging and rib fractures. Jones testified that the location of bruises on Giugler's hands and wrists indicated that these injuries were defensive.

A warrant was issued for Timmens' arrest, and he was apprehended in Kearney, Nebraska, on the evening of July 24, 2000. He was advised of his *Miranda* rights while being escorted to a Kearney Police Department cruiser and was taken to the Kearney Law Enforcement Center. At the time of his arrest, Timmens refused to speak to investigators. Upon arriving at the Kearney Law Enforcement Center, however, he spoke to Paul Schwarz and Investigator Randy Ricley about the death of Giugler. He gave a statement which was reduced to writing.

According to the statement, Timmens remembered being outside with his dog sometime after he arrived home on Friday

evening, July 21, 2000. He next remembered finding Giugler propped up on some clothes by the washer in the kitchen shortly after he woke up on Saturday morning. He tried to wake her up, but "felt that she was dead." He then picked her up, took her to the basement, and put her on the couch. That interview lasted approximately 3½ hours.

Timmens was then taken to the Buffalo County jail, and from there, Jeff Schwarz and a sheriff's deputy transported him back to the Dawson County jail. While in transport, Timmens began talking, so Jeff Schwarz advised him of his constitutional rights. Timmens did not tell the investigators anything relevant to the case while in transport.

After arriving at the Dawson County jail, Timmens again spoke to the investigators. According to Jeff Schwarz, Timmens stated that he must have been involved in the death of Giugler because he knew she was in the basement. He then stated that he knew he had assaulted Giugler, but did not know why or how. That interview began around 4:30 a.m., roughly 2 hours after his interview in Buffalo County was concluded. It lasted approximately 45 minutes to 1 hour.

On July 26, 2000, Timmens was placed in a room by law enforcement personnel to allow Paul Schwarz to take tissue samples from him. Paul Schwarz testified that it was not his intention to conduct an interview. Timmens told him that he knew the tissue samples were being taken for DNA comparison, and Paul Schwarz advised him that he was correct. Timmens then asked whether the procedures would stop if he discussed what had happened. Paul Schwarz responded that some techniques being used would stop, but most would continue. Timmens then began to cry, and blurted out: " 'I beat her up.' " Paul Schwarz stopped Timmens at that point and told him that they had to contact his attorney, since he was then represented by counsel. Paul Schwarz contacted Jeff Schwarz, who then contacted Timmens' attorney. Paul Schwarz ended all contact with Timmens upon the arrival of Timmens' attorney.

On September 12, 2000, Timmens was charged by information with second degree murder, a Class IB felony, in violation of Neb. Rev. Stat. § 28-304 (Reissue 1995). Timmens elected to stand mute at the arraignment, and the trial court entered a not

guilty plea on his behalf. Timmens filed a motion in limine to prevent the State from introducing evidence by Shaffer or any law enforcement officer as to his alleged flight from any motor vehicles or evidence that he left the city of Lexington around the time the crime charged in the information occurred. The trial court overruled the motion in limine in its entirety.

Timmens also filed a motion to suppress any statements he made after he was represented by counsel and after he was incarcerated in the Dawson County jail. The hearing on that motion covered not only statements made by Timmens to investigators while at the Dawson County jail and while represented by counsel on July 26, 2000, but also the statements made in Buffalo County on July 24 and 25, and those made the morning of July 25, after he arrived at the Dawson County jail. The trial court issued three separate orders denying the motion to suppress, one for each instance that statements were made by Timmens while in custody.

ASSIGNMENTS OF ERROR

Timmens claims that the trial court erred when it (1) allowed the State to present evidence of his alleged flight and failed to suppress the same; (2) sentenced him to a term of 45 years' to life imprisonment, which constitutes an excessive sentence; and (3) failed to suppress certain statements attributed to him during interrogations by law enforcement officials.

STANDARD OF REVIEW

[1] Because overruling a motion in limine is not a final ruling on the admissibility of evidence and therefore does not present a question for appellate review, a question concerning the admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection during trial. *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997); *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992).

[2] A failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and that party will not be heard to complain of the alleged error on appeal. *State v. Thieszen*, 252 Neb. 208, 560 N.W.2d 800 (1997).

[3] An appellate court will not disturb sentences within statutory limits, unless the district court abused its discretion in establishing the sentences. *State v. Leonor, ante* p. 86, 638 N.W.2d 798 (2002).

ANALYSIS

EVIDENCE OF FLIGHT

Timmens first argues that the trial court erred when it allowed the State to present evidence of his alleged flight and failed to suppress the same. Timmens filed a motion in limine for an order preventing the State from eliciting or introducing any testimony from Shaffer or any law enforcement officer as to his alleged flight from any motor vehicle or that he left the city of Lexington before, near, or after the crime charged in the information occurred. Timmens alleged that said testimony is "speculative, conjectural, conclusionary, lacking in credibility, wholly lacking in foundation, highly prejudicial, would tend to mislead the jury, and would violate [Timmens'] right to due process."

A hearing on the motion in limine was held on January 12, 2001. The trial court found the evidence to be highly relevant and admissible at trial and, therefore, overruled Timmens' motion in limine. Evidence of flight was presented at trial through the testimony of Shaffer and Jeff Schwarz. At no point during that testimony did Timmens object.

[4,5] When a court overrules a motion in limine to exclude evidence, the movant must object when the evidence sought to be excluded by the motion is offered during trial. *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998). A motion in limine is but a procedural step to prevent prejudicial evidence from reaching the jury. It is not the office of such a motion to obtain a final ruling upon the ultimate admissibility of the evidence. Rather, its office is to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the matter to the jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself. *State v. Merrill, supra*, citing *State v. Coleman, supra*.

Because overruling a motion in limine is not a final ruling on the admissibility of evidence and therefore does not present a

question for appellate review, a question concerning the admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection during trial. *Id.*

Timmens did not object at trial to the admission of evidence of his flight, which he earlier tried to exclude through the motion in limine. Thus, we conclude that he failed to preserve the alleged error for appellate review.

TIMMENS' STATEMENTS TO POLICE

Timmens made statements to investigators on three separate occasions while in custody: during the interview on July 24 and 25, 2000, in Buffalo County, during the interview which began at 4:30 a.m. on July 25 in Dawson County, and during the procedure in which Paul Schwarz took physical samples from him on July 26 in Dawson County. Timmens argues that all three statements should have been suppressed and that the trial court erred by failing to do so. Timmens filed a motion to suppress, and at the suppression hearing, the statements he made in all three instances were considered by the court. The trial court issued three separate orders overruling the motion to suppress, finding that the statements made in each instance were relevant and admissible.

Paul Schwarz testified at trial as to the statements Timmens gave on July 26, 2000, during the collection of physical samples. A review of his trial testimony reveals no objection to the admission of that evidence. Jeff Schwarz testified at trial as to the statements Timmens gave on the morning of July 25 in Dawson County. Again, Timmens failed to object to the introduction of that evidence.

Both Paul Schwarz and Ricley testified at trial to the statements Timmens made on July 24 and 25, 2000, after being arrested in Buffalo County, and to the written statement Timmens signed. Timmens made no objection to either the statements made or the introduction of the written statement except that the written statement was cumulative and a violation of the rule against jury note-taking. In his brief, however, Timmens objects to the statements as not being the product of his free and rational choice and not being voluntary.

[6] It has long been the rule that in a criminal trial, after a pretrial hearing and order denying a motion to suppress, the defendant must object at trial to the admission of evidence sought to be suppressed to preserve an appellate question concerning the admissibility of that evidence. *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995). A failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and that party will not be heard to complain of the alleged error on appeal. *State v. Thieszen*, 252 Neb. 208, 560 N.W.2d 800 (1997).

Although Timmens did make an objection on the basis of the evidence as being cumulative and violative of the rule against jury note-taking, he failed to preserve for review the assignment of error he is now arguing in his brief. Timmens objected to the introduction of the written statement, but not for the same reasons that he alleges in his brief.

[7,8] On appeal, a defendant may not assert a different ground for his objection to the admission of evidence than was offered to the trier of fact. *State v. Harris, ante* p. 331, 640 N.W.2d 24 (2002). An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground. *State v. Davlin, ante* p. 283, 639 N.W.2d 631 (2002).

We conclude that Timmens failed to preserve the question of the admissibility of the statements he gave to investigators in Buffalo County and Dawson County.

Excessive Sentence

Timmens also argues that his sentence was excessive and constituted an abuse of discretion. He was found guilty of second degree murder. The statutory penalty for second degree murder is a maximum sentence of life imprisonment and a minimum sentence of 20 years' imprisonment. Neb. Rev. Stat. § 28-105 (Cum. Supp. 2000). Timmens was sentenced to a term of 45 years' to life imprisonment.

Timmens alleges that his sentence is nearer to the maximum allowed, which is not warranted under the circumstances before this court. He also alleges that pursuant to plea negotiations, he would have received a straight sentence of 25 years in prison in

return for entering a plea to the charges. Timmens further alleges that to sentence him to 45 years to life in prison constitutes an abuse of discretion, as it penalized him for utilizing his constitutionally guaranteed right of trial by jury.

[9] An appellate court will not disturb sentences within statutory limits, unless the district court abused its discretion in establishing the sentences. 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. Leonor, ante* p. 86, 638 N.W.2d 798 (2002); *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001).

[10] In imposing a sentence, a judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Leonor, supra*; *State v. Tucker*, 262 Neb. 940, 636 N.W.2d 853 (2001); *State v. Kula*, 262 Neb. 787, 635 N.W.2d 252 (2001).

[11] In considering a sentence, the sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life. *State v. Leonor, supra*; *State v. Kunath*, 248 Neb. 1010, 540 N.W.2d 587 (1995).

Timmens has a history of violent behavior. He has had two prior felonies, and one involved violence similar to the incident at issue. He has had 15 prior misdemeanors, at least 5 of which involved violence. The trial court looked to his previous arrests, especially his prior arrest for first degree assault on a former girl friend, and to the savageness of the crime against Giugler. The court concluded that it had to incarcerate Timmens for a considerable period of time for the protection of society. Based upon all of this, the trial court found that a sentence of 45 years' to life imprisonment, with 237 days' credit, was appropriate.

We conclude that the trial court did not abuse its discretion in handing down its sentence upon Timmens. The beating Giugler received was extremely depraved, violent, and senseless.

Moreover, Timmens has a history of violating the law and of violent behavior, committing a similar type of assault on at least one other occasion in the past. We thus affirm the sentence handed down to Timmens.

CONCLUSION

We conclude that because Timmens did not object at trial to the admission of evidence regarding his alleged flight, he failed to preserve that assignment of error for appellate review. We also conclude that because Timmens did not properly object to the admission of statements he gave to police while in custody, he failed to preserve for review the argument that the trial court erred in admitting the statements. Finally, we conclude that because of the severity of the crime and Timmens' history of violent and unlawful activity, the trial court did not abuse its discretion in sentencing him to a prison term of 45 years to life.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
BENNIE L. UTTER, APPELLANT.
641 N.W.2d 624

Filed April 5, 2002. No. S-01-677.

1. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **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. **Controlled Substances: Circumstantial Evidence: Intent.** Circumstantial evidence may support a finding that a defendant intended to distribute, deliver, or dispense a controlled substance in the defendant's possession. Circumstantial evidence sufficient to establish possession of a controlled substance with intent to deliver may consist of evidence of the quantity of the substance, equipment and supplies found with the substance, the place where the substance was found, the manner of packaging, and the testimony of witnesses experienced and knowledgeable in the field.
4. **Criminal Law: Statutes.** Penal statutes are to be strictly construed.

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

Thomas C. Riley, Douglas County Public Defender, and Timothy F. Shanahan for appellant.

Don Stenberg, Attorney General, and George R. Love for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Bennie L. Utter was convicted by a jury in the district court for Douglas County of two counts of possession of a controlled substance with intent to deliver and one count of failure to affix a tax stamp. Utter appeals his convictions on the basis that the evidence introduced at trial was insufficient to establish that he had an intent to deliver or that he was a "dealer" subject to the marijuana and controlled substances tax statutes. We affirm Utter's convictions for possession with intent to deliver but, due to insufficient evidence, reverse his conviction and sentence for failure to affix a tax stamp.

II. STATEMENT OF FACTS

On November 26, 1999, an Omaha police officer stopped a pickup truck because a person, later identified as Utter, was occupying the open pickup box. After the pickup stopped, Utter jumped out of the box and was reaching toward his waistband. The officer ordered Utter to place his hands on the side of the pickup and asked Utter if he could search him. Utter consented to the search. During the search, the officer found two plastic bags containing white substances. Neither bag bore a tax stamp.

Utter was charged with two counts of possession of a controlled substance with intent to deliver in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 2000) and one count of failure to affix a tax stamp in violation of Neb. Rev. Stat. § 77-4309 (Reissue 1996). Trial was held March 13 and 14, 2001. A forensic chemist testified that the contents of one bag were found to be

a mixture of methamphetamine and dimethylsulfone (DMS) and that the contents of the other bag were found to be a mixture of cocaine and mannitol, a cutting agent "used to make the bulk larger." A forensics report was entered into evidence which indicated that the methamphetamine/DMS mixture weighed 3.45 grams and that the cocaine/mannitol mixture weighed 7.05 grams. The chemist was unable to testify regarding what weight of the methamphetamine/DMS mixture was attributable to methamphetamine or what weight of the cocaine/mannitol mixture was attributable to cocaine.

Also at trial, an officer qualified as an expert in narcotics activity testified that in his opinion, based on the combination of the two drugs and the amount of each drug, the quantity of methamphetamine and cocaine confiscated from Utter constituted a "distribution amount."

Utter testified in his own defense. Utter stated that he had purchased the methamphetamine and cocaine for his own use and had been in possession of the drugs for only about 15 minutes prior to the search. Utter testified that prior to his arrest, he had a drug habit and regularly used both methamphetamine and cocaine. He testified that in 1999, he would typically use 3.5 grams of methamphetamine and/or 7 grams of cocaine in 1 week.

Utter also called a state probation officer who had been assigned to Utter in 1994 and 1995 as a witness. The probation officer testified that during the time he had been assigned to Utter, the officer had tested Utter for drug use approximately eight times and that five of the eight tests came back positive for cocaine use, but that Utter had not been tested for methamphetamine.

When instructing the jury on the counts involving possession with intent to deliver, the district court instructed on the lesser-included offense of simple possession. The jury found Utter guilty on both counts of possession with intent to deliver and on the count of failure to affix a tax stamp. On May 15, 2001, the district court sentenced Utter to 3 years of intensive supervised probation on each conviction and ordered the sentences to be served concurrently.

III. ASSIGNMENT OF ERROR

Utter asserts that the evidence introduced at trial was insufficient as a matter of law to sustain convictions for two counts of

possession of a controlled substance with intent to deliver and one count of failure to affix a tax stamp.

IV. STANDARDS OF REVIEW

[1] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Castor*, 262 Neb. 423, 632 N.W.2d 298 (2001).

[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. *First Data Corp. v. State, ante* p. 344, 639 N.W.2d 898 (2002).

V. ANALYSIS

Utter contends that the evidence introduced at trial was insufficient as a matter of law to sustain his convictions for possession of a controlled substance with intent to deliver and for failure to affix a tax stamp. Because the elements of the crimes of possession with intent to deliver and failure to affix a tax stamp differ, we first consider the evidence with regard to the convictions separately.

1. Possession With Intent to Deliver

The basis of Utter's argument regarding insufficient evidence with respect to the possession with intent to deliver charges is that the State put on no evidence of an intent to deliver other than the narcotics officer's testimony that the quantity of methamphetamine and cocaine found on Utter at the time of his arrest constituted a "distribution amount." Utter asserts that such evidence was contradicted by his own testimony regarding his drug habit and his testimony that he personally intended to use the drugs. We conclude that the evidence presented by the State was sufficient to convict Utter of two counts of possession with intent to deliver.

[3] In reviewing a conviction for sufficiency of the evidence, we must view the evidence in the light most favorable to the State. *Castor, supra.* Circumstantial evidence may support a finding that a defendant intended to distribute, deliver, or dispense a controlled substance in the defendant's possession. *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994), *disapproved on other grounds, State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999). Circumstantial evidence sufficient to establish possession of a controlled substance with intent to deliver may consist of evidence of the quantity of the substance, equipment and supplies found with the substance, the place where the substance was found, the manner of packaging, and the testimony of witnesses experienced and knowledgeable in the field. *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996).

Section 28-416 makes it a crime to possess a controlled substance with the intent to deliver. Section 28-416 does not specify a quantity of controlled substance which must be possessed in order to establish intent to deliver. In the present case, the State put on evidence of the quantity of substances possessed by Utter, and the narcotics officer, whose testimony established his experience and knowledge in the field of narcotics transactions, testified that the amount and combination of drugs possessed by Utter were considered a "distribution amount." Evidence of the quantity of a substance possessed combined with expert testimony that such quantity indicates an intent to deliver can be sufficient for a jury to infer an intent to deliver. See *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992).

Utter emphasizes that he testified in his own defense that he did not intend to distribute the drugs but instead possessed the drugs for his own use. In this regard, we note that the trial court instructed the jury on simple possession as a lesser-included offense of possession with intent to deliver. The jury apparently discredited Utter's testimony and gave more weight to the testimony of the narcotics officer. On appeal, this court does not pass on the credibility of witnesses or reweigh the evidence because such matters are for the finder of fact. *State v.Castor*, 262 Neb. 423, 632 N.W.2d 298 (2001). Although there was contradictory evidence regarding Utter's intent, the evidence put on by the State was sufficient for the jury to find an intent to deliver and

to convict Utter on both counts of possession of a controlled substance with intent to deliver.

2. Failure to Affix Tax Stamp

(a) Utter's Claim of Insufficient Evidence

Utter claims that the evidence was insufficient to convict him of the count of failure to affix a tax stamp. The basis of Utter's argument is generally that the State failed to prove under the controlling statutes that he was a "dealer" who distributed or possessed "seven or more grams of any controlled substance" and that, therefore, the evidence failed to establish that Utter was subject to the marijuana and controlled substances tax statutes, Neb. Rev. Stat. §§ 77-4301 to 77-4316 (Reissue 1996). Utter asserts specifically that the State's evidence was insufficient because, although there was evidence that he possessed 3.45 grams of a methamphetamine/DMS mixture and 7.05 grams of a cocaine/mannitol mixture, the State did not establish, as it was required to do under the statutes, how much pure methamphetamine or how much pure cocaine Utter possessed. Whereas § 28-416 pertaining to possession with intent to deliver does not specify a quantity of controlled substance which must be possessed in order to establish an intent to deliver, the marijuana and controlled substances tax statutes do specify a quantity which must be possessed before one is considered a "dealer" and therefore required to pay the tax and affix the stamp.

(b) Controlling Statutes

Utter was charged under § 77-4309, which provides in relevant part, "A dealer distributing or possessing marijuana or a controlled substance without affixing the official stamp, label, or other indicium shall be guilty of a Class IV felony." Section 77-4301(2) defines "dealer" as

> a person who, in violation of Nebraska law, manufactures, produces, ships, transports, or imports into Nebraska or in any manner acquires or possesses six or more ounces of marijuana, *seven or more grams of any controlled substance which is sold by weight*, or ten or more dosage units of any controlled substance which is not sold by weight.

(Emphasis supplied.) Thus, in order to be considered a "dealer" under the tax stamp statutes, Utter would have to have been found to possess "seven or more grams of any controlled substance which is sold by weight."

The definition of "controlled substance" for purposes of §§ 77-4301(2) and 77-4309 is found at § 77-4301(1), which provides, "Controlled substance shall mean any drug or substance, including an imitation controlled substance, that is held, possessed, transported, transferred, sold, or offered to be sold in violation of Nebraska law. Controlled substance shall not include marijuana." The definition of "controlled substance" found in § 77-4301(1) includes drugs or substances possessed "in violation of Nebraska law." The statutes which delineate the drugs or substances possession of which is "in violation of Nebraska law" are found in chapter 28 of the Nebraska Revised Statutes.

Section 28-416(1) provides in relevant part that "it shall be unlawful for any person knowingly or intentionally [t]o . . . possess with intent to manufacture, distribute, deliver, or dispense a controlled substance." For purposes of § 28-416(1), "controlled substance" is defined in Neb. Rev. Stat. § 28-401(4) (Cum. Supp. 2000), which provides in relevant part, "Controlled substance shall mean a drug, biological, substance, or immediate precursor in Schedules I to V of section 28-405." Neb. Rev. Stat. § 28-405 (Supp. 1999) contains Schedules I to V. Schedule II of § 28-405 contains both subsection (a)(4) which lists "cocaine" and subsection (c) which lists a "mixture . . . which contains . . . methamphetamine." Thus, Schedule II includes "cocaine" without reference to a mixture, § 28-405(a)(4), and a "mixture . . . which contains . . . methamphetamine," § 28-405(c). Neither DMS nor mannitol is listed in Schedules I to V of § 28-405.

Construing the controlling statutes together as they relate to a case involving cocaine and methamphetamine, we conclude that the 7 or more grams of controlled substance which would make one a "dealer" under § 77-4301(2), and therefore subject to conviction under § 77-4309, must be composed of (1) 7 or more grams of cocaine in isolation, or (2) 7 or more grams of a mixture which contains methamphetamine, or (3) 7 or more grams combined of cocaine in isolation and a mixture which contains methamphetamine.

(c) Positions of Parties

Utter argues that the State did not provide evidence that he possessed 7 or more grams of any controlled substance, as "controlled substance" is used in the relevant statutes. A chemist testified that the substances possessed by Utter were cocaine mixed with mannitol and methamphetamine mixed with DMS. The forensic report showed that the weight of the cocaine/mannitol mixture was 7.05 grams and the weight of the methamphetamine/DMS mixture was 3.45 grams. The chemist testified that she did not separate the cocaine from the mannitol or the methamphetamine from the DMS, and she rendered no estimate or opinion as to how much of the weight of each mixture was attributable to each of the components. Utter claims that because the State did not provide evidence of the weight of the pure cocaine or the pure methamphetamine, there was not sufficient evidence that he possessed 7 or more grams of "any controlled substance," § 77-4301(2), and that the evidence therefore did not establish that he was a "dealer" under the marijuana and controlled substances tax statutes, *id.*

The State argues in its brief that the "purity" of a controlled substance is not relevant to a determination of the quantity of the controlled substance involved for Nebraska tax stamp purposes. The State relies on *U.S. v. Bishop*, 894 F.2d 981 (8th Cir. 1990). The holding in *Bishop* was based on a federal drug sentencing statute which provided an enhanced penalty based on the quantity of substance involved in the offense. The court in *Bishop* quotes the relevant statute specifically referring to quantities " 'of a mixture or substance containing a detectable amount of' " certain controlled substances. 894 F.2d at 984. See, also, 21 U.S.C. § 841(b)(1)(A) (2000). The Court of Appeals for the Eighth Circuit concluded that based on 21 U.S.C. § 841, the quantity forming the basis for imposition of the enhanced penalty could be the quantity of a controlled substance mixed with another substance. The court in *Bishop* distinguished its prior decision in *U.S. v. McGeehan*, 824 F.2d 677 (8th Cir. 1987), which had interpreted a prior version of the federal statute that did not contain the "mixture" language and had stated that only the weight of the controlled substance, not the combined weight of the "mixture," could be considered. Because *Bishop* is based

on a federal statute with language which differs from the Nebraska statutes, it is distinguishable.

Although based on somewhat different reasoning, we find merit in Utter's argument summarized above.

(d) Resolution

The definition of "dealer" in § 77-4301(2) refers to "any controlled substance." Section 77-4301(1) defines "controlled substance" for purposes of the marijuana and controlled substances tax as "any drug or substance, including an imitation controlled substance, that is held, possessed, transported, transferred, sold, or offered to be sold in violation of Nebraska law." By reference to §§ 48-416(1), 28-401(4), and 28-405, quoted *supra*, it is clear that the "controlled substance[s]" in this case, for purposes of the tax stamp statute, are found in Schedule II.

Section 28-405, Schedule II, includes

> (a) Any of the following substances . . . .
>
> . . . .
>
> (4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent to or identical with any of these substances, including cocaine and its salts, optical isomers, and salts of optical isomers, except that the substances shall not include decocainized coca leaves or extractions which do not contain cocaine or ecgonine[.]

Schedule II further lists "(c) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system: . . . (3) methamphetamine, its salts, isomers, and salts of its isomers . . . ." Neither DMS nor mannitol is listed in Schedules I to V of § 28-405. In sum, Schedule II of § 28-405 defines "controlled substance" to include, inter alia, "cocaine" and a "mixture . . . which contains . . . methamphetamine."

The Schedule II listing includes cocaine in isolation and a mixture containing methamphetamine, but it does not include a mixture containing cocaine. Compare, 21 U.S.C. § 841 applied in *U.S. v. Bishop*, 894 F.2d 981, 984 (8th Cir. 1990) (referring to

quantities "'of a mixture or substance containing a detectable amount of'" certain controlled substances), and *People v. Esquivel-Alaniz*, 985 P.2d 22, 24 (Colo. App. 1999) (holding evidence sufficient to support conviction for possession and sale of cocaine in amount greater than 25 grams, even though pure cocaine in mixture was less than 25 grams, because Colorado statute defined "cocaine" to include "'any compound, mixture, or preparation which contains any quantity of'" cocaine (emphasis omitted)).

[4] We are aware that § 28-416(7), which grades drug offenses involving cocaine based on the quantity involved, provides as follows:

> Any person who violates subsection (1) of this section with respect to cocaine *or any mixture or substance containing a detectable amount of cocaine* in a quantity of:
>
> (a) One hundred forty grams or more shall be guilty of a Class IB felony;
>
> (b) At least twenty-eight grams but less than one hundred forty grams shall be guilty of a Class IC felony; or
>
> (c) At least ten grams but less than twenty-eight grams shall be guilty of a Class ID felony.

(Emphasis supplied.) We find it significant that in grading drug offenses according to quantity, the Legislature specified "cocaine or any mixture or substance containing a detectable amount of cocaine." However, in contrast, § 77-4301(2) refers only to "any controlled substance" as defined in Schedule II and not to "any mixture containing a controlled substance." Penal statutes are to be strictly construed, and we are not at will to read "mixture" into the controlling statute where that concept has not been expressed by the Legislature. *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001) (it is not for courts to supply missing words or sentences to statute).

Utter was convicted under § 77-4309 of being a "dealer distributing or possessing . . . a controlled substance without affixing the official stamp, label, or other indicium." Section 77-4301(2), which defines "dealer," requires involvement of 7 grams or more of a controlled substance. We are obliged to construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. *In re Estate of Eickmeyer*, 262

Neb. 17, 628 N.W.2d 246 (2001). Schedule II is applicable to the tax stamp statute and identifies a mixture containing methamphetamine and cocaine in isolation as controlled substances, but does not include a mixture containing cocaine as a controlled substance. For purposes of the marijuana and controlled substances tax statutes, 7 or more grams of a "controlled substance" must be involved in order to be a "dealer" subject to the tax. Thus, a sufficient quantity of cocaine in isolation and/or a mixture containing methamphetamine could be the basis of a finding of 7 or more grams for "dealer" purposes; however, the entire weight of a quantity identified only as "a mixture containing cocaine" could not be considered a controlled substance when assessing whether 7 or more grams are involved.

In the present case, the evidence established that Utter possessed 3.45 grams of a methamphetamine/DMS mixture, which mixture is a controlled substance for purposes of § 77-4309. However, although the evidence established that Utter possessed 7.05 grams of a cocaine/mannitol mixture, a mixture containing cocaine is not a controlled substance for purposes of § 77-4309, and the evidence did not establish how much cocaine in isolation Utter possessed. For the sake of completeness, we note that § 77-4303(2) provides that for purposes of the marijuana and controlled substances tax, the weight of a controlled substance in the dealer's possession "shall be the actual weight, if known, or *the estimated weight* as determined by the Nebraska State Patrol or other law enforcement agency. Such determination shall be presumed to be the weight of such . . . controlled substances for purposes of sections 77-4301 to 77-4316." (Emphasis supplied.) The chemist in the instant case testified that the weight of the cocaine/mannitol mixture was 7.05 grams, but made no estimate under § 77-4303(2) as to what weight of the mixture was attributable to cocaine in isolation.

In order to establish that Utter was a "dealer" under § 77-4301(2), and therefore subject to conviction under § 77-4309, the State needed to prove that he possessed "seven or more grams of any controlled substance" listed in § 28-405. The charges against Utter involved cocaine and methamphetamine, and therefore the State needed to prove that he possessed (1) 7 or more grams of cocaine in isolation, or (2) 7 or more grams of a

mixture containing methamphetamine, or (3) 7 or more grams combined of cocaine in isolation and a mixture which contains methamphetamine. The State provided evidence that Utter possessed 3.45 grams of the methamphetamine mixture, a controlled substance for tax stamp purposes. However, the State failed to provide evidence of the amount of cocaine in isolation. Thus, although the 3.45 grams of the methamphetamine mixture was properly considered by the jury, the State failed as a matter of law to put on evidence regarding pure cocaine or an estimated weight of cocaine alone, and therefore, the jury could not properly consider the cocaine mixture in its evaluation of whether Utter possessed "seven or more grams of any controlled substance" for tax stamp purposes. Therefore, there was insufficient evidence as a matter of law from which the jury could find that Utter was a dealer for tax stamp purposes, and his conviction must be reversed.

VI. CONCLUSION

We conclude that the evidence in this case was sufficient for the jury to find an intent to deliver and to convict Utter of two counts of possession of a controlled substance with intent to deliver and affirm these convictions. We conclude, however, that the evidence was not sufficient for the jury to find that Utter was a "dealer" under the definition in § 77-4301(2) and to convict him of a failure to affix a tax stamp in violation of § 77-4309. Thus, we affirm Utter's convictions on two counts of possession of a controlled substance with intent to deliver, and reverse his conviction and sentence for failure to affix a tax stamp and remand the cause with directions to dismiss the count of failure to affix a tax stamp.

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

STATE OF NEBRASKA, APPELLEE, V. SHANE R. RECEK, APPELLANT.

641 N.W.2d 391

Filed April 5, 2002. No. S-01-769.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Speedy Trial: Proof.** To avoid a defendant's absolute discharge from an offense charged, as dictated by Neb. Rev. Stat. § 29-1208 (Reissue 1995), the State must prove by a preponderance of the evidence the existence of a period of time which is authorized by Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) to be excluded in computing the time for commencement of the defendant's trial.
4. **Criminal Law: Final Orders: Appeal and Error.** An appellate court will not hear an appeal by the State pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 1995) unless it involves a final order.
5. **Speedy Trial.** Where a motion to discharge on speedy trial grounds is submitted to a trial court, the excludable period attributable to a defendant's pretrial motion is calculated from the date the motion is filed until the date the motion is granted or denied.
6. **Speedy Trial: Good Cause.** If a trial court relies on Neb. Rev. Stat. § 29-1207(4)(f) (Reissue 1995) in excluding a period of delay from the 6-month speedy trial computation, a general finding of good cause will not suffice. The trial court must make specific findings as to the good cause which resulted in the extension of time.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Reversed and remanded with directions to dismiss.

Susanne Dempsey, Platte County Public Defender, and James R. Mowbray and Kelly S. Breen, of Nebraska Commission on Public Advocacy, for appellant.

Don Stenberg, Attorney General, and Ronald D. Moravec for appellee.

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

WRIGHT, J.

NATURE OF CASE

Shane R. Recek moved to dismiss a charge of manslaughter based upon an alleged violation of his statutory right to a speedy

trial. The Platte County District Court denied Recek's motion, and he appeals.

SCOPE OF REVIEW

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Murphy*, 255 Neb. 797, 587 N.W.2d 384 (1998).

[2] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *State v. French*, 262 Neb. 664, 633 N.W.2d 908 (2001).

FACTS

An information was filed by the Platte County Attorney on June 23, 2000, alleging that Recek caused the death of Anthony Still unintentionally while in the commission of an unlawful act (count I) and used a firearm to commit a felony (count II). On July 25, Recek moved to quash count II on the basis that it was inconsistent to charge him with intentionally using a weapon to commit the unintentional act of manslaughter. On September 8, the district court sustained the motion to quash and dismissed count II.

The State attempted to appeal the dismissal pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 1995), and Recek moved for summary dismissal of the appeal, contending that the district court's order dismissing count II was not a final, appealable order. On February 22, 2001, this court granted summary dismissal. The State moved for a rehearing, and the motion was overruled. The mandate issued on March 27, and judgment was entered on the mandate on March 29. Recek was arraigned on April 18, and on April 24, he filed a motion to transfer the case to juvenile court. This motion was denied on May 29.

On June 7, 2001, Recek moved for discharge, claiming that his statutory and constitutional rights to a speedy trial had been violated. At a hearing on the motion, the State argued that there were applicable exceptions in Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) that tolled the running of the statute. The State asserted that the periods during which the motion to quash and

the motion to transfer were pending in the district court were excludable. Specifically, the State claimed that § 29-1207(4)(a) excluded the time between Recek's motion to quash and resolution of the State's appeal regarding the motion because the motion was not finally disposed of until the district court entered judgment on the mandate.

The district court found that the motion to quash was sustained on September 8, 2000, but that the order had been appealed by the State on September 19 pursuant to § 29-2315.01, which authorizes a county attorney to take exception to any rule or decision of the court constituting a final order made during the prosecution of a case. The district court stated that it was divested of subject matter jurisdiction after the State's appeal was instituted until the mandate of this court issued and that final disposition of Recek's motion to quash did not occur until judgment was entered on the mandate on March 29, 2001. The court concluded that pursuant to § 29-1207(4)(a), the period of time between the filing of Recek's motion to quash on July 25, 2000, and final disposition via judgment on the mandate on March 29, 2001, must be excluded in computing the time for speedy trial purposes.

The district court also noted that summary dismissal of the State's appeal reflected by implication that the dismissal of count II was not a final order but that there was nothing before the court to suggest that the State's appeal was frivolous or motivated by bad faith. The court concluded that even if it could be argued that the time during which the State's appeal was pending should not be excluded for speedy trial purposes, the time nonetheless should be excluded pursuant to § 29-1207(4)(f) because under the facts presented, the delay occurred for good cause. The court found that the period between April 24, 2001, when Recek filed his motion to transfer, and May 29, when the motion was denied, must likewise be excluded in computing the time for speedy trial pursuant to § 29-1207(4)(a). The court found that 113 days remained in the statutory 6-month speedy trial period within which Recek must be brought to trial. Therefore, the court denied Recek's statutory and constitutional speedy trial claims.

ASSIGNMENTS OF ERROR

Recek assigns as error that the district court erred in denying his speedy trial motion because the court found that the time period between "September 8, 2000 until March 2[9], 2001," was excluded from the statutory speedy trial computation by application of § 29-1207(4)(a) and (f). He does not assign as error that the court erred in failing to find a violation of his constitutional right to a speedy trial.

ANALYSIS

[3] To avoid a defendant's absolute discharge from an offense charged, as dictated by Neb. Rev. Stat. § 29-1208 (Reissue 1995), the State must prove by a preponderance of the evidence the existence of a period of time which is authorized by § 29-1207(4) to be excluded in computing the time for commencement of the defendant's trial. *State v. Baird*, 259 Neb. 245, 609 N.W.2d 349 (2000).

Section 29-1207(4) provides:

> The following periods shall be excluded in computing the time for trial:
>
> (a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to . . . the time from filing until final disposition of pretrial motions of the defendant . . . .
>
> . . . .
>
> (f) Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause.

We therefore proceed to determine the periods of time which are excludable pursuant to § 29-1207(4). We note first that the period of time between Recek's filing of the motion to quash on July 25, 2000, and the district court's sustaining of the motion on September 8 is clearly excludable.

The State claims that the time between Recek's filing of his motion to quash and the time the district court entered judgment on the mandate on March 29, 2001, is excludable pursuant to § 29-1207(4)(a). For this to be true, final disposition of the motion to quash must not have occurred until the district court entered judgment on the mandate.

In *State v. Wieczorek*, 252 Neb. 705, 565 N.W.2d 481 (1997), we held that the State's right to seek review of a ruling made during the prosecution of a criminal case is limited to the procedures set forth in § 29-2315.01, which permits a county attorney to file an application to the trial court seeking leave to appeal. The State's right to appeal in criminal cases pursuant to § 29-2315.01 is limited to an appeal only after a final order has been entered in the case. See *State v. Martinez*, 198 Neb. 347, 252 N.W.2d 630 (1977).

In *Wieczorek*, the State filed an application for review of the dismissal of three counts of a four-count information before the defendant had been sentenced on the remaining count. We held that the application was filed before the entry of a final order and was therefore insufficient to confer jurisdiction. We stated that an order entered during the pendency of a criminal cause is final only when no further action is required to dispose of the matter pending.

In *State v. Hall*, 252 Neb. 885, 566 N.W.2d 121 (1997), the district court sustained the defendant's demurrer to the second count of a two-count information alleging murder in the first degree (count I) and use of a weapon to commit a felony (count II). The State appealed the order dismissing count II purportedly pursuant to § 29-2315.01. We dismissed the appeal for lack of jurisdiction because count I was still pending.

[4] As established in *Wieczorek* and *Hall*, this court will not hear an appeal by the State pursuant to § 29-2315.01 unless it involves a final order. The case at bar is distinguishable from *State v. Hayes*, 10 Neb. App. 833, 639 N.W.2d 418 (2002), in which the Nebraska Court of Appeals held that the speedy trial clock does not run while the State pursues appeals under Neb. Rev. Stat. § 29-824 (Cum. Supp. 2000). The Court of Appeals stated:

> "We have held, with reference to § 29-1207(3), that the 6-month period in which the State is to retry a defendant following a successful appeal is fixed by reference to the date on which the district court first takes action pursuant to the mandate of the appellate court. *State v. Kinser*, 256 Neb. 56, 588 N.W.2d 794 (1999). Our rationale for that holding was that the date of the district court's first action on the mandate was the date on which the district court had reacquired juris-

diction over the case from the appellate courts. *Id.* See, also, *State v. Belmarez*, 254 Neb. 436, 577 N.W.2d 255 (1998).

> "This rationale also dictates that where further proceedings are to be had following an interlocutory appeal, for speedy trial purposes, the period of time excludable due to the appeal concludes when the district court first reacquires jurisdiction over the case by taking action on the mandate of the appellate court."

Hayes, 10 Neb. App. at 840, 639 N.W.2d at 426 (quoting *State v. Ward*, 257 Neb. 377, 597 N.W.2d 614 (1999)). *Hayes* is inapplicable because in that case the State's appeal was clearly permissible pursuant to Neb. Rev. Stat. § 29-116 (Cum. Supp. 2000). Here, the State appealed pursuant to § 29-2315.01, but its appeal was dismissed for lack of jurisdiction.

The State's right to seek a review is limited to the procedure set forth in § 29-2315.01. A county attorney is permitted to file an application to the trial court seeking leave to appeal within 20 days after a final order is entered in a cause. See *State v. Hall, supra*. The granting of Recek's motion to quash was not a final order because the manslaughter charge was still pending. Since no final order had been entered, the State was without statutory authority to take the appeal.

Thus, the question is whether the time during which the State's appeal was pending should be excluded from the speedy trial calculation when there was no statutory authority to take the appeal. The district court found that final disposition of Recek's motion to quash did not occur until the court entered judgment on the mandate from this court. The district court therefore concluded that this period of delay was the result of Recek's conduct in filing the motion to quash.

[5] In *State v. Murphy*, 255 Neb. 797, 802, 587 N.W.2d 384, 388 (1998), citing *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983), we held that the pretrial motion of a defendant is " 'finally disposed' " on the date that it is granted or denied. The excludable period attributable to a defendant's pretrial motion is calculated from the date the motion is filed until the date the motion is granted or denied. *State v. Ward, supra*. Therefore, unless the time for the State's appeal can be "charged" to Recek, only the period from the filing of the motion to quash to the date

it was granted can be excluded from the time for bringing Recek to trial.

We have not addressed this issue previously; however, other jurisdictions have faced similar questions. In *Com. v. Malinowski*, 543 Pa. 350, 671 A.2d 674 (1996), the Commonwealth of Pennsylvania's appeal was determined to be a nullity because it failed to have the appeal certified. The defendant moved to dismiss, alleging that the commonwealth had failed to bring him to trial within the time period mandated by law. The court found that the commonwealth's failure to comply with proper certification procedures rendered its appeal a nullity and that, as such, the commonwealth was not entitled to exclude the time period encompassed by the appeal from the computation of the defendant's right to a prompt trial as provided by law. Rule 341(c) of the Pennsylvania Rules of Appellate Procedure provided in part: "'[A]n Appeal may be taken by the Commonwealth from any final order in a criminal matter only in the circumstances provided by law.'" (Emphasis omitted.) *Malinowski*, 543 Pa. at 358, 671 A.2d at 678. The court held that without certification, the commonwealth had no right to appeal and that without the right to appeal, the commonwealth failed to exercise due diligence by filing the appeal. Failure to file the certification rendered the suppression order unappealable.

In *State v. Ho*, 7 Haw. App. 516, 782 P.2d 29 (1989), *overruled on other grounds, State v. Hoey*, 77 Haw. 17, 881 P.2d 504 (1994), the state appealed an oral suppression order. Without a written order of suppression, there was no appellate jurisdiction. The defendant successfully argued that the appeal from such order was a nullity and that, therefore, the period of time should not be excluded.

In *State v. Grimes*, 229 Kan. 143, 622 P.2d 143 (1981), the defendant moved for a new trial. The trial court granted the motion, and the state appealed. The defendant then moved for involuntary dismissal of the appeal because the state was not authorized to appeal from the granting of a new trial. The Kansas Supreme Court held that since the state's appeal from the order was unauthorized, the time period within which the state was required to bring the defendant to trial continued to run during the unauthorized appeal.

We find the reasoning of the above jurisdictions applicable to the case at bar. The State appealed from a nonfinal order, and this court did not acquire jurisdiction to hear the appeal. Such delay was not an expected and reasonable consequence of the motion to quash and was not chargeable to Recek. Final disposition of the motion to quash occurred when the district court sustained the motion. Thus, the court erred in finding that the time during which the appeal was pending was excludable under § 29-1207(4)(a).

[6] Next, we analyze whether the time was excludable under § 29-1207(4)(f). The district court determined that the State showed by a preponderance that there existed good cause for the delay. In *State v. Kinstler*, 207 Neb. 386, 299 N.W.2d 182 (1980), we held that if a trial court relies on § 29-1207(4)(f) in excluding a period of delay from the 6-month speedy trial computation, a general finding of "good cause" will not suffice. The trial court must make specific findings as to the good cause which resulted in the extension of time. Here, the court found: "[T]here is nothing before the Court to suggest the State's appeal was frivolous or motivated by bad faith." The court also noted that the legal question of whether a count of use of a weapon to commit a felony could be charged along with a manslaughter count had not previously been decided by this court. Thus, the court concluded that good cause had been shown by the State.

Good cause is not shown simply because there has been no proof that the State acted in bad faith or because the substantive issue raised by the appeal has not previously been decided. The district court's finding that the State did not act in bad faith does not equate to a showing that there was good cause for the delay. Recek has correctly asserted that such a finding would improperly shift the burden to the defendant. Rather than requiring the State to show good cause, the court would require Recek to show bad faith. Also, the fact that at the time the appeal was taken, this court had not determined the issue presented by the appeal does not establish good cause for the delay. Thus, we conclude that the State has not sustained its burden to show good cause for the delay, and the district court erred in not sustaining Recek's motion to dismiss on the ground that his statutory right to a speedy trial had been denied.

The information was originally filed against Recek on June 23, 2000. If no time periods were excluded under § 29-1207(4)(a), the last day on which the State could have brought Recek to trial would have been December 23. The State proved that 45 days were properly excluded from July 25 until September 8, when Recek's motion to quash was pending. Therefore, the State had until February 6, 2001, to bring Recek to trial and failed to do so. As a result, Recek is entitled to an absolute discharge under § 29-1208.

We also note that the time between Recek's filing of his motion to transfer to juvenile court on April 24, 2001, and the district court's denial of the motion on May 29 is not relevant to our determination because by the time Recek filed his motion for transfer, the time for bringing him to trial pursuant to § 29-1207 had already expired.

CONCLUSION

Because the State has failed to prove an exception under § 29-1207(4), the judgment of the district court is reversed, and the cause is remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA EX REL. LAUREY STEINKE, AN INDIVIDUAL, AND JOHN T. LANGAN, AN INDIVIDUAL, APPELLEES, V. SCOTT A. LAUTENBAUGH, DOUGLAS COUNTY ELECTION COMMISSIONER, IN HIS OFFICIAL CAPACITY, APPELLANT.

642 N.W.2d 132

Filed April 10, 2002. No. S-02-206.

1. **Mandamus: Words and Phrases.** Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the 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 right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law.
2. **Mandamus.** A grant or denial of mandamus is within the trial court's discretion.
3. **Judgments: Jurisdiction.** A jurisdictional question which does not involve a factual dispute is a matter of law.

4. **Standing: Jurisdiction.** Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.
5. **Standing: Jurisdiction: Justiciable Issues.** As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.
6. **Standing.** In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy.
7. **Standing: Proof.** In order for a party to establish standing to bring suit, it is necessary to show that the party is in danger of sustaining direct injury as a result of anticipated actions, and it is not sufficient that one has merely a general interest common to all members of the public.
8. **Public Officers and Employees: Actions.** A person seeking to restrain the act of a public board or officer must show special injury peculiar to himself or herself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation.
9. **Constitutional Law: Appeal and Error.** Except in the most unusual of cases, a separation of powers constitutional argument must be raised in the district court in order to be preserved on appeal.
10. **Schools and School Districts: Legislature.** The creation of school districts and their boundaries is a legislative function which may be delegated to another body. When such duties are delegated, they remain a function entirely within the province of the Legislature and are not subject to judicial review. However, when the Legislature delegates authority, it may place such restrictions and limitations upon the authority granted as it chooses.
11. **Statutes.** Interpreting a statute presents a question of law for judicial determination.
12. **Political Subdivisions: Counties: Legislature.** A county is a political subdivision of the state and has subordinate powers of sovereignty conferred by the Legislature.
13. **Actions: Public Officers and Employees: Immunity.** When an action is brought against an individual employee of a state agency, a court must determine whether the action against the individual official is in reality an action against the state and therefore barred by sovereign immunity.
14. ____: ____: ____. An action against a public officer to obtain relief from an invalid act or from an abuse of authority by the officer or agent is not a suit against the state and is not prohibited by sovereign immunity.
15. ____: ____: ____. Suits which seek to compel affirmative action on the part of a state official are barred by sovereign immunity, but if a suit simply seeks to restrain the state official from performing affirmative acts, it is not within the rule of immunity.
16. **Schools and School Districts: Public Officers and Employees.** Read together, Neb. Rev. Stat. §§ 32-552 and 32-553 (Reissue 1998 & Supp. 2001) authorize an election commissioner to draw or adjust the boundaries of school districts following a federal decennial census only as is necessary to maintain substantial population equality within the districts.
17. ____: ____. Adjustment of district boundaries does not have the effect of depriving an incumbent from exercising his or her duties for the full elected term even when the

change of boundary lines places the officer's residence outside the district from which he or she was elected.

18. **Mandamus: Public Officers and Employees.** A decision by a public official contrary to law or based on a mistaken view of the law is not within the exercise of discretion lying outside the remedy of mandamus, and by mandamus, a court can correct such mistake of law and compel the proper application of law, thereby converting an otherwise discretionary act into a purely ministerial duty.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

H. Daniel Smith and John A. Kinney, of Dwyer, Smith, Grimm, Gardner, Lazer, Pohren, & Rogers, for appellant.

Jill Robb Ackerman and David M. Pedersen, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, L.L.P., for appellees.

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

STEPHAN, J.

Douglas County Election Commissioner Scott A. Lautenbaugh appeals from an order of the district court for Douglas County allowing the issuance of a peremptory writ of mandamus directing Lautenbaugh to restore the number "9" to the adjusted territory of an Omaha school board election subdistrict and to accept John T. Langan's filing as an incumbent candidate for reelection in that subdistrict. We affirm.

FACTS

Relators, Laurey Steinke and Langan, are individual taxpayers, voters, and residents of Douglas County School District No. 001, a Class V school district commonly known as Omaha Public Schools (OPS). Prior to November 29, 2001, both were residents of OPS board election subdistrict No. 9, and Langan was the incumbent board member from that subdistrict. On that date, Lautenbaugh, in his official capacity as election commissioner, certified new boundaries for the 12 OPS board election subdistricts based upon 2000 federal decennial census data. See Neb. Rev. Stat. §§ 32-552 and 32-553 (Reissue 1998 & Supp. 2001). After Lautenbaugh's certification of new boundaries, neither Steinke nor Langan, nor any other resident of what had been subdistrict No. 9, resided in the newly designated subdistrict No. 9.

On February 5, 2002, Langan filed a "Candidate Filing Form for Non Partisan Office" with the Douglas County Election Office, indicating his intention to run for reelection to the office of OPS board member in subdistrict No. 9 at the May 14, 2002, election. This filing was rejected by Lautenbaugh because Langan was no longer a resident of subdistrict No. 9 according to the new boundaries. On the same day, relators filed a petition and an affidavit for writ of mandamus in the district court for Douglas County. The petition alleged that Lautenbaugh exceeded his authority under § 32-552(3) and abused his statutory power by "not simply adjusting boundaries, but by also switching the numbers between" subdistricts Nos. 9 and 10. The petition further alleged that the general area of former subdistrict No. 9 was labeled subdistrict No. 10 by Lautenbaugh and that the general area of former subdistrict No. 10 was labeled subdistrict No. 9. Pursuant to Neb. Rev. Stat. § 32-545 (Reissue 1998), elections for odd-numbered subdistricts will be held in 2002 and elections for even-numbered subdistricts will be held in 2004. The petition requested the issuance of a writ of mandamus directing Lautenbaugh to restore the subdistrict numbers and accept Langan's filing in subdistrict No. 9. An alternative writ was ordered by the court.

On February 12, 2002, trial was held on the provision of the alternative writ compelling Lautenbaugh to appear and show cause. Relators appeared with counsel, and Lautenbaugh appeared pro se. On cross-examination, Lautenbaugh testified that no subdistrict numbers were put in before he adjusted the boundaries. He further testified:

> [Counsel for relators:] So you had that done. So you had all of that done, but then when you put the numbers on, the numbers didn't have anything to do with population — did it — adjusting these boundaries for population when you changed the numbers?
>
> [Lautenbaugh:] No.
>
> Q. And they didn't have anything to do with keeping this area compact; did they?
>
> A. The numbers, no.
>
> Q. And they didn't have anything to do with keeping it contiguous; did it?

A. No. I drew all of them to be compact and contiguous.

Q. Basically your changing the numbers didn't have anything to do with your statutory directive; did it?

A. The one you cited, no.

Q. That's [§§ 32-]552 and [32-]553 that we looked at; isn't that correct?

A. Yes.

On redirect, Lautenbaugh testified that "[a]s it now stands, if the Relators are successful, the people in District 10 will be represented by someone who lives outside of District 10. In my opinion, that is a judgment call that I made as a proper consideration of how to redistrict." Upon being questioned by the court, Lautenbaugh testified that "how I numbered the districts after I adjusted the lines was largely then a function of whether or not a district would go unrepresented for three years with a resident incumbent or otherwise."

During the February 12, 2002, trial, the district court concluded that Lautenbaugh exceeded his statutory authority because "[r]egardless of how pure his motive was, he is not permitted to take into account a political result or political situation which occurs as a result of him performing his statutory duty to adjust the boundaries." On February 14, the district court ordered the issuance of a peremptory writ of mandamus. Lautenbaugh filed this timely appeal, which, upon relators' request to expedite due to the pending May 14, 2002, election, we moved to our docket.

ASSIGNMENTS OF ERROR

Lautenbaugh assigns that the district court erred in (1) finding that relators had standing to bring suit, (2) issuing a peremptory writ barred by the separation of powers provisions of the Nebraska Constitution, (3) issuing a peremptory writ in a case which raises only a political question, (4) accepting jurisdiction and issuing a peremptory writ barred by sovereign immunity, (5) finding that the 12 OPS subdistricts had to remain unchanged as "core territories," and (6) substituting its discretion for the discretion of the election commissioner in the drawing of subdistrict boundaries for school district elections.

STANDARD OF REVIEW

[1,2] Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the 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 right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law. *Sydow v. City of Grand Island, ante* p. 389, 639 N.W.2d 913 (2002). A grant or denial of mandamus is within the trial court's discretion. *State ex rel. Fick v. Miller*, 255 Neb. 387, 584 N.W.2d 809 (1998).

[3] A jurisdictional question which does not involve a factual dispute is a matter of law. *Sydow v. City of Grand Island, supra.*

ANALYSIS

STANDING

[4,5] Lautenbaugh asserts that relators lack standing and that, thus, the district court lacked jurisdiction to order the issuance of the writ. Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. *Hagan v. Upper Republican NRD*, 261 Neb. 312, 622 N.W.2d 627 (2001). As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf. *Id.*

[6-8] In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy. *Id.* In order for a party to establish standing to bring suit, it is necessary to show that the party is in danger of sustaining direct injury as a result of anticipated actions, and it is not sufficient that one has merely a general interest common to all members of the public. *Id.* Specifically,

> "[a] person seeking to restrain the act of a public board or officer must show special injury peculiar to himself or herself aside from and independent of the general injury to the

> public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation."

Id. at 317, 622 N.W.2d at 630, quoting *Neb. Against Exp. Gmblg. v. Neb. Horsemen's Assn.*, 258 Neb. 690, 605 N.W.2d 803 (2000), citing *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999).

In the instant case, Steinke alleged that she was injured by the challenged renumbering of subdistricts Nos. 9 and 10 because she will be denied the opportunity to vote for the candidate of her choice in the upcoming election, she will be denied the opportunity to vote in the upcoming election, and she will be represented for the next 2 years by a school board member who was not elected by the constituents in her subdistrict. Langan alleged that he was injured by the challenged renumbering because he will be denied the opportunity to file and run for office for OPS subdistrict No. 9, he will be denied the opportunity to vote for the school board candidate of his choice, he will be denied the opportunity to vote in the upcoming election, and he will be represented for the next 2 years by a school board member who was not elected by the constituents in his subdistrict. The issue is whether these allegations demonstrate a special injury peculiar to relators.

Lautenbaugh argues that relators have suffered no injury because they have no legal right to vote in this particular election for any particular candidate. In *Barnett v. Boyle*, 197 Neb. 677, 250 N.W.2d 635 (1977), we held that voters affected by the original division of OPS into subdistricts and the implementation of the staggered election system did not have a valid equal protection claim that they were disenfranchised by the enactment of the statute. We noted that the right to vote was merely delayed and not denied. *Barnett*, however, addressed only whether the constitutional right to vote was violated; it did not hold that a person is not injured by a delay in his or her right to vote. In fact, by reaching the merits and determining that the statute requiring election by subdistrict was constitutional, *Barnett* implicitly recognized that the plaintiffs had standing to bring the action. Relators herein have alleged a direct interest in participating in the upcoming election that will be affected by the actions of the election commissioner which they challenge as unlawful.

Lautenbaugh also asserts that relators have demonstrated no injury that is peculiar to them and not an injury suffered by the public at large. Although the injury alleged by relators was presumably suffered by all residents of the former subdistrict No. 9, those residents do not constitute the general public. Relators have alleged a special interest peculiar to them and therefore have standing to bring this action. Compare *Neb. Against Exp. Gmblg., supra* (holding taxpayer and nonprofit organization opposed to gambling lacked standing to challenge State Racing Commission's issuance of simulcast horseracing license when plaintiffs asserted only general interest common to all members of public); *Ritchhart, supra* (holding Omaha citizen and taxpayer lacked standing to challenge verbal agreements between mayor, fire chief, and communications chief because no special injury independent from that of general public alleged).

Separation of Powers

Lautenbaugh asserts that the district court violated the doctrine of separation of powers embodied in the Nebraska Constitution when it ordered the issuance of the peremptory writ. Article II, § 1, of the Nebraska Constitution provides: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." Lautenbaugh contends that it is for "the legislature and legislature alone to design a scheme for fixing the boundaries of these [school] districts, and to delegate the power as it sees fit, and the entire matter is 'not subject to judicial review.' " Brief for appellant at 18, quoting *School District No. 49 v. School District No. 65-R*, 159 Neb. 262, 66 N.W.2d 561 (1954).

[9] Initially, we note that Lautenbaugh did not present this argument to the district court. Except in the most unusual of cases, a separation of powers constitutional argument must be raised in the district court in order to be preserved on appeal. See, *State ex rel. Shepherd v. Neb. Equal Opp. Comm.*, 251 Neb. 517, 557 N.W.2d 684 (1997); *State v. Criffield*, 241 Neb. 738, 490 N.W.2d 226 (1992). Lautenbaugh had the opportunity

to raise the separation of powers issue in his answer to the alternative writ and at the hearing to show cause on that writ, but did not do so. He therefore has not preserved the issue for our review.

[10,11] Moreover, there is no violation of the doctrine of separation of powers in this case. Clearly, the creation of school districts and their boundaries is a legislative function which may be delegated to another body. *Farrell v. School Dist. No. 54*, 164 Neb. 853, 84 N.W.2d 126 (1957); *School District No. 49, supra.* When such duties are delegated, they remain a function entirely within the province of the Legislature and are not subject to judicial review. *Id.* However, when the Legislature delegates authority, it may place such restrictions and limitations upon the authority granted as it chooses. *Nickel v. School Board of Axtell*, 157 Neb. 813, 61 N.W.2d 566 (1953). In the instant action, the courts are not being asked to redistrict, but, rather, to interpret the statutes by which the Legislature delegated authority to the election commissioner to adjust district boundaries in order to determine what restrictions and limitations, if any, the Legislature imposed upon the delegated authority. Interpreting a statute presents a question of law for judicial determination. *Arizona Motor Speedway v. Hoppe*, 244 Neb. 316, 506 N.W.2d 699 (1993); *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993). The district court therefore did not violate the separation of powers doctrine by interpreting the relevant statutes in this case.

Political Question

In a related argument, Lautenbaugh argues that neither the district court nor this court should address the issue presented because it involves a political question. As we have noted, although this appeal relates to the legislative function of establishing school district subdivisions, and as a political consequence the representation thereof, the precise issue before this court is simply the justiciable question of the proper interpretation of applicable statutes. See *Bressler v. Chicago & N. W. Ry. Co.*, 152 Neb. 732, 42 N.W.2d 617 (1950). There is no political question involved in this case, and the district court did not err in addressing the issue.

SOVEREIGN IMMUNITY

Lautenbaugh asserts that the district court lacked subject matter jurisdiction to order the issuance of the writ because the state's sovereign immunity barred the suit. In *Henderson v. Department of Corr. Servs.*, 256 Neb. 314, 589 N.W.2d 520 (1999), we held that nothing in the mandamus statutes, Neb. Rev. Stat. §§ 25-2156 to 25-2169 (Reissue 1995), indicates a legislative intent to waive sovereign immunity for mandamus actions against a state agency. Thus, if the instant action were brought against a state agency, it would be barred.

[12-15] In this case, the suit is brought against a public official who is a county employee. See Neb. Rev. Stat. § 32-217 (Reissue 1998) (designating election commissioner as county employee). A county is a political subdivision of the state and has subordinate powers of sovereignty conferred by the Legislature. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994). As such, it acts purely as an agent of the state. *Id.* When an action is brought against an individual employee of a state agency, a court must determine whether the action against the individual official is in reality an action against the state and therefore barred by sovereign immunity. See *County of Lancaster v. State*, 247 Neb. 723, 529 N.W.2d 791 (1995). In addressing this issue, we have stated that an action against a public officer to obtain relief from an invalid act or from an abuse of authority by the officer or agent is not a suit against the state and is not prohibited by sovereign immunity. *Johnson v. Clarke*, 258 Neb. 316, 603 N.W.2d 373 (1999). This exception to the rule of sovereign immunity exists because "'acts of state officers not legally authorized, or which exceed or abuse the authority conferred upon them, are judicially regarded as their own acts and not acts of the state.'" *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 156, 505 N.W.2d 654, 658 (1993), quoting *Rein v. Johnson*, 149 Neb. 67, 30 N.W.2d 548 (1947). Suits which seek to compel affirmative action on the part of a state official are barred by sovereign immunity, but if a suit simply seeks to restrain the state official from performing affirmative acts, it is not within the rule of immunity. *Logan v. Department of Corr. Servs.*, 254 Neb. 646, 578 N.W.2d 44 (1998).

Application of the foregoing principles demonstrates that this is not in reality an action brought against the state or one of its political subdivisions. The basis for relators' claims is that Lautenbaugh exceeded his statutory authority to adjust subdistrict boundaries, and thus, they seek relief from what they allege to be an invalid act or an abuse of authority by Lautenbaugh. In this situation, the relief requested is affirmative only to the extent that it requests Lautenbaugh's actions be nullified if determined to be invalid. Because the mandamus is brought only to remedy alleged invalid acts of a county official, the district court did not lack subject matter jurisdiction.

Issuance of Writ

Lautenbaugh contends that the district court erred in ordering the issuance of the writ because §§ 32-552 and 32-553 vest the election commissioner with complete discretion to renumber and adjust school district boundaries in a Class V school district. As noted, the creation of school districts and their boundaries is a legislative function which may be delegated to another body. *Farrell v. School Dist. No. 54*, 164 Neb. 853, 84 N.W.2d 126 (1957); *School District No. 49 v. School Dist. No. 65-R*, 159 Neb. 262, 66 N.W.2d 561 (1954). However, when the Legislature delegates authority, it may place such restrictions and limitations upon the authority granted as it chooses. *Nickel v. School Board of Axtell*, 157 Neb. 813, 61 N.W.2d 566 (1953). Therefore, the fact that the Legislature has delegated some authority to the election commissioner of a county in which a Class V school district is located does not necessarily mean that the election commissioner may act with unfettered discretion. To determine what authority has been delegated, it is necessary to examine the statutory language.

Section 32-553(1) provides that "[w]hen any political subdivision except a public power district nominates or elects members of the governing board by districts, such districts shall be substantially equal in population as determined by the most recent federal decennial census." Section 32-553(1) also mandates that political subdivisions "shall, if necessary to maintain substantial population equality as required by this subsection, have new district boundaries drawn within six months after the

passage and approval of the legislative bill providing for reestablishing legislative districts" after each federal decennial census. According to § 32-552(1), any political subdivision that makes changes to its district boundaries after a federal census must notify the election commissioner or county clerk in the county of the need of his or her office to perform such "adjustment of the boundaries of election districts."

Section 32-553(2) provides:

> The governing board of each such political subdivision shall be responsible for drawing its own district boundaries and shall, as nearly as possible, follow the precinct lines created by the election commissioner or county clerk after each federal decennial census, except that the election commissioner of any county in which a Class IV or V school district is located shall draw district boundaries for such school district as provided in this section and section 32-552.

Section 32-552(3) provides:

> The election commissioner of the county in which the greater part of a Class V school district is situated shall divide the school district into twelve numbered districts of compact and contiguous territory and of as nearly equal population as may be practical. The election commissioner shall adjust the boundaries of such districts to conform to changes in the territory of the school district and also following each federal decennial census.

[16] These statutes, read together, clearly impose limitations and restrictions upon the authority of the election commissioner when performing his or her duties relating to school districts after each federal decennial census. Section 32-553(2) provides that an election commissioner is to "draw district boundaries" as provided in §§ 32-553 and 32-552. Section 32-553(1) mandates that all districts be substantially equal in population and requires a political subdivision to "have new district boundaries drawn" only "if necessary to maintain substantial population equality" within the districts. Section 32-552(3), in turn, allows the election commissioner to "adjust the boundaries" of the districts following each federal decennial census. Read together, §§ 32-552 and 32-553 authorize an election commissioner to draw or adjust the boundaries of school districts following a federal

decennial census only as is necessary to maintain substantial population equality within the districts.

[17] In the instant case, Lautenbaugh testified that he adjusted the boundaries of the districts to account for population changes. He further testified, however, that he then assigned the number "9" to the territory which included most of former subdistrict No. 10, and the number "10" to the area which included most of former subdistrict No. 9, so that the incumbent board member in former subdistrict No. 10 would remain a resident of that district following adjustment of the boundaries. Lautenbaugh conceded that his assignment of subdistrict numbers had nothing to do with the statutory directives set forth in §§ 32-552 and 32-553, but contended that the residency of the incumbent was a "political factor" which formed the basis for a "judgment call that I made as a proper consideration of how to redistrict." We note that Lautenbaugh's alteration of subdistrict numbers was not necessary to preserve the incumbency of the school board member who had been elected from subdistrict No. 10. Adjustment of district boundaries does not have the effect of depriving an incumbent from exercising his or her duties for the full elected term even when the change of boundary lines places the officer's residence outside the district from which he or she was elected. *State v. Haverly*, 62 Neb. 767, 87 N.W. 959 (1901). See, also, *Barnett v. Boyle*, 197 Neb. 677, 250 N.W.2d 635 (1977) (noting that during transition period from election of school board members on at-large basis to election by district in alternating years, residents of some odd-numbered districts would be represented by school board members who had been elected at large).

We agree with the district court that the applicable statutes do not authorize an election commissioner to take into account political considerations when adjusting boundaries following a federal decennial census. As noted, the applicable statutes authorize the election commissioner to adjust subdistrict boundaries to maintain substantial equality in population. The statutes do not authorize the formation of new subdistricts. See *State v. Haverly, supra*. By adjusting the boundaries of what had been subdistricts Nos. 9 and 10 to reflect population changes reflected in the 2000 census data, Lautenbaugh carried out his statutory authority. By then assigning the subdistrict numbers to

the areas within the adjusted boundaries based upon the residency of an incumbent, he clearly exceeded that authority.

[18] Mandamus is an extraordinary remedy, not a writ of right, issued to compel the 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, and (3) there is no other plan and adequate remedy available in the ordinary course of law. *Sydow v. City of Grand Island, ante* p. 389, 639 N.W.2d 913 (2002). A decision by a public official contrary to law or based on a mistaken view of the law is not within the exercise of discretion lying outside the remedy of mandamus, and by mandamus, a court can correct such mistake of law and compel the proper application of law, thereby converting an otherwise discretionary act into a purely ministerial duty. See, *State ex rel. Wieland v. Beermann*, 246 Neb. 808, 523 N.W.2d 518 (1994); *State ex rel. Creighton Univ. v. Smith*, 217 Neb. 682, 353 N.W.2d 267 (1984). Lautenbaugh's decision to alter the numbering of subdistricts Nos. 9 and 10 was a decision contrary to law, and the district court did not err in ordering the issuance of a peremptory writ directing Lautenbaugh to return the original numbers to the subdistricts. In addition, because Langan resides within the proper subdistrict No. 9, the court did not err in ordering Lautenbaugh to accept Langan's filing.

CONCLUSION

For the reasons discussed, we affirm the order of the district court authorizing the issuance of a peremptory writ of mandamus, and we remand the cause to the district court for implementation of such relief.

AFFIRMED.

LINDA MARIE MEDLOCK, APPELLANT, V. MELVIN EUGENE MEDLOCK, APPELLEE.

642 N.W.2d 113

Filed April 12, 2002. No. S-00-1083.

1. **Property Division: Appeal and Error.** The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion.
2. **Appeal and Error.** To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.
3. **Divorce: Attorney Fees: Appeal and Error.** In an action for dissolution of marriage, the award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
4. **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.
5. **Property Division.** Equitable property division under Neb. Rev. Stat. § 42-365 (Reissue 1998) is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
6. **Divorce: Property Division.** Generally, the division of property in a dissolution case is based on equitable principles, and its purpose is to divide the marital assets equitably.
7. ____: ____. As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule.
8. ____: ____. In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held.
9. **Corporations.** A corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears.
10. **Corporations: Equity: Fraud.** In equity, the corporate entity may be disregarded and held to be the mere alter ego of a shareholder or shareholders in various circumstances where necessary to prevent fraud or other injustice.
11. **Corporations: Fraud.** When a corporation is or becomes the mere alter ego, or business conduit, of a person, it may be disregarded.
12. ____: ____. Among the factors which are relevant in determining to disregard the corporate entity are diversion by the shareholder or shareholders of corporate funds or assets to their own or improper uses and the fact that the corporation is a mere facade for the personal dealings of the shareholder and that the operations of the corporation are carried on by the shareholder in disregard of the corporate entity.
13. **Corporations: Liability.** In a case of "reverse piercing" of the corporate veil, in which the assets of the corporate entity may be used to satisfy the obligations of the controlling alter ego, factors to be considered in determining to disregard the corporate entity

are the insolvency of the individual and the extent to which the individual's ostensible poverty is supported by corporate assets.

14. **Corporations: Divorce: Property Division.** The assets of a spouse's corporate alter ego may be considered to be, and distributed as, part of the marital estate.
15. **Corporations: Courts: Equity.** The essence of the alter ego doctrine is that a court of equity will examine the whole transaction, looking through corporate forms to the substance of things, to protect the rights of innocent parties.
16. **Corporations.** Legal ownership, while relevant, is not a dispositive factor and does not preclude the finding of alter ego when control of the corporation is otherwise established.
17. **Corporations: Equity.** A corporation's status as a nonprofit corporation in and of itself does not bar a court from finding the corporation to be the alter ego of an individual and from applying the equitable remedy of piercing the corporate veil.
18. **Corporations.** Religious corporations are governed by the same general rules of law and equity as other corporations; in other words, they are subject to the same principles of law as any other civil corporation in courts of general jurisdiction.
19. **Constitutional Law: Legislature.** Government action passes muster under the Establishment Clause if (1) the statute or government action has a secular legislative purpose, (2) its principal or primary effect must neither advance nor inhibit religion, and (3) it does not foster excessive government entanglement with religion.
20. **Constitutional Law: Courts: Property.** The State has a legitimate interest in resolving property disputes, and a civil court is a proper forum for that resolution. Not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment.
21. **Courts.** The application of general law, the purpose and effect of which is to advance the State's secular goals, is valid despite an indirect burden on religious observance.
22. **Courts: Property.** So long as a court is not involved in resolving underlying controversies over religious doctrine, there are neutral principles of law, developed for use in all property disputes, which can be applied without "establishing" churches to which property is awarded.
23. ____: ____. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property.
24. **Statutes.** An individual's religious beliefs do not excuse the individual from compliance with an otherwise valid law regarding conduct that the State is free to regulate.
25. **Appeal and Error.** A party cannot complain of error which that party has invited the court to commit.
26. **Corporations: Judgments: Equity.** A nonparty may be bound by an equitable judgment sustaining an alter ego action if the party's interests are so closely affiliated with the nonparty's interests that the interests are merged.
27. **Corporations.** In order for a corporation to be accorded treatment as a separate legal entity, it must exist and function as such and not merely as the alter ego of a person controlling it.
28. **Divorce: Appeal and Error.** Appeals in domestic relations matters are heard de novo on the record, and thus, an appellate court is empowered to enter the order which should have been made as reflected by the record.
29. **Divorce: Attorney Fees.** In dissolution proceedings, an award of attorney fees depends on a variety of factors, including the amount of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation.

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

Gregory Garland, of Garland Law, P.C., and Kathy Pate Knickrehm for appellant.

Amy S. Geren, of Nolan, Olson, Hansen, Fieber, Lautenbaugh & Geren, and, on brief, Brent M. Kuhn, of Harris, Feldman Law Offices, for appellee.

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

GERRARD, J.

NATURE OF CASE

This is an appeal from the decree dissolving the marriage of Linda Marie Medlock and Melvin "Buddy" Eugene Medlock. The issue presented in this appeal is whether Linda was entitled to a share of the assets of Union Oaks, Inc., a nonprofit religious corporation operated by Buddy.

FACTUAL BACKGROUND

Buddy and Linda were married in 1972 and have five children, three of whom were under the age of 19 at the time of trial. Child custody is not at issue in this appeal.

Buddy was ordained as a minister in 1971 by the Christian Brotherhood, an organization of which Buddy was one of the founders. Union Oaks was founded in 1978; the parties dispute whether Union Oaks was founded by Buddy and Linda, or solely by Buddy. Union Oaks is a tax-exempt organization under the Internal Revenue Code. See I.R.C. § 501(c)(3) (2000). Buddy is the president of Union Oaks.

The seed funding for Union Oaks was provided by the proceeds of real estate sold by Buddy and Linda. Essentially, Buddy and Linda sold their property and transferred their marital property and income to Union Oaks. Buddy and Linda have not owned any personal property since 1978. Instead, Union Oaks has provided Buddy with a parsonage, the use of various vehicles, and a salary that appears to vary from year to year. Joint tax returns,

filed between 1991 and 1998, show total annual income for the Medlocks ranging from $25,181 in 1998 to $7,779 in 1993.

Union Oaks, at the time of trial, owned assets, primarily in real estate, that the district court found to have a total value of approximately $1.3 million. George Tesar, Jr., a certified real estate appraiser retained by Linda to value the property owned by Union Oaks, valued the parsonage at $275,000, an unimproved lot adjacent to the parsonage at $43,000, and a former restaurant used as a banquet hall at $525,000. Union Oaks also owned a $12,000 motorcycle and three other vehicles and had sold six other vehicles since Linda had filed her petition for legal separation. At the time of trial, Union Oaks had cash assets of $134,381.73 and held debts owed to Union Oaks in the amount of roughly $90,000. The only debt admittedly owed by Union Oaks to anyone else was a note owed from Union Oaks to Buddy and Linda in the amount of approximately $50,000. There was conflicting evidence presented regarding the continued existence of certificates of deposit valued at approximately $207,000.

The assets of Union Oaks were accrued from the initial funding provided by Buddy and Linda through a series of real estate transactions, primarily involving "like-kind" exchanges of real property. The details of many of these transactions are rather murky. Generally speaking, Buddy's answers to cross-examination regarding his financial dealings can be characterized as evasive, as Buddy repeatedly denied knowledge or recollection of even the most basic aspects of Union Oaks' financial transactions. It is undisputed, however, that Union Oaks has received very few donations and that most corporate revenue comes from the gains on the purchase and sale of real estate by Buddy.

The debt owed from Union Oaks to Buddy and Linda was the subject of considerable dispute at trial. Buddy and Linda had acquired and jointly held several parcels of real estate prior to the formation of Union Oaks, which were transferred to Union Oaks between 1978 and 1987 in exchange for promissory notes totaling $177,094.49 at the time of execution. The balance on those notes was, or would have been, $269,811 at the time of trial. Buddy testified, however, that the transfers were meant as gifts to Union Oaks and that the notes were executed because his accountant told

him to do it that way. Buddy testified that all of the notes, except the $50,000 note previously mentioned, were "forgiven" by 1991, when Linda filed a previous petition for legal separation that had been voluntarily dismissed. Buddy was otherwise unclear on the circumstances surrounding the forgiving of the notes.

Linda testified, on the other hand, that during the course of the marriage, Buddy repeatedly told her that Union Oaks owed them the money that would have been due from the notes that were later forgiven. The figure set forth above regarding the present value of the notes is taken from an amortization schedule that Linda testified was shown to her by Buddy when Linda asked about the couple's financial situation. Linda testified that only after the couple's separation was she informed that the notes had been forgiven. In addition, Paul Curry, the former president of NP Dodge Management Company, Inc., and a friend of Buddy and Linda, testified that, in 1995 or 1996, while he was counseling Buddy regarding his separation from Linda, Buddy mentioned a note from Union Oaks to Buddy and Linda in the amount of $250,000.

There is substantial evidence in the record establishing Buddy's habit of using Union Oaks funds to pay for what can reasonably be characterized as personal expenses. Buddy testified that when he used corporate funds to pay for personal expenses, he later had those expenses charged against the balance on the remaining note that Union Oaks owed to Buddy and Linda. Charge card statements contained in the record show corporate funds to have been expended on restaurants, groceries, and travel, among other things. Buddy testified that the family's trips to Mazatlan, Mexico, were spent studying and writing, but Linda characterized them as family vacations. Buddy did specifically defend the use of corporate funds, and the Union Oaks tax-exempt identification number, to pay for visits to tanning salons. William Stevens, a certified public accountant employed by Buddy and Union Oaks, testified that Buddy claimed personal expenses paid for by Union Oaks as personal income for tax purposes, but that Stevens did not review the expenses and relied on Buddy to determine which expenses were personal in nature.

The record also contains a substantial amount of testimony regarding the board of directors of Union Oaks and the amount

of actual control that the three members of the board, in addition to Buddy, have exercised over Union Oaks. According to the Union Oaks corporate charter contained in the record, a majority of the board could remove Buddy from office and take control of the assets of Union Oaks.

Three members of Union Oaks' board of directors, in addition to Buddy, testified at trial. The first director, a member of the board since 1994 or 1995, testified that any meetings of the board were called by Buddy. Buddy testified that the board met once a year. This director testified that he never signed checks for Union Oaks, met with lawyers, or discussed any of Union Oaks' real estate transactions. In addition, this director testified that he did not review Union Oaks' books and did not recall ever disapproving any expense or proposal suggested by Buddy. This director also testified that he had not been aware that Buddy had charged personal items to the organization.

Similarly, another witness, a Union Oaks director since 1994, testified that he had not been aware of Union Oaks' ownership of a motorcycle or cars and that he had not been involved in Union Oaks' real estate transactions. This director did not know the cash balance of Union Oaks or about any notes payable to Buddy and Linda. The director did testify, however, that he did not consider himself a puppet of Buddy. A third board member also testified that he did not consider himself to be a puppet of Buddy. He testified, however, that he was not involved in Union Oaks' real estate transactions, except for "[d]uring the board meetings," and was not aware of Union Oaks' ownership of cars, holdings of cash, or certificates of deposit. A former member of the board of directors testified that he resigned from the board when he was unable to get Buddy to resolve concerns over Union Oaks' business practices.

There was relatively little evidence presented regarding the religious ministry of Union Oaks. Buddy testified that he did missionary work as part of his trips to, among other destinations, Mexico, Costa Rica, Panama, Nicaragua, and Taiwan. Buddy also claimed to have conducted weddings and funerals, taught Bible studies, and started "several churches." No independent evidence was presented to corroborate Buddy's claims. When one of the members of Union Oaks' board of directors

was asked about Union Oaks' religious activities, the only thing he could identify that Union Oaks had done for the community in the year prior to trial was to donate some money to the ministry of a local pastor. The same director later testified that in the past, Union Oaks had conducted Bible studies, used the former restaurant property for some religious purposes, held fundraisers for charity, and "been out promoting the word of God." No evidence was presented regarding any other religious activities conducted by Union Oaks.

Linda testified, generally, that she had no involvement in any personal or corporate financial transactions and that she just did what Buddy and Stevens told her to do. While she signed documents, she testified that she was not "in that loop" with regard to financial decisions, even when she served on the board. Linda testified that Buddy informed her only of financial decisions that he made himself and that Buddy expected her to be obedient.

Stevens testified that the Internal Revenue Service (IRS) had audited Buddy and Linda in 1994 for the tax years 1991 and 1992. Stevens testified that the IRS generally concluded that Buddy's status as a "minister of the Gospel" was appropriate under IRS regulations, although adjustments were made to the Medlocks' individual tax returns. While Stevens was employed by Union Oaks, he testified that he only maintained Union Oaks' cashflow and did not prepare balance sheets, payroll reports, or quarterly statements of any kind. No accounting records besides those prepared by Stevens, however, appear in the record.

PROCEDURAL BACKGROUND

On July 2, 1997, Linda filed a petition for legal separation. Buddy answered and cross-petitioned for dissolution. Trial was had, and on September 18, 2000, the district court entered a decree of dissolution.

The district court made several factual findings that were not memorialized in the decree, but that the district court stated should be present in the record for purposes of appeal. The court noted that Union Oaks had been legally established and was a separate legal entity. The court was "impressed with the fact that the Internal Revenue Service did certify this corporation as a 501C3 corporation." The court stated that

if we had a trial on the status of the corporation, as far as its 501C3 status, we would say that I would be bound by that earlier decision of a court. And while it's not exactly the same situation, I find — I find it very persuasive that the Internal Revenue [Service] came and made an examination of the corporation and that they continued the 501C3 status.

With reference to Buddy, however, the court stated:

I'm not impressed with the defendant's religious activities. I'm not impressed with the fact that the corporation in the last couple of years had approximately ten cars and a motorcycle and trips to various countries. But that's not for me to judge. As a general statement, I do not believe the assertions of the respondent.

The court nonetheless concluded:

On a best — on a best case basis, from the assets he and petitioner gave to the Union Oaks, it is clear that this nonprofit corporation has grown in value to approximately $1.3 million. I don't think there's any serious dispute over that particular finding. This Court finds that under the circumstances here that this Court cannot rectify what I consider to be a travesty of this corporation.

Mr. Medlock, if he can reconcile things with his board, will continue to receive automobiles, a parsonage, all of his expenses will be paid, and he will benefit greatly from the assets that he and the petitioner put into this corporation.

It's a situation that this Court feels, and I don't mean to make unkind remarks or to make light of it, but it's kind of like a coin machine where you put your money in and you don't get it back. And this Court does not have Union Oaks before it as a party, and this is not a situation in a classic sense of piercing a corporate veil that we talked about in the law. This is a situation that I can take into account, in my opinion, the benefits that have and continue and will inure to the benefit of Mr. Medlock, but I have not found any case exactly like this one in Nebraska law or otherwise, nor have the attorneys brought to my attention any case that is similar on facts to this case. And in my reading of the law, I cannot take these assets of Union and cut them

> in half and say, okay, Mrs. Medlock, the petitioner, you get one-half of the assets of Union Oaks.

Based on those findings, the court went on to order the division of property. The court ordered, in part:

> First of all, we start with some of the assets. The note that has been talked about from Union Oaks to the Medlocks in the approximate amount of $50,000, the petitioner receives the entire proceeds of the note. And the order is to provide that Mr. Medlock is to be ordered to make his best efforts to obtain payment of the entire amount by 12/1/2000.
>
> Number two . . . the petitioner is to receive the 1996 Voyager automobile in her possession or an equivalent automobile. And that is to be done forthwith.

In its written decree, the court specified that Buddy was to be required to purchase the automobile from Union Oaks or purchase a comparable vehicle for Linda.

The court then considered the issues of alimony and attorney fees, stating in part:

> The next category is alimony. The Court finds that the petitioner in staying at home and raising the children and working in the ministry has seriously disrupted her education and work career; and in addition to the points that I announced earlier as findings, these facts are taken into an [sic] account in the award of alimony, as well as the — as I indicated, the long duration of the marriage.
>
> Commencing October 1, 2000, and continuing for a period of 18 years, respondent shall pay alimony of $1,400 per month to petitioner subject to the standard language regarding termination, and that is death or remarriage under the statutory language. . . .
>
> The attorney fee question in this case presents a very difficult question. The change of attorneys on the petitioner's side, the length of time in preparation, the lost time between the first attorney and the third attorney, the ability to pay of the respondent, creates a very difficult question regarding attorney fees.
>
> The Court has thought a great deal about the question of attorney fees, and under all of the circumstances the Court feels that a reasonable attorney fee in a case of this sort with

> as many days of trial as we've had and all the preparation, that an award of $10,000 of an attorney fee to be payable by the respondent to the petitioner within 60 days is an appropriate attorney fee under all of the circumstances.

Linda perfected this appeal, and we subsequently granted Linda's petition to bypass the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Linda assigns, summarized, that the trial court erred in (1) failing to include property which was held in the name of Union Oaks in the marital estate and (2) its award of attorney fees.

STANDARD OF REVIEW

[1-4] The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion. *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001). However, to the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below. *Hartman v. Hartman*, 261 Neb. 359, 622 N.W.2d 871 (2001). In an action for dissolution of marriage, the award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Shockley v. Shockley*, 251 Neb. 896, 560 N.W.2d 777 (1997). 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. *Carter v. Carter*, 261 Neb. 881, 626 N.W.2d 576 (2001).

ANALYSIS

The facts of this case are certainly unique. The parties have not cited, nor has our research revealed, a case with established facts that mirror those of the instant case. Nonetheless, there are several well-established legal principles that guide our determinations regarding equitable property division and the equitable piercing of a corporate veil. We begin with those basic principles.

[5] Equitable property division under Neb. Rev. Stat. § 42-365 (Reissue 1998) is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is

to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Gibilisco v. Gibilisco, ante* p. 27, 637 N.W.2d 898 (2002). The primary issue presented in this case, whether the assets titled in Union Oaks should be included in the marital estate, arises under the first step of the process.

[6,7] Generally, the division of property in a dissolution case is based on equitable principles, and its purpose is to divide the marital assets equitably. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000). As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule. *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998). Linda urges this court to find, pursuant to equitable principles, that Union Oaks is an alter ego of Buddy and that assets titled in Union Oaks should be considered Buddy's property for purposes of dividing the marital estate.

ALTER EGO

[8-10] In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held. *McCollister v. McCollister*, 219 Neb. 711, 365 N.W.2d 825 (1985). See, also, *Knigge v. Knigge*, 204 Neb. 421, 282 N.W.2d 581 (1979), *modified* 205 Neb. 149, 286 N.W.2d 444 (1980). A corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears. *Southern Lumber & Coal v. M. P. Olson Real Est.*, 229 Neb. 249, 426 N.W.2d 504 (1988). However, "'"[i]n equity, the corporate entity may be disregarded and held to be the mere alter ego of a shareholder or shareholders in various circumstances where necessary to prevent fraud or other injustice."'" *Id.* at 256, 426 N.W.2d at 508. Accord, *Graham Graphics v. Baer Mktg. Internat.*, 10 Neb. App. 382, 631 N.W.2d 550 (2001), quoting *United States Nat. Bank of Omaha v. Rupe*, 207 Neb. 131, 296 N.W.2d 474 (1980); *In re Application of CN Carriers, Inc.*, 1 Neb. App. 1151, 510 N.W.2d 545 (1993), citing *Brown v. Alron, Inc.*, 223 Neb. 1, 388 N.W.2d 67 (1986).

[11,12] When a corporation is or becomes the mere alter ego, or business conduit, of a person, it may be disregarded. *Carpenter Paper Co. v. Lakin Meat Processors*, 231 Neb. 93, 435 N.W.2d 179 (1989). Among the factors which are relevant in determining to disregard the corporate entity are diversion by the shareholder or shareholders of corporate funds or assets to their own or improper uses and the fact that the corporation is a mere facade for the personal dealings of the shareholder and that the operations of the corporation are carried on by the shareholder in disregard of the corporate entity. See *id.*

[13] We have stated that other factors to be considered in determining to disregard the corporate entity are grossly inadequate capitalization and insolvency of the debtor corporation at the time the debt is incurred. These factors are relevant in cases in which creditors are seeking to pierce the corporate veil and hold individual shareholders liable for corporate debts. This case, however, presents the issue of "reverse piercing," in which the assets of the corporate entity may be used to satisfy the obligations of the controlling alter ego. See, e.g., *Towe Antique Ford Foundation v. I.R.S.*, 999 F.2d 1387 (9th Cir. 1993); *Century Hotels v. U.S.*, 952 F.2d 107 (5th Cir. 1992). In such an instance, the relevant factors do not relate to the insolvency of the corporation, but instead to the insolvency of the individual and the extent to which the individual's ostensible poverty is supported by corporate assets.

[14] Although a question of first impression in this jurisdiction, it is not unusual for a domestic relations court to pierce the corporate veil in a dissolution proceeding. See *Standage v. Standage*, 147 Ariz. 473, 711 P.2d 612 (Ariz. App. 1985). When the equitable principles set forth above have been applied to dissolution of marriage and division of the marital estate, it has generally been concluded that the assets of a spouse's corporate alter ego may be considered to be, and distributed as, part of the marital estate. See, e.g., *A & L, Inc. v. Grantham*, 747 So. 2d 832 (Miss. 1999); *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1982); *Barineau v. Barineau*, 662 So. 2d 1008 (Fla. App. 1995); *Watson v. Watson*, 837 P.2d 1 (Utah App. 1992); *Goldberg v. Goldberg*, 172 A.D.2d 316, 568 N.Y.S.2d 394 (1991); *Stainback v. Stainback*, 11 Va. App. 13, 396 S.E.2d 686 (1990); *Standage, supra*; *State ex rel.*

Grabhorn v. Grabhorn, 28 Or. App. 357, 559 P.2d 923 (1977), *Lyons v. Lyons*, 340 So. 2d 450 (Ala. Civ. App. 1976).

Applying the above-stated principles to the facts of the instant case, we conclude, on our de novo review, that the record shows Union Oaks to be the alter ego of Buddy and that Union Oaks' assets should be included in the marital estate. As described above, the record demonstrates beyond reasonable question that Buddy made extensive personal use of corporate funds and assets and that Buddy carried on personal dealings in the name of the corporation. The record shows a nearly complete unity of interest between Buddy and Union Oaks. Buddy exercised nearly unfettered control of Union Oaks and regularly purchased vehicles, travel, and other goods and services in the corporate name for his family's personal use. Compare *Watson, supra.*

The record is also clear that the Medlocks did not acquire personal property in their own names because all the property that would ordinarily have been acquired over the course of a 28-year marriage was instead acquired in the name of Union Oaks. Buddy's purported poverty conflicts sharply with the affluent lifestyle he has maintained with the use of corporate assets. Buddy's ability to maintain his family's manner of living, with no reported assets and the meager income to which he will admit, is significant both to our determination that Union Oaks is Buddy's alter ego and to our conclusion that equity requires the assets of Union Oaks to be included in the marital estate.

This court confronted a similar quandary in *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986). In that case, the husband was provided, as an employee and minority shareholder of his family's ranch corporation, with a house, food, vehicles, and other benefits. In awarding the wife a substantial cash payment as part of the property division, we noted:

> Nevertheless, in reaching a just and equitable award, the fact remains that due to the way the parties to this marriage lived during the marriage, they did not acquire a house or a car or any property a married couple of 16 years, with above average assets, would be expected to acquire. We must consider that particular situation in this case.

Id. at 701, 380 N.W.2d at 285. See, also, *Dormann v. Dormann*, 8 Neb. App. 1049, 606 N.W.2d 837 (2000). Similar circumstances

are present here. Furthermore, in the instant case, the assets acquired by the parties prior to the formation of Union Oaks were transferred to Union Oaks and form the basis of the corporation's current value. In *Grace, supra*, we ordered a cash award as compensation for the inadequacy of the marital estate. In *Grace*, however, the ranch corporation was clearly a separate legal entity, of which the husband was only a minority shareholder. In this case, on the other hand, Union Oaks has been shown to be Buddy's alter ego, and the distribution of assets from the corporation is a more appropriate remedy.

On our de novo review of the record, we determine that the evidence conclusively shows, insofar as the issues in this divorce case are concerned, that Union Oaks is the alter ego of Buddy, and has been since it was established. The assets which came into Union Oaks during the time of the parties' marriage were in fact part of the marital estate and subject to division upon dissolution. See *Zisblatt v. Zisblatt*, 693 S.W.2d 944 (Tex. App. 1985). The district court erred in concluding otherwise.

Buddy argues, however, that ordinary equitable principles cannot be applied in this case because Union Oaks is a nonprofit corporation, purportedly organized for religious purposes, and because Union Oaks was not a party to the divorce proceedings. We address each of these arguments in turn.

Nonprofit Status

The fact that Union Oaks is organized as a nonprofit religious corporation distinguishes this situation from an ordinary situation involving a corporate alter ego. Buddy argues that because he did not legally own Union Oaks, it cannot be considered an alter ego. See, generally, Nebraska Nonprofit Corporation Act, Neb. Rev. Stat. § 21-1901 et seq. (Reissue 1997 & Cum. Supp. 2000).

[15,16] The essence, however, of the alter ego doctrine is that a court of equity "'"'will examine the whole transaction, looking through corporate forms to the substance of things, to protect the rights of innocent parties . . . .'"'" See *Southern Lumber & Coal v. M. P. Olson Real Est.*, 229 Neb. 249, 256, 426 N.W.2d 504, 509 (1988). Consequently, courts have generally held that legal ownership, while relevant, is not a dispositive factor and does not preclude the finding of alter ego when control of the

corporation is otherwise established. See, *Century Hotels v. U.S.*, 952 F.2d 107 (5th Cir. 1992); *Shades Ridge Holding Co., Inc. v. U.S.*, 888 F.2d 725 (11th Cir. 1989); *Towe v. Martinson*, 195 B.R. 137 (D. Mont. 1996); *Macaluso v. Jenkins*, 95 Ill. App. 3d 461, 420 N.E.2d 251, 50 Ill. Dec. 934 (1981). Because the record clearly establishes such control in this case, as stated above, our finding that Union Oaks is Buddy's alter ego is not affected by the fact that Buddy does not legally own the corporation.

The primary distinction between nonprofit corporations and for-profit corporations is found in the nondistribution constraint, which bars the nonprofit corporation from distributing profits or net earnings to those who control the corporation. See, § 21-19,127 (providing that nonprofit religious corporations "shall not make any distributions"); § 21-1914(10) (defining "distribution" as "the payment of a dividend or any part of the income or profit of a corporation to its members, directors, or officers"). See, also, I.R.C. § 501(c)(3) (defining corporation exempt from taxation as corporation "no part of the net earnings of which inures to the benefit of any private shareholder or individual").

However, the nondistribution constraint does not preclude nonprofit corporations from engaging in commercial activity, as Union Oaks has clearly done. The term "commercial nonprofit" is broadly used by commentators to describe any nonprofit engaged in significant commercial activity, even when the commercial activity is an ancillary endeavor used to subsidize noncommercial activities that are the nonprofit's principal mission. Evelyn Alicia Lewis, *When Entrepreneurs of Commercial Nonprofits Divorce: Is it Anybody's Business? A Perspective on Individual Property Rights in Nonprofits*, 73 N.C. L. Rev. 1761 (1995). In the instant case, for example, Union Oaks, while organized as a nonprofit corporation, engaged in the sale and purchase of real estate in the same manner that might be expected of a for-profit real estate business. The nondistribution constraint does not bar such activity, so long as the income accrued is used in a way that is consistent with the nonprofit purpose of the organization. See, *id.*; § 21-1928 (setting forth general powers of nonprofit corporation). Well-known examples of significant commercial activity used by nonprofit entities to raise money include the merchandising of Sesame Street products and the sale of Girl Scout cookies.

When commercial nonprofits are relatively small, such as Union Oaks, their operational character is analogous to those for-profit organizations commonly referred to "closely held corporations" or "close corporations." See Lewis, *supra*. The reality of blurring between for-profits and nonprofits is continuing to change the legal rules that apply to nonprofits, and as nonprofits have become more business-like in character, many laws once considered inapposite have become relevant. See *id.* Consequently, as stated by Professor Lewis:

> The relevance of divorce law to nonprofits may not be immediately evident. But this reflects one of the problems addressed by this Article: The subtleties of sector-blurring are masked by organizational forms that once accurately reflected organizational substance, but that now have lost their accuracy. The traditional for-purpose/for-profit dichotomy between nonprofits and businesses is no longer sufficiently substantial to justify equating organizational form with substance. Today, many nonprofits serve both for-purpose and for-profit goals . . . . Therefore, many of the legal changes now applicable to nonprofits reflect logical extensions of settled law to the altered reality of nonprofits. Such extensions are based on a fundamental jurisprudential tenet: Similar factual situations dictate similar legal treatment.

Id. at 1773. See, also, generally, 18 Am. Jur. 2d *Corporations* § 47 (1985) (stating that status of entity as nonprofit corporation in and of itself does not bar application of equitable remedy of piercing corporate veil).

Accordingly, the courts which have confronted the situation have held that nonprofit corporations are subject to the same rules of law as for-profit corporations with respect to the equitable remedy of "reverse piercing" of the nonprofit corporate veil under an alter ego theory of liability. See, e.g., *Towe Antique Ford Foundation v. I.R.S.*, 999 F.2d 1387 (9th Cir. 1993); *U.S. v. Kitsos*, 770 F. Supp. 1230 (N.D. Ill. 1991), *aff'd* 968 F.2d 1219 (7th Cir. 1992); *Loving Saviour Church v. United States*, 556 F. Supp. 688 (S.D. 1983), *aff'd* 728 F.2d 1085 (8th Cir. 1984); *Barineau v. Barineau*, 662 So. 2d 1008 (Fla. App. 1995). See, also, e.g., *Lakota Girl Scout C., Inc. v. Havey Fund-Rais. Man., Inc.*, 519

F.2d 634 (8th Cir. 1975); *Macaluso v. Jenkins*, 95 Ill. App. 3d 461, 420 N.E.2d 251, 50 Ill. Dec. 934 (1981) (holding individual liable for obligations of alter ego nonprofit corporation).

In *Barineau, supra*, the Florida District Court of Appeal applied reverse piercing, under an alter ego theory, specifically in the context of equitable distribution in a dissolution of marriage. In that case, the trial court entered summary judgment in favor of Faith Chapel, Inc., a nonprofit corporation alleged to be the husband's alter ego. The appellate court reversed the trial court's ruling and remanded the case, stating that basic corporation law is that nonprofit corporations are not exempt from the doctrines of piercing the corporate veil and the alter ego theory. See *id.* The court stated that "[t]he arguments presented by [the husband] do not convince us that the court may never inquire whether a non-profit corporation is the alter ego of a party in a dissolution proceeding for the purpose of achieving equitable distribution." *Id.* at 1009. Instead, the court adopted the wife's theory that "if Faith Chapel is determined to be [the husband]'s alter ego, and if it is determined that the corporation is engaged in improper conduct involving assets that are rightfully marital assets, such findings can be taken into account in equitable distribution." *Id.*

[17] We agree with the foregoing analysis and likewise hold that a corporation's status as a nonprofit corporation in and of itself does not bar a court from finding the corporation to be the alter ego of an individual and from applying the equitable remedy of piercing the corporate veil. Applying that holding to the present case, we determine that application of those equitable principles to Union Oaks is appropriate. Union Oaks, while organized as a religious nonprofit, has nonetheless been financed by its activities as a commercial nonprofit, specifically by real estate transactions. The record is clear that Union Oaks has received few if any donations and that Buddy's real estate transactions have been the primary foundation for Union Oaks' assets. If Union Oaks had been financed by donations from third parties, intended to support religious activities, the equities of this situation would be far different. Under the circumstances presented, however, Union Oaks may be appropriately subjected to the same rules of law that would be applied to a for-profit corporation.

FIRST AMENDMENT

[18] Buddy argues that Union Oaks is exempt from scrutiny under the First Amendment to the U.S. Constitution, because Union Oaks is a religious organization. The religious activities of Union Oaks, or lack thereof, were the subject of considerable dispute in the district court. However, we need not address the legitimacy of Union Oaks' religious status, as the neutral principles of law set forth above are in any event applicable to Union Oaks. Religious corporations are governed by the same general rules of law and equity as other corporations; in other words, they are subject to the same principles of law as any other civil corporation in courts of general jurisdiction. See, generally, 1A William Meade Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 80 (perm. ed., rev. vol. 1993 & Cum. Supp. 2001).

[19] Buddy does not specify whether his First Amendment claim is made pursuant to the Establishment Clause or the Free Exercise Clause. Neither clause, however, supports Buddy's claim that the First Amendment bars the equitable remedy applied above. In Establishment Clause cases, a three-part test has been elaborated by the Supreme Court. Government action passes muster under this clause if (1) the statute or government action has a secular legislative purpose, (2) its principal or primary effect must neither advance nor inhibit religion, and (3) it does not foster excessive government entanglement with religion. *Donovan v. Tony and Susan Alamo Foundation*, 722 F.2d 397 (8th Cir. 1983), *aff'd sub nom. Tony & Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985), citing *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971).

[20-22] Measured by this standard, the application of equitable distribution principles to Union Oaks, on the facts of this case, does not violate the Establishment Clause. The State has a legitimate interest in resolving property disputes, and a civil court is a proper forum for that resolution. *Presbyterian Church v. Hull Church*, 393 U.S. 440, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969). Not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. *Id.* The application of general law, the purpose and effect of which is to advance the State's secular goals, is valid

despite an indirect burden on religious observance. See *Braunfeld v. Brown*, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961). So long as a court is not involved in resolving underlying controversies over religious doctrine, "there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." *Presbyterian Church*, 393 U.S. at 449. In this case, there is no dispute presented regarding Union Oaks' religious doctrine, if any, and we have applied the same well-established principles of law to Union Oaks that would be applied in any similar dispute involving a secular corporation.

[23,24] Similarly, "[c]ivil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property." *Id.* A legal determination, otherwise legitimate, "does not violate the Free Exercise Clause merely because financial detriment results." *Donovan*, 722 F.2d at 403, citing *Braunfeld, supra*. An individual's religious beliefs do not excuse the individual from compliance with an otherwise valid law regarding conduct that the State is free to regulate. See *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990).

Moreover, the activities of Union Oaks most at issue here relate to its commercial activity, not a course of conduct asserted to be an expression of religion. For instance, driving a Sunday school bus does not constitute a religious practice merely because the bus is owned by a religious organization, the driver is an ordained minister, and the bus is taking church members to a religious ceremony. *Wollersheim v. Church of Scientology*, 212 Cal. App. 3d 872, 66 Cal. Rptr. 2d 1 (1989), *vacated on other grounds* 499 U.S. 914, 111 S. Ct. 1298, 113 L. Ed. 2d 234 (1991). Where, as here, a nominally religious nonprofit corporation is engaged in a discrete commercial enterprise, it subjects itself to the same general rules of law otherwise applicable to such enterprises. See, generally, *Tony & Susan Alamo Foundation v. Sec'y of Labor, supra*.

The application of general rules of family law and corporate law to a situation involving a religious corporation offends neither the Establishment Clause nor the Free Exercise Clause. Without inquiry into the legitimacy of Union Oaks' religious

activities, we conclude that on the facts presented, the corporate veil of Union Oaks may be pierced without violating the First Amendment to the U.S. Constitution.

JURISDICTION OVER UNION OAKS

[25] Finally, Buddy argues that the district court and this court cannot dispose of Union Oaks' assets because Union Oaks was not made a party to the proceedings. It should be noted that Linda sought to have Union Oaks joined as a party, but that Buddy successfully persuaded the district court not to join Union Oaks. It is a general rule that a party cannot complain of error which that party has invited the court to commit. *Schrempp and Salerno v. Gross*, 247 Neb. 685, 529 N.W.2d 764 (1995).

[26,27] In any event, however, the interests of Union Oaks were adequately represented in the district court by Buddy, Union Oaks' alter ego. A nonparty may be bound by an equitable judgment sustaining an alter ego action if the party's interests are so closely affiliated with the nonparty's interests that the interests are merged. See, e.g., *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 97 S. Ct. 619, 50 L. Ed. 2d 530 (1977); *Valley Finance, Inc. v. United States*, 629 F.2d 162 (D.C. Cir. 1980); *In re 1438 Meridian Place, N. W., Inc.*, 15 B.R. 89 (D.C. 1981), *Sample v. Sample*, 152 Ariz. 239, 731 P.2d 604 (Ariz. App. 1986); *Lyons v. Lyons*, 340 So. 2d 450 (Ala. Civ. App. 1976). In order for a corporation to be accorded treatment as a separate legal entity, it must exist and function as such and not merely as the alter ego of a person controlling it. See *Lyons, supra*. Clearly, there can be no argument here that Union Oaks was without notice or will be deprived of any substantive rights, where it was on notice of the relief requested by Linda and where it was brought before the court in the person of its alter ego, Buddy.

VALUATION AND DIVISION

As previously stated, equitable property division under § 42-365 is a three-step process. The first step is to classify the parties' property as marital or nonmarital. *Gibilisco v. Gibilisco, ante* p. 27, 637 N.W.2d 898 (2002). We have concluded that assets which came into Union Oaks during the time of the parties' marriage were in fact part of the marital estate and subject to division upon dissolution.

The second step is to value the marital assets and marital liabilities of the parties. *Id.* The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Gibilisco, supra.* Having determined that Union Oaks' assets are part of the marital estate, it remains to value and divide those assets between the parties.

Although the district court did not include the assets of Union Oaks in the marital estate, it did state, for the record, the value of Union Oaks. The court concluded that the value of Union Oaks had grown to approximately $1.3 million. This court, like the district court, is somewhat frustrated in an attempt to place a more precise value on Union Oaks' assets, due to Union Oaks' questionable fiscal discipline and Buddy's reticence to answer even the most basic financial questions. Nonetheless, the district court's figure of $1.3 million is supported by the record and is perhaps even somewhat conservative, given that Union Oaks' real estate holdings, cash assets, and accounts receivable, by themselves, added up at the time of trial to just under $1.02 million. On a de novo review of the record, we find no basis for concluding that the district court's valuation of Union Oaks' assets, at $1.3 million, constituted an abuse of discretion, and we conclude that the valuation is proper in all respects. Cf. *Bryan v. Bryan*, 222 Neb. 180, 382 N.W.2d 603 (1986) (appellate court will affirm trial court's valuation of closely held corporation if such method of valuation has acceptable basis in fact and principle).

[28] Appeals in domestic relations matters are heard de novo on the record, and thus, an appellate court is empowered to enter the order which should have been made as reflected by the record. *Carter v. Carter*, 261 Neb. 881, 626 N.W.2d 576 (2001). In this case, however, we find the record is too stale for this court to attempt an in-kind distribution. See *Kellner v. Kellner*, 8 Neb. App. 316, 593 N.W.2d 1 (1999). While this appeal was pending, Union Oaks may have engaged in further commercial activity, thus changing the manner in which Union Oaks' assets are held, or Union Oaks' board of directors may have asserted its authority in some manner.

We note that action by Union Oaks' board of directors, even the removal of Buddy from his position of control over the

corporation, would not affect the equitable remedy to which Linda is entitled, because Union Oaks was the alter ego of Buddy at all relevant times during the marriage and the assets acquired by Union Oaks during the marriage are properly considered marital property. Nonetheless, absent current information regarding Union Oaks' assets, we cannot appropriately exercise our appellate power to enter an order equitably dividing the marital estate; under the circumstances, the equitable division of the marital estate is properly committed to the discretion of the district court based upon the principles expressed in this opinion.

Consequently, we reverse the district court's judgment with respect to property division, except that we affirm the district court's judgment with respect to the $50,000 note from Union Oaks to the Medlocks and the automobile awarded to Linda. We remand the cause to the district court with directions to distribute those assets of Union Oaks as may be necessary to equitably divide the marital estate. We do not comment on whether cash payment or in-kind distribution will be the appropriate means for such distribution, but instead entrust the details of the distribution to the district court's discretion based upon the evidence presented.

[29] We also recognize that the district court's alimony award and award of attorney fees may now change given the substantially altered circumstances presented by our resolution of this appeal. The record reveals that some of the real estate held by Union Oaks was income producing, and the possible transfer of these income-producing assets may alter the equities involved in the award of alimony. See, *Ritz v. Ritz*, 229 Neb. 859, 429 N.W.2d 707 (1988); *Grams v. Grams*, 9 Neb. App. 994, 624 N.W.2d 42 (2001); *Hafer v. Hafer*, 3 Neb. App. 129, 524 N.W.2d 65 (1994). Similarly, an award of attorney fees depends on a variety of factors, including the amount of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995); *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994). Thus, we also reverse the district court's awards of alimony and attorney fees. We specifically do not find that the district court abused its discretion in entering those awards; rather, we simply direct the district court to reconsider the issues

of alimony and attorney fees in light of the changed circumstances of the division of marital property between the parties.

CONCLUSION

The district court's judgment regarding division of marital property, alimony, and attorney fees is reversed, with the exceptions noted above. The district court's dissolution decree is affirmed in all other respects. The cause is remanded to the district court with directions to equitably divide the marital estate, including the assets of Union Oaks, valued at $1.3 million, and revisit the issues of alimony and attorney fees in light of the property division.

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

RENAE SPRADLIN, APPELLANT, V. DAIRYLAND INSURANCE COMPANY AND SENTRY INSURANCE A MUTUAL COMPANY, APPELLEES.

641 N.W.2d 634

Filed April 12, 2002. No. S-00-1108.

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 the 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 must be overruled.
3. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
4. **Demurrer.** When a demurrer is interposed stating several grounds, the court sustaining the demurrer should specify the grounds upon which the demurrer is sustained.
5. **Judgments: Demurrer: Appeal and Error.** An order sustaining a demurrer will be affirmed if any one of the grounds upon which it was asserted is well taken.
6. **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.
7. **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.

8. **Pleadings: Words and Phrases.** A statement of facts sufficient to constitute a cause of action, as used in Neb. Rev. Stat. § 25-806(6) (Reissue 1995), means a narrative of events, acts, and things done or omitted which shows a legal liability of the defendant to the plaintiff.

Appeal from the District Court for Phelps County: TERRI HARDER, Judge. Affirmed.

Lori L. Phillips, for Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Gary J. Nedved, of Keating, O'Gara, Davis & Nedved, P.C., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Appellees, Dairyland Insurance Company (Dairyland) and Sentry Insurance a Mutual Company (Sentry), issued to appellant, Renae Spradlin, an insurance policy that included underinsured motorist coverage. Spradlin was involved in an automobile accident which resulted in the death of a passenger in her automobile, Cashe Klein. Rebecca L. Klein, the mother of Cashe, assigned to Spradlin her cause of action against Dairyland and Sentry. Spradlin brought a cause of action against Dairyland and Sentry pursuant to the wrongful death statutes. See Neb. Rev. Stat. § 30-809 (Reissue 1995). Dairyland and Sentry filed a demurrer, which the trial court sustained, and Spradlin appealed. We affirm the order of the trial court.

BACKGROUND

On June 4, 1998, Spradlin was operating her automobile in a westerly direction approaching an intersection in rural Phelps County, Nebraska. At the same time, Kenton Benson was operating his automobile in a southerly direction, approaching the same intersection. The entrance to the intersection from the north was controlled by a stop sign. Benson did not yield to Spradlin's automobile when he entered the intersection and collided with Spradlin's automobile. As a result, Cashe, a minor child, who was a passenger in Spradlin's automobile, was killed.

At the time of the accident, Spradlin owned an insurance policy that provided underinsured motorist coverage, which she had purchased from Dairyland and Sentry.

Cashe's mother, Rebecca, was appointed personal representative of Cashe's estate and assigned to Spradlin her causes of action against Dairyland and Sentry in her capacity as personal representative and as surviving parent of Cashe. Benson's insurance carrier, Shelter Insurance, provided a total of $50,000 of coverage, which was divided equally between Cashe's estate and Spradlin's family. The $25,000 received by Cashe's estate was allegedly insufficient to compensate for all of the damages sustained by the estate.

On June 2, 2000, Spradlin filed a petition in the district court for Phelps County against Dairyland and Sentry for the wrongful death of Cashe. Pursuant to Neb. Rev. Stat. § 25-806(2) and (6) (Reissue 1995), Dairyland and Sentry filed a demurrer to Spradlin's petition, asserting that the petition did not state facts sufficient to constitute a cause of action and that Spradlin had no legal capacity to sue for the wrongful death of Cashe. The trial court sustained Dairyland and Sentry's demurrer, gave Spradlin 30 days to amend her petition, and later dismissed Spradlin's cause of action. Thereafter, Spradlin appealed to the Nebraska Court of Appeals. On its own motion, this court removed the case to its docket.

ASSIGNMENT OF ERROR

Spradlin claims that the trial court erred in sustaining Dairyland and Sentry's demurrer.

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 the conclusions of the pleader. *Mulinix v. Roberts*, 261 Neb. 800, 626 N.W.2d 220 (2001).

[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 must be overruled. *J.B.*

Contracting Servs. v. Universal Surety Co., 261 Neb. 586, 624 N.W.2d 13 (2001).

[3] 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. *Malone v. American Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001).

ANALYSIS

Spradlin argues that she stated facts sufficient to constitute a cause of action and alleges that Rebecca validly assigned to Spradlin her cause of action. The assignment stated:

> THE UNDERSIGNED, in consideration of the parties' agreement with respect to the division of proceeds recovered from Shelter Insurance and the Estate of Kenton Benson, assigns to Renae Spradlin in her individual capacity as biological mother of Dylan Hauser and Andrew Spradlin, and as conservator of the Estate of Dylan Hauser and Estate of Andrew Spradlin, all of her rights and interests in and unto any cause of action, claims and damages sustained by herself individually and as parent, guardian and personal representative of Cashe Klein, deceased, arising out of or in connection with an accident occurring on June 4, 1998, in Phelps County, Nebraska in which Cashe Klein was killed. This assignment is an assignment only of claims the undersigned may have against Renae Spradlin's insurance carrier pursuant to and under the underinsurance provisions of said policy.

The language contained in the assignment delineates the intent of Rebecca to transfer her present interest in the wrongful death cause of action to Spradlin. As a result, Spradlin argues that she possesses Rebecca's rights in pursuing the wrongful death cause of action. In taking such a position, Spradlin necessarily argues that Nebraska law allows for a wrongful death cause of action to be assigned.

We initially note that Dairyland and Sentry cited two reasons in support of their demurrer: (1) The petition does not state facts sufficient to state a cause of action and (2) Spradlin has no legal capacity to sue for the wrongful death of Cashe. In the order sustaining the demurrer, the trial court did not specify the ground upon which it relied.

[4,5] In *Coburn v. Reiser*, 254 Neb. 495, 577 N.W.2d 289 (1998), we stated that when a demurrer is interposed stating several grounds, the court sustaining the demurrer should specify the grounds upon which the demurrer is sustained. If the trial court does not specify such grounds, an appellate court is not informed in regard to wherein the complaint was determined to be deficient. However, an order sustaining a demurrer will be affirmed if any one of the grounds upon which it was asserted is well taken. *Noffsinger v. Nebraska State Bar Assn.*, 261 Neb. 184, 622 N.W.2d 620 (2001).

[6] According to Neb. Rev. Stat. § 30-810 (Reissue 1995), an action for wrongful death "shall be brought by and in the name of the person's personal representative for the exclusive benefit of the widow or widower and next of kin." As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion. *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000). The use of the word "shall" in § 30-810 precludes anyone but the personal representative from bringing the cause of action.

[7] 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. *Burlington Northen Santa Fe Ry. Co. v. Chaulk*, 262 Neb. 235, 631 N.W.2d 131 (2001); *In re Guardianship & Conservatorship of Garcia*, 262 Neb. 205, 631 N.W.2d 464 (2001).

The plain language of the statute allows only the personal representative to bring the action and only the widow, widower, or next of kin to benefit. We therefore hold that a wrongful death cause of action cannot be assigned.

[8] A statement of facts sufficient to constitute a cause of action, as used in § 25-806(6), means a narrative of events, acts, and things done or omitted which shows a legal liability of the defendant to the plaintiff. *Coburn v. Reiser, supra.* Since Rebecca could not have validly assigned her wrongful death action to Spradlin, Spradlin could not have validly brought the claim against Dairyland and Sentry. Under the plain language of § 30-810, Spradlin is not a proper plaintiff in a cause of action for the wrongful death of Cashe. Thus, Dairyland and Sentry

cannot be legally liable to Spradlin for the wrongful death of Cashe, and Spradlin has failed to state facts sufficient to constitute a cause of action.

CONCLUSION

We conclude that the plain language of § 30-810 does not allow for the assignment of a wrongful death cause of action. That being so, Spradlin has failed to state facts in her petition sufficient to constitute a cause of action. Thus, the trial court was correct in sustaining the demurrer to Spradlin's petition and dismissing the action.

AFFIRMED.

HENDRY, C.J., not participating.

MICHELE McCORMICK, CONSERVATOR OF THE ESTATE OF ALYSSA M. WICKERT McCORMICK, A MINOR, AND PATRICK AND MICHELE McCORMICK, PARENTS OF ALYSSA M. WICKERT McCORMICK, A MINOR, APPELLANTS, V. CITY OF NORFOLK, APPELLEE.

641 N.W.2d 638

Filed April 12, 2002. No. S-00-1332.

1. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
2. **Political Subdivisions Tort Claims Act: Immunity: Waiver.** Neb. Rev. Stat. § 13-908 (Reissue 1997) of the Political Subdivisions Tort Claims Act sets forth a general waiver of immunity subject to certain limited exceptions stated in Neb. Rev. Stat. § 13-910 (Reissue 1997).
3. **Political Subdivisions: Highways.** The placement of traffic control devices is a discretionary function of a political subdivision under Neb. Rev. Stat. § 13-910(2) (Reissue 1997).
4. **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.
5. **Political Subdivisions Tort Claims Act: Governmental Subdivisions: Pedestrians: Motor Vehicles: Pleadings.** A petition which purports to impose a duty to warn or otherwise protect pedestrians based upon a governmental entity's acts or omissions regarding traffic control devices in response to changed traffic circumstances cannot form the basis of a valid duty-to-warn claim under the Political Subdivisions Tort Claims Act.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

Richard L. Swenson, of Wintroub, McCreary, Lunz & Jersey, for appellants.

C.J. Gatz and Todd B. Vetter, of Gatz, Fitzgerald & Vetter, for appellee.

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

CONNOLLY, J.

The appellants, Patrick and Michele McCormick, filed this action under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997), for personal injuries sustained by their 9-year-old daughter, Alyssa M. Wickert McCormick. The district court sustained the demurrer of the appellee, City of Norfolk (City), and dismissed the petition. The court found that the City's acts and omissions were immune from liability under § 13-910(9). The court found that the petition could not be amended to state a claim against the City and dismissed the petition. We affirm.

BACKGROUND

In their amended petition, the McCormicks alleged the following facts, which this court accepts as true in reviewing the order sustaining the City's demurrer:

On May 16, 1998, Alyssa was hit by a car while walking her bicycle in a marked crosswalk across Fourth Street at the intersection of Fourth and Elm Streets. Alyssa suffered severe and permanent injuries because of the accident. She is restricted to a wheelchair and requires 24-hour care.

Fourth Street has a high volume of traffic, runs in a north-south direction, and is unimpeded by traffic control signals or pedestrian crossing devices at the intersection. Before the accident, the City had actual or constructive knowledge of numerous motor vehicle collisions and motor vehicle-pedestrian collisions at this intersection. The City also had knowledge that the intersection was used by persons of like age, intelligence, and experience as

Alyssa. The traffic on Elm Street runs in an east-west direction and is stopped at the intersection by stop signs.

The McCormicks alleged that the City's failure to install traffic signals or other types of warning devices to protect pedestrians had created a dangerous and hazardous condition. They also alleged that pedestrians of Alyssa's age, intelligence, and experience would not appreciate the danger. They further alleged that although the choice of what type of warning or protection to use was discretionary, the decision whether to do so was not a planning-level decision involving policy judgment. The McCormicks have not alleged that the City failed to comply with any adopted policies.

The City demurred on the ground that the McCormicks' amended petition failed to set forth facts sufficient to constitute a cause of action. The court found that because § 13-910(9) provides immunity to the City for its acts or omissions, the McCormicks had failed to state a cause of action. It concluded that they could not amend their petition to correct its defects.

ASSIGNMENTS OF ERROR

The McCormicks assign that the district court erred in finding that § 13-910(9) provided immunity to the City and in sustaining the City's demurrer.

STANDARD OF REVIEW

[1] In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Northwall v. State, ante* p. 1, 637 N.W.2d 890 (2002).

ANALYSIS

Paragraph 9 of the petition states:

> That the failure of the [City] to install a traffic signal or any other types of warning device to protect pedestrians using the crosswalk and proceeding either in an easterly or westerly direction across 4th Street at the intersection of 4th Street and Elm Street on May 16, 1998, rendered that intersection dangerous and hazardous for pedestrian use; that on May 16, 1998, the [City] had actual or constructive notice

> or knowledge of the dangerous and hazardous condition of the intersection . . . and that said intersection, in its hazardous state, was under the control of the [City]; that the dangerous condition or hazard was not readily apparent to [Alyssa], who was likely to be injured by the dangerous or hazardous condition of the intersection and as such, the [City] had a non-discretionary duty to warn of the danger or take other protective measures that would prevent injury as a result of the dangerous or hazardous condition of the intersection of 4th and Elm Streets. That the [City's] failure to warn or take other protective measures in this situation constituted actionable negligence and was not a planning-level decision involving a social, economic, or political policy judgment and, therefore, did not come within the discretionary function exemption of the Political Subdivision[s] Tort Claim[s] Act.

In the petition, the McCormicks admitted that stop signs were in place for traffic crossing Fourth Street on Elm Street in an east-west direction. They also admitted that there was a marked crosswalk for pedestrians crossing Fourth Street. We read the petition to assert that the City's failure to install traffic control devices for traffic moving in a north-south direction on Fourth Street created a dangerous condition or hazard. The McCormicks further alleged that this dangerous and hazardous condition gave rise to a duty to warn or take other measures to protect pedestrians who are crossing Fourth Street.

[2] The court granted the City's demurrer because it found that the City was immune from liability under the exception in § 13-910(9). Section 13-908 of the Political Subdivisions Tort Claims Act sets forth a general waiver of immunity subject to certain limited exceptions stated in § 13-910. *Lawry v. County of Sarpy*, 254 Neb. 193, 575 N.W.2d 605 (1998). Section 13-910 provides:

> The Political Subdivisions Tort Claims Act . . . shall not apply to:
>
> . . . .
>
> (9) Any claim arising out of the malfunction, destruction, or unauthorized removal of any traffic or road sign, signal, or warning device unless it is not corrected by the political

> subdivision responsible within a reasonable time after actual or constructive notice of such malfunction, destruction, or removal. Nothing in this subdivision shall give rise to liability arising from an act or omission of any political subdivision in placing or removing any traffic or road signs, signals, or warning devices when such placement or removal is the result of a discretionary act of the political subdivision.

The City contends that under the second sentence of § 13-910(9), its decisions regarding the installation of traffic control or warning devices do not give rise to a cause of action. It claims that its decisions to install a crosswalk and stop signs rather than traffic signals or other devices are immune from liability as discretionary functions. The McCormicks, however, argue that the second sentence is only a cautionary reminder that this exception does not result in liability when such placement or removal is the result of a discretionary act. We agree.

Section 13-910(9) distinguishes between a political subdivision's liability for failure to maintain or replace existing signs, signals, or warning devices and its liability for acts or omissions concerning their placement or deliberate removal. It states that the City's acts or omissions regarding their placement or removal are exempt from the general waiver of immunity when they are the result of a discretionary act. Thus, the City's immunity ultimately depends upon whether the acts or omissions regarding its alleged failure to install traffic controls or pedestrian crossing devices are discretionary within the meaning of § 13-910(2).

Section 13-910(2) provides an exception to liability for "[a]ny claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion be abused." A political subdivision can be liable in tort "to the extent, and only to the extent, provided by the Political Subdivisions Tort Claims Act." See § 13-902.

Neb. Rev. Stat. § 60-6,121 (Reissue 1998) indicates that the Legislature intended political subdivisions to have discretion in the installation of traffic control devices:

> Local authorities in their respective jurisdictions shall place and maintain such traffic control devices upon

> highways under their jurisdictions *as they deem necessary* to indicate and to carry out the provisions of the Nebraska Rules of the Road or to regulate, warn, or guide traffic. All such traffic control devices erected pursuant to the rules shall conform with the manual.

(Emphasis supplied.) See, also, *Allen v. County of Lancaster*, 218 Neb. 163, 352 N.W.2d 883 (1984) (holding that when official must make judgmental decision within regulatory framework, acts are discretionary).

Further, the installation of traffic control devices involves balancing the competing needs of pedestrian safety, engineering concerns, commerce, and traffic flow—which in itself involves safety issues—with limited financial resources. These decisions are normally the type of economic, political, and social policy judgments that the discretionary function exception was designed to shield. See, e.g., *Rapp v. State*, 648 P.2d 110 (Alaska 1982); *Aguehounde v. District of Columbia*, 666 A.2d 443 (D.C. 1995); *Department of Transp. v. Konney*, 587 So. 2d 1292 (Fla. 1991); *Nawrocki v Macomb Co Rd Comm*, 463 Mich. 143, 615 N.W.2d 702 (2000); *Nevada Power v. Clark County*, 107 Nev. 428, 813 P.2d 477 (1991); *Weiss v. New Jersey Transit*, 128 N.J. 376, 608 A.2d 254 (1992); *Winwood v. Dayton*, 37 Ohio St. 3d 282, 525 N.E.2d 808 (1988); *Ochoa v. Taylor*, 635 P.2d 604 (Okla. 1981); *City of Midland v. Sullivan*, 33 S.W.3d 1 (Tex. App. 2000). But see *Alexander v. Eldred*, 63 N.Y.2d 460, 472 N.E.2d 996, 483 N.Y.S.2d 168 (1984) (holding that city did not have immunity where evidence that traffic engineer had not reviewed current traffic study and believed that city had no power to install stop sign on private road established that traffic plan was based on both inadequate study and unreasonable basis).

[3] "Because immunity necessarily implies that a 'wrong' has occurred, we are cognizant that some tort claims, against a governmental agency, will inevitably go unremedied." *Nawrocki*, 463 Mich. at 157, 615 N.W.2d at 710. We are also cognizant that every intersection has some inherent danger and that there are, potentially, unlimited theories of recovery that could be raised against governmental entities for failing to install traffic control devices. The immunity provisions of § 13-910(2) and (9) signify that this is the type of public policy decision the Legislature

intended to preclude courts from reviewing. We conclude that the placement of traffic control devices is a discretionary function of a political subdivision.

The McCormicks, however, argue that the discretionary function exception does not apply when (1) a governmental entity has actual or constructive knowledge of a known dangerous condition or hazard caused by or under the control of the governmental entity and (2) the dangerous condition or hazard is not readily apparent to persons likely to be injured by the dangerous condition or hazard. See, *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 256 Neb. 406, 591 N.W.2d 532 (1999); *Lemke v. Metropolitan Utilities Dist.*, 243 Neb. 633, 502 N.W.2d 80 (1993).

In *Lemke*, we relied on two Florida cases for the duty-to-warn exception to the discretionary function immunity. Florida recognizes an operational-level duty to warn the public of a known dangerous condition which is not readily apparent to those who could be injured by the condition—when the governmental entity has created the danger through a discretionary decision. See, *City of St. Petersburg v. Collom*, 419 So. 2d 1082 (Fla. 1982); *Department of Transp. v. Neilson*, 419 So. 2d 1071 (Fla. 1982).

The Florida Supreme Court has explained that this exception applies only when a dangerous condition arises out of the design or planning decision itself. See *Department of Transp. v. Konney, supra*. In *Konney*, a jury awarded damages to the decedent's personal representative on a duty-to-warn theory. The plaintiffs had alleged that a rural intersection should have been upgraded by installing flashing beacons and rumble strips instead of stop signs to warn drivers of the intersection. The Florida Supreme Court reversed. The court concluded that the evidence established that the intersection was not a known dangerous condition when it was created. It held that the plaintiffs could not establish a cause of action by asserting that the county had a duty to upgrade the intersection because of changed circumstances. See *id.*

The McCormicks' petition did not allege that the City's initial design or planning decisions regarding this intersection were inherently dangerous or that the decisions caused a dangerous condition or hazard. Rather, they allege that the City's duty to warn arose out of its failure to install traffic control devices after it had actual or constructive notice of numerous accidents at the

intersection. In their brief, the McCormicks concede that "[t]he design of this street itself was adequate as it was. All it needed was the addition of a traffic light, a pedestrian crossing signal, a stop sign at the crosswalk or some other form of warning or protection of the children using that crosswalk." Brief for appellants at 7.

[4,5] 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. *Hamilton v. Foster*, 260 Neb. 887, 620 N.W.2d 103 (2000). The McCormicks' petition purports to impose a duty to warn or otherwise protect pedestrians based upon the City's acts or omissions regarding traffic control devices in response to changed traffic circumstances. We conclude that these circumstances cannot form the basis of a valid duty-to-warn claim under the Political Subdivisions Tort Claims Act.

CONCLUSION

The McCormicks' petition has failed to state a valid duty-to-warn claim against the City and cannot be amended to correct the defect. The district court's sustainment of the City's demurrer is affirmed.

AFFIRMED.

JEFFREY W. HENERY, SPECIAL ADMINISTRATOR OF THE ESTATE OF CAROL LEE HENERY, DECEASED, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT AND CROSS-APPELLEE, AND DOUGLAS L. HENDERSON, THIRD-PARTY DEFENDANT, APPELLEE AND CROSS-APPELLANT.

641 N.W.2d 644

Filed April 12, 2002. No. S-01-498.

1. **Statutes.** Statutory interpretation presents a question of law.
2. **Appeal and Error.** When an appeal presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
3. **Statutes: Appeal and Error.** When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.

4. ____: ____. 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.
5. **Police Officers and Sheriffs: Motor Vehicles: Words and Phrases.** An "innocent third party" under Neb. Rev. Stat. § 13-911 (Reissue 1991) is one who has not promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and one who is not sought to be apprehended in the fleeing vehicle.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed. Cross-appeal dismissed.

Thomas O. Mumgaard and Michelle Peters for appellant.

Ronald J. Palagi and Steven H. Howard, of the Law Offices of Ronald J. Palagi, for appellee Jeffrey W. Henery.

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

MILLER-LERMAN, J.

NATURE OF CASE

During a police pursuit, a motor vehicle driven by Douglas L. Henderson collided with a building, and the vehicle's passenger, Carol Lee Henery (Henery), was killed. Jeffrey W. Henery, the special administrator of Henery's estate (special administrator), filed a petition in the district court for Douglas County alleging that the City of Omaha was liable for damages due to Henery's death by operation of Neb. Rev. Stat. § 13-911 (Reissue 1991) in that Henery was an "innocent third party" whose death was proximately caused by the vehicular pursuit by an Omaha police officer. The city filed an answer generally denying liability. Independently of its answer, the city filed a third-party petition against Henderson, generally alleging that Henderson was responsible for Henery's death and seeking judgment against Henderson in the event the city were found liable for damages for Henery's death.

The district court concluded that Henery was an "innocent third party" within the meaning of § 13-911 and concluded that the city was liable for damages due to Henery's death. The district court entered judgment against the city and in favor of the special administrator of Henery's estate in the amount of $185,211.22. The city appeals from the district court's judgment.

Henderson filed a cross-appeal. We affirm the district court's judgment against the city and in favor of Henery's estate. Due to the lack of a final order as between the city and Henderson, we dismiss Henderson's cross-appeal.

STATEMENT OF FACTS

The relevant facts are not in dispute. At approximately 1:30 a.m. on July 28, 1991, Omaha police officer Charles Matson, patrolling in a marked police cruiser, observed a vehicle with two occupants driving north on Park Avenue at an excessive rate of speed. It was later determined that Henderson was the vehicle's driver and that Henery was a passenger in the car. Matson estimated that the vehicle was exceeding the posted speed limit by approximately 20 miles per hour. When the vehicle did not slow down, Matson initiated pursuit of Henderson as a speeder and suspected drunk driver.

Henderson turned his vehicle east onto Leavenworth Street. Matson followed in pursuit. Near 19th and Leavenworth Streets, Matson activated his overhead rotating lights. Several times during the police pursuit, he also gave short blasts of his police siren in an attempt to gain Henderson's attention. The parties have stipulated that Henderson was aware or should have been aware of Matson's pursuit and that he was "resisting apprehension by maintaining or increasing his speed, ignoring Officer Matson, or attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the circumstances."

Matson lost sight of Henderson's vehicle after it crested a hill at 16th and Leavenworth Streets. As he approached the same hill, Matson heard screeching tires and a loud crash. Once he had gained the top of the hill, he saw that the vehicle driven by Henderson had left Leavenworth Street near 14th Street, traveled across a vacant lot, and crashed along its passenger side into a brick building.

Henery sustained serious injuries as a result of the accident and died without recovering consciousness. It was later determined that passenger Henery's blood alcohol level was 0.123. The driver, Henderson, was injured in the accident, and although he refused to undergo chemical tests to determine whether he was intoxicated, blood drawn for purposes of medical treatment

was tested and the report listed an alcohol concentration of approximately "25MG/DL."

The parties agree that prior to the accident, Henderson and Henery had spent the evening together visiting bars and consuming alcohol. The parties also agree that at the time of the accident, Henderson was visibly intoxicated, displaying slurred speech and impaired motor functions.

On April 23, 1993, the special administrator of Henery's estate filed a petition in the district court for Douglas County pursuant to the Political Subdivisions Tort Claims Act, § 13-901 et seq. (Reissue 1987). As one of its theories of recovery, the petition alleged that the city was liable for damages due to Henery's death by operation of § 13-911 (Reissue 1991) in that Henery was an innocent third party whose death was proximately caused by the vehicular pursuit by Matson, the Omaha police officer. Section 13-911 provides as follows: "In case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by a political subdivision during vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer." Section 13-911 defines "vehicular pursuit" as

> an active attempt by a law enforcement officer operating a motor vehicle to apprehend one or more occupants of another motor vehicle, when the driver of the fleeing vehicle is or should be aware of such attempt and is resisting apprehension by maintaining or increasing his or her speed, ignoring the officer, or attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the conditions.

In its amended answer, the city generally denied that it was liable for damages for Henery's death. Independent of its answer, the city filed a third-party petition against Henderson. As later amended, the city's third-party petition alleged that the "sole proximate cause of the collision between the vehicle driven by [Henderson] and the building was the negligence and/or willful disregard and intentional acts of [Henderson]." The city prayed that if the special administrator were awarded a judgment in his suit against the city, the city would receive a judgment against Henderson in the same amount.

The special administrator's petition against the city and the city's third-party petition against Henderson came on for trial on November 13, 2000. The special administrator and the city appeared at trial. Henderson did not appear either personally or through counsel. The trial lasted 2 days. The record contains almost 400 pages of testimony from 14 witnesses. Approximately 65 exhibits were received into evidence.

During the trial, Matson testified that he did not observe Henery commit any crimes and that he was not aware of any reason for Henery to flee from police. He also testified that he had no knowledge that Henery planned or encouraged Henderson's flight from the police. Finally, he testified that he was unaware that Henery "did anything wrong" the morning of July 28, 1991.

In an order filed January 16, 2001, the court concluded that "the requirements of Neb.Rev.Stat. Sec. 13-911, creating . . . liability on the part of [the city] have been met." The court's order further stated that "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT pursuant to Neb.Rev.Stat. Sec. 13-911, the [special administrator] is entitled to a judgment against [the city] in the amount of $185,211.22." The district court's order did not resolve the city's third-party petition against Henderson.

In an order filed April 13, 2001, in accordance with the provisions of Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2000), the district court found that there was no reason to delay the entry of the final judgment in favor of the special administrator and against the city. Accordingly, the district court ordered that the January 16 order was a final judgment as between the special administrator of Henery's estate and the city.

On April 30, 2001, the city filed its notice of appeal from the district court's April 13 order. On May 25, Henderson filed a separate notice of appeal. The city and the special administrator have filed briefs in this appeal. Henderson has not submitted a brief.

ASSIGNMENT OF ERROR

In its appeal, the city assigns one error. The city claims the district court erred in concluding that Henery was an "innocent third party" within the scope of § 13-911 and in entering judgment against the city and in favor of the special administrator of Henery's estate.

STANDARD OF REVIEW

[1,2] Statutory interpretation presents a question of law. *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001); *Hatcher v. Bellevue Vol. Fire Dept.*, 262 Neb. 23, 628 N.W.2d 685 (2001). When an appeal presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Hunt v. Trackwell, supra.*

ANALYSIS

Rules of Statutory Construction.

[3,4] This appeal presents a question of statutory construction. When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001). 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.*; *Hunt v. Trackwell, supra.*

Innocent Third Party: § 13-911.

On appeal, the city does not challenge the district court's conclusions that Matson was in vehicular pursuit of Henderson and that such pursuit was the proximate cause of Henery's death, both of which are statutory requirements which must be met before the city can be found liable for damages under § 13-911. Instead, the city argues that Henery was not an "innocent third party" as that phrase is used in § 13-911 and that, therefore, the city does not owe damages to Henery's estate.

The city correctly notes that "innocent third party" is not defined within the statute. The city claims that when the Legislature enacted § 13-911 and its predecessor, Neb. Rev. Stat. § 25-21,183 (Cum. Supp. 1982), it "intended only to protect persons who were hurt through no fault or negligence of their own." Brief for appellant at 13. The city argues that "the Legislature never expected recovery by actual participants in a vehicular pursuit." *Id.* at 10. According to the city, Henery's estate cannot recover damages because Henery placed herself in

danger by her "own foolish actions." *Id.* at 13. The city's arguments are unavailing in this case.

Section 13-911 imposes liability upon the city for the damages, injuries, or death sustained by an "innocent third party" as a result of vehicular pursuit involving a city law enforcement officer when the pursuit is an attempt by a law enforcement officer "to apprehend one or more occupants of another motor vehicle, when the driver of the fleeing vehicle is . . . resisting apprehension." The word "innocent" used to describe the third party to whom damages shall be paid under § 13-911 qualifies the individual who is not the occupant sought to be apprehended and who is, therefore, not the object of the pursuit. See *id.* As used in § 13-911, "innocent" refers to the third party as distinguished from the "one or more occupants" sought to be apprehended, although the third party may be found in the vehicle being pursued.

Our reading of § 13-911 is consistent with *Stewart v. City of Omaha*, 242 Neb. 240, 494 N.W.2d 130 (1993), in which this court affirmed a decision by the trial court to the effect that a motorcycle passenger who sustained fatal injuries during a police pursuit of the motorcycle's driver was an "innocent third party" within the meaning of the version of § 13-911 then in force and that the city was liable for damages occasioned by the passenger's death. There was no indication in *Stewart* that the motorcycle passenger was the object of apprehension by law enforcement officers.

Following our decision in *Stewart*, the Legislature in 1996 amended § 13-911 to provide for reimbursement to the city from various entities for sums paid under the statute. Despite this court's decision in *Stewart*, the Legislature did not amend § 13-911 to define an "innocent third party." Specifically, the Legislature did not amend the statute to provide that a passenger in a fleeing vehicle being pursued by law enforcement personnel is not an "innocent third party." When 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. *Creighton St. Joseph Hosp. v. Nebraska Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000); *Brown v. Kindred*, 259 Neb. 95, 608 N.W.2d 577 (2000).

[5] Statutory language is to be given its plain and ordinary meaning. *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001). In the absence of anything to the contrary, an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Id.*; *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001). We conclude that by its use of the phrase "innocent third party" in § 13-911, the Legislature was concerned with the actions of the third party as those actions may relate to the flight of the driver sought to be apprehended. "Innocent" as used in the statute describes an individual who is a "third party" under § 13-911. An "innocent third party" under § 13-911 is one who has not promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and one who is not sought to be apprehended in the fleeing vehicle.

In the instant case, Matson testified that Henery had not done "anything wrong" and that he had no knowledge that she planned or encouraged Henderson's flight from police. There is no evidence that law enforcement attempted to apprehend Henery. Although Henery may have exhibited poor judgment in riding with Henderson, she did not lose her "innocent third party" status under § 13-911 based only on such choice. There is no evidence that Henery participated in, promoted, provoked, or persuaded Henderson to flee from Matson. Accordingly, we conclude, as a matter of law, that Henery was an "innocent third party" within the provisions of § 13-911. We find no merit to the city's sole assignment of error, and we affirm the district court's decision.

Section 13-911 requires the city to pay damages for the death, injury, or property damage sustained by an "innocent third party" proximately caused by the action of a law enforcement officer employed by the city during a vehicular pursuit. To the extent dicta in *Stewart v. City of Omaha*, 242 Neb. 240, 494 N.W.2d 130 (1993), suggest that contributory negligence or assumption of the risk are defenses to a cause of action under § 13-911, such language is disapproved.

Henderson's Cross-Appeal.

As noted above, Henderson filed a separate notice of appeal in this case, which we treat as a cross-appeal. Henderson has

failed to file a brief or otherwise indicate from what order he is appealing. See Neb. Ct. R. of Prac. 1E and 9D(4) (rev. 2000). Despite this procedural omission, we have reviewed the record in this appeal and find no final order entered by the district court with regard to the city's third-party petition against Henderson. Absent a final order, this court is without jurisdiction to consider Henderson's cross-appeal. See *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001). Accordingly, we dismiss Henderson's cross-appeal.

CONCLUSION

Henery was an "innocent third party" within the meaning of § 13-911. We affirm the district court's decision entering judgment against the city and in favor of Henery's estate pursuant to § 13-911 for Henery's death which occurred as a result of a vehicular pursuit by a law enforcement officer of a vehicle in which Henery was a passenger. Because the record does not contain a final, appealable order in the city's case against Henderson, we are without jurisdiction to consider Henderson's cross-appeal.

AFFIRMED. CROSS-APPEAL DISMISSED.

R.W. ET AL., APPELLANTS, V. DANIEL B. SCHREIN, M.D., APPELLEE, AND THE MEDICAL PROTECTIVE COMPANY OF FORT WAYNE, INDIANA, GARNISHEE-APPELLEE.

642 N.W.2d 505

Filed April 19, 2002. Nos. S-00-808 through S-00-812.

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. **Judgments: 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. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.

4. **Collateral Estoppel.** Four conditions must exist for the doctrine of collateral estoppel to apply: (1) the identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
5. **Res Judicata: Judgments.** The doctrine of res judicata applies to bar relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
6. **Insurance: Contracts: Intent.** An insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made.
7. **Contracts: Words and Phrases.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.
8. **Insurance: Contracts.** While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract.
9. **Malpractice: Physician and Patient: Liability.** It is the physician's deviation from the recognized medical standard of care during the course of treatment that is the essence of a claim for medical malpractice, and there must exist a causal relationship between the alleged harm and the complained-of deviation from that standard of care in order for liability to attach.
10. **Sexual Assault: Intent.** An intent to inflict injury can be inferred as a matter of law in cases of sexual abuse.
11. **Insurance: Contracts.** Coverage under an insurance policy or contract is generally understood to consist of two separate and distinct obligations: the duty to defend any suit filed against the insured party and the duty to pay, on behalf of the insured, sums for which the insured shall become legally obligated to pay because of injury caused to a third party by acts of the insured.
12. **Insurance: Contracts: Parties.** Parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute.

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

James E. Harris and Britany S. Shotkoski, of Harris, Feldman Law Offices, for appellants.

Mark A. Christensen and Pamela K. Epp, of Cline, Williams, Wright, Johnson & Oldfather, P.C., for garnishee-appellee.

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

STEPHAN, J.

As children, the five appellants in these actions were patients of Daniel B. Schrein, M.D., who was then a pediatrician practicing in Omaha. Now adults, appellants brought actions to recover damages for sexual abuse perpetrated upon them by Schrein under the guise of medical treatment. After obtaining default judgments against Schrein, appellants commenced these garnishment proceedings against The Medical Protective Company of Fort Wayne, Indiana (Medical Protective), Schrein's professional liability insurer. The district court for Douglas County determined that the claims were not covered under the policy and entered summary judgment in favor of Medical Protective. Appellants perfected these appeals, which we moved to our docket and decide together in this opinion because the dispositive issues are common to each.

I. BACKGROUND

This controversy is before us for the second time. In *Medical Protective Co. v. Schrein*, 255 Neb. 24, 582 N.W.2d 286 (1998), Medical Protective sought a declaratory judgment determining that it had no duty to defend or indemnify Schrein with respect to the claims of five former patients that they were sexually abused by Schrein during purported examinations or treatments. The district court entered summary judgment in favor of Medical Protective based upon its determination that Schrein's conduct was not within the scope of professional services as contemplated by the insurance policy. The individual claimants appealed, but Schrein did not cross-appeal. This court held that declaratory judgment with respect to the claimants was improper because the facts pertaining to the issue of coverage had not yet been developed. We noted that the record did not reflect "the specific claims that may be brought against Schrein, e.g., whether the claims involve solely sexual acts or intentional torts, or include other acts or professional negligence." *Id.* at 30, 582 N.W.2d at 291. We further noted that we lacked "the requisite knowledge of what discovery may reveal or, more importantly, what verdict may be rendered by the fact finder." *Id.* We concluded that declaratory relief with respect to the claimants was not necessary because "[a]ny of Medical Protective's defenses or

assertions of noncoverage can be presented without any consequential harm to Medical Protective if or when any of the claimants seeks to garnish policy proceeds as a result of a judgment against Schrein." *Id.* at 31, 582 N.W.2d at 291. However, we determined that because the claimants lacked standing with respect to contractual issues between Medical Protective and Schrein, including the existence of duties to defend or indemnify, our holding did not affect the declaratory judgment rendered in favor of Medical Protective against Schrein.

Appellants herein filed separate actions for professional malpractice against Schrein. Appellant R.W. filed a petition on November 23, 1998, alleging he was Schrein's patient from 1972 to 1990. R.W. alleged that in January 1987, Schrein diagnosed him with and was treating him for recurring meatitis. He alleged that at approximately that time, he developed an antibiotic-induced scrotal infection which Schrein diagnosed as excoriation of the scrotum. R.W. alleged that during an examination, Schrein applied ointment to R.W.'s penis and manipulated it to the point of ejaculation. After commenting about needing to do a sperm count, Schrein forced R.W. to ejaculate again.

Appellant G.N. filed a petition on November 23, 1998. G.N. alleged that he was Schrein's patient from 1986 to 1990. G.N. alleged that from the time he was 11 years old, Schrein would have him sit nude on Schrein's lap while Schrein stroked his body and discussed sexual behavior. G.N. alleged that in 1989, Schrein treated him for meatitis during a physical examination and asked that he return for a followup visit. He alleged that in February 1990, Schrein had him sit on Schrein's lap while he performed a procedure involving insertion of a metal rod into G.N.'s penis.

Appellant C.T. filed a petition on November 23, 1998. C.T. alleged that she was Schrein's patient from 1979 to 1990. She alleged that during the course of examinations, Schrein would have her sit on his lap while nude and would discuss sexual behavior. C.T. alleged that in 1989, while conducting her first pelvic examination, Schrein fondled her breasts, inserted his fingers in her vagina, and manipulated her vulva. C.T. further alleged that before she got dressed, Schrein had her sit on his lap while he

tickled her thighs and asked if she had any boyfriends and if she was sexually active.

Appellant L.N. filed a petition on November 23, 1998. L.N. alleged that during the course of examinations, Schrein would have her sit on his lap nude while he stroked her body and discussed sexual behavior. L.N. also alleged that during examinations, Schrein digitally penetrated her vagina, watched her dress and undress, and made her turn around in front of him when she was nude.

Appellant M.M. filed a petition on October 1, 1998. M.M. alleged that in 1990, when he was 13 years old, he went to Schrein for a routine medical evaluation and treatment concerning the medical condition of being overweight. M.M. alleged that during this visit, Schrein performed a physical examination and diagnosed urinary meatitis. According to the petition, Schrein applied an ointment to M.M.'s penis and manipulated it to the point of ejaculation.

The petitions of all of the above appellants alleged that Schrein knew or should have known that his minor patients were especially vulnerable and readily subject to manipulation and control by their physician. The petitions alleged that this emotional reaction of a patient toward a physician is referred to in the medical community as "transference" and that Schrein had a duty to properly recognize and manage transference as it developed. Each petition alleged that Schrein had a professional, fiduciary, and ethical duty to avoid sexual contact and that his failure to do so fell below the standard of care. Each petition also alleged that Schrein failed to provide proper medical treatment for the conditions presented and performed unnecessary medical examinations and treatments.

Schrein was served by publication in all of the above actions. He failed to answer or appear, and default judgments were entered against him in each case. Each judgment recited that sexual contact with a patient by a fiduciary caused the harm for which damages were sought. The default judgments, which were prepared and submitted by counsel for appellants, also recited that "the acts and omissions of Defendant Schrein arose out of his medical treatment of [appellants] during the course and scope of professional services" in violation of the standard of care.

On March 25, 1999, each appellant issued summons in garnishment upon Medical Protective, alleging that he or she believed Medical Protective held property, in the form of a liability policy, belonging to Schrein. In its answers to the garnishment interrogatories, Medical Protective denied that it held property of Schrein and alleged that its policy of insurance issued to Schrein did not cover payment of damages which were not based upon professional services and that any coverage was further excluded because damages incurred by appellants were the result of criminal, willful, or sexual acts. Appellants each filed applications to determine garnishee liability. See Neb. Rev. Stat. § 25-1030 (Reissue 1995). All parties filed motions for summary judgment. In orders dated July 28, 2000, the district court granted Medical Protective's motions for summary judgment in all five garnishment proceedings. Appellants filed timely appeals, and we granted their respective motions to bypass. The cases were consolidated for oral argument.

II. ASSIGNMENTS OF ERROR

Each appellant assigns, restated, summarized, and consolidated, that the district court erred in (1) allowing Medical Protective to collaterally attack the underlying judgments against Schrein; (2) determining that Medical Protective had a right to assert policy defenses against Schrein in the garnishment proceedings; (3) determining that appellants' claims did not arise from the rendering of "professional services" by Schrein and were therefore not covered under the professional liability insurance policy issued by Medical Protective; (4) determining that there was no coverage under the policy for the additional reason that the claims against Schrein fell within specific coverage exclusions for criminal, willful, or sexual acts; and (5) determining that public policy did not compel that Schrein's victims be compensated.

In addition, R.W. further assigns that the district court erred in (1) finding that his claim against Schrein was barred by the statute of limitations, (2) failing to find that Neb. Rev. Stat. § 25-21,156 (Reissue 1995) was applicable and that his petition was timely filed pursuant thereto, (3) failing to find that his petition and malpractice suit against Schrein relate back to the filing of the

declaratory judgment, and (4) failing to apply the doctrine of judicial estoppel against Medical Protective as it relates to the statute of limitations.

III. STANDARD OF REVIEW

[1,2] 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. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001); *Olsen v. Farm Bureau Ins. Co.*, 259 Neb. 329, 609 N.W.2d 664 (2000).

IV. ANALYSIS

1. Preliminary Issues

(a) Collateral Estoppel and Res Judicata

[4,5] Appellants argue that under principles of collateral estoppel and res judicata, the issue of whether Schrein was engaged in the rendition of professional services at the time the damages were incurred has been conclusively established by the findings in the default judgments that Schrein's acts arose out of medical treatment during the course and scope of providing professional service in violation of the standard of care and therefore cannot be raised in the garnishment proceedings. Four conditions must exist for the doctrine of collateral estoppel to apply: (1) the identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the

issue in the prior action. *Torrison v. Overman*, 250 Neb. 164, 549 N.W.2d 124 (1996). Similarly, the doctrine of res judicata applies to bar relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. *Baltensperger v. United States Dept. of Ag.*, 250 Neb. 216, 548 N.W.2d 733 (1996). Both doctrines require an identity or privity of parties.

The only parties to these actions at the time the default judgments were entered were appellants and Schrein. Medical Protective received no notice of the filing of the actions until the commencement of garnishment proceedings. In order for the doctrines of collateral estoppel or res judicata to apply, it must be shown that Medical Protective was in privity with the parties. In the previous appeal, *Medical Protective Co. v. Schrein*, 255 Neb. 24, 582 N.W.2d 286 (1998), we held that because the claimants, who are now appellants in the instant cases, lacked standing with respect to contractual issues between Medical Protective and Schrein, our holding did not affect the declaratory judgment entered in favor of Medical Protective against Schrein which determined that there was no duty to defend. In *Torrison*, 250 Neb. at 176, 549 N.W.2d at 132, we noted that "'"[p]rivity requires, at a minimum, a substantial identity between the issues in controversy and [a] showing [that] the parties in the two actions are really and substantially in interest the same."'" (Quoting *VanDeWalle v. Albion Nat. Bank*, 243 Neb. 496, 500 N.W.2d 566 (1993).) We concluded that no privity existed between an insurer and an insured where there was no duty to defend the claim which was the subject of the action. Here, because Medical Protective was not in privity with any party to these actions at the time the default judgments were entered, the doctrines of collateral estoppel and res judicata do not foreclose consideration of whether the claims arose out of "professional services" for purposes of determining garnishee liability.

(b) Proper Defenses of Garnishee

Appellants also argue generally that as a garnishee, Medical Protective is precluded from attacking any aspect of the

underlying default judgments sought to be enforced in the garnishment proceedings. In response, Medical Protective argues that it is entitled to raise any defense in this garnishment action that it could have raised in the underlying malpractice actions.

In *Medical Protective v. Schrein*, 255 Neb. 24, 31, 582 N.W.2d 286, 291 (1998), we held that declaratory relief with respect to whether specific claims were covered under the professional liability policy was unnecessary, in part because "[a]ny of Medical Protective's defenses or assertions of noncoverage can be presented without any consequential harm to Medical Protective if or when any of the claimants seeks to garnish policy proceeds as a result of a judgment against Schrein." We reaffirm that holding here.

In the instant case, Medical Protective relies primarily upon three policy defenses it could have raised against Schrein and thus may properly raise in the garnishment proceedings. First, Medical Protective argues that because the policy required that Schrein give it notice of actions filed against him and he failed to do so, a condition precedent to coverage under the policy was not met. Second, Medical Protective argues that Schrein's actions were not "professional services" covered under the policy. Third, Medical Protective argues that the exclusionary clauses of the policy for criminal or sexual acts negate any coverage under the policy. We limit our discussion to the second issue, which is dispositive of these appeals.

2. Rendering of "Professional Services"

[6-8] The applicable language of the insurance policy issued to Schrein provides that Medical Protective will pay damages "based on professional services rendered or which should have been rendered . . . by the insured or any other person for whose acts or omissions the insured is legally responsible, in the practice of the insured's profession." An insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. *Farmers Union Co-op Ins. Co. v. Allied Prop. & Cas.*, 253 Neb. 177, 569 N.W.2d 436 (1997). When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them. *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*,

262 Neb. 746, 635 N.W.2d 112 (2001). While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract. *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001). We conclude that the language of the insuring agreement is unambiguous. The question, then, is whether Schrein's actionable conduct constituted "professional services."

In two prior cases, this court has addressed the issue of whether certain conduct constituted "professional services." In *Marx v. Hartford Acc. & Ind. Co.*, 183 Neb. 12, 157 N.W.2d 870 (1968), a physician's employee mistakenly poured benzine instead of water into a sterilization container, resulting in an explosion and a fire. The physician was insured by a policy covering damages arising out of " 'malpractice, error or mistake of the insured, or of a person for whose acts or omissions the insured is legally responsible . . . in rendering or failing to render professional services.' " (Emphasis omitted.) *Id.* at 13, 157 N.W.2d at 871. Noting that the precise question presented was whether the damages arose out of the rendering or failure to render professional services, we stated:

> The insurer's liability is thus limited to the performing or rendering of "professional" acts or services. Something more than an act flowing from mere employment or vocation is essential. The act or service must be such as exacts the use or application of special learning or attainments of some kind. The term "professional" in the context used in the policy provision means something more than mere proficiency in the performance of a task and implies intellectual skill as contrasted with that used in an occupation for production or sale of commodities. A "professional" act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. . . . In determining whether a particular act is of a professional nature or a "professional service" we must look not to the title or character of the party performing the act, but to the act itself.

(Citations omitted.) *Id.* at 13-14, 157 N.W.2d at 871-72. Finding that the boiling of water for sterilization was "not a part of any patient's treatment per se any more than any other routine cleaning or arranging procedure incidental to the proper general operations of the plaintiffs' offices," we concluded that the act was not a professional service covered by the language of the insurance policy. *Id.* at 14, 157 N.W.2d at 872.

[9] We recently revisited the *Marx* holding in *Iwanski v. Gomes*, 259 Neb. 632, 640, 611 N.W.2d 607, 613 (2000), which presented the question whether "a doctor commits malpractice by engaging in sexual relations or having consensual sex with an individual with whom the doctor concurrently maintains a physician-patient relationship." After recognizing our holding in *Marx*, we concluded that in order to establish that conduct by a physician constitutes malpractice, the acts of the physician upon which the claim is based must " 'be such as exacts the use or application of special learning or attainments of some kind' " that would constitute the " 'performing or rendering of "professional" acts or services.' " *Iwanski*, 259 Neb. at 641, 611 N.W.2d at 614 (quoting *Marx, supra*). In addressing whether the acts of the physician fell within this definition, we referred to case law from other jurisdictions interpreting "professional services" coverage in insurance contracts. We then stated:

> We agree that the fact that sexual misconduct occurs in a medical professional's office "does not automatically transmute the act into a professional service [because the] location of an act's occurrence is not determinative of liability." *Lindheimer v. St. Paul Fire & Marine Ins.*, 643 So. 2d 636, 638 (Fla. App. 1994). When the only connection between the sexual misconduct and treatment is that the activity occurred in the medical professional's office, such a connection is too remote from the actual rendering of proper services to impose liability upon the medical professional for malpractice. See *Roe v. Federal Ins. Co.*, 412 Mass. 43, 587 N.E.2d 214 (1992).
>
> We conclude, based on the foregoing rationale, that there must be a causal relationship between the alleged harm and the complained-of professional act or service. When there is

> a claim of medical malpractice based on unwanted sexual contact, the determination of liability should focus not solely on the locale of the alleged harm or the professional status of the actor, but, rather, on the context of the alleged medical service involved in the action. In other words, it is the physician's deviation from the recognized medical standard of care *during the course of treatment* that is the essence of a claim for medical malpractice, and *there must exist a causal relationship between the alleged harm and the complained-of deviation from that standard of care in order for liability to attach.*

(Emphasis in original.) (Emphasis supplied.) *Iwanski*, 259 Neb. at 642, 611 N.W.2d at 614. In applying this standard to the facts, we held that the relationship between the adult parties was consensual and that as to the only incident related to the direct provision of medical services, the evidence established that the sexual act between the patient and the physician took place well after the physician had completed a gynecological examination. We thus held that there was no actionable claim for "professional negligence." *Id.* at 643, 611 N.W.2d at 615.

While the conduct upon which each appellant's claim is based occurred in Schrein's office during what purported to be medical examination and treatment, it is clear from the record that there was no causal connection between any legitimate medical procedure and the harm which appellants suffered. Kevin Cahill, Ph.D., a clinical psychologist who examined four of the appellants, provided affidavits upon which their damage awards were based. Cahill characterized the conduct which caused their psychological injuries as "sexual abuse" and "sexual molestation." William H. Batey, a psychotherapist who examined C.T. and provided the factual basis for her damage award, similarly stated that the injury was "a fairly direct outcome of her sexual molestation experience with her pediatrician." Neither Cahill nor Batey established any causal relationship between the harm experienced by appellants and any professional act or omission on the part of Schrein. Harlan C. Schriner, Jr., M.D., a board-certified pediatrician, stated in affidavits offered by Medical Protective in each of these cases that in his opinion, the actions of Schrein which caused injuries to appellants

> amount to no more than intentional sexual abuse. Schrein's actions do not constitute or arise out of professional services and do not constitute professional negligence. The actions could not have been unintentionally or negligently done. I am appalled at the suggestion that such actions could be considered to be a part of professional services rendered by a pediatrician in Nebraska. Although Schrein's actions were immoral and unethical, he did not breach the applicable standard of care.

[10] Appellants offered no evidence to rebut Schriner's opinion that Schrein's actions were unrelated to any professional medical services and did not constitute "professional negligence." They argue that because the abuse occurred in Schrein's office while he was purporting to examine or treat his patients, it necessarily fell within the coverage for "professional services." However, appellants did not establish any harm attributable to any failure to properly diagnose or treat a medical condition. Rather, their injuries and damages flowed solely from the affirmative acts of abuse and molestation committed by Schrein under the guise of medical examination and treatment. While these circumstances make Schrein's conduct all the more reprehensible, they do not transform his acts of abuse into "professional services" for purposes of the professional liability insurance policy. An intent to inflict injury can be inferred as a matter of law in cases of sexual abuse. *State Farm Fire & Cas. Co. v. van Gorder*, 235 Neb. 355, 455 N.W.2d 543 (1990). It is clear from the record that when Schrein chose to sexually abuse his patients, he was no longer providing "professional services." See, e.g., *St. Paul Fire &c. v. Alderman*, 216 Ga. App. 777, 455 S.E.2d 852 (1995) (holding physician's digital penetration and clitoral manipulation of patient during examination for urinary tract infection and leg cyst solely for satisfaction of physician's prurient interests and not "professional services" within meaning of liability insurance policy), and *Lindheimer v. St. Paul Fire & Marine Ins.*, 643 So. 2d 636, 639 (Fla. App. 1994) (holding oral surgeon's sexual assault of anesthetized patient not causally connected to provision of professional services "regardless of the 'pretense of medical care used by the insured to catch his victim unaware' "), cited with approval in *Iwanski v. Gomes*, 259 Neb. 632, 611 N.W.2d 607 (2000).

Appellants refer to Schrein's betrayal of their trust as the "essence of the transference phenomenon." As we noted in *Iwanski*, 259 Neb. at 643, 611 N.W.2d at 615, "[t]ransference has been defined as '"[t]he process whereby the patient displaces on to the therapist feelings, attitudes and attributes which properly belong to a significant attachment figure of the past, usually a parent, and responds to the therapist accordingly." S. Waldron-Skinner, *A Dictionary of Psychotherapy* 364 (1986).'" (Quoting *St. Paul Fire & Marine Ins. Co. v. Love*, 459 N.W.2d 698 (Minn. 1990).) We further noted that while transference was not confined solely to psychiatric treatment and the mental health profession, it is not a recognized component in the medical treatment of physical conditions. There is no evidence in the record that transference was in any way involved in Schrein's molestation of appellants, and thus, as was true in *Iwanski*, there is no genuine issue with respect to professional negligence in the mishandling of the transference phenomenon.

In their petitions, appellants alleged that in addition to being liable for his own acts, Schrein was vicariously liable for the failure of an office nurse employed by him to report her "suspicious findings" regarding Schrein's actions to authorities. Although this argument was not addressed by the district court or developed in the briefs, appellants' counsel contended at oral argument that this allegation brought the case within the provision of the policy which provided coverage for professional services rendered by "any other person for whose acts or omissions the insured is legally responsible." We disagree. Medical Protective offered evidence that the determination of what constitutes immoral or unethical conduct on the part of a physician is not a topic as to which a nurse receives or needs special training, learning, or attainment, and the claim therefore does not involve "professional services" provided by the nurse. Because this evidence was uncontroverted, there was no genuine issue of material fact as to whether the action or inaction of the nurse for which Schrein was alleged to be vicariously liable constituted "professional services" within the meaning of the policy.

3. Public Policy

Appellants contend that the district court erred in "finding that public policy did not compel that the innocent children victims

of Dr. Schrein be compensated." The phrasing of this assignment of error misconstrues the issue before us. There is no doubt that appellants are entitled to compensation from Schrein based upon their default judgments. The question in this garnishment proceeding, however, is whether Medical Protective is obligated to provide that compensation on Schrein's behalf under the terms of the professional liability insurance policy it issued to him.

[11,12] As we have previously stated in this opinion, an insurance policy is a contract. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001); *Callahan v. Washington Nat. Ins. Co.*, 259 Neb. 145, 608 N.W.2d 592 (2000). Coverage under an insurance policy or contract is generally understood to consist of two separate and distinct obligations: the duty to defend any suit filed against the insured party and the duty to pay, on behalf of the insured, sums for which the insured shall become legally obligated to pay because of injury caused to a third party by acts of the insured. *Farm Bureau Ins. Co. v. Witte*, 256 Neb. 919, 594 N.W.2d 574 (1999). Parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute. *Hood v. AAA Motor Club Ins. Assn.*, 259 Neb. 63, 607 N.W.2d 814 (2000). In this case, the parties to the contract of insurance are Medical Protective and Schrein. Therefore, the precise legal issue presented by this assignment of error is whether a professional liability insurance policy contravenes public policy when it does not include a duty to pay a physician's liability to a patient whom he sexually abused.

Appellants cite the Nebraska Hospital-Medical Liability Act as the source of public policy supporting their entitlement to compensation. See Neb. Rev. Stat. §§ 44-2801 to 44-2855 (Reissue 1998 & Cum. Supp. 2000). They argue that because Schrein was qualified under the act, which requires that he submit proof of liability insurance, the act provides their exclusive remedy against him. Appellants therefore contend that a determination that the policy did not provide coverage for their claims denies them of "legislatively mandated" insurance coverage.

Section 44-2801(2) states that the intent of the act is "to serve the public interest by providing an alternative method for

determining malpractice claims in order to improve the availability of medical care, to improve its quality and to reduce the cost thereof, and to [e]nsure the availability of malpractice insurance coverage at reasonable rates." The act specifically defines "[m]alpractice or professional negligence" to mean a failure to meet certain specified standards "in rendering professional services." § 44-2810. As we have noted, the conduct upon which Schrein's liability to appellants is based was not the rendering of professional services, but, rather, sexual abuse. The Nebraska Hospital-Medical Liability Act makes no reference to such conduct and therefore cannot be regarded as establishing a public policy requiring that a professional liability insurance policy must provide coverage for sexual abuse inflicted by a physician upon his patient. The fact that Schrein's coverage is limited to liability incurred in the performance of professional services is not inconsistent with the purpose or language of the act. See *N.M. Physicians Mut. Liability v. LaMure*, 116 N.M. 92, 860 P.2d 734 (1993) (holding insurance policy which did not provide coverage for physician's sexual assault of patient not inconsistent with state's Medical Malpractice Act).

Other courts have rejected arguments that professional liability insurance policies should be construed to provide coverage under circumstances similar to those before us based upon a public policy favoring compensation of victims. In *Roe v. Federal Ins. Co.*, 412 Mass. 43, 54 n.9, 587 N.E. 2d 214, 220 n.9 (1992), the court noted that the dispositive issue was "not what coverage is desirable, but rather what coverage does the policy provide in fact and law." Another court noted that a policy which did not provide coverage for a physician's sexual misconduct with a patient was not inconsistent with public policy which prohibited the acts in question and invalidated contracts indemnifying a person against loss from willful wrongdoing. *Chicago Ins. Co. v. Manterola*, 191 Ariz. 344, 955 P.2d 982 (Ariz. App. 1998). Similarly, in *N.M. Physicians Mut. Liability*, 116 N.M. at 100, 860 P.2d at 742, the court rejected a claim that coverage for "professional services" should be held to exist on public policy grounds in a case involving a sexual assault on a child by a physician, stating: "Despite our sympathy for LaMure's victim,

denying LaMure indemnification supports the public policy of preventing an insured from being shielded from the negative consequences of his crimes, and of enforcing fair private contracts as written absent conflicting statutorily expressed public policy." See, also, *Austin v. State Farm Mut. Auto Ins. Co.*, 261 Neb. 697, 625 N.W.2d 213 (2001) (holding it is against public policy to insure against liability for one's own intentional acts). We likewise conclude that despite our sympathy for appellants in these cases, there is no clearly articulated public policy which would permit or require us to disregard the unambiguous coverage provisions of Schrein's insurance policy and the fact that his acts did not fall within the coverage provided.

V. CONCLUSION

For the reasons discussed, we conclude that Medical Protective was entitled to summary judgment in its favor because Schrein's liability to appellants was not based on the provision or failure to provide professional services, and therefore, no coverage existed under the professional liability insurance policy which Medical Protective issued to Schrein. Having made this determination, we need not and do not reach the issue of whether any policy exclusion applies or whether R.W.'s claim was barred by the statute of limitations. The judgments of the district court are affirmed.

AFFIRMED.

WRIGHT and MCCORMACK, JJ., not participating.

CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE AND CROSS-APPELLEE, V. KUM & GO, L.L.C., DOING BUSINESS AS KUM & GO #359, APPELLANT, AND NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE AND CROSS-APPELLANT.

642 N.W.2d 154

Filed April 19, 2002. No. S-01-305.

1. **Administrative Law: Liquor Licenses: Appeal and Error.** Appeals from orders or decisions of the Nebraska Liquor Control Commission are taken in accordance with the Administrative Procedure Act.

2. **Administrative Law: Final Orders: Appeal and Error.** Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency.
3. ____: ____: ____. 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.
4. **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.
5. **Administrative Law: Appeal and Error.** In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings.
6. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
7. **Administrative Law: Liquor Licenses: Statutes: Intent.** The Nebraska Liquor Control Commission is empowered to adopt and promulgate rules and regulations to carry out the Nebraska Liquor Control Act, Neb. Rev. Stat. §§ 53-101 to 53-1,122 (Reissue 1998, Cum. Supp. 2000 & Supp. 2001), including provisions covering any and all details which are necessary or convenient to the enforcement of the intent, purpose, and requirements of the act.
8. ____: ____: ____: ____. The Nebraska Liquor Control Commission may not adopt rules and regulations that are in conflict with the Nebraska Liquor Control Act. The power to regulate must be exercised in conformity with all the provisions of the act and in harmony with its spirit and expressed legislative intent.
9. **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.
10. **Administrative Law.** Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law.
11. **Administrative Law: Statutes.** An administrative agency may not employ its rule-making power to modify, alter, or enlarge provisions of a statute which it is charged with administering.
12. ____: ____. In order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated.
13. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
14. **Words and Phrases.** The plain, ordinary, and popular meaning of the word "church" includes a building in which people assemble for the worship of God and for the administration of such offices and services as pertain to that worship, a building used predominately for the honor of God and religion, and a place where persons regularly assemble for worship. A building which is used predominately for the honor of a religion would likewise include buildings in which people assemble for non-Christian worship, such as a mosque, a synagogue, or a temple.

15. **Administrative Law.** In the absence of anything to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning.
16. **Administrative Law: Statutes.** Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction.
17. **Statutes.** A statute is open for construction to determine its meaning only when the language used requires interpretation or may reasonably be considered ambiguous.
18. ____. In the absence of ambiguity, courts must give effect to statutes as they are written.
19. ____. If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.

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

Michael J. Lehan, of Kelley & Lehan, P.C., for appellant.

Don Stenberg, Attorney General, Hobert B. Rupe, and, on brief, Laurie Smith Camp for appellee Nebraska Liquor Control Commission.

Thomas O. Mumgaard, Deputy Omaha City Attorney, for appellee City of Omaha.

Amy A. Miller for amicus curiae American Civil Liberties Union of Nebraska Foundation.

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

GERRARD, J.

NATURE OF CASE

Neb. Rev. Stat. § 53-177(1) (Cum. Supp. 2000) provides that no license shall be issued for the retail sale of liquor within 150 feet of any church. The issue presented in this appeal is whether the "House of Faith," located in leased storefront quarters, is a "church" within the meaning of § 53-177.

PROCEDURAL BACKGROUND

Kum & Go, L.L.C., filed an application with the Nebraska Liquor Control Commission (Commission), on May 21, 1998, for a retail class B liquor license for Kum & Go's location at 503 North 33d Street in Omaha, Nebraska. The Omaha City Council voted, on June 30, to recommend denial of Kum & Go's applica-

tion. However, the Commission granted Kum & Go's application on August 25. The City of Omaha brought a petition for judicial review in the district court. The district court concluded that the Kum & Go location was 139 feet from the House of Faith, which the district court determined was a church within the meaning of § 53-177. Consequently, the district court reversed the decision of the Commission granting Kum & Go a liquor license.

Kum & Go appealed to this court; in a memorandum opinion, we reversed the decision of the district court and remanded the cause to the district court with instructions to remand the case to the Commission. See *City of Omaha v. Nebraska Liquor Control Comm.*, 259 Neb. xix (case No. S-99-452, May 17, 2000). We concluded that the Commission had erred in not applying its own rule defining a "church" for purposes of § 53-177, and we instructed the district court to remand the case for a consideration of Kum & Go's application under the appropriate rule. We specifically declined to comment on the validity of the rule. See *City of Omaha, supra*.

After remand, on August 22, 2000, the Commission again granted Kum & Go a retail class B liquor license. The Commission determined that the House of Faith was not a "church" as defined by the Commission. The City of Omaha appealed to the district court pursuant to the Administrative Procedure Act. The district court determined, in an order filed on February 13, 2001, that the Commission's definition of "church" was arbitrary and that the House of Faith was a church under the plain meaning of the word. The district court vacated the order of the Commission granting Kum & Go a liquor license and reversed the decision of the Commission. Kum & Go appeals.

FACTUAL BACKGROUND

Mary L. Sherman testified before the Commission by affidavit, dated August 3, 1998, that she was an ordained Pentecostal minister and pastor of the House of Faith. Sherman averred that the House of Faith had a congregation of between 75 and 150 members and regularly accepted new members.

Sherman averred that the House of Faith had been located at 502 North 33d Street, in Omaha, for over 9 years. Sherman testified that the House of Faith rented the building on North 33d

Street and, prior to that time, had held services at the House of Faith Church at 3219 Q Street in Omaha. Sherman also testified that before the House of Faith moved into the building on North 33d Street, the building housed a Baptist church.

Sherman testified that the House of Faith offered religious worship services each Sunday and Friday, prayer meetings each Monday, and choir practice each Saturday. Sherman stated that the House of Faith regularly held services at least four times per week that were open to any person wishing to attend. Sherman also stated that the use of the building was exclusively for worship or religious purposes.

Sherman testified that the House of Faith had maintained a bank account, in the name of the House of Faith, for at least 12 years prior to Sherman's testimony. Sherman stated, however, that because she did not draw a salary as pastor of the House of Faith, the House of Faith had not incorporated or applied for tax-exempt status under Nebraska law.

Photographic evidence in the record shows that the House of Faith is located in a storefront property and has a large white cross prominently displayed on the door. A sign over the door identifies the building as occupied by the House of Faith, "Evangelist M. Sherman (Pastor)," and lists a schedule of services including Sunday school and church services, Monday Bible class, Tuesday prayer service, and a Friday night service. The evidence also reveals that the House of Faith is directly across the street from the Kum & Go location. A report from the city's planning department established that the Kum & Go location was 138 feet from the House of Faith building.

Kum & Go adduced testimony before the Commission hearing officer from Gary Braaten, a district supervisor for Kum & Go. Braaten was the supervisor of the location at issue in this proceeding. Braaten testified that he was aware that the House of Faith was across the street from the Kum & Go location. Braaten stated that the management of the Kum & Go store had reported seeing about a dozen people going in and out of the House of Faith on Sunday mornings, but no other activity at the House of Faith.

Kum & Go also presented evidence that the House of Faith was not listed in the Omaha telephone book or city directory.

Kum & Go presented the affidavit of Michael Howard, superintendent of the office of permits and inspections of the City of Omaha, indicating that as of July 8, 1997, no certificate of occupancy had been issued that would permit the occupancy of the House of Faith property for religious assembly as required by city ordinances. A letter from the Douglas County assessor's office indicated that there was no record that the House of Faith property was classified as a tax-exempt organization.

ASSIGNMENTS OF ERROR

Kum & Go assigns, consolidated, that the district court erred in finding that (1) the Commission's regulation was arbitrary and beyond its authority and (2) there was not sufficient evidence to support the Commission's findings using the plain meaning of the term "church." On cross-appeal, the Commission also assigns that the district court erred in finding that the Commission's rule defining "church" for purposes of § 53-177 was arbitrary and beyond the Commission's authority.

STANDARD OF REVIEW

[1-4] Appeals from orders or decisions of the Commission are taken in accordance with the Administrative Procedure Act. See Neb. Rev. Stat. § 53-1,116 (Cum. Supp. 2000). Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. *Urwiller v. Neth, ante* p. 429, 640 N.W.2d 417 (2002). 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. *Id.* 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.*

[5,6] In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings. See *Miller v. Horton*, 253 Neb. 1009, 574 N.W.2d 112 (1998). To the extent, however, that the meaning and

interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. See *Schmidt v. State*, 255 Neb. 551, 586 N.W.2d 148 (1998).

ANALYSIS

Validity of Regulation

Section 53-177(1) provides, in relevant part, that "[n]o license shall be issued for the sale at retail of any alcoholic liquor within one hundred and fifty feet of any church . . . ." The Legislature has not defined the word "church" for these purposes. However, the Commission has adopted 237 Neb. Admin. Code, ch. 2, § 012.05 (rev. 1997), which provides that " '[c]hurch' shall mean a building owned by a religious organization, used primarily for religious purposes, and having tax-exempt status under Neb. Rev. Stat., Sec. 77-202 (1) (c) (Cum. Supp. 1992)." The Commission determined, pursuant to § 012.05, that the House of Faith was not a church within the meaning of § 53-177(1). The district court, however, determined that the Commission's definition of "church," set forth in § 012.05, was invalid because it was inconsistent with the plain meaning of § 53-177(1).

[7,8] The Commission is empowered to adopt and promulgate rules and regulations to carry out the Nebraska Liquor Control Act, Neb. Rev. Stat. §§ 53-101 to 53-1,122 (Reissue 1998, Cum. Supp. 2000 & Supp. 2001), including provisions covering any and all details which are necessary or convenient to the enforcement of the intent, purpose, and requirements of the act. See § 53-118. See, also, *Terry Carpenter, Inc. v. Nebraska Liquor Control Com.*, 175 Neb. 26, 120 N.W.2d 374 (1963); *State ex rel. Nebraska Beer Wholesalers Assn. v. Young*, 153 Neb. 395, 44 N.W.2d 806 (1950). However, the Commission may not adopt rules and regulations that are in conflict with the act. *Terry Carpenter, Inc., supra*; *Young, supra*. The power to regulate must be exercised in conformity with all the provisions of the act and in harmony with its spirit and expressed legislative intent. *Terry Carpenter, Inc., supra*; *Young, supra*.

[9-12] Generally, 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. *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000); *County Cork v. Nebraska Liquor Control Comm.*, 250 Neb. 456, 550 N.W.2d 913 (1996). See, also, *County of Dodge v. Department of Health*, 218 Neb. 346, 355 N.W.2d 775 (1984) (Legislature can delegate power to make rules and regulations to implement policy of statute). Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law. *City of Lincoln v. Central Platte NRD, ante* p. 141, 638 N.W.2d 839 (2002). However, an administrative agency may not employ its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering. *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994); *County of Dodge, supra.* See, also, *Creighton St. Joseph Hosp., supra.* In order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated. *State ex rel. Spire v. Stodola*, 228 Neb. 107, 421 N.W.2d 436 (1988); *County of Dodge, supra.*

[13,14] Obviously, then, the Commission may not define "church" in a manner that is inconsistent with the plain meaning of the word. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Ottaco, Inc. v. McHugh, ante* p. 489, 640 N.W.2d 662 (2002). This court has determined that the plain, ordinary, and popular meaning of the word "church" includes a building in which people assemble for the worship of God and for the administration of such offices and services as pertain to that worship, a building used predominately for the honor of God and religion, and a place where persons regularly assemble for worship. See *Latenser v. Intercessors of the Lamb, Inc.*, 250 Neb. 789, 553 N.W.2d 458 (1996), citing *Calvary Baptist Church v. Coonrad*, 163 Neb. 25, 77 N.W.2d 821 (1956). A building which is used predominately for the honor of a religion would likewise include buildings in which people assemble for non-Christian worship, such as a mosque, a synagogue, or a temple. See *Latenser, supra.* In *Calvary Baptist Church, supra*, this court specifically defined "church," essentially as set forth above, in the context of § 53-177.

The Commission's definition of "church," however, differs substantially from the plain and ordinary meaning of the word. Most significantly, § 012.05 requires that a church be owned by a religious organization, both by the express terms of the regulation and because property must be owned by an educational, religious, charitable, or cemetery organization to be eligible for a property tax exemption pursuant to Neb. Rev. Stat. § 77-202 (Cum. Supp. 2000), which is in relevant part identical to § 77-202 (Cum. Supp. 1992).

[15] Whether or not a building is a church, however, does not depend on the legal ownership of the building. The plain meaning of the word "church" encompasses buildings in which persons regularly assemble for religious worship, regardless of whether the building is owned or rented by those persons. Section 012.05, however, plainly states that a "church" must be owned by a religious organization. In the absence of anything to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning. *Busch v. Omaha Pub. Sch. Dist.*, 261 Neb. 484, 623 N.W.2d 672 (2001). The mandatory criteria for a church, set forth in § 012.05, are contrary to the plain meaning of the word as used in § 53-177 and may arbitrarily exclude from their definition a number of churches that are entitled to the protection of the statute.

We also note that the criteria set forth by § 012.05 are in some ways more inclusive than the plain meaning of "church." A parsonage, owned by a religious organization and furnished to a member of the clergy, and used primarily to promote the objects and purposes of a faith, is used exclusively for religious purposes and exempt from taxation. See, § 77-202 (Cum. Supp. 2000); *Neb. Unit. Meth. Ch. v. Scotts Bluff Cty. Bd. of Equal.*, 243 Neb. 412, 499 N.W.2d 543 (1993). Arguably, a parsonage would then be a "church" as defined by § 012.05, despite the fact that a parsonage is not a church under the plain meaning of the word.

[16-19] The Commission argues that its interpretation of the statute is reasonable and has the benefit of being objective and easy to apply. We have stated that although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction. *Affiliated Foods Co-op v. State*, 259 Neb. 549, 611 N.W.2d 105

(2000). However, a statute is open for construction to determine its meaning only when the language used requires interpretation or may reasonably be considered ambiguous. *Philpot v. Aguglia*, 259 Neb. 573, 611 N.W.2d 93 (2000). In the absence of ambiguity, courts must give effect to statutes as they are written. *American Employers Group v. Department of Labor*, 260 Neb. 405, 617 N.W.2d 808 (2000). If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *First Data Corp. v. State, ante* p. 344, 639 N.W.2d 898 (2002). Because the language of § 53-177(1) is clear, see *Calvary Baptist Church v. Coonrad*, 163 Neb. 25, 77 N.W.2d 821 (1956), the statute is not susceptible to construction, regardless of whether the Commission's definition is easier to use. We also note that this court's exposition of the plain meaning of "church" in the context of § 53-177, set forth over 45 years ago, has not evoked an amendment of the statute, and we presume that the Legislature has acquiesced to our declaration of the statute's meaning. See *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000).

In short, the Commission's definition of "church," as set forth in § 012.05, is contrary to the plain meaning of the word "church" as used in § 53-177(1), and is thus invalid. While a building's ownership by a religious organization, and incident tax exemption, is relevant evidence in inquiring whether a building is a church, ownership is not dispositive of the inquiry. The district court did not err in determining that § 012.05 was invalid as contrary to the plain language of § 53-177, the statute under which the regulation was promulgated. Kum & Go's first assignment of error and the Commission's assignment of error on cross-appeal are without merit.

Application of Plain Meaning of Statute

Having correctly found that the Commission's regulation was invalid, the district court proceeded, on its de novo review, to consider whether the House of Faith is a church under the plain meaning of § 53-177(1). This is a factual determination, and the district court's factual findings will be affirmed where competent evidence supports those findings. See *Miller v. Horton*, 253 Neb. 1009, 574 N.W.2d 112 (1998).

The record, as summarized above, clearly supports the district court's finding that the House of Faith is a church within the meaning of § 53-177(1). While there was a conflict in the evidence regarding the size and frequency of religious services at the House of Faith, there was ample evidence from which the district court could have concluded that the House of Faith was a building in which people assemble for the worship of God and for the administration of such offices and services as pertain to that worship, a building used predominately for the honor of God and religion, and a place where persons regularly assemble for worship. See *Latenser v. Intercessors of the Lamb, Inc.*, 250 Neb. 789, 553 N.W.2d 458 (1996).

Kum & Go calls our attention to the fact that the House of Faith did not own the building at issue, did not have a property tax exemption, was not listed in Omaha telephone directories, and had not filed a certificate of occupancy with the City of Omaha. Even considering these facts, however, Sherman's testimony regarding the religious services and other activities conducted by the House of Faith is sufficient to support the district court's factual finding that the House of Faith is a church. The district court's judgment conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. Kum & Go's second assignment of error is without merit.

CONCLUSION

The district court did not err in concluding that the Commission's definition of "church," set forth in § 012.05, is contrary to the plain meaning of the word as used in § 53-177, and the district court's factual finding that the House of Faith is a church is supported by competent evidence. We therefore affirm the judgment of the district court which vacated the order of the Commission granting Kum & Go a liquor license and reversed the decision of the Commission.

AFFIRMED.

MURIEL H. NYE AND CHARLES A. NYE, APPELLANTS, V. FIRE GROUP PARTNERSHIP, A NEBRASKA GENERAL PARTNERSHIP, APPELLEE.

642 N.W.2d 149

Filed April 19, 2002. No. S-01-319.

1. **Motions to Vacate: Proof: Appeal and Error.** An appellate court will reverse a decision on a motion to vacate or modify a judgment under the statutory grounds listed in Neb. Rev. Stat. § 25-2001 (Cum. Supp. 2000) only if the litigant shows that the district court abused its 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 refrains from acting, and 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. **Statutes.** Statutory interpretation presents a question of law.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
5. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Court Rules: Legislature: Statutes.** A district court is not free to displace duties that the Legislature statutorily requires to be performed by the clerk of the court by reassigning the duties to its bailiff.
7. **Motions for New Trial: Judgments: Notice: Appeal and Error.** The right of a party to move for a new trial or to appeal cannot ordinarily be defeated by the clerk of the court's failure to give the parties notice of the entry of the judgment.
8. **Summary Judgment: Notice.** The failure of the clerk of the court to send notice of a summary judgment is beyond the control of the parties and within the statutory grounds for vacating or modifying an order under Neb. Rev. Stat. § 25-2001(4) (Cum. Supp. 2000).

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Reversed and vacated.

Charles A. Nye, pro se, and for appellant Muriel H. Nye.

Ann M. Grottveit and Robert J. Becker, of Stalnaker, Becker, Buresh, Gleason & Farnham, P.C., for appellee.

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

CONNOLLY, J.

This is an appeal from a district court's order denying a motion to vacate or modify a summary judgment under Neb. Rev. Stat. § 25-2001(4) (Cum. Supp. 2000). The appellants, Muriel H. Nye and Charles A. Nye, claimed that they never received notice of the court's order. The district court overruled the appellants' motion to vacate or modify because it found that its bailiff had mailed notice in compliance with Neb. Rev. Stat. § 25-1301.01 (Cum. Supp. 2000).

The issue raised by this appeal is whether the mailing of notice of a judgment by a judge's bailiff, instead of the clerk of the district court, satisfies the requirements of § 25-1301.01. We reverse and vacate the entry of the summary judgment because § 25-1301.01 mandates that the clerk of the district court mail notice of civil judgments.

BACKGROUND

The Nyes filed a petition in district court to quiet title to property in Douglas County that was next to the tract on which they lived. They alleged that they had used the adjacent property in an open, adverse, exclusive, and continuous manner for over 10 years by erecting a snow fence and collecting and burning leaves on the property. The appellee, Fire Group Partnership (Fire Group), is the record owner of the adjacent property. Fire Group answered and filed a motion for summary judgment. In an order dated November 22, 2000, the district court granted Fire Group's motion for summary judgment. The court found that the evidence showed permissive use rather than continuous, exclusive, and notorious possession that would have put the owner on notice of the Nyes' claim to the property.

Charles Nye asserted in his affidavit that on January 19, 2001, he contacted Fire Group's counsel to discuss a settlement. Fire Group's counsel responded that the court had already sustained its motion for summary judgment. On January 22, Nye asserted that he told the trial judge that his conversation with Fire Group's counsel was the first knowledge that he had had of the court's summary judgment order and that he had never received a copy of it. The judge gave him a copy of the order at that time and made the following notation on the docket sheet on the same

day: "The plaintiff's copy of the order was mailed on November 22, 2000 to . . . the address provided in the plaintiff's pleadings."

On February 6, 2001, the Nyes filed a motion to vacate or modify the order. They alleged that they did not have knowledge of the order until January 21 and that the clerk of the court had not mailed them notice of the judgment as required under § 25-1301.01. They further alleged that this omission constituted grounds to vacate or modify the order under § 25-2001(4). At a hearing on the motion, the Nyes submitted an affidavit from the chief deputy clerk of the district court. In the affidavit, the clerk stated that her office did not send out a notice of the summary judgment to the Nyes and that her office does not send out summary judgment notices. The court stated that summary judgment orders were sent out by the bailiff in that court and not by the clerk. The court found that the order was mailed to the Nyes in compliance with § 25-1301.01. The motion was overruled.

ASSIGNMENTS OF ERROR

The Nyes assign, restated, that the district court erred in denying their motion to vacate or modify its summary judgment order against them based on its findings that they had received notice of the summary judgment order and that § 25-1301.01 was complied with by the bailiff's notification of judgment.

STANDARD OF REVIEW

[1] An appellate court will reverse a decision on a motion to vacate or modify a judgment under the statutory grounds listed in § 25-2001 only if the litigant shows that the district court abused its discretion. *Hornig v. Martel Lift Systems*, 258 Neb. 764, 606 N.W.2d 764 (2000) (overruling, in part, *Thrift Mart v. State Farm Fire & Cas. Co.*, 251 Neb. 448, 558 N.W.2d 531 (1997)).

[2] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and 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. *Crawford v. Crawford, ante* p. 37, 638 N.W.2d 505 (2002).

[3,4] Statutory interpretation presents a question of law. *Sydow v. City of Grand Island, ante* p. 389, 639 N.W.2d 913

(2002). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

ANALYSIS

The Nyes contend that the district court erred in finding that the requirements of § 25-1301.01 were satisfied and in denying their motion to vacate or modify the summary judgment order.

Fire Group contends that the court did not abuse its discretion in denying the Nyes' motion to vacate or modify the summary judgment order. It argues that the bailiff was the appropriate officer to mail the order under that court's practices and that the order was timely mailed.

Section 25-2001 sets out certain circumstances under which a district court may vacate or modify an order in a subsequent term. The Nyes claimed that the district court's summary judgment order should be vacated or modified under subsection (4), which provides, in relevant part: "A district court may vacate or modify its own judgments or orders after the term at which such judgments or orders were made . . . for mistake, neglect, or omission of the clerk . . . ."

The district court impliedly found that there was not a "mistake, neglect, or omission of the clerk" under subsection (4) by concluding that § 25-1301.01 was satisfied by the bailiff's mailing of notice to the Nyes. Section 25-1301.01 provides:

> Within three working days after the entry of any civil judgment, except judgments by default when service has been obtained by publication or an appearance of the defaulting party has been made, *the clerk of the court* shall send a postcard or notice by United States mail to each party whose address appears in the records of the action, or to the party's attorney or attorneys of record, advising that a judgment has been entered and the date of entry.

(Emphasis supplied.)

[5] 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. *City of Lincoln v. Central Platte NRD, ante* p. 141, 638 N.W.2d 839 (2002).

Under § 25-1301.01, the notice of civil judgments must be sent to the parties by the clerk of the court except in two circumstances not at issue here. Neb. Rev. Stat. § 25-1301(1) (Cum. Supp. 2000), in turn, defines a judgment as "the final determination of the rights of the parties in an action." The district court's summary judgment order specified that the evidence adduced did not support a claim of adverse possession and concluded that the defendants were entitled to judgment as a matter of law. The order, therefore, was a final determination of the rights of the parties in this action and a civil judgment within the meaning of § 25-1301.

Fire Group relies upon *Roemer v. Maly*, 248 Neb. 741, 539 N.W.2d 40 (1995), in its argument that the statutory grounds for vacation or modification are not satisfied when the clerk complies with the standard practice of the district court in sending out notice. Fire Group's reliance on *Roemer* is misplaced. In that case, the clerk sent notice of an order to show cause but the notice was not received due to the plaintiff's failure to notify the clerk of a change of attorney and new address. Here, unlike *Roemer*, the clerk of the court did not send the notice of judgment to the parties.

The district court's assertion that notice was sent by its bailiff will not cure the clerk's omission under § 25-2001(4) in the absence of evidence that the Nyes received actual notice of the judgment in a timely fashion. In general, the clerk of the court is the officer responsible for keeping court records and filings. See Neb. Rev. Stat. §§ 25-2204 through 25-2214.01 (Reissue 1995) (setting out general duties of clerk of district court). A bailiff is the officer responsible for preserving order and taking charge of the jury, guarding prisoners, and other services which are reasonably necessary for the court's proper functioning. See Neb. Ct. R. of Dist. Cts. 12 (rev. 2000) (setting forth duties of court personnel).

[6] A district court is permitted to assign additional court duties to the bailiff to perform. See *id.* But a district court is not free to displace duties that the Legislature statutorily requires to be performed by the clerk of the court by reassigning the duties to its bailiff. Compare *Building Systems, Inc. v. Medical Center, Ltd.*, 228 Neb. 168, 421 N.W.2d 773 (1988).

In holding that notice of judgment sent by the court's bailiff does not comply with the requirements of § 25-1301.01, we are not exalting form over substance. This case aptly illustrates the problems that can arise when notice is not sent by the clerk. If the clerk had made a court entry indicating that the notice had been mailed, a presumption of regularity would have attached to his or her actions, and the Nyes' claim that they did not receive notice would be without merit under *Roemer*. See, e.g., *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001) (holding that presumption of regularity is afforded to clerks of court performing their official duties). But when both the court and clerk admit that notice of the judgment was not sent by the clerk, no presumption arises.

[7] This court has held that the right of a party to move for a new trial or to appeal cannot ordinarily be defeated by the clerk of the court's failure to give the parties notice of the entry of the judgment. See, *Tietsort v. Ranne*, 200 Neb. 651, 264 N.W.2d 860 (1978); *Pofahl v. Pofahl*, 196 Neb. 347, 243 N.W.2d 55 (1976); *Simmons v. Lincoln*, 176 Neb. 71, 125 N.W.2d 63 (1963).

[8] The failure of the clerk of the court to send notice of the summary judgment was beyond the control of the Nyes and within the statutory grounds for vacating or modifying an order under § 25-2001(4). Unless the omission is corrected, the Nyes will be denied the opportunity to appeal the decision. Therefore, the court's refusal to vacate or modify the decision granting the summary judgment should be reversed and vacated.

CONCLUSION

The district court abused its discretion by overruling the Nyes' motion to modify or vacate its summary judgment order when the evidence showed that the clerk of the district court had not sent notice of the judgment to the Nyes.

REVERSED AND VACATED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JOHN L. APKER, RESPONDENT.

642 N.W.2d 162

Filed April 19, 2002. No. S-01-538.

1. **Disciplinary Proceedings: Appeal and Error.** When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, the Nebraska Supreme Court may, at its discretion, adopt the findings of the referee as final and conclusive.
2. ____: ____. A proceeding to discipline an attorney is a trial de novo on the record.
3. **Appeal and Error.** Under existing case law, the Nebraska Supreme Court is limited in its review to examining only those items to which the parties have taken exception.
4. **Disciplinary Proceedings.** Under Neb. Ct. R. of Discipline 10(L) (rev. 2001), the Nebraska Supreme Court may, in its discretion, consider the referee's findings as final and conclusive.
5. ____. Violation of a disciplinary rule concerning the practice of law is a ground for discipline.
6. ____. 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 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.
7. ____. The determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors.
8. ____. In an attorney disciplinary proceeding, an isolated incident not representing a pattern of conduct is considered as a factor in mitigation.
9. ____. An attorney's cooperation during the disciplinary proceedings is considered as a factor in mitigation.
10. ____. For the purpose of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.
11. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.

Original action. Judgment of suspension.

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

John R. Douglas, of Cassem, Tierney, Adams, Gotch & Douglas, for respondent.

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

PER CURIAM.

NATURE OF CASE

On May 9, 2001, the office of the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against John L. Apker, the respondent. Apker filed an answer in which he substantially admitted the facts alleged in the formal charges. A referee was appointed to consider the charges and take evidence in the matter. In a report filed October 11, 2001, the referee concluded that Apker's conduct breached disciplinary rules and recommended a sanction of a 1-year suspension from the practice of law, retroactive to October 13, 2000, when Apker had voluntarily ceased the practice of law. Both Apker and the Counsel for Discipline take exception to the recommended sanction. The only issue presented in this proceeding is the appropriate sanction for Apker's unethical conduct.

BACKGROUND

[1] Neither Apker nor the Counsel for Discipline has taken exception to the referee's findings of fact. When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, the Nebraska Supreme Court may, at its discretion, adopt the findings of the referee as final and conclusive. *State ex rel. NSBA v. Frederiksen*, 262 Neb. 562, 635 N.W.2d 427 (2001). The referee's report sets forth his findings of fact substantially as follows:

Apker was admitted to the practice of law in the State of Nebraska on April 23, 1987. He has been engaged in the practice of law in Omaha, Douglas County, Nebraska, since that date and at all times relevant to these proceedings.

Apker and the firm of Dwyer, Smith, Gardner, Lazer, Pohren and Forrest were asked to represent Virginia J. Gonzalez, guardian and conservator of F.G. Schlosser (Schlosser) in an action against Virginia M. Zalovich. Schlosser has five adult children: John Schlosser, Kenneth Schlosser, Barbara Lambries, Gonzalez, and Wanda L. Zielinski (collectively the Schlossers). Zalovich also has children who were not identified.

Schlosser is a widower. Zalovich is divorced. Schlosser and Zalovich decided to live together. They built a house together in 1990 which they owned jointly (the House). Schlosser and

Zalovich never married. They jointly prepared a revocable trust agreement (the Trust Agreement) which provided for the distribution of their interests in the House upon their death or moving from the House. The Trust Agreement provided that in that event the House would be sold, the proceeds would be distributed one-half to the Schlossers and one-half to the Zalovich children. The language was ambiguous regarding the requirement for sale if only one party died or moved from the House.

While Schlosser and Zalovich were cohabitating in the House, Schlosser became obsessed with having to pay real estate taxes on the House. To avoid paying these taxes, in September 1998, Schlosser transferred his interest in the House to Zalovich by a quitclaim deed, so that Zalovich now owns the House outright. The Trust Agreement was rewritten with generally the same terms and signed by Zalovich alone.

At some point, Schlosser developed signs of dementia and the inability to manage his own personal and financial affairs. The Schlossers requested and received court appointment of Gonzalez as Schlosser's guardian and conservator. Although Gonzalez is guardian and conservator, she consults with the other Schlossers on matters of importance to their father, Schlosser, and relies on individual siblings in their areas of expertise. She relies upon Kenneth Schlosser on legal matters, John Schlosser for investment matters, and the others on medical matters. Apker communicated with Gonzalez and the Schlossers primarily through Kenneth Schlosser.

After appointment of Gonzalez as guardian, Schlosser moved out of the House and into a hospital for care. In June 1999, Schlosser moved to a nursing home and has not returned to live in the House. The Schlossers then asked Zalovich to sell the House and distribute the Schlossers' share of the proceeds under the terms of the Trust Agreement. Zalovich refused on the basis that the Trust Agreement did not require her to move out of and sell the House, but that if it did, she would revoke it.

Apker was asked by the Schlossers to file an action to enforce the terms of the Trust Agreement as they interpreted it. The action was filed in the district court for Sarpy County in the name of Gonzalez, as guardian and conservator of the Estate of F.G. Schlosser, against Zalovich to enforce the terms of the

revokable trust requiring the sale of the House and distribution of one-half of the proceeds to the Schlossers. After depositions were taken, Zalovich filed a motion for summary judgment. The motion was heard on June 7, 2000, in the district court.

The district judge indicated at the argument on Zalovich's motion that he was leaning against Apker's position. Kenneth Schlosser and Barbara Lambries attended the hearing. Apker met with Kenneth Schlosser and Barbara Lambries after the hearing. Apker advised them that he believed they would not succeed on this motion and that he did not recommend an appeal of an adverse ruling. There was no agreement at the time as to whether they would appeal an adverse ruling. Kenneth Schlosser and Barbara Lambries delayed any decision until after they received the judge's order, reviewed it, and consulted with other siblings.

The court issued its order on June 9, 2000, granting Zalovich's motion for summary judgment and dismissing Gonzalez' petition (the Order). The district judge set out his reasoning in a two-page letter to counsel dated on the same date (the Opinion).

Apker received and reviewed the Order and the Opinion on June 15, 2000, and set them aside. When he got back to the Order on July 23, Apker wrote a letter to the Schlossers (the Gonzalez letter) advising them of the decision and enclosing copies of the Order and the Opinion. Before making copies of the Order and the Opinion, Apker removed the filing stamp from the Order and the date from the Opinion. The time for appeal of the Order had expired when Apker wrote the letter.

In the Gonzalez letter, Apker recapitulated the court's Order and Opinion. He went on to state:

> Although I do not agree with the Judge's interpretation of the trust, I do not feel that this decision should be appealed for several reasons. First, it is doubtful that the Court of Appeals or Supreme Court will reverse [the district court] on an interpretation question. . . .
>
> Second, the cost (both financial and emotional) in this case is significant. Any further litigation only will further deplete your father's resources. Given the slim chance of prevailing, I cannot recommend that an appeal be commenced.

The Gonzalez letter did not state that the time to appeal had already expired. Although Apker prepared the Gonzalez letter, he signed it "John L. Apker/LJM."

Upon receiving the Gonzalez letter, the Schlossers consulted another attorney, Pamela A. Car. Car noted that the Order was missing the customary filing stamp and date and that the Opinion was missing a date. Car wrote a letter to the district judge on August 14, 2000, inquiring about the authenticity of the copies of the court's undated Order and Opinion received by the Schlossers before she made "any appropriate referral to the disciplinary committee." A copy of this letter was also sent to Apker.

Apker responded to Car's letter to the district judge in a letter to Car dated August 18, 2000 (the Car letter), in which he made the following statements:

> Prior to receiving your letter, I did not realize that there was a problem in the delivery of the Order from [the district court] to our clients. . . .
>
> According to my time sheets, I received the Order from [the district court] on June 20, 2000 and dictated a letter to Mr. Ken Schlosser and Virginia Gonzalez on that same day. I revise[d] the letter on . . . June 23, 2000 (again according to my time records) and believed the letter had been sent. Obviously, it was not.
>
> My copy of the Order from [the district court] is the same as the Court file in that it reflects the date and the stamp. At no point in time was it my intention to delay the Order from getting to Mr. Schlosser and Ms. Gonzalez. My letter, in fact, directly mentions the appeal. It would seem incongruous to dictate a letter discussing an appeal if, in fact as you allege, my intent was to prohibit Schlosser and Gonzalez from appealing the Court's Order.
>
> I must admit I was quite dumbfounded by the content of your letter. In reviewing our file and my time charges, I was unable to ascertain why the letter had been delayed. However, upon further investigation, I learned the truth of the matter.
>
> In conversations with my secretary, she admitted that she had inadvertently misplaced the letter and had only discovered it in late July. Without intending to harm the

clients, she admitted to changing the date of the letter and in removing the date stamp and date line to the Order.

She also admitted to changing my time records to read "July" as opposed to "June" in an attempt to atone for her error.

I have asked her to prepare an affidavit stating these facts and will provide that document to you and your clients next week.

To further bolster the facts, if you look at the letter, my secretary executed it on July 23, 2000. July 23, 2000 was a Sunday. We do not work on Sundays and even if we (the attorneys) do work, we do not have our staff come in. Not only that, but it would have been difficult for me to prepare a letter on this date since I was in Rockford, IL the week of July 23 through July 28, 2000.

I was also curious as to why I did not immediately get the Order out on June 12, 2000 (the date I believe it would have been delivered to my office). Unfortunately, I was in Des Moines that week and did not actually review the Order until June 20, 2000. Obviously, had the letter gone out on June 23, 2000, Schlosser and Gonzalez would have had ample time to decide whether or not to appeal.

Apker has never produced such an affidavit from his secretary.

Apker altered the time records on his client billing to show the date of his "[l]etter to clients regarding Order" was June 20, 2000, instead of July 20, when it was actually performed. He also changed the date for his revision of the letter to show June 23, when the letter was actually revised July 23.

In September, Apker realized that his conduct had been "inappropriate," and on September 20, 2000, he contacted his attorney to discuss reporting his conduct to the Counsel for Discipline. Apker met with his attorney on September 22. When Apker's attorney contacted the office of the Counsel for Discipline, Apker's attorney was advised that the Counsel for Discipline had already received a complaint from Car regarding Apker's conduct.

Apker replied to Car's complaint by letter dated October 5, 2000. In this letter he stated:

> Regarding the second allegation, I did receive the letter and Order from [the district judge] and, unfortunately, but

not intentionally, did not send the correspondence to my client until July 23, 2000. . . .

. . . .

Concerning the charge of tampering with the documents by removing the date, I admit to removing the date from [the district judge's] Order and letter. However, my intention was not to mislead my clients but, rather, to save myself the embarrassment of admitting that I had inadvertently overlooked sending the Order and letter to my clients in a timely manner. Since my clients had already advised me not to appeal from the anticipated adverse ruling, my recommendations not to appeal were a repetition of our prior discussions in [the District] Court. My references to my secretary in my letter of August 18, 2000, to Ms. Car were the result of my attempt to avoid the embarrassment of admitting that I had failed to timely forward information to my clients.

. . . .

I am extremely disappointed and embarrassed by my behavior and will cooperate fully with your office to resolve this matter. Please contact either myself or Mr. Douglas if you require additional information.

On October 13, 2000, Apker began a leave of absence from his firm at his request. He has subsequently turned down a job offer as trust officer with a bank because this charge is pending. He has been a stay-at-home father since October 13, and he has not practiced law since that date.

The Counsel for Discipline charged Apker with two counts of misconduct: count I, relating to the Gonzalez letter and alteration of the Order and the Opinion, and count II, relating to the Car letter. Based on the above-stated factual findings, the referee concluded that Apker's conduct on counts I and II constituted violations of Canon 1, DR 1-102(A)(4), of the Code of Professional Responsibility (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and Canon 6, DR 6-102(A), of the Code of Professional Responsibility (attempting to exonerate himself from or limit his liability to client for his personal malpractice).

In considering the appropriate sanction, the referee noted that Apker had deliberately and knowingly deceived and misled his

client. However, the referee also observed that Apker's conduct was limited to an incident with one client over a period of only 2 months and that there was no evidence that Apker's conduct was reflective of how Apker had treated other clients at other times. Apker has no record of prior discipline. The referee noted that Apker self-reported his violation, admitted the factual allegations of the complaint, and had been fully cooperative with the Counsel for Discipline.

The referee also stated that the "most persuasive mitigating factor" was that Apker voluntarily discontinued the practice of law, effective October 13, 2000. The referee concluded that Apker deserved leniency in light of the mitigating factors. The referee recommended a sanction of a 1-year suspension from the practice of law, to be retroactive to October 13, 2000.

ASSIGNMENTS OF ERROR

Neither Apker nor the Counsel for Discipline takes exception to the factual findings of the referee or the conclusion that Apker violated DR 1-102(A)(4) and DR 6-102(A). However, both Apker and the Counsel for Discipline take exception to the recommended sanction. The Counsel for Discipline takes exception to the recommendation that Apker's suspension be made retroactive to October 13, 2000. Apker takes exception to the recommendation of a suspension and argues that a private reprimand would be the appropriate sanction.

STANDARD OF REVIEW

[2] A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Lopez Wilson*, 262 Neb. 653, 634 N.W.2d 467 (2001).

ANALYSIS

[3,4] Under existing case law, the Nebraska Supreme Court is limited in its review to examining only those items to which the parties have taken exception. *State ex rel. NSBA v. Denton*, 258 Neb. 600, 604 N.W.2d 832 (2000). Under Neb. Ct. R. of Discipline 10(L) (rev. 2001), the Nebraska Supreme Court may, in its discretion, consider the referee's findings as final and conclusive. *Id.* Accordingly, we find, on our de novo examination of

the record, clear and convincing evidence that Apker's conduct, set forth above, violated DR 1-102(A)(4) and DR 6-102(A).

[5,6] Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *Lopez Wilson, supra.* 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 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. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002).

[7] The referee determined that leniency is appropriate because of the mitigating factors present in this case. The determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *State ex rel. NSBA v. Abrahamson*, 262 Neb. 632, 634 N.W.2d 462 (2001).

[8,9] As the referee noted, the record indicates that Apker's conduct in representing Gonzalez was an isolated incident and did not represent a pattern of unethical conduct. In an attorney disciplinary proceeding, an isolated incident not representing a pattern of conduct is considered as a factor in mitigation. *Id.* Furthermore, Apker has been cooperative with the Counsel for Discipline during the investigation, and an attorney's cooperation during the disciplinary proceedings is considered as a factor in mitigation. See *id.* Apker has also admitted his misconduct and acknowledged responsibility for his actions, which reflects positively upon his attitude and character and is to be considered in determining the appropriate discipline. See *State ex rel. NSBA v. Frederiksen*, 262 Neb. 562, 635 N.W.2d 427 (2001).

However, these mitigating factors cannot obscure the nature of Apker's indefensible conduct in this incident, isolated though it may have been. Apker not only neglected a matter entrusted to him, depriving a client of the right to appeal an adverse judgment, but engaged in deception, prevarication, and forgery in attempting to conceal his neglect; when that was discovered, Apker attempted to shift the blame for his actions to an innocent party. Given those circumstances, a private reprimand, as suggested by Apker, is not appropriate to the nature of the offense.

The referee also found, as a mitigating factor, that Apker had voluntarily ceased the practice of law as of October 13, 2000, and that Apker's suspension from the practice of law should be made retroactive to that date. In two recent cases, this court has imposed a period of suspension and made that suspension retroactive. See, *State ex rel. NSBA v. Jensen*, 260 Neb. 803, 619 N.W.2d 840 (2000); *State ex rel. NSBA v. Aupperle*, 256 Neb. 953, 594 N.W.2d 602 (1999). Those cases are distinguishable from this case, however, in that in *Jensen* and *Aupperle*, this court had temporarily suspended the respondents' licenses to practice law during the pendency of the disciplinary proceedings. In this case, no temporary suspension was requested or entered by this court.

[10] In *Jensen, supra*, and *Aupperle, supra*, it was appropriate for this court to make the suspensions retroactive to the respective dates on which this court had first suspended the respondents' licenses to practice law. In this case, although Apker has voluntarily ceased to practice law, his license to practice law has not yet been suspended by this court. To make a suspension from the practice of law retroactive under these circumstances would be to allow the respondent to choose the time and circumstances of his own suspension and would not serve the purposes of attorney discipline. Nonetheless, for the purpose of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Abrahamson, supra*. While we do not find that a retroactive suspension is appropriate where a temporary suspension has not been ordered by this court, we nonetheless consider Apker's voluntary cessation of the practice of law as a mitigating factor in determining what sanction should be imposed.

[11] Absent mitigating factors, the conduct set forth above would merit no less than 1 year's suspension from the practice of law. However, each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. *Frederiksen, supra*. Given the mitigating factors present in this case, including Apker's voluntary cessation of the practice of law on October 13, 2000, we conclude that a suspension of 6 months, effective from the date of this opinion, is warranted.

CONCLUSION

It is therefore the judgment of this court that John L. Apker be suspended from the practice of law for a period of 6 months, effective immediately, after which period Apker may apply for readmission to the bar. Apker is directed to pay costs in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997).

JUDGMENT OF SUSPENSION.

STATE OF NEBRASKA, APPELLEE, V.
MONTE G. SIDDENS, APPELLANT.
642 N.W.2d 791

Filed April 19, 2002. No. S-01-918.

1. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.

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

Dennis R. Keefe, Lancaster County Public Defender, and Paul E. Cooney for appellant.

Don Stenberg, Attorney General, and George R. Love for appellee.

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

HENDRY, C.J.

NATURE OF CASE

Monte G. Siddens was charged with first degree murder and use of a deadly weapon to commit a felony in connection with the January 28, 2000, death of Gary L. Jones. Jones, a clerk at a retail gun store and pawnshop in Lincoln, Nebraska, was killed when he exchanged gunfire with Siddens, who was attempting to rob the store.

On June 28, 2001, pursuant to a plea agreement, Siddens pled guilty to first degree murder and the State agreed to dismiss the charge of use of a deadly weapon to commit a felony. The State

further agreed that it would not offer any evidence of statutory aggravating circumstances at the sentencing proceeding. On July 23, the Lancaster County District Court sentenced Siddens to life imprisonment. Siddens appeals.

ASSIGNMENT OF ERROR

Siddens asserts that he was "denied due process and effective assistance of counsel, contrary to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 11, of the Constitution of the State of Nebraska."

STANDARD OF REVIEW

Errors that are assigned but not argued will not be addressed by an appellate court. *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001).

ANALYSIS

Siddens assigns as error that he was denied due process and effective assistance of counsel. However, in his brief, Siddens fails to set forth any arguments as to how his due process rights were violated. Siddens also does not provide any arguments as to what his trial counsel did or failed to do that would constitute ineffective assistance of counsel. Errors that are assigned but not argued will not be addressed by an appellate court. *State v. Dunster, supra*; *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001); *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001).

CONCLUSION

For the foregoing reasons, we do not address Siddens' assignment of error. We therefore affirm Siddens' conviction and sentence.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EUSEBIO L. BECERRA, APPELLANT.

642 N.W.2d 143

Filed April 19, 2002. No. S-01-1111.

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. **Constitutional Law: Criminal Law: Right to Counsel.** Under the U.S. Constitution, a defendant in a criminal case has a right to effective assistance of counsel.
3. **Constitutional Law: Right to Counsel: Appeal and Error.** The assistance of counsel provision in the U.S. Constitution applies to direct appeals only.
4. **Postconviction: Constitutional Law: Right to Counsel.** A prisoner does not have a constitutional right to effective assistance of postconviction counsel.
5. ____: ____: ____. Any right to effective assistance of counsel under Neb. Rev. Stat. § 29-3004 (Reissue 1995) is statutory only and cannot render a prisoner's conviction void or voidable under the U.S. or Nebraska Constitution.
6. **Kidnapping: Sentences.** Neb. Rev. Stat. § 28-313 (Reissue 1995) creates a single criminal offense and not two separate offenses, even though it is punishable by two different ranges of penalties depending on the treatment accorded to the victim.
7. ____: ____. The factors which determine which of the two penalties under Neb. Rev. Stat. § 28-313 (Reissue 1995) is to be imposed are not elements of the offense of kidnapping, and their existence or nonexistence should properly be determined by the trial judge.
8. **Kidnapping: Sentences: Statutes.** *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), is concerned only with cases involving an increase in penalty beyond the statutory maximum and does not apply to the mitigating factors in Neb. Rev. Stat. § 28-313 (Reissue 1995).

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

Eusebio L. Becerra, pro se.

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

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

CONNOLLY, J.

The appellant, Eusebio L. Becerra, was convicted by a jury of kidnapping as a Class IA felony. He moved for postconviction relief, claiming he received ineffective assistance of postconviction counsel in his first postconviction proceeding. He also claims

that his trial counsel was ineffective under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), because his trial counsel failed to object to a jury instruction. He argues that the instruction did not allow the jury to consider whether he was guilty of kidnapping as a Class II felony, which carries a lesser sentence. We affirm because we do not recognize a claim for ineffective assistance of postconviction counsel. Further, trial counsel was not ineffective because *Apprendi* applies only when a case involves an increase in penalty beyond the statutory maximum.

BACKGROUND

Becerra was convicted in 1996 of kidnapping under Neb. Rev. Stat. § 28-313(1) (Reissue 1995) and use of a weapon to commit a felony. We affirmed the convictions and sentences on direct appeal in *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998) (*Becerra I*). In 2001, we affirmed the denial of his first motion for postconviction relief. *State v. Becerra*, 261 Neb. 596, 624 N.W.2d 21 (2001) (*Becerra II*). The facts about the kidnapping are set forth in full in *Becerra I*.

At the sentencing hearing, Becerra's counsel requested that the trial court consider sentencing Becerra to a period of probation or minimal incarceration. The court responded that kidnapping is a Class IA felony and that life imprisonment is the only possible sentence allowed by statute. On direct appeal, Becerra assigned as error that he was denied effective assistance of counsel at trial. He argued that his trial counsel failed to offer a jury instruction on the lesser-included offenses of kidnapping as a Class II felony or false imprisonment. *Becerra I*. We determined that we were unable to address the issue on direct appeal because the record was unclear about what instructions were tendered by Becerra's counsel. *Id.* We then stated that in any event, kidnapping as a Class II felony is not a separate offense from kidnapping as a Class IA felony. *Id.* We stated that the provisions of § 28-313 regarding kidnapping as a Class II felony are only mitigating circumstances which may reduce the penalty for kidnapping and that the existence or nonexistence of the mitigating circumstances is a matter properly considered by the court at sentencing. *Id.*

FIRST POSTCONVICTION PROCEEDING

In his first motion for postconviction relief, Becerra alleged that his constitutional right to effective assistance of counsel was violated by (1) his trial counsel's failure to discuss with him a plea bargain offer allegedly made by the prosecution; (2) his trial counsel's failure to perform adequate discovery, resulting in trial counsel's failure to object to alleged misrepresentations by a law enforcement officer who testified at trial concerning a statement made by Becerra; (3) his trial counsel's failure to understand the charges against Becerra, thus prejudicing his defense; and (4) his appellate counsel's failure to properly raise, on direct appeal, the issue of his trial counsel's inability to understand the charges. *Becerra II.*

Becerra testified at an evidentiary hearing that his trial counsel did not tell him of an offer of a plea bargain. Becerra's trial counsel testified that Becerra told him emphatically that he did not wish to enter into plea negotiations. He further told Becerra that a mandatory life sentence would be imposed if he was convicted of kidnapping. Other testimony indicated that Becerra was never offered a plea bargain and that he was told that the maximum penalty for a kidnapping conviction was life in prison. The district court denied relief, and based on the testimony at the evidentiary hearing, we affirmed. *Becerra II.*

Becerra also argued on appeal that his trial counsel was ineffective by failing to request a lesser-included offense instruction on false imprisonment. In addition, he claimed that his postconviction counsel was ineffective for failing to argue the issue to the trial court. Becerra did not raise the issue of whether the jury should have been instructed concerning kidnapping as a Class II felony. We stated that Becerra did not include any claims about jury instructions in his motion for postconviction relief. Thus, we did not consider this assignment of error because it was not presented to the district court. We then held that Becerra was not denied effective assistance of counsel when his attorney did not request a lesser-included offense instruction on first degree false imprisonment. *Becerra II.*

SECOND POSTCONVICTION ACTION

In July 2001, Becerra filed the motion for postconviction relief that is the subject of this appeal. In his motion, Becerra

alleges that he learned that he was not told about a plea bargain. Becerra alleges that in 1998, an attorney, Michael Levy, called Becerra's family and left a message stating that he had learned from a prosecutor that a plea bargain offer was made. Becerra alleges that a family member kept the tape-recorded message and still has it. Levy was then hired to represent Becerra in his first postconviction proceeding. Becerra alleges that because Levy was acting as his attorney, he could not testify about what the prosecutor said, thus prejudicing Becerra in the postconviction proceeding. As a result, Becerra alleges that he received ineffective assistance of postconviction counsel.

In addition, Becerra alleges that his trial, appellate, and postconviction counsel were ineffective. He argues they were ineffective because they failed to raise the issue that the jury was not instructed to consider whether he was guilty of kidnapping as a Class II felony, which carries a lesser sentence. He alleges that the decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), should be applied retroactively to his case and requires that the jury decide whether he is guilty of kidnapping as a Class II felony instead of as a Class IA felony.

The district court determined that Nebraska does not recognize a claim for ineffective assistance of postconviction counsel. The court then determined that *Apprendi* did not apply to Becerra's case. The court denied Becerra's motion.

ASSIGNMENT OF ERROR

Becerra assigns, rephrased, that the district court erred in denying his motion for postconviction relief.

STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Curtright*, 262 Neb. 975, 637 N.W.2d 599 (2002).

ANALYSIS

Becerra contends that he received ineffective assistance of counsel in his first postconviction action. He concedes that we have previously held that Nebraska does not recognize a claim for ineffective assistance of postconviction counsel. See, *State*

v. Hunt, 262 Neb. 648, 634 N.W.2d 475 (2001); *State v. Gray*, 259 Neb. 897, 612 N.W.2d 507 (2000). He argues, however, that a 1993 amendment to Neb. Rev. Stat. § 29-3004 (Reissue 1995) creates a liberty interest in effective assistance of postconviction counsel.

Neb. Rev. Stat. § 29-3001 (Reissue 1995) provides in part:

> A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion at any time in the court which imposed such sentence, stating the grounds relied upon, and asking the court to vacate or set aside the sentence.

Section 29-3004 provides: "The district court may appoint not to exceed two attorneys to represent the prisoners in all proceedings under sections 29-3001 to 29-3004. . . . The attorney or attorneys shall be competent and shall provide effective counsel."

[2,3] We have held that under the U.S. Constitution, a defendant in a criminal case has a right to effective assistance of counsel. But the assistance of counsel provision in the U.S. Constitution applies to direct appeals only. *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993), citing *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987).

[4,5] In *State v. Hunt, supra*, we noted that postconviction relief is civil in nature. States have no obligation to provide a postconviction relief procedure, and when they do, the Due Process Clause of the U.S. Constitution does not require that the state supply a lawyer. We held that a prisoner does not have a constitutional right to effective assistance of postconviction counsel. *State v. Hunt, supra*. We noted that § 29-3001 provides a postconviction action when a prisoner is claiming a right to be released because there was a denial or infringement of his or her rights, rendering the judgment void or voidable under the Constitution of the United States. We then held that any right to effective assistance of counsel under § 29-3004 is statutory only and cannot render a prisoner's conviction void or voidable under the U.S. or Nebraska Constitution. *State v. Hunt, supra*.

The reasoning of *Hunt* applies equally to Becerra's case. Although Becerra claims that § 29-3004 creates a liberty interest in effective assistance of postconviction counsel, we held in *Hunt* that any rights created by § 29-3004 are statutory only. Becerra cannot obtain postconviction relief for ineffective assistance of postconviction counsel.

Becerra next contends that under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), it was improper for the district court to decide whether he should be sentenced to kidnapping as a Class IA felony instead of as a Class II felony. Thus, Becerra argues that his trial counsel was ineffective in failing to object to jury instructions that did not allow the jury to decide which felony he was guilty of. Becerra also contends that his appellate and postconviction counsel were ineffective for failing to raise the issue. We note that this is the first opportunity for Becerra to raise the *Apprendi* issue.

Section 28-313 provides:

> (1) A person commits kidnapping if he abducts another or, having abducted another, continues to restrain him with intent to do the following:
>
> (a) Hold him for ransom or reward; or
>
> (b) Use him as a shield or hostage; or
>
> (c) Terrorize him or a third person; or
>
> (d) Commit a felony; or
>
> (e) Interfere with the performance of any government or political function.
>
> (2) Except as provided in subsection (3) of this section, kidnapping is a Class IA felony.
>
> (3) If the person kidnapped was voluntarily released or liberated alive by the abductor and in a safe place without having suffered serious bodily injury, prior to trial, kidnapping is a Class II felony.

When Becerra was sentenced, a Class IA felony carried a penalty of life imprisonment, while a Class II felony carried a penalty of 1 to 50 years. See Neb. Rev. Stat. § 28-105 (Reissue 1995).

In *Apprendi v. New Jersey, supra*, the U.S. Supreme Court held that other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable

doubt. The Court stressed that the fact must increase the penalty. The Court made a distinction between facts in aggravation of punishment and facts in mitigation of punishment. The Court stated that when the issue involves mitigating facts under which the defendant can escape the statutory maximum, core concerns involving the jury and burden of proof requirements are absent. See *id.*

[6-8] *Apprendi* is inapplicable to Becerra's case. We have held that § 28-313 creates a single criminal offense and not two separate offenses, even though it is punishable by two different ranges of penalties depending on the treatment accorded to the victim. The factors which determine which of the two penalties is to be imposed are not elements of the offense of kidnapping. The factors are simply mitigating factors which may reduce the sentence of those charged under § 28-313, and their existence or nonexistence should properly be determined by the trial judge. *State v. Hand*, 244 Neb. 437, 507 N.W.2d 285 (1993); *State v. Schneckloth, Koger, and Heathman*, 210 Neb. 144, 313 N.W.2d 438 (1981). Under § 28-313, any factual finding about whether the person kidnapped was voluntarily released affects whether the defendant will receive a lesser penalty instead of an increased penalty. *Apprendi* made clear that it was concerned only with cases involving an increase in penalty beyond the statutory maximum and does not apply to the mitigating factors in § 28-313.

We conclude that *Apprendi* does not apply to this case. Accordingly, Becerra was not entitled to a jury instruction requiring the jury to evaluate whether he was guilty of kidnapping as a Class II felony. The district court did not err in denying Becerra's motion for postconviction relief.

CONCLUSION

We conclude that § 29-3004 does not provide a postconviction claim for ineffective assistance of postconviction counsel. We further conclude that Becerra was not entitled to postconviction relief based on the U.S. Supreme Court's opinion in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Accordingly, we affirm.

AFFIRMED.

GERRARD, J., participating on briefs.

KLH RETIREMENT PLANNING, LTD., A NEBRASKA LIMITED PARTNERSHIP, APPELLEE, V. VINCENT OKWUMUO ET AL., APPELLANTS, AND CORNHUSKER BANK ET AL., APPELLEES.

642 N.W.2d 801

Filed April 25, 2002. No. S-00-1302.

1. **Statutes.** Statutory interpretation presents a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Judicial Sales: Property: Foreclosure: Taxes.** Under Neb. Rev. Stat. § 77-1912 (Reissue 1996), a sheriff's sale of real property after a foreclosure order for delinquent taxes is governed by the provisions for sales on execution under Neb. Rev. Stat. § 25-1501 et seq. (Reissue 1995 & Cum. Supp. 2000).
4. **Public Officers and Employees: Presumptions.** In the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties and that absent evidence showing misconduct or disregard of law, the regularity of official acts is presumed.
5. **Foreclosure: Records: Presumptions: Notice.** A district court clerk's failure to include a signed copy of an order of sale in the record will not overcome the presumption of regularity that the order was properly issued when the master commissioner's return to the order of sale specifically states that the order was received and the publication and sale comply with the order and foreclosure decree.
6. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded because a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
7. **Judicial Sales: Notice.** The requirements of Neb. Rev. Stat. § 25-520.01 (Reissue 1995) apply to a publication of notice given under Neb. Rev. Stat. § 25-1529 (Reissue 1995) governing sales on execution.
8. **Mortgages: Foreclosure: Notice.** Under Neb. Rev. Stat. § 25-1531 (Reissue 1995), a court errs in confirming a mortgage foreclosure sale when the facts show that the mortgagee did not comply with the notification requirements of Neb. Rev. Stat. § 25-520.01 (Reissue 1995).

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

James A. Cada and Edward F. Hoffman, of Cada & Associates, for appellants Vincent Okwumuo and Sabrina Okwumuo.

Harvey Froscheiser for appellant F & F Oil Co., Inc.

Ward F. Hoppe and S. Grace Acosta, of Hoppe & Harner Law Office, for appellee Cornhusker Bank.

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

CONNOLLY, J.

Vincent Okwumuo, Sabrina Okwumuo, and F & F Oil Co., Inc. (F & F Oil), (collectively the appellants) appeal from a district court's order confirming a judicial sale under a decree foreclosing a real estate mortgage. The appellants objected to the confirmation on various grounds, including lack of notice and inadequacy of sale price. The district court found that the sale was made in conformity with the law and sold for fair value. We reverse because the appellee Cornhusker Bank failed to give notice of the sale in accordance with Neb. Rev. Stat. § 25-520.01 (Reissue 1995).

BACKGROUND

On September 28, 1995, the Lancaster County treasurer sold property owned by Vincent and Sabrina in Lincoln at a private tax sale for delinquent taxes. On January 24, 1996, KLH Retirement Planning, Ltd. (KLH), took assignment of the tax sale certificate and also paid the taxes for the subsequent years. On October 13, 1998, after the 3-year redemption period had expired, KLH filed a petition in district court seeking to foreclose its tax sale certificate. See Neb. Rev. Stat. § 77-1902 (Reissue 1996). The petition named the owners and other lienholders as defendants. KLH alleged that the other liens were inferior to its interests and asked that its lien be decreed superior and that the property be sold to satisfy its lien. The other liens included (1) a deed of trust filed by Cornhusker Bank, (2) a deed of trust filed by F & F Oil, and (3) a federal tax lien filed by the Internal Revenue Service (IRS).

In March 1999, all of the parties entered a joint motion and stipulation for entry of judgment. They agreed that KLH had a valid first lien and was entitled to foreclose and sell the property as a result of its ownership of the tax sale certificate. They agreed that Cornhusker Bank had a valid second lien, F & F Oil had a valid third lien, and the IRS had a valid fourth lien.

The district court issued its decree of foreclosure in March 1999. The court found that all four of the liens were valid and that

the total amount owed on the liens was $92,776.45, plus interest. The court found that unless the liens were redeemed or satisfied before June 1, 1999, the real estate should be sold. The liens were not redeemed or satisfied. Between June 9, 1999, and June 27, 2000, KLH asked the court four times to issue an order of sale for the property, but none of the published sales ever took place.

On August 10, 2000, KLH filed a notice that its tax sale certificate had been redeemed in full and that it was releasing its interest in the property. On August 11, Cornhusker Bank requested an order of sale, but the record contains only an unsigned, proposed order. On September 13, Cornhusker Bank filed a proof of service that it had sent a copy of the notification to the attorneys of the remaining parties. The notification, stating that the sale would take place on September 19, was first published in The Daily Reporter on August 25.

The master commissioner's return to order of sale indicates that he received the order on August 16, 2000, and caused notification to be published in The Daily Reporter for 4 consecutive weeks, beginning August 25. He then sold the property through public auction on September 19 to "Hot to Trot Specialty Foods, Inc.," for $39,000.

On October 2, 2000, F & F Oil filed a motion to set aside the sale because, among other reasons: (1) Cornhusker Bank had not complied with § 25-520.01 and (2) the amount of the sale price, $39,000, was inadequate when the property had a value of over $100,000. Vincent and Sabrina also filed a motion to set aside the sale. Their allegations were identical with one exception. They additionally alleged that Cornhusker Bank told them on September 12, 7 days before the sale, that the balance due on the mortgage was the monthly payment of $481 and that the bank accepted a payment of $481 on September 14.

On October 16, 2000, a hearing was held on the two motions to set aside the September 19 sale and Cornhusker Bank's motion to confirm the sale. At the hearing, Cornhusker Bank's counsel submitted an affidavit in which he stated that his office had sent a copy of the published notification of sale to the attorneys of record for the other parties on September 13, 2000. Vincent and Sabrina submitted, without objection, a valuation of the property for tax assessment purposes performed in August 2000. That

assessment used a cost method to determine that the value of the land without improvements was $21,247 and that the value of the improvements was $104,353, for a total value of $125,600. No other appraisals or evaluations were submitted as evidence.

In November 2000, the court entered an order confirming the sale. The court found that the sale was made in conformity with the law in all respects and that the property sold for fair value under the circumstances and conditions of the sale. The appellants then filed this appeal.

ASSIGNMENTS OF ERROR

The appellants assign, restated, that the district court erred in finding that the sale price of $39,000 was adequate and a fair value under the circumstances and conditions of the sale when (1) the evidence showed that the property's minimum market value was $125,600, and no contrary evidence was adduced regarding the property's value; (2) the appellants' evidence indicated that a subsequent sale of the property would realize a greater sale price than $39,000; (3) the sale price of $39,000 was less than the decree amount, which was in excess of $92,000; (4) the master commissioner was without authority to sell the property because an order of sale was not issued by the clerk's office; (5) Cornhusker Bank did not comply with the requirements of § 25-520.01; (6) the notice of sale did not comply with due process; and (7) the uncontroverted evidence showed that Vincent and Sabrina were not in default to Cornhusker Bank.

STANDARD OF REVIEW

[1,2] Statutory interpretation presents a question of law. *Sydow v. City of Grand Island, ante* p. 389, 639 N.W.2d 913 (2002). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

ANALYSIS

AUTHORIZATION FOR JUDICIAL SALE

The appellants contend that the master commissioner was without authority to sell the property because the district court clerk did not issue an order of sale as required under Neb. Rev.

Stat. § 25-1501 (Reissue 1995). Cornhusker Bank contends that the clerk's failure to include a signed copy of the order in the court file is an insufficient reason to set aside the sale. We agree.

[3] Neb. Rev. Stat. § 77-1912 (Reissue 1996) governs the procedures for a sheriff's sale of real property after a foreclosure order for delinquent taxes. It provides, in relevant part, that the "sheriff shall sell the real property in the same manner provided by law for a sale on execution." Execution sales, in turn, are governed by Neb. Rev. Stat. § 25-1501 et seq. (Reissue 1995 & Cum. Supp. 2000).

[4] Section 25-1501 provides in part that "[e]xecutions shall be deemed process of the court, and shall be issued by the clerk and directed to the sheriff of the county." In the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties and that absent evidence showing misconduct or disregard of law, the regularity of official acts is presumed. *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001). Although the record contains only an unsigned, proposed order, the presumption of regularity is not overcome.

[5] We have held that a district court clerk's failure to attach his seal of office to an order of sale does not invalidate a judicial sale under a decree of foreclosure because the decree of foreclosure is "sufficient authority for the sheriff to sell the property. The issuance of the order of sale was unnecessary . . . ." *Salisbury v. Murphy*, 63 Neb. 415, 416, 88 N.W. 764, 764 (1902). Compare *Stephenson v. Murdock*, 89 Neb. 818, 132 N.W. 406 (1911) (holding that decree, not order of sale, controls sheriff's authority to sell property). The master commissioner's return to the order of sale specifically stated that he received the order of sale on August 16, 2000. Under its commands, he published notice and then sold the property. We conclude that this assignment of error is without merit.

Adequacy of Notice

The appellants next contend that the notice they received did not comply with § 25-520.01 or the requirements of due process under *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983). Cornhusker Bank claims that the court was not presented with the due process issue and

that the facts of *Mennonite Board of Missions* are distinguishable. Cornhusker Bank further contends that § 25-520.01 was intended to apply to situations when service of process is performed by publication.

[6] When an issue is raised for the first time in an appellate court, it will be disregarded because a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *In re Adoption of Luke, ante* p. 365, 640 N.W.2d 374 (2002).

Neither F & F Oil nor Vincent and Sabrina raised a due process objection in their motions to set aside the sale or in their arguments to the court at the confirmation hearing. Thus, we consider only their argument that the notice of sale did not comply with § 25-520.01.

Section 25-1529 requires notice by publication in a sale on execution of real property: "Lands and tenements taken in execution shall not be sold until the officer causes public notice of the time and place of sale to be given. The notice shall be given by publication once each week for four successive weeks in some newspaper printed in the county . . . ."

The court officer appointed to conduct the sale has the duty to publish this notice. Here, the issue is whether the party requesting the order of sale had the duty to mail a copy of the published notice to other parties with an interest in the property being sold. Section 25-520.01 provides:

> In any action or proceeding of any kind or nature . . . where a notice by publication is given as authorized by law, a party instituting or maintaining the action or proceeding with respect to notice or his attorney shall within five days after the first publication of notice send by United States mail a copy of such published notice to each and every party appearing to have a direct legal interest in such action or proceeding whose name and post office address are known to him. Proof by affidavit of the mailing of such notice shall be made by the party or his attorney and shall be filed with the officer with whom filings are required to be made in such action or proceeding within ten days after mailing of such notice.

Section 25-520.01 is included in the statutes governing the commencement of actions, service of process, and constructive service. See § 25-1501 et seq. Although some of its provisions are obviously intended to apply only to constructive service when a party cannot be located, its application is not limited to service of process. Neb. Rev. Stat. § 25-520.03 (Reissue 1995) states that the Legislature intended § 25-520.01 to be "cumulative and supplemental to existing legislation [and to] apply to all parties authorized by law to give notice by publication."

[7] This court has concluded that § 25-520.01 applies to the publication of notice for a judicial sale. See *Kleeb v. Kleeb*, 210 Neb. 637, 316 N.W.2d 583 (1982). See, also, *Hollstein v. Adams*, 187 Neb. 781, 194 N.W.2d 216 (1972). In *Kleeb*, the district court ordered a tract of property to be sold after determining the parties' interests in a partition action. The appellants argued that the district court erred in finding that § 25-520.01 was satisfied when the copy of the notice was not mailed on the fifth day after the first publication. This court, citing Neb. Rev. Stat. § 25-2221 (Reissue 1995) (computation of time), held that § 25-520.01 was not violated by mailing the notice on the following Monday when the fifth day after the first publication fell on a Saturday. *Kleeb, supra*. We conclude that § 25-520.01 applies to a publication of notice given under § 25-1529 governing sales on execution.

Cornhusker Bank, however, argues that it substantially complied with § 25-520.01 by serving notice of publication on the attorneys of record for the appellants as provided for under Neb. Rev. Stat. § 25-534 (Reissue 1995). That section allows for service or notice of any document other than a summons to be given to a party's attorney of record unless the court orders otherwise. Even if § 25-534 modifies the requirement of § 25-520.01 to mail notice to the parties, that would not overcome Cornhusker Bank's failure to mail the notice within 5 days of the first publication. Cornhusker Bank cannot, and does not, claim that it substantially complied with the 5-day notice requirement when it sent notice of publication to the parties' attorneys 19 days after the first publication.

[8] Section 25-1531 requires a court to carefully examine the proceedings and "be satisfied that the sale has in all respects been made in conformity to the provisions of this chapter" before

confirming a mortgage foreclosure sale. As discussed, we have previously held that the notice by publication under § 25-1529 must conform to the requirements of § 25-520.01. We determine that the district court abused its discretion in confirming this sale when the facts showed that Cornhusker Bank did not comply with the requirements of § 25-520.01. Because of our ruling, we do not reach the remaining assignments of error.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V.
JOHN V. HALTOM, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V.
DANIEL C. BACON, APPELLANT.
642 N.W.2d 807

Filed April 25, 2002. Nos. S-01-485, S-01-486.

1. **Constitutional Law: Obscenity: Appeal and Error.** In reviewing a fact finder's determination that certain material is obscene, the threshold duty of an appellate court is to conduct an independent review and determine, as a matter of constitutional law, if the material falls within the substantive limitations set forth in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), i.e., is the material the type of "hardcore" sexual material that may be constitutionally regulated under the First Amendment.
2. **Obscenity: Appeal and Error.** In reviewing the determinations of the trier of fact under the three-part obscenity standard set forth in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), and Neb. Rev. Stat. § 28-807(10) (Reissue 1995), the appellate court should give appropriate deference to the trier of fact regarding the first two prongs of the test, i.e., the "prurient interest" test and the "patently offensive" test, as these issues depend on knowledge of contemporary community standards which are uniquely within the province of the trier of fact.
3. ____: ____. An appellate court should apply a de novo review in considering the third prong of the test in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), i.e., the "value" of the material at issue, since this determination does not depend upon community standards and is particularly amenable to appellate review.
4. **Constitutional Law: Obscenity.** Obscenity is not constitutionally protected speech and can be prohibited or otherwise regulated without violating the prohibitions of the First Amendment to the U.S. Constitution.
5. **Obscenity: Words and Phrases.** The definition of obscenity is limited to those materials which, taken as a whole, appeal to the prurient interest in sex; which portray sexual conduct in a patently offensive way; and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.
6. **Obscenity.** Material that provokes only normal, healthy sexual desires is not intended to be characterized as obscene.

7. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
8. **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.
9. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
10. **Obscenity: Words and Phrases: Appeal and Error.** It is error in an obscenity case to define the term "prurient" as "a tendency to excite lustful thoughts."
11. **Criminal Law: Evidence: New Trial: Appeal and Error.** Upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial.
12. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid retrial if the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeals from the District Court for Douglas County, MARY G. LIKES, Judge, on appeal thereto from the County Court for Douglas County, EDNA R. ATKINS, Judge. Judgments of District Court reversed, and causes remanded for a new trial.

Andrew M. Ferguson and Joseph M. Acierno, of Ferguson, Chesterman & Acierno, P.C., and John Fahle, of Carter & Fahle, for appellants.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

CONNOLLY, J.

John V. Haltom and Daniel C. Bacon (collectively the appellants) appeal from orders of the district court affirming their convictions and sentences in county court for preparing, distributing, or promoting obscene literature or material. The two cases were consolidated for appeal. The materials at issue are two videos depicting a variety of sexual acts.

The appellants contend that the county court erred in its instruction on the elements of the offense and in the definition of "prurient interest." We reverse, and remand for a new trial because

the jury was improperly instructed that "prurient" was defined as "a tendency to excite lustful thoughts."

BACKGROUND

Haltom is the owner of Dr. John's Lingerie and Novelty Boutique in Omaha, Nebraska. Bacon is an employee of the store. According to Haltom, the store carries a variety of merchandise including lingerie, swim wear, stockings, vibrators, rubber goods, dildos, gag gifts, and adult videos and literature. Adult videos make up approximately 15 percent of the inventory.

Two videos are the subject of this appeal. The first video was sold on January 23, 2000, and is the subject of a count against Haltom. The video, entitled "Sex Patrol," consists of nine scenes. The video has some dialog, although most of the dialog refers to sexual situations. The video depicts a variety of sex acts, including intercourse in a variety of positions and oral sex. Some of these scenes involve one woman engaging in sex acts with two men. The video also depicts various sex acts between two women and a man. The video shows ejaculation and includes a very brief depiction of spanking. The video contains several scenes involving a woman masturbating, one of which includes the use of a very large replica of a male penis. In addition, the video includes three scenes involving anal sex, including a scene in which two males simultaneously penetrate a woman, one vaginally, and the other anally.

The second video was sold on January 24, 2000, and is the subject of one count against Bacon and an additional count against Haltom. The video, entitled "Bleached Banged Blondes," consists of an advertisement for a telephone hotline, a warning that the tape contains sexual highlights and is for adults only, and nine scenes of sexual content. The video contains little dialog and nearly all of the dialog is sexual in nature. The video depicts a variety of sex acts, including intercourse in a variety of positions, oral sex, and penile-breast sex. The video also shows ejaculation and contains a scene that includes spanking. One scene depicts two women engaging in oral sex while a man watches. The man mentions on at least two occasions that the women are sisters and later joins the women in various sexual acts. The boxes containing each video portray photographs of sexual intercourse.

Omaha police officer Karen McArdle testified that in December 1999 and January 2000, she went to Haltom's store on several occasions as part of an undercover investigation. During the investigation, McArdle went to the store to arrest Haltom on five counts of distributing obscene materials that are not the subject of this appeal. During the arrest, McArdle identified herself as a police officer and spoke with Haltom after first advising him of his *Miranda* rights. She testified that Haltom told her that he had owned similar stores in Missouri and that he had previously been arrested there for distributing obscene material. The appellants initially objected to this testimony as part of a motion in limine before trial, but did not renew their objection to the testimony at trial.

McArdle testified that on January 24, 2000, she again went to the store with another officer. The officers spoke to Haltom about the purchase of a video. Bacon also assisted the officers in choosing a video. The officers purchased the video entitled "Bleached Banged Blondes." Bacon rang up the sale and gave the officers a receipt. McArdle stated that she did not know if either of the appellants had ever viewed the video.

Ronald B. Cole, a sergeant with the Omaha Police Department, testified that he conducted an undercover investigation of the store in December 1999. As part of the investigation, he spoke with Bacon. Cole testified that Bacon stated that he had watched some of the videos in the store and that he was aware that the videos depicted sexual intercourse. On January 23, 2000, Cole purchased the video entitled "Sex Patrol." Neither Haltom nor Bacon sold the video to Cole. Instead, the sale was made by another person. Cole admitted that he did not know if either Haltom or Bacon had ever viewed the video. At the end of the State's case, the appellants moved to dismiss. The motion was overruled.

Haltom testified that his store is strictly oriented to heterosexual couples. He stated that he does not carry videos depicting male-on-male sexual contact, sex with animals, sex with children, or violence. He testified that he had no reason to believe that any of the videos he received from his distributor were obscene.

Haltom testified that he has viewed a few of the videos that he sells. He stated that he had not viewed either of the two videos before they were sold to the officers. To Haltom's knowledge,

Bacon also had not previously viewed the videos. He stated that he and Bacon did watch the videos before trial. He testified that in his opinion, both videos were regular, standard adult videos. Haltom testified that he had been arrested five times in Missouri for selling obscene material, but was never convicted. Bacon did not testify.

The jury was instructed that the elements of the crime were that the defendants "did knowingly publish, circulate, sell, rent, lend, transport in interstate commerce, distribute, or exhibit any obscene material; or had in his or her possession with intent to sell, rent, lend, transport, or distribute any obscene material." The jury was further instructed:

> **"Knowingly"** shall mean having general knowledge of, reason to know, or a belief or reasonable ground for belief which warrants further inspection or inquiry of the character and content of any material, taken as a whole, described in this section, which is reasonably susceptible to examination by the defendant.

The appellants objected to the instruction because it did not set out each element separately and would be confusing to the jury. The appellants also offered an alternate instruction on the elements of the offense.

The jury was instructed on the definition of obscene in instruction No. 6 as follows:

> **"Obscene"** shall mean (a) that an average person applying contemporary community standards would find that the work, material, conduct, or live performance taken as a whole predominantly appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion, (b) the work, material, conduct, or live performance depicts or describes in a patently offensive way sexual conduct . . . and (c) the work conduct, material, or live performance taken as a whole lacks serious literary, artistic, political, or scientific value.

In a separate instruction, No. 8, the jury was instructed that " '[p]rurient' means material having a tendency to excite lustful thoughts."

The appellants objected to the instructions, contending that prurient was correctly defined in instruction No. 6 as a shameful

or morbid interest in nudity, sex, or excretion, but incorrectly defined in instruction No. 8. The appellants argued that the term "prurient" could not be defined only in terms of lust and that the combination of instructions would confuse the jury about the correct definition of the term. The appellants offered alternate instructions on the definition of prurient interest.

The jury found Bacon guilty of one count of preparing, distributing, or promoting obscene literature or material and found Haltom guilty of two counts of the same charge. Following the verdict, the appellants moved for judgment notwithstanding the verdict. The court overruled the motion, and the appellants filed a motion for a new trial, which was also overruled. On appeal, the district court affirmed.

ASSIGNMENTS OF ERROR

The appellants assign that the district court erred in (1) instructing the jury that "prurient" means material having a tendency to excite lustful thoughts, (2) failing to instruct the jury that knowledge of the character or content of the material is an element of the crime, (3) allowing evidence of prior bad acts, (4) failing to grant their motions for judgment notwithstanding the verdict and new trial because there was insufficient evidence to convict them, and (5) failing to provide a complete and accurate record of the proceedings.

STANDARD OF REVIEW

[1,2] In reviewing a fact finder's determination that certain material is obscene, the threshold duty of an appellate court is to conduct an independent review and determine, as a matter of constitutional law, if the material falls within the substantive limitations set forth in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), i.e., is the material the type of "hard-core" sexual material that may be constitutionally regulated under the First Amendment. Thereafter, the appellate court must review the determinations of the trier of fact under the three-part obscenity standard set forth in *Miller v. California, supra*, and Neb. Rev. Stat. § 28-807(10) (Reissue 1995). In doing so, the appellate court should give appropriate deference to the trier of fact regarding the first two prongs of the test, i.e., the "prurient interest" test and the "patently offensive" test, as these issues depend on knowledge of

contemporary community standards which are uniquely within the province of the trier of fact. *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999).

[3] The appellate court should apply a de novo review in considering the third prong of the *Miller v. California* test, i.e., the "value" of the material at issue, since this determination does not depend upon community standards and is particularly amenable to appellate review. *Id.*

ANALYSIS

The appellants contend that the district court erred when instructing the jury. They further contend that no reasonable jury could have found the videos to be obscene. We begin our review with some familiar principles concerning the regulation of obscenity.

DEFINITION AND REGULATION OF OBSCENITY

[4-6] Obscenity is not constitutionally protected speech and can be prohibited or otherwise regulated without violating the prohibitions of the First Amendment to the U.S. Constitution. *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957); *State v. Harrold, supra*. The U.S. Supreme Court has limited the definition of obscenity to those materials which, "taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. at 24. Material that provokes only normal, healthy sexual desires is not intended to be characterized as obscene. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985).

Neb. Rev. Stat. § 28-813 (Reissue 1995) provides in part:

> (1) It shall be unlawful for a person knowingly to (a) print, copy, manufacture, prepare, produce, or reproduce obscene material for the purpose of sale or distribution, (b) publish, circulate, sell, rent, lend, transport in interstate commerce, distribute, or exhibit any obscene material, (c) have in his or her possession with intent to sell, rent, lend, transport, or distribute any obscene material, or (d) promote any obscene material or performance.

"Material" for purposes of § 28-813 includes any "motion picture . . . television production, other pictorial representation or electric reproduction." § 28-807(7). "Obscene" is defined in § 28-807(10) as follows:

> Obscene shall mean (a) that an average person applying contemporary community standards would find that the work, material, conduct, or live performance taken as a whole predominantly appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion, (b) the work, material, conduct, or live performance depicts or describes in a patently offensive way sexual conduct specifically set out in sections 28-807 to 28-829, and (c) the work, conduct, material, or live performance taken as a whole lacks serious literary, artistic, political, or scientific value.

PRURIENT INTEREST INSTRUCTION

The appellants contend that the trial court improperly instructed the jury on the definition of the term "prurient." They argue that by instructing the jury that prurient means material having a tendency to excite lustful thoughts, they could be found guilty even if the jury determined that the videos appealed to only a normal interest in sex. At trial, the State argued that the definition was approved by the U.S. Supreme Court in *Roth v. United States, supra.*

[7,8] Whether jury instructions given by a trial court are correct is a question of law. *State v. Bao, ante* p. 439, 640 N.W.2d 405 (2002). When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *Id.*

[9] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Id.*

The statutes regulating obscenity do not specifically define the term "prurient." But, § 28-807(10) defines obscene as including material that "predominately appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion." See, also, Neb. Rev. Stat. § 28-814(2) (Reissue 1995) (requiring jury instruction using similar language).

The U.S. Supreme Court has deferred to the decision of a federal circuit court of appeals that a statute could not constitutionally define "prurient" solely in terms of "lust." *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482 (9th Cir. 1984), *reversed on other grounds, Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985).

In *Eikenberry*, the Ninth Circuit noted that the U.S. Supreme Court first attempted to define "prurient" in 1957 in *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957). The Ninth Circuit recognized that the Court in *Roth* initially stated in a footnote that " 'material having a tendency to excite lustful thoughts' was an example of material 'appealing to prurient interest.' " *Eikenberry*, 725 F.2d at 490, quoting *Roth v. United States, supra*. But, the court in *Eikenberry* noted that *Roth* then "referred to the Webster's New International Dictionary (Unabridged, 2d ed., 1949), which defined 'prurient' as '[i]tching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd.' " *Eikenberry*, 725 F.2d at 490. The *Eikenberry* court quoted *Roth* which ultimately concluded that there was " 'no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I., Model Penal Code, § 207.10(2) (Tent. Draft No. 6, 1957).' " That section of the Model Penal Code defined an item as obscene " 'if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion.' " *Eikenberry*, 725 F.2d at 490. Thus, the *Eikenberry* court concluded that the U.S. Supreme Court did not intend in *Roth* to equate "lust" with "prurient interest."

The *Eikenberry* court also concluded that even if "lust" could be equated with "prurient interest" in 1957, the meaning of the term "lust" is interpreted differently today. The court stated:

> [W]e also recognize that the meaning of words changes as a result of contemporary usage. Obscenity jurisprudence—based as it has been on contemporary community standards and changing social mores—is an extremely fluid area of law. . . . The connotations that accompanied the word "lust" in 1957, when *Roth* was decided, are not necessarily the same ones that attach to the word today. For example, the

> most recent edition of Webster's New International Dictionary (Unabridged, 3d ed., 1976) no longer includes the word "lust" in its definition of "prurient."

725 F.2d at 490.

The *Eikenberry* court further noted that the U.S. Supreme Court's 1973 decision in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), made no reference to the term "lust" and relied solely on the definition of obscenity offered in the A.L.I.'s 1962 Official Draft of the Model Penal Code. The court further stated:

> Indeed, to permit expression that merely excites "lust" to be regulated by the state would destroy the boundaries between protected and unprotected speech. To the contemporary jury, "lust" is unlikely to connote anything more than "sexual desire." *Websters Third New International Dictionary* (Unabridged 3d ed., 1976) . . . ("lust" defined as "sexual desire or appetite"). . . . Expression that may merely stimulate sexual longing or desire is entitled to the full range of first amendment protections and cannot constitutionally be branded as obscene.

725 F.2d at 491. The court then held that a statute defining "prurient interest" using the term "lust" was unconstitutional. On appeal, the U.S. Supreme Court did not decide the proper definition of the term "prurient" and instead deferred to the conclusion of the Ninth Circuit. The Court reversed to the extent that the Ninth Circuit had invalidated the entire statute at issue when the statute had a severability clause. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985).

Several other courts have similarly concluded that "prurient interest" cannot be defined solely in terms of "lust." See *State v. LeBlang*, 530 So. 2d 601 (La. App. 1988) (error to include lust in jury instruction defining "prurient interest"). See, generally, *Little Store, Inc. v. State*, 295 Md. 158, 453 A.2d 1215 (1983).

Although we have not directly addressed the proper definition of the term "prurient," we have stated that a jury was properly instructed when given the following instruction:

> "You must determine whether the material appeals to a prurient interest in sex, for unless it does it cannot be obscene. A prurient interest in sex is not the same as a

> candid, wholesome, or healthy interest in sex. Material does not appeal to the prurient interest just because it deals with sex, or shows nude bodies. Prurient interest is a shameful or morbid interest in sex, nudity or excretion which goes beyond the customary limits of candor."

State v. Harrold, 256 Neb. 829, 846, 593 N.W.2d 299, 313-14 (1999). We further stated that this definition was taken directly from *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957), and remains an accurate description of the definition under *Brockett v. Spokane Arcades, Inc., supra.*

[10] We find the reasoning of the Ninth Circuit in *J-R Distributers, Inc. v. Eikenberry*, 725 F.2d 482 (9th Cir. 1984), *reversed on other grounds, Brockett v. Spokane Arcades, Inc., supra*, persuasive. We do not read *Roth* to define "prurient" as a "tendency to excite lustful thoughts." Instead, *Roth* defined "prurient" in the same manner as it is used in § 28-807(10). Under § 28-807(10), obscene material "predominately appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion." We further agree that by defining "prurient" as "a tendency to excite lustful thoughts," the jury could impermissibly determine that material which provokes normal, healthy sexual desires is obscene.

Here, the jury was initially instructed in part that "obscene" material predominantly appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion. But later, in instruction No. 8, the jury was specifically told that "prurient" means "material having a tendency to excite lustful thoughts." We conclude that this definition was in error.

The State argues that when the instructions are read as a whole, there is no error. We note, however, that the court did not instruct the jury that it could not find material obscene if the material provokes normal, healthy sexual desires. When the improper definition of prurient is combined with the statutory definition, the jury still could have found the appellants guilty even if they believed the videos did provoke normal, healthy sexual desires. We determine that the jury was improperly instructed regarding the definition of the term "prurient" and that the appellants were prejudiced by the error. Accordingly, we reverse.

SUFFICIENCY OF EVIDENCE

[11,12] Upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial. *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). The Double Jeopardy Clause does not forbid retrial if the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000), citing *Lockhart v. Nelson*, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988). It would unduly lengthen this opinion to again detail the facts. We have reviewed the record and viewed the videos, and we determine that there was sufficient evidence to sustain the guilty verdicts. Because of our ruling, we do not address the appellants' other assignments of error.

CONCLUSION

We conclude that the county court improperly instructed the jury regarding the definition of the term "prurient." The appellants were prejudiced by the erroneous instruction. Accordingly, we reverse, and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

LEE SCOTT TRAINUM, APPELLEE, V. SUTHERLAND ASSOCIATES, LLC, ET AL., APPELLANTS.

642 N.W.2d 816

Filed April 25, 2002. No. S-01-575.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **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. ____: ____. Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
4. **Mandamus: Attorneys at Law: Conflict of Interest.** Mandamus is a viable means of addressing perceived attorney conflicts of interest.

5. **Attorneys at Law: Appeal and Error.** If an appeal from an order of disqualification involves issues collateral to the basic controversy and if an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, interlocutory review is appropriate.
6. **Mandamus.** Mandamus is not a preventive remedy but essentially a coercive writ, one that commands performance of a duty and not desistance therefrom.
7. ____. Mandamus is the appropriate method of seeking interlocutory review of lower court orders denying disqualification of counsel.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Appeal dismissed.

Richard A. DeWitt and Robert S. Lannin, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, P.C., and John M. Touhy, Andrew W. Morris, and Craig Isenberg, of Mayer, Brown & Platt, for appellants.

Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Sutherland Associates, LLC; Sutherland Ethanol Company, LLC; Robert L.B. "Bibb" Swain; Robert Swain; and Delta-T Corporation (collectively Sutherland) appeal from an order of the district court denying disqualification of Lee Scott Trainum's counsel. We conclude that this court does not have jurisdiction over Sutherland's appeal and therefore dismiss the appeal.

BACKGROUND

From 1992 to 2000, Trainum was an employee and director of Delta-T, a Virginia corporation located in Williamsburg, Virginia. In 1998, several employees of Delta-T began taking steps toward purchasing an ethanol plant near Sutherland, Nebraska. Among these employees were Trainum, Bibb Swain, and Robert Swain. In 1999, Sutherland Associates, a Nebraska limited liability company, was formed for the purpose of purchasing the ethanol plant. Trainum, Bibb Swain, and Delta-T were the initial member managers of Sutherland Associates.

Since 1997, Sheila Marsh has served as part-time, in-house general legal counsel for Delta-T. During that time, Marsh participated in meetings with Trainum, Bibb Swain, and Robert Swain and gave legal advice regarding the creation of Sutherland Associates, the duties of Trainum and the Swains as both officers of Delta-T and member managers of Sutherland Associates, and tax-related issues. Marsh also drafted a proposed operating agreement for Sutherland Associates and negotiated loan agreements. During this time period, Trainum was not represented by separate counsel.

Marsh requested that the Richmond, Virginia, law firm of McCandlish Kaine serve as outside counsel to Delta-T on matters related to Sutherland Associates. At the time, Naila Townes Ahmed was a partner in McCandlish Kaine, and Ahmed provided a number of services to Delta-T at Marsh's request. Ahmed gave legal advice to Delta-T and Sutherland (which included Trainum at that time) regarding the membership interests in Sutherland Associates, the merger of Sutherland Associates into Sutherland Ethanol Company, and the dilution of member interests as a result of the merger. Ahmed also advised Marsh regarding communications Marsh had with the law firm of Williams, Mullen, Clark & Dobbins (Williams Mullen) over matters involved in the current lawsuit and also drafted a settlement agreement with Trainum regarding this lawsuit. Other attorneys at McCandlish Kaine provided similar services to Delta-T regarding matters at issue in this lawsuit.

On March 1, 2000, Trainum terminated his employment with Delta-T. Subsequent negotiations over Trainum's status as member manager of Sutherland Associates were conducted. On August 30, 2000, Trainum was informed by Bibb Swain that his membership interest in Sutherland Associates was being reduced from 22.5 percent to 1 percent and that Sutherland Associates would be merged into Sutherland Ethanol Company, a newly formed Nebraska limited liability company. Trainum was also notified that should the merger be approved, his interest in Sutherland Associates would be purchased for $1. Upon receipt of this information, Trainum retained Malcolm Ritsch, Jr., of Williams Mullen to represent him. Shortly thereafter, Trainum retained the

Lincoln, Nebraska, law firm of Cline, Williams, Wright, Johnson & Oldfather (Cline Williams).

On October 25, 2000, Trainum filed a petition against Sutherland alleging several limited liability company improprieties and asserting eight separate claims, including claims under Nebraska and Virginia securities laws and the Virginia Conspiracy Act. The petition was signed by Cline Williams, while Williams Mullen was listed as "Of Counsel."

On November 1, 2000, Marsh learned that Ahmed had announced her intention to leave McCandlish Kaine and join Williams Mullen. Ahmed began working for Williams Mullen on December 1, 2000, and Marsh verified this on December 6, 2000, in telephone calls to McCandlish Kaine and Williams Mullen.

Sutherland demurred to Trainum's petition on December 18, 2000, and the district court overruled the demurrer on February 7, 2001. Between those dates, the parties served on each other interrogatories and various motions to produce.

On February 14, 2001, Sutherland filed a motion to disqualify Willams Mullen and Cline Williams because Ahmed had provided legal services to Sutherland concerning this lawsuit and has since joined the law firm representing Trainum. In response to the motion to disqualify, Trainum offered the affidavits of Ritsch and Ahmed. Ritsch asserted that he had no knowledge that Ahmed had been involved in representing Sutherland and that no communication had taken place between himself and Ahmed regarding this lawsuit. Ritsch also averred that because he had not received any information from Ahmed regarding Sutherland, he had not provided any such information to any member of Cline Williams. Ahmed also asserted that she had had no communication with any Williams Mullen attorney regarding this lawsuit.

On February 20, 2001, Trainum filed a motion asking for leave to allow Williams Mullen to withdraw as counsel. The record does not reflect any action taken by the court on this motion. The district court, in an April 25 order addressing only Cline Williams, denied the motion to disqualify. Sutherland timely filed a notice of appeal from the district court's order, and we moved the case to our docket.

ASSIGNMENTS OF ERROR

Sutherland makes five assignments of error, all claiming generally that the district court erred in denying its motion to disqualify Cline Williams.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *In re Interest of Jaden H., ante* p. 129, 638 N.W.2d 867 (2002).

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. *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001). Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte. *Id.*

In *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245 (1990), Freezer Services brought an original action seeking a writ of mandamus compelling the disqualification of counsel. The order at issue was, as in this appeal, an order denying a motion to disqualify counsel. This court noted that Freezer Services first attempted a direct appeal from the district court's order denying disqualification. *Id.* That appeal was dismissed for lack of jurisdiction on appellee's motion for summary dismissal. *Freezer Services, Inc. v. Waller*, 233 Neb. xxxiv (case No. 89-1255, November 16, 1989). See Neb. Ct. R. of Prac. 7B(1) (rev. 2000).

In several subsequent decisions, we again reviewed a lower court's denial of a motion to disqualify counsel. See, e.g. *State ex rel. Wal-Mart v. Kortum*, 251 Neb. 805, 559 N.W.2d 496 (1997); *State ex rel. Creighton Univ. v. Hickman*, 245 Neb. 247, 512 N.W.2d 374 (1994); *State ex rel. FirsTier Bank v. Buckley*, 244 Neb. 36, 503 N.W.2d 838 (1993). As in *State ex rel. Freezer Servs., Inc. v. Mullen, supra*, these cases were reviewed by this court in an original action for mandamus.

[4] *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995), also involved review of a lower court's

alleged error in the denial of a motion to disqualify counsel. However, the issue was presented to this court by an appeal of the lower court's judgment on the merits and not by an original action for mandamus. We affirmed on the merits and did not review the district court's denial of the motion to disqualify, noting that "[a]n appellate action is an inadequate means of presenting attorney conflicts of interest for review." *Id.* at 853, 540 N.W.2d at 326 (citing *State ex rel. Freezer Servs., Inc. v. Mullen, supra*). We also noted that "mandamus is a viable means of addressing perceived attorney conflicts of interest." 248 Neb. at 854, 540 N.W.2d at 327.

[5] Each of the cases cited above were decided prior to our decision in *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997), which presented a district court's order granting attorney disqualification. Although the order granting disqualification was not a final order, we held that jurisdiction existed under a newly adopted exception to the final order requirement: If an appeal from an order of disqualification involves issues collateral to the basic controversy and if an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, interlocutory review is appropriate. *Richardson v. Griffiths, supra.*

As in *Richardson*, the denial of the motion to disqualify Cline Williams in this case is not a final order. The question now becomes whether the *Richardson* exception to the final order requirement applies to vest jurisdiction over Sutherland's appeal in this court. We conclude that it does not.

[6] The exception adopted in *Richardson* was necessary because where the order sought to be reviewed is an order granting disqualification, mandamus is not an appropriate remedy. The general rule is that mandamus is not a preventive remedy but essentially a coercive writ, one that commands performance of a duty and not desistance therefrom. *Id.* Thus, the appellants in *Richardson* could not bring an original action for mandamus to compel the district court to vacate its order of disqualification. *Id.* However, to allow the district court's disqualification order to stand, without allowing an immediate avenue for appellate review, would have prejudiced the rights of the party whose counsel had been disqualified.

[7] Although we stated in *Richardson* that we were adopting the exception to the final order requirement in part "to provide both parties (movant and nonmovant) with an equal opportunity to seek interlocutory review of an attorney disqualification decision," it is clear that the exception was necessary in that case only to provide interlocutory review of an order granting disqualification. *Id.* at 831, 560 N.W.2d at 435. *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245 (1990), and our other cases involving district court orders denying motions to disqualify make clear that mandamus is the appropriate method of seeking interlocutory review.

Our decision today to preclude use of the *Richardson* exception to directly appeal orders denying disqualification is also compelled by practical concerns. The ability of a party to file a motion to disqualify, which is subsequently denied, and then seek appellate review of that ruling under the *Richardson* exception could cause unnecessary delay in the course of litigation. Instead, a mandamus action brought as an original action in the Supreme Court would offer the parties a more expedient method of review and would prevent use of a meritless motion to disqualify to bring the proceedings to a halt.

CONCLUSION

The district court's order denying disqualification of Trainum's counsel is not a final, appealable order because it does not affect a substantial right of Trainum. While the exception to the final order requirement in *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997), is the appropriate method to seek review of a lower court's order granting disqualification of counsel, such exception is not the appropriate method of seeking review of a lower court's order denying disqualification. Instead, aggrieved parties should bring an original action seeking a writ of mandamus compelling counsel disqualification. Therefore, this court does not have jurisdiction over Sutherland's direct appeal, and the appeal is dismissed.

APPEAL DISMISSED.

WRIGHT, J., not participating.

JOE EDWARD SCHAEFER, APPELLANT AND CROSS-APPELLEE, V. CARLA JEAN SCHAEFER, APPELLEE AND CROSS-APPELLANT.

642 N.W.2d 792

Filed April 25, 2002. No. S-01-665.

1. **Divorce: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
2. **Divorce: Property Division: Alimony.** In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party, the polestar being fairness and reasonableness as determined by the facts of each case.
3. **Divorce: Attorney Fees.** In dissolution proceedings, an award of attorney fees depends on a variety of factors, including the amount of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation.
4. **Property Division: Alimony.** The attainment by one spouse of a professional degree with aid from the other is one factor a district court may consider in the division of assets and award of alimony.

Appeal from the District Court for Kimball County: KRISTINE R. CECAVA, Judge. Affirmed.

Tylor J. Petitt, of The Van Steenberg Firm, P.C., for appellant.

Jeffrey L. Hansen, of Simmons, Olsen, Ediger, Selzer, Ferguson & Carney, P.C., for appellee.

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

STEPHAN, J.

This is an appeal from an order of the district court for Kimball County dissolving the marriage of Joe Edward Schaefer (Joe) and Carla Jean Schaefer (Carla). Joe contends the district court erred in determining custody of the parties' minor child, in awarding alimony, and in its distribution of the marital assets. Carla cross-appeals on the issues of alimony, child support, and property distribution.

FACTS

Joe and Carla were married November 30, 1974. Three children were born during the marriage, and one child remained a

minor at the time of the dissolution proceedings. Joe was 49 and Carla was 50 at the time of the dissolution hearing.

Carla received a degree from Iowa State University in art education in 1972, prior to the marriage. Joe completed his bachelor's degree in education at Chadron State College during the early years of the marriage. Carla taught at a school in Harrison, Nebraska, from 1973 to 1977, when she returned to school at Chadron State College and obtained an endorsement in home economics. The couple returned to Harrison in approximately 1978, and Joe worked for his cousin at a mechanic shop. Their first child was born in 1978, and Carla stayed home with the children from 1978 to 1985. Carla declined a teaching job in 1979 because Joe felt it was important for her to stay home with the children. In 1985, Carla resumed teaching part time, and in 1987, she opened a home daycare business which she operated until 1996. During this time period, she also worked odd jobs, including cleaning the local bank in the evenings, baking rolls to sell at the local bakery, and caring for two local elderly women on weekends.

In 1984, Joe started a mechanic shop in Harrison which he operated until 1996. Carla testified that in approximately 1993, Joe began sleeping in a room above his shop in Harrison. He continued to come to the marital home for lunch and for dinner, and after spending time with the children, he would return to his shop to sleep. The parties have not lived together for any extended period of time since 1993.

Joe injured his hand in a work-related accident in the early 1990's, and in 1995, with the assistance of vocational rehabilitation, he returned to school at Chadron State College to earn a degree in justice studies. He sold his business during this time period. Joe testified that while he was attending Chadron State College, he also worked full time and used the money to pay for family bills. On cross-examination, however, he admitted that he did not help pay household utility bills after 1996. Carla testified that while Joe was in school, he never sent money to help with household expenses, and that it was difficult for her to provide for the family on her income.

Joe received his second degree from Chadron State College in May 1997. In August 1997, Joe entered law school in Lincoln, Nebraska, and graduated in May 2000. While attending law

school, Joe lived in Lincoln and saw his family sporadically. He borrowed money to pay for his education and testified that while in law school, he bought some items, including clothes, for the children. He admitted that no money was sent to help Carla with expenses during this time period. Joe incurred significant credit card debt while in law school. Carla did not assist Joe in paying for law school.

During law school, Joe began working part time as a legislative aid for a state senator. After graduation, he accepted a full-time position in the same capacity. He testified that the position utilized his legal skills, although he did not need to be an attorney to perform the job. Joe testified that his net income at the time of trial was $1,670 per month. He further testified that he enjoyed his job and intended to continue doing it, with the possibility of using it as a springboard into a political career.

In 1996, Carla accepted a teaching position in Kimball, Nebraska, and moved there with the children. Joe was attending Chadron State College at the time. In 1999, Carla accepted a teaching position in Coon Rapids, Iowa, where she resided at the time of the dissolution. She built a home in Iowa at the time of her move and financed it through her earnings, inheritance, and a government assistance program. Carla's net income at the time of trial was $1,800 per month.

Joe testified that during the course of the marriage, the parties borrowed approximately $51,000 from his parents. He testified that his mother kept a ledger balance documenting the amount of the loan and that he was expected to repay the entire balance. He admitted that there were no promissory notes or other documents obligating the repayment of the debt and that the last payment was made 8 years prior to trial. Carla testified that she never signed a document evidencing the loan.

The parties' three children resided with Carla at all relevant times. The oldest child recently completed college, the middle child is now attending college, and the minor child continues to reside with Carla in Iowa. At the time of the dissolution hearing in December 2000, the minor child was a 16-year-old high school junior. Both parties testified that Carla was the primary caregiver for the children throughout the marriage. The deposition of the minor child was admitted into evidence

at the dissolution hearing. The minor child generally testified that she preferred to live with Joe.

The parties bought a home while they lived in Harrison and continued to own it at the time of the dissolution. Carla testified that she used a portion of the inheritance she received during the marriage from the estate of her sister to pay off the mortgage balance on the Harrison home. Joe testified that the Harrison home had a value between $25,000 and $45,000 at the time of trial, and Carla testified the value was $35,000 to $45,000. Both parties offered exhibits valuing the household goods in their possession at the time of the dissolution. Both parties also offered deposition testimony from accountants relating to the value of Joe's law degree.

In an April 17, 2001, order, the district court dissolved the marriage. The court awarded custody of the minor child to Carla, reasoning that it was in the minor child's best interests to remain with Carla even though she expressed a preference to live with Joe. The court ordered Joe to pay child support in the amount of $423 per month, based upon his actual income, and alimony in the amount of $100 per month for 60 months. The court generally divided the household goods according to the goods in the possession of the parties at the time of dissolution. The court awarded Carla both the Harrison and the Iowa homes and refused to place a value upon Joe's law degree. Joe appealed, and Carla cross-appealed. Additional facts will be set forth when necessary in the analysis of the arguments made by the parties.

ASSIGNMENTS OF ERROR

Joe assigns that the district court erred in (1) granting custody of the minor child to Carla, (2) ordering Joe to pay alimony, (3) ruling that a loan from Joe's parents was not marital debt, (4) ruling that Carla's inheritance was used to pay off the Harrison home, (5) granting a certificate of deposit to Carla on the basis that its source was her inheritance, (6) ruling that a 1993 Buick LaSabre awarded to Carla was nonmarital property, (7) placing too low a value on the Harrison home, (8) improperly valuing the personal property of the parties, (9) inequitably dividing the marital assets and debts, and (10) ordering Joe to pay $2,000 of Carla's attorney fees.

On cross-appeal, Carla assigns that the district court erred in (1) failing to award an appropriate amount of alimony, (2) failing to award alimony for an appropriate term, (3) failing to use Joe's earning capacity in calculating child support, (4) not placing a value on Joe's law degree, and (5) not awarding Carla a sufficient amount of attorney fees.

STANDARD OF REVIEW

[1] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Gibilisco v. Gibilisco, ante* p. 27, 637 N.W.2d 898 (2002).

ANALYSIS

CUSTODY

The district court granted custody of the 16-year-old minor child to Carla, reasoning that although both parents were fit, it was clear from the record that Carla had met the daily responsibilities of raising the child and that the stronger parent-child relationship existed between Carla and the minor child. While acknowledging that the minor child expressed a desire to live with Joe, the court concluded that changing schools and hometowns during the final year of high school was not in the minor child's best interests.

Joe argues that the court erred in awarding Carla custody because he has a "wonderful relationship" with the minor child and because she wanted to live with him. Brief for appellant at 18. Although Neb. Rev. Stat. § 42-364(2)(b) (Reissue 1998) instructs the trial court to consider the child's preferences on the issue of custody, the statute also requires the court to consider all aspects of the best interests of the child. The record clearly establishes that Carla has been the primary caregiver throughout the minor child's life. The minor child wished to live with Joe primarily because she disagreed with Carla's disciplinary style. The district court did not abuse its discretion in awarding custody to Carla.

ALIMONY

The district court found that this was a long-term marriage with significant imbalances in the contributions and sacrifices

made to the marriage. Joe argues that the alimony award of $100 per month for 60 months is improper because Carla is capable of supporting herself and because the award of alimony causes his monthly expenses to exceed his monthly income. Carla cross-appeals, contending the court erred in not considering Joe's earning capacity in determining alimony.

[2] In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party, the polestar being fairness and reasonableness as determined by the facts of each case. *Meints v. Meints*, 258 Neb. 1017, 608 N.W.2d 564 (2000). See, also, Neb. Rev. Stat. § 42-365 (Reissue 1998). A court is to consider the income and earning capacity of each party, as well as the general equities of each situation. *Ainslie v. Ainslie*, 249 Neb. 656, 545 N.W.2d 90 (1996).

In his brief, Joe cites *Kimbrough v. Kimbrough*, 228 Neb. 358, 422 N.W.2d 556 (1988), for the proposition that "it is error to order alimony in excess of the spouse's earnings." (Emphasis omitted.) Brief for appellant at 21. In *Kimbrough*, we cited *Gleason v. Gleason*, 218 Neb. 629, 357 N.W.2d 465 (1984), for the principle that it is an abuse of discretion to award alimony in excess of the earning capacity of the paying party. The facts presented in *Kimbrough* revealed that after payment of the child support ordered by the court, the husband would have $1,162 available for his living expenses. After paying her portion of childcare expenses, the wife would have $260 remaining from her net income. Under these circumstances, we determined that the trial court's alimony award of $1,000 per month continuing until the death or remarriage of the wife was excessive and should be reduced to $400 per month for a period of 7 years, or until the death of one of the parties or the wife's remarriage, whichever occurred first.

According to the worksheets submitted under the child support guidelines, Joe has net income of $1,804.42 per month based upon gross income of $27,660 per year, and net income of

$1,945.49 per month based upon earning capacity of $30,000 per year. Joe was ordered to pay child support of $423 per month based on his actual gross income. Joe's child support obligation will terminate no later than July 14, 2003, when the minor child reaches the age of 19. In addition to his income from employment, Joe expects to receive a substantial inheritance from the estate of his brother, who died in January 2000. Carla's monthly net income, after subtraction of her pro rata share of support for their minor child, is $1,439.46. There is ample evidence in the record to support the finding by the district court that Carla made significant contributions to the 26-year marriage. Under these circumstances, we find no abuse of discretion in the alimony award of $100 per month for 60 months, capitalized on the basis of Joe's actual current income.

Child Support

Carla contends that the district court erred in using Joe's actual total monthly income of $2,305 in calculating child support. She argues that the district court should have considered Joe's earning capacity, which she calculated to be $2,500 per month. Using Joe's earning capacity would result in an increase in the child support obligation of $23 per month. Due to the insignificant variation between Joe's actual income and Carla's calculation of his earning capacity, the district court did not abuse its discretion in basing its child support calculations on Joe's actual income.

Loan From Joe's Parents

The district court held that the debt to Joe's parents was Joe's personal debt to either pay or have forgiven by his parents. Joe contends that the finding that the debt was personal is erroneous because both parties testified that the money was used to finance marital projects.

The only evidence in the record regarding the legal existence of this debt is Joe's assertion that he intended to fully repay his parents. No payment has been made on any amounts owed for at least 8 years, and neither Joe nor Carla ever signed any document evidencing the debt. Thus, even if any money borrowed was used for marital purposes, there is no evidence in this record to support the existence of an enforceable marital debt.

The district court did not err in excluding the purported debt from the marital estate.

BUICK LESABRE

The court awarded Carla a 1993 Buick LeSabre that was in her possession at the time of the dissolution, determining that it was nonmarital property. Carla testified that the car was purchased in 1996 as a gift to her from her father, even though it was titled in the names of both Carla and Joe. She stated that a previous car, also purchased by her father and titled in the name of the couple, was used as a trade-in on the Buick and that her father paid the difference. Carla testified that Joe had removed a diesel engine from the previous car and replaced it. Joe argues that this evidence establishes that the car was marital property.

On the evidence presented in this record, the district court did not abuse its discretion in concluding that the car was a gift to Carla from her father. At the time the car was purchased in 1996, Joe was in Chadron and Carla was teaching in Kimball, and the car was for her personal use. Joe has presented no evidence to the contrary and no evidence of the value of any improvements he made to the previous car. We find no abuse of discretion.

HARRISON HOME VALUE

The district court found that the Harrison home had a value of $30,000. Joe contends that there is no evidence in the record to support this valuation. Joe, however, testified that the value of the home was between $25,000 and $45,000, and Carla testified that the value was $35,000 to $45,000. The district court valued the home within this range and did not abuse its discretion in doing so.

PROPERTY AND DEBT DISTRIBUTION

Joe argues that the trial court improperly relied upon the "excessive" values Carla assigned to Joe's household property in dividing the household assets of the parties. Brief for appellant at 26. He contends that a 1995 computer was overvalued at $500, a used sofa was valued at $500, and end tables were valued at $200. We find that the parties generally agreed as to the division of household goods and that the district court did not abuse its discretion in relying upon the values placed upon the property.

In addition, Joe argues that Carla should not have been granted both her home in Iowa and the home in Harrison. Carla financed her Iowa home without any assistance from Joe, and the court clearly did not err in awarding her that asset. In addition, the district court found that awarding Carla the Harrison home was justified due to the significant imbalance in the contributions of the parties to the marriage from and after 1991. We find no abuse of discretion in this determination.

Carla's Inheritance

During the marriage, Carla inherited money from the estate of her sister. In her deposition, she testified that the value of the inheritance was approximately $13,000, and at trial, she testified that after reviewing records, she determined the value to be $16,800. Carla testified that she deposited this money into a certificate of deposit and that in November 1995, she used approximately $7,000 from this account to pay off the real estate mortgage on the parties' Harrison home. Carla further testified that she then transferred the remaining money into a money market account and that she used all but approximately $230 of the remaining amount for a downpayment on her Iowa home. The district court found that Carla used the money to pay off the loan on the house in Harrison and that Carla was entitled to the proceeds of her inheritance certificate of deposit, as it was nonmarital property.

Joe argues that the bank records in the record do not support Carla's testimony that she used a portion of her inheritance to pay off the Harrison home loan. He argues that because Carla cannot trace the inherited money, her inheritance should have been considered marital property. In this regard, the bank records do not coincide with Carla's testimony regarding the date the Harrison loan was paid in full. The records do indicate, however, that a payment was made from the certificate of deposit in November 1996 and that the remaining money was transferred to one money market account and then subsequently to another. The records also indicate that Carla made payments out of this account for her Iowa home. We have already determined that the district court did not abuse its discretion in awarding the Harrison home to Carla. With respect to the tracing argument,

there is sufficient evidence in the record to substantiate Carla's testimony regarding the expenditure of her inheritance. Although we note that the district court incorrectly referred to the certificate of deposit containing Carla's inheritance as an existing asset, the court did not abuse its discretion in finding Carla's inheritance to be nonmarital property, nor did it abuse its discretion in awarding the Harrison property to Carla.

Attorney Fees

The court ordered Joe to pay $2,000 of Carla's attorney fees. Joe argues that such an award was improper and that it was merely a penalty to him for receiving his law degree, as Carla was awarded both alimony and a larger share of the marital assets. On cross-appeal, Carla argues that the court should have awarded her $3,611.52, the entire amount requested.

[3] In dissolution proceedings, an award of attorney fees depends on a variety of factors, including the amount of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995); *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994). Considering the general equities of this case, the district court did not abuse its discretion in awarding $2,000 in attorney fees to Carla.

Valuation of Law Degree

Carla's primary contention on cross-appeal is that the district court erred in not considering Joe's law degree as valuable marital property. She contends that while Joe obtained the degree, she worked, took care of the children, and gave up the benefits of a second income with the expectation that the law degree would provide the family a better standard of living in the future.

Darrell Eskam, a certified public accountant, testified via deposition that the value of Joe's law degree was approximately $80,000. Eskam valued the degree by comparing the lifetime earnings of a college graduate with the lifetime earnings of a person holding a law degree, reduced to present value. Carol Lockwood, also a certified public accountant, testified via deposition that it was very difficult to value a law degree because a degree was worth something only if it was used by an individual. Lockwood did not specifically dispute Eskam's method but

disagreed with his use of an average starting salary for an associate in Lincoln or Omaha, stating that the correct average should have considered Lincoln only. Utilizing Eskam's basic method, Lockwood testified that any value of the degree was approximately $40,000.

[4] The overwhelming majority of jurisdictions that have addressed this issue have declined to expressly place a value on a professional degree. We agree with that view. See, *Guy v. Guy*, 736 So. 2d 1042 (Miss. 1999); *In re Marriage of Speirs*, 956 P.2d 622 (Colo. App. 1997); *Roberts v. Roberts*, 670 N.E.2d 72 (Ind. App. 1996); *Stevens v. Stevens*, 23 Ohio St. 3d 115, 492 N.E.2d 131 (1986). As Lockwood testified, the value of a professional degree is dependent upon its use by the individual, and any method of valuation is thus purely speculative. See *id.* We note, however, that § 42-365 requires a dissolution court to divide property and award alimony in a reasonable manner, having regard for, inter alia, the circumstances of the parties and the history of contributions to the marriage. Pursuant to this statutory language, the attainment by one spouse of a professional degree with aid from the other is one factor a district court may consider in the division of assets and award of alimony in a marital dissolution proceeding. On the facts and records of this case, the district court did not abuse its discretion in its division of the assets and its award of alimony.

CONCLUSION

Both parties have filed motions for attorney fees on appeal. Because we have concluded that neither the appeal nor the cross-appeal has merit, we deny both parties' motions. Further, we note that review of this appeal was complicated by the lack of compliance with Neb. Ct. R. of Prac. 5 (rev. 2000) relating to the proper preparation of the bill of exceptions, a failure we attribute to neither party.

For the foregoing reasons, the district court did not abuse its discretion in awarding custody, child support, and alimony and in distributing the assets. The judgment of the district court is affirmed.

AFFIRMED.

KADE M. GRACEY, APPELLANT, V. FRED E. ZWONECHEK, INTERIM DIRECTOR OF THE NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEE.
LARRY L. JANSSEN, APPELLANT, V. BEVERLY NETH, DIRECTOR OF THE NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEE.
KIMBERLY D. STETSON, APPELLANT, V. EDWARD D. WIMES, DIRECTOR OF THE NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

643 N.W.2d 381

Filed May 3, 2002. Nos. S-00-149, S-00-285, S-00-286.

1. **Administrative Law: Final Orders: Appeal and Error.** A final order entered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Statutes: Appeal and Error.** Interpretation of statutes presents a question of law, and an appellate court is obligated to reach an independent conclusion, irrespective of the decision made by the court below, with deference to the agency's interpretation of its own regulations, unless plainly erroneous or inconsistent.
4. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Venue.** Neb. Rev. Stat. § 60-6,205(6)(a) (Reissue 1998), establishing the location for administrative driver's license revocation hearings, is a venue statute.
5. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
6. ____. If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.

Appeals from the District Courts for Dawes and Sheridan Counties: PAUL D. EMPSON, Judge. Reversed and remanded with directions.

David E. Veath for appellants.

Don Stenberg, Attorney General, Hobert B. Rupe, Jodi M. Fenner, and, on brief, Kyle C. Dahl for appellees.

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

McCORMACK, J.

NATURE OF CASE

In these consolidated cases, Kade M. Gracey, Larry L. Janssen, and Kimberly D. Stetson (collectively the appellants) appeal from the district courts' orders affirming the decisions and orders of revocation entered by the director of the Nebraska Department of Motor Vehicles (the Department) following administrative license revocation hearings. Because the appellants' respective administrative license revocation hearings were not held in the counties in which the appellants were arrested, as required by Neb. Rev. Stat. § 60-6,205(6)(a) (Reissue 1998), we reverse, and remand with directions.

BACKGROUND

Each of the three cases share common facts as they relate to the issues raised on appeal. The appellants, in separate and unrelated incidents, were contacted by law enforcement officers who detected the smell of alcohol on or about the appellants. Field sobriety tests were administered, and the appellants failed to satisfactorily complete the tests. Two of the appellants also subsequently failed preliminary breath tests.

The appellants were arrested pursuant to Neb. Rev. Stat. § 60-6,197 (Reissue 1998 & Supp. 1999). Gracey was arrested in Dawes County, while Janssen and Stetson were each arrested in Sheridan County. Upon being arrested, each appellant was read a postarrest chemical test advisement form. This document informed the appellants that they were required to submit to a chemical test of their blood, breath, or urine and that "[r]efusal to submit to such test or tests is a separate crime for which you may be charged." The appellants agreed to submit to chemical testing. The chemical test results indicated the presence of alcohol in excess of the legal limit.

The appellants subsequently petitioned for hearings before the director of the Department to contest the revocation of their driver's licenses. Gracey's hearing was held via videoconference, with the hearing officer located in Lancaster County and all other participants located in Dawes County. Janssen's hearing utilized teleconference hearing procedures, with the hearing officer located in Lancaster County, Janssen's attorney located

in Dawes County, and the arresting officer located in Sheridan County. Stetson's hearing also used teleconference hearing procedures, with the hearing officer located in Lancaster County, Stetson and her attorney located in Dawes County, and the arresting officer located in Sheridan County.

At each hearing, the appellants objected to the venue of the hearing, as discussed in further detail below. Following the hearings, the appellants' driver's licenses were revoked by the director after finding, inter alia, that the appellants' venue objections were without merit. The appellants timely appealed their revocations to the district courts for the counties in which the arrests occurred. The district courts affirmed the director's decisions, and these appeals followed.

ASSIGNMENTS OF ERROR

Three assignments of error are common to the appellants. The appellants assign, restated, that the district courts erred in (1) finding that the license revocation hearings were held in accordance with § 60-6,205(6)(a); (2) finding that the Department's "Notice/Sworn Report/Temporary License" forms were supported by sufficient foundation and were properly received into evidence; and (3) finding that the postarrest chemical test advisement forms provided sufficient notice of the consequences of failing the chemical test.

Janssen and Stetson each additionally assign that the district court erred in finding that their license revocation hearings were held in accordance with Neb. Rev. Stat. § 84-913.03 (Reissue 1999).

Finally, Janssen raises one assignment of error unique to his case. He assigns that the district court erred in finding that his arrest was supported by probable cause.

Because the appellants' first assignment of error is dispositive, we do not address the remaining assignments of error.

STANDARD OF REVIEW

[1,2] A final order entered by a district court in a judicial review pursuant to the Administrative Procedure Act (APA) may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Father Flanagan's Boys' Home v. Agnew*, 256 Neb. 394, 590 N.W.2d 688 (1999). When reviewing

an order of a district court under the APA for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3] Interpretation of statutes presents a question of law, and an appellate court is obligated to reach an independent conclusion, irrespective of the decision made by the court below, with deference to the agency's interpretation of its own regulations, unless plainly erroneous or inconsistent. *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 571 N.W.2d 53 (1997).

ANALYSIS

The appellants argue that their license revocation hearings were not held in accordance with § 60-6,205(6)(a). This statute provides that administrative license revocation hearings "shall be conducted in the county in which the arrest occurred or in any other county agreed to by the parties." During each of the appellants' license revocation hearings, the hearing officer was located in Lancaster County.

[4] The argument made by the appellants has been raised before this court on several prior occasions; however, we have not yet had the opportunity to address it. In *Muir v. Nebraska Dept. of Motor Vehicles*, 260 Neb. 450, 618 N.W.2d 444 (2000), we held that § 60-6,205(6)(a) is a venue statute and that generalized objections to the method by which the hearing was being conducted were not proper objections to venue. See, also, *Davis v. Wimes, ante* p. 504, 641 N.W.2d 37 (2002); *Reiter v. Wimes, ante* p. 277, 640 N.W.2d 19 (2002). In both *Davis* and *Reiter*, we did not reach the substantive merits of the defendants' arguments because the defendants failed to properly object to the venue of their hearings and because their subsequent participation in the hearings acted as a waiver of any objection they may have had. The consolidated cases currently before us suffer from no such defect.

At Gracey's hearing, his attorney objected to "the conduct of this hearing with regard to the in-county requirement." He later stated:

> [T]he statute 60-6,205(6)(a) . . . requires that the director — the director's hearing "shall be conducted in the county

> in which the arrest occurred". The county in which the arrest occurred is Dawes County. . . . [T]he hearing today, notwithstanding the videoconferencing, the hearing is held in Lancaster County and, therefore, not in the county of arrest which is mandated by statute.

Janssen's and Stetson's objections took similar forms, with each observing that § 60-6,205(6)(a) was the relevant statute and arguing that their hearings did not comply with the statute's requirement. We conclude that the objections made by the appellants were properly aimed at the venue of their hearings and were sufficient to preserve the alleged error for appeal.

The appellants contend that the presence of the hearing officers in Lancaster County violated § 60-6,205(6)(a) because none of the appellants were arrested in Lancaster County. This argument implies that the location of the hearing officer determines the situs of the hearing, regardless of where any other participants in the hearing are located. The Department argues that the hearing simultaneously occurs at each location of the participants.

[5,6] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Haber v. V & R Joint Venture, ante* p. 529, 641 N.W.2d 31 (2002). If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *First Data Corp. v. State, ante* p. 344, 639 N.W.2d 898 (2002). The clear and unambiguous language of § 60-6,205(6)(a) requires that a license revocation hearing be held in the county in which the arrest occurred. Contrary to the Department's arguments, the statute does not allow the hearing to be held concurrently in two or more counties. Therefore, we hold that for purposes of § 60-6,205(6)(a), the hearing is held at the location of the hearing officer.

In *Essman v. Nebraska Law Enforcement Training Ctr.*, 252 Neb. 347, 351, 562 N.W.2d 355, 358 (1997), we were required to interpret the phrase " 'county where the action is taken.' " *Essman* involved an APA appeal of the Nebraska Commission on Law Enforcement and Criminal Justice's action at its meeting in Lancaster County. At this meeting, the commission affirmed the Nebraska Police Standards Advisory Council's decision. The advisory council had previously reached its decision as a result of

an evidentiary hearing in Hall County. We held that "'county where the action is taken'" refers to the site (county) of the first adjudication hearing, rather than the county where the final order is issued. *Id.*

We note that the statute does allow for the parties to agree to hold the hearing in any other county. In that event, we see nothing in the statute which would bar the parties from conducting the hearing in any manner agreed upon, whether it be in person or by electronic means.

The Department argues that video or telephonic hearings are authorized by § 84-913.03 of the APA, which generally permits a hearing to be conducted by telephone, television, or other electronic means. As part of the APA, § 84-913.03 applies to the Department. We agree that § 84-913.03 allows license revocation hearings to be conducted by telephone, television, or other electronic means, and our holding does not prevent the Department from utilizing § 84-913.03. However, if the Department chooses to utilize § 84-913.03, it must still adhere to § 60-6,205(6)(a). That statute, in the absence of an agreement among the parties, requires that the hearing officer be located in the county in which the arrest occurred. Upon meeting that requirement, the Department is free to conduct the hearing via telephone, television, or other electronic means.

The Department also argues that if we determine the appellants' hearings did not take place in the county in which the arrests occurred, as we have above, then the district courts had no jurisdiction over the appeals by the appellants of their license revocations. The Department cites Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1999), which states: "Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken . . . ." The Department claims that the "action" in the present cases are the license revocation hearings. As we have determined the hearings took place at the location of the hearing officers, i.e., Lancaster County, the Department argues that the appeals should have been brought in the district court for Lancaster County. This argument is easily disposed of by citation to Neb. Rev. Stat. § 60-6,208 (Reissue 1998), which allows an individual to appeal his or her license revocation to "the district court of the county where the alleged events

occurred for which he or she was arrested in accordance with the Administrative Procedure Act." The appellants filed appeals from their license revocations in the district courts for the counties in which they were arrested. Thus, the district courts clearly had jurisdiction over the appeals.

CONCLUSION

The clear language of § 60-6,205(6)(a) requires that license revocation hearings be held in the county in which the arrest occurred, unless the parties agree otherwise. For purposes of § 60-6,205(6)(a), we conclude that the hearing is held wherever the hearing officer is located. The appellants' hearings were not held in accordance with the statute because the hearing officers were located in a county other than where the arrests occurred. Therefore, we reverse the decisions of the district courts and remand the causes with directions to remand the appellants' cases to the Department with directions to vacate the orders of revocation.

REVERSED AND REMANDED WITH DIRECTIONS.

VALERIE ANN SPRINGER, APPELLEE, V. TODD BOHLING, APPELLANT.

643 N.W.2d 386

Filed May 3, 2002. No. S-00-918.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, and the trial court's decision will be upheld unless it is based upon reasons that are untenable or if its action is clearly against justice or conscience, reason, and evidence.
2. **Jury Instructions.** Whether the jury instructions given by a trial court are correct is a question of law.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
4. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.
5. **Negligence: Words and Phrases.** Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty which the law imposes upon

persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury.

6. **Motor Vehicles: Highways: Right-of-Way.** Intersection right-of-way is a qualified, not absolute, right to proceed through an intersection, exercising due care, in a lawful manner in preference to another vehicle.
7. ____: ____: ____. A motorist has the duty to look both to the right and to the left and to maintain a proper lookout for the motorist's safety and that of others.
8. **Motor Vehicles: Highways: Right-of-Way: Public Health and Welfare.** One traveling on a favored street protected by stop signs of which one has knowledge may properly assume, until one has notice to the contrary, that motorists about to enter from a nonfavored street will come to a complete stop as near the right-of-way line as possible and yield the right-of-way to any vehicle approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves into or across the intersection.
9. **Motor Vehicles: Negligence.** While one may assume, until having warning, notice, or knowledge to the contrary, that others will use a highway lawfully, one must nonetheless keep a proper lookout and watch where one is driving.
10. **Judges: Motions for New Trial.** A trial judge is accorded significant discretion in granting or denying a motion for new trial.
11. **Judges: Evidence: Witnesses: Verdicts.** The trial judge sees the witnesses, hears the testimony, and has a special perspective on the relationship between the evidence and the verdict, and because of this unique position, the trial judge becomes the primary buffer against verdicts not supported by the evidence.
12. **Trial: Evidence.** The admission of medical bills into evidence without objection does not mean the opposing party has conceded that these costs were necessitated by the accident.
13. **Judgments: Evidence: Damages.** In awarding damages, the fact finder is not required to accept a party's evidence of damages at face value, even though that evidence is not contradicted by evidence adduced by the party against whom the judgment is to be entered.
14. **Juries: Damages: Proximate Cause.** Generally, a jury is entitled to determine what portion of a claimed injury was proximately caused by the incident and what portion of the medical bills was reasonably required.
15. **Juries: Verdicts.** If it appears that the jury has committed a gross error, or has rendered a verdict that is so clearly wrong and unreasonable as to indicate passion, prejudice, or mistake, it is as much the duty of the trial court to interfere, to prevent the wrong, as in any other case.
16. **Damages: Verdicts: Juries: Appeal and Error.** Where the amount of damages allowed by a jury is clearly inadequate under the evidence, it is error for the trial court to refuse to set the verdict aside.
17. **New Trial: Appeal and Error.** An appellate court will not ordinarily disturb a trial court's order granting a new trial and will not disturb it at all unless it clearly appears that no tenable grounds existed therefor.
18. **New Trial: Damages.** When the issue of liability has been determined and there has been error in the determination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages.

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

Joel D. Nelson, of Keating, O'Gara, Davis & Nedved, P.C., L.L.O., for appellant.

Rolf Edward Shasteen for appellee.

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

GERRARD, J.

NATURE OF CASE

This case is before our court for a second time. The appellee, Valerie Ann Springer, was injured when the bicycle she was riding was struck by an automobile driven by the appellant, Todd Bohling. Springer had sued Bohling, but, pursuant to a jury verdict, the district court entered judgment for Bohling based upon Springer's contributory negligence. Springer appealed. See *Springer v. Bohling*, 259 Neb. 71, 607 N.W.2d 836 (2000). This court reversed the judgment and remanded the cause for a new trial. After a second trial, a jury verdict was returned for Springer and both parties filed posttrial motions for new trial. Springer claimed that the damages awarded by the jury were inadequate, while Bohling claimed that the jury should have been instructed on contributory negligence. The district court granted Springer's motion, but denied Bohling's. Bohling appeals the district court's order granting a new trial. For the following reasons, we affirm as modified.

FACTUAL BACKGROUND

The accident in which Springer was injured occurred near the intersection of 14th and Court Streets in Lincoln, Nebraska. This is a T-shaped intersection, such that a vehicle approaching from the east on Court Street must turn either north or south onto 14th Street. Court Street has three lanes at the 14th Street intersection: one lane for vehicles traveling east, one lane for vehicles turning north onto 14th Street, and a left-turn lane for vehicles turning south onto 14th Street. Vehicles already traveling north or south on 14th Street are not required to stop at this

intersection, but there is a stop sign facing traffic approaching from the east on Court Street.

The circumstances of the accident were set forth as follows in our opinion in *Springer*:

> Springer was riding her bicycle home from work at about 5 p.m. on October 15, 1996. Springer rode south on the sidewalk parallel to 14th Street, approaching the intersection of 14th and Court Streets. Springer rode to a private driveway on 14th Street, across from and slightly to the south of Court Street. Springer stopped there and waited for traffic on 14th Street to clear so that she could cross 14th Street and proceed east on Court Street.
>
> As Springer waited, she saw Bohling's vehicle sitting at the stop sign on Court Street in the left-turn lane. The vehicle's left turn signal was on and Bohling was evidently waiting to turn left from Court Street to proceed south on 14th Street. Springer waited between 2 to 5 minutes for traffic to clear on 14th Street.
>
> When the traffic on 14th Street cleared, Springer looked at Bohling's vehicle and confirmed that it was still stationary. Springer then looked across 14th Street where she intended to cross, and rode onto 14th Street. About halfway across the street, Springer looked to her right, and then back to her left toward Bohling's vehicle. Springer did not see the vehicle pull away from the stop sign or begin its turn. When Springer looked back to her left, Bohling's vehicle was already coming toward her. Bohling's vehicle struck Springer, and she was injured. The evidence was undisputed that Bohling never saw Springer prior to impact.

259 Neb. at 72-73, 607 N.W.2d at 837-38.

PROCEDURAL BACKGROUND

At the first trial, the district court entered a verdict for Bohling based upon a finding by the jury that Springer had been contributorily negligent. Springer appealed, assigning that the district court erred in instructing the jury regarding whether Springer failed to yield the right-of-way and that the evidence was insufficient to support the verdict. In support of the second assignment

of error, Springer's argument was essentially that there was no evidence to support a finding of contributory negligence.

We reversed the judgment and remanded the cause for a new trial, determining that

> based upon the evidence presented, it is clear that the duty to yield the right-of-way was not Springer's, but Bohling's. Since there was no evidence sufficient to support a finding that Springer failed to yield the right-of-way, it was error for the trial court to instruct the jury regarding Springer's duty to yield.

Springer v. Bohling, 259 Neb. 71, 76, 607 N.W.2d 836, 840 (2000). Since the cause was to be remanded for a new trial in any event, we specifically declined to address Springer's second assignment of error.

The present appeal is taken from the second trial in the district court. At the second trial, Bohling argued contributory negligence, based upon a theory different from the failure to yield the right-of-way, but the district court declined to give a contributory negligence instruction. The jury returned a verdict for Springer in the amount of $2,908.

Both parties filed motions for new trial. Bohling argued that the jury should have been instructed on contributory negligence. Springer argued that the damages were clearly inadequate. The district court denied Bohling's motion, but granted Springer's. The district court noted that during deliberations, the jury submitted written questions to the court, inquiring about whether Springer's damages had been paid by insurance. The district court also noted that the jury's verdict was at least $2,000 below Springer's stipulated medical expenses resulting from the accident. The district court thus vacated the verdict and restored the case to the active trial docket.

ASSIGNMENTS OF ERROR

Bohling assigns, restated, that the district court erred in (1) failing to give a contributory negligence instruction because Springer was contributorily negligent by (a) failing to maintain a proper lookout and (b) entering a place of peril or danger without due care and (2) sustaining Springer's motion for new trial because the jury's verdict was inadequate.

STANDARD OF REVIEW

[1] A motion for new trial is addressed to the discretion of the trial court, and the trial court's decision will be upheld unless it is based upon reasons that are untenable or if its action is clearly against justice or conscience, reason, and evidence. *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001).

[2,3] Whether the jury instructions given by a trial court are correct is a question of law. See *Russell v. Stricker*, 262 Neb. 853, 635 N.W.2d 734 (2001). When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Smith v. Fire Ins. Exch. of Los Angeles*, 261 Neb. 857, 626 N.W.2d 534 (2001).

ANALYSIS

We initially note that this appeal is presented in a somewhat unusual procedural posture in that Bohling is claiming on the one hand that a new trial should be ordered and claiming on the other hand that the district court erred by ordering a new trial. We view Bohling's arguments as being conditional: Bohling is arguing that a new trial should be ordered at which the jury is instructed on contributory negligence, but if this court should determine that a contributory negligence instruction was properly denied, then the jury's verdict from this trial should be reinstated.

CONTRIBUTORY NEGLIGENCE

[4,5] Bohling argues that the district court should have instructed the jury on contributory negligence. To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Paulk v. Central Lab. Assocs.*, 262 Neb. 838, 636 N.W.2d 170 (2001). Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury. *Corcoran v. Lovercheck*, 256 Neb. 936, 594 N.W.2d 615 (1999). The instruction requested and refused in the instant

case would have instructed the jury that it could find Springer contributorily negligent in "failing to maintain a proper lookout" and in "moving suddenly from a place of safety to a place of peril or danger."

[6-9] Intersection right-of-way is a qualified, not absolute, right to proceed through an intersection, exercising due care, in a lawful manner in preference to another vehicle. *Dolberg v. Paltani*, 250 Neb. 297, 549 N.W.2d 635 (1996). A motorist has the duty to look both to the right and to the left and to maintain a proper lookout for the motorist's safety and that of others. *Corcoran, supra.* One traveling on a favored street protected by stop signs of which one has knowledge may properly assume, until one has notice to the contrary, that motorists about to enter from a nonfavored street will come to a complete stop as near the right-of-way line as possible and yield the right-of-way to any vehicle approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves into or across the intersection. *Id.* However, while one may assume, until having warning, notice, or knowledge to the contrary, that others will use a highway lawfully, one must nonetheless keep a proper lookout and watch where one is driving. See *Dolberg, supra.* The foregoing principles apply to bicyclists as well as drivers of motor vehicles. See *Springer v. Bohling*, 259 Neb. 71, 607 N.W.2d 836 (2000).

Given the facts established at trial, there was no evidence from which the jury could have determined that Springer failed to keep a proper lookout. We have previously explained what is meant by a driver's duty to keep a proper lookout:

> "[T]he driver of an automobile is legally and mandatorily obligated to keep such a lookout that he can see what is plainly visible before him and to operate his automobile in such a manner that he can stop it and avoid a collision with any object in front of him."

Vilas v. Steavenson, 242 Neb. 801, 807, 496 N.W.2d 543, 548 (1993).

The evidence in this case established that Springer saw Bohling's vehicle stopped at a stop sign and that Springer had the right-of-way. Springer kept a proper lookout and saw Bohling's vehicle. Springer's uncontested testimony established

that before proceeding into the intersection, Springer waited for traffic to clear and looked left, right, and ahead. It would, in fact, be inconsistent with Springer's duty to keep a proper lookout if that duty was construed to have required Springer to maintain her observation of Bohling at the expense of looking in other directions for other possible hazards. At an unobstructed intersection, Springer, having the right-of-way, had the right to assume that her right-of-way would be respected unless it would have appeared to an ordinarily careful and prudent person that to proceed would probably result in a collision. See *Muirhead v. Gunst*, 204 Neb. 1, 281 N.W.2d 207 (1979).

Bohling cites this court to the proposition that "a motorist's failure to look, when looking would have been effective in avoiding a collision, is negligence as a matter of law." *Krul v. Harless*, 222 Neb. 313, 322, 383 N.W.2d 744, 750 (1986). However, that rule is applicable to situations where another vehicle is indisputably located in a favored position or a driver charged with negligence as a matter of law has executed a dangerous driving maneuver which, in part, led to a collision. *Id.* To the extent those conditions exist in the instant case, they are present in Bohling's admitted negligence and cannot be used to establish any negligence on the part of Springer.

Bohling also argues that Springer was negligent in moving suddenly from a place of safety to a place of peril or danger. We have stated: " 'When one, being in a place of safety, sees and is aware of the approach of a moving vehicle in close proximity to him, suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence . . . .' " *Bixby v. Ayers*, 139 Neb. 652, 665, 298 N.W. 533, 540 (1941). It is evident that this proposition does not apply to the instant case. The undisputed facts established that Bohling's vehicle was stopped and was thus not "approaching" when Springer entered the intersection. In fact, this was the deciding factor of our decision in *Springer, supra*. Springer could not have moved " 'into the path' " of a stationary vehicle.

We confronted an argument similar to Bohling's in *Dolberg v. Paltani*, 250 Neb. 297, 549 N.W.2d 635 (1996). In that case, the trial court instructed the jury on the defendant's theory that the

plaintiff had been contributorily negligent in failing to anticipate that the defendant would run a red light. We held that

> absent exceptional circumstances, a motorist on a favored street with a green light does not have the duty to anticipate the negligence of a motorist on a cross street who runs a red light. By exceptional circumstances, we mean where the driver could have easily avoided the accident by exercising the slightest degree of care. As no such extreme circumstances were present in this case, there was not sufficient evidence to support the court's submission of the issue of contributory negligence to the jury.

Id. at 304, 549 N.W.2d at 639.

Similarly, under the evidence in this case as reflected by the record, there was no factual issue presented as to whether Springer should have realized that Bohling was not going to yield the right-of-way. Bohling's proposed jury instruction was not warranted by the evidence. The district court did not err in refusing Bohling's contributory negligence instruction.

Insufficient Damages

[10,11] Bohling argues that the district court abused its discretion in determining that the damages of $2,908 were inadequate. In resolving that issue, we begin our analysis by observing that a trial judge is accorded significant discretion in granting or denying a motion for new trial. See *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001). The trial judge sees the witnesses, hears the testimony, and has a special perspective on the relationship between the evidence and the verdict, and because of this unique position, we recognize that the trial judge becomes the primary buffer against verdicts not supported by the evidence. See *id.*

The evidence presented at trial, as briefly summarized, established that Springer required transportation by ambulance after the accident, which cost $358.10, and radiology and emergency room care, which cost $601.72. Springer required immediate surgery after the accident to insert a metal plate, seven screws, and three pins to repair a bimalleolar ankle fracture. This surgery, and inpatient hospital care, cost $3,846.

Springer also testified to the pain and fear she felt after the accident. Springer spent 3 days in the hospital after the first

surgery, spent 6 weeks on crutches, and spent 8 weeks on pain medication. Springer later required another surgery to remove the pins from her ankle. The record contains medical bills, admitted by stipulation, that total $6,115.72.

The district court, in its written order, clearly articulated its reasoning for granting Springer's motion for new trial. In addition to citing the above uncontroverted evidence, the court stated:

> This court found, as a matter of law, that the plaintiff was not negligent and that the sole cause of the accident and the injuries sustained by the plaintiff was the negligence of the defendant; the jury was instructed accordingly. The jury returned a verdict of $2,908.00. During deliberations, the jury submitted a written question(s) to the court, primarily inquiring about whether the plaintiff's medical expenses had been paid by insurance. After conferring with counsel, it was agreed that the court would inform the jury in writing that insurance should not be considered.
>
> It is clear, under all the circumstances, that the verdict is inadequate.

The district court also noted in its order that the parties stipulated prior to the first trial in this case that Springer's medical expenses were fair and reasonable, necessary, and a result of the accident. However, for some reason not apparent from the record, that stipulation was not communicated to the jury via jury instructions or in any other manner. Nonetheless, there was no evidence presented at the second trial to contest Springer's testimony regarding her damages or to suggest that Springer's medical expenses were in any way unreasonable, unnecessary, or not a result of the October 15, 1996, accident.

[12] The trial court accurately noted that the admission of medical bills into evidence without objection does not mean the opposing party has conceded that these costs were necessitated by the accident. See *Jones v. Meyer*, 256 Neb. 947, 594 N.W.2d 610 (1999). However, in *Jones*, the trial court stated that there was conflicting evidence as to whether all of the plaintiff's medical bills were occasioned by the accident. In addition, in *Jones*, there were several significant breaks in the treatment by a chiropractor, whose bill was approximately 93 percent of the total medical expenses; there was also evidence concerning a preexisting

condition. This court observed in *Jones, supra*, that the medical bills incurred immediately following the accident, mainly the emergency room and radiology expenses, were less than the verdict. Therefore, we determined that the jury could have reasonably concluded the evidence did not support the finding that all of Jones' chiropractic expenses were a result of the accident. *Id.*

In the instant case, however, the trial court noted, and we agree, that the undisputed medical bills incurred *directly after* the accident to repair Springer's fractured ankle exceeded the verdict by nearly $2,000. The court went on to state:

> In addition, it was stipulated by the parties that the plaintiff suffered a nine percent partial disability as a result of the accident. Further, the plaintiff testified without contradiction as to her employment, her rate of pay, and her inability to work from the date of the accident to January 8, 1997, when the medical records shows [sic] she was released to return to work. . . . Clearly the verdict is inadequate and bears no reasonable relationship to the damages that are uncontradicted and those proved.

(Emphasis in original.)

[13,14] In awarding damages, the fact finder is not required to accept a party's evidence of damages at face value, even though that evidence is not contradicted by evidence adduced by the party against whom the judgment is to be entered. *ConAgra, Inc. v. Bartlett Partnership*, 248 Neb. 933, 540 N.W.2d 333 (1995). Generally, a jury is entitled to determine what portion of a claimed injury was proximately caused by the incident and what portion of the medical bills was reasonably required. See *Holden v. Wal-Mart Stores*, 259 Neb. 78, 608 N.W.2d 187 (2000).

[15,16] However, if it appears that the jury has committed a gross error, or has rendered a verdict that is so clearly wrong and unreasonable as to indicate passion, prejudice, or mistake, it is as much the duty of the trial court to interfere, to prevent the wrong, as in any other case. See, *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001); *Reiser v. Coburn*, 255 Neb. 655, 587 N.W.2d 336 (1998). Where the amount of damages allowed by a jury is clearly inadequate under the evidence, it is error for the trial court to refuse to set the verdict aside. *Reiser, supra*; *O'Neil v. Behrendt*, 212 Neb. 372, 322 N.W.2d 790 (1982).

[17] In the present case, there was no evidence to suggest that Springer's medical bills were in any way unfair or unreasonable and the evidence clearly establishes that a minimum of $4,805.82 of medical expenses were a direct result of the emergency care and surgery required immediately after the October 15, 1996, accident. This undisputed sum of special damages is irrespective of any damages for followup medical care (totaling an additional $1,309.90), disability, pain and suffering, and loss of income. An appellate court will not ordinarily disturb a trial court's order granting a new trial and will not disturb it at all unless it clearly appears that no tenable grounds existed therefor. *Holmes, supra.* The record establishes substantial grounds for the district court's determination; the district court did not abuse its discretion in granting Springer a new trial. Bohling's assignment of error is without merit.

[18] Finally, we note that the district court's order granting Springer's motion for new trial was not explicit regarding whether the new trial was to be limited to the issue of damages. When the issue of liability has been determined and there has been error in the determination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages. *Id.*

In *Erftmier v. Eickhoff*, 210 Neb. 726, 316 N.W.2d 754 (1982), *overruled on other grounds, Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986), we addressed a situation similar to the instant case, in which the jury returned a verdict on the plaintiff's second cause of action but awarded $0 in damages. This court affirmed the district court's action in granting the plaintiff's motion for new trial, but modified the order by limiting the new trial to the issue of damages. See *id.* Similarly, in the instant case, the issue of liability has been determined but a new trial is warranted on the issue of damages. Since the district court did not explicitly so provide, we modify the district court's order to limit the new trial of this cause to the issue of Springer's damages.

CONCLUSION

The district court did not err in refusing Bohling's proposed instruction on contributory negligence and did not abuse its discretion in determining that the damages awarded were inadequate. The district court's order granting Springer's motion for

new trial, but denying Bohling's motion for new trial, is affirmed. The district court's order is modified to reflect that the new trial shall be limited to the issue of damages.

AFFIRMED AS MODIFIED.

HENDRY, C.J., and STEPHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
RUSSELL W. HARMS, APPELLANT.
643 N.W.2d 359

Filed May 3, 2002. No. S-00-1157.

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. **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 witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition.
3. **Judgments: Trial: Evidence: Proof: Convictions: Appeal and Error.** In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence in a case tried without a jury. The appellant must show that the trial court made a finding of guilt based exclusively on the erroneously admitted evidence. If there is other sufficient evidence to support the finding of guilt, the conviction will not be reversed.
4. **Verdicts: Insanity: Appeal and Error.** The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support such a finding.
5. **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.
6. **Constitutional Law: Miranda Rights: Appeal and Error.** Requests for counsel, as well as actual silence, constitute silence for purposes of analyzing potential *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986), violations.
7. **Criminal Law: Confessions.** Refusal to give a statement constitutes silence.
8. **Criminal Law: Confessions: Miranda Rights: Impeachment: Mental Competency.** It is not a violation of fundamental fairness for the State to use a defendant's pre-*Miranda* silence as impeachment or as substantive evidence of sanity.

9. **Trial: Testimony: Appeal and Error.** Where an objection has once been made to the admission of testimony and overruled by the court, it is unnecessary to repeat the same objection to further testimony of the same nature by the same witness in order to preserve alleged error in the admission of the testimony to which the objection was made.
10. **Evidence: Waiver: Appeal and Error.** A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection.
11. **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.
12. **Trial: Waiver: Appeal and Error.** One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.
13. **Criminal Law: Miranda Rights: Appeal and Error.** Because the nature of a *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), error is so egregious and so inherently prejudicial, reversal is the norm rather than the exception.
14. ____: ____: ____. *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), and *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986), violations constitute trial error and are subject to a harmless error analysis.
15. **Trial: Evidence: Appeal and Error.** Erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.
16. **Criminal Law: Insanity: Time.** Nebraska follows the *M'Naghten* rule as to the defense of insanity. The test of responsibility for crime is a defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act. For an insanity defense, the insanity must be in existence at the time of the alleged criminal act.
17. **Insanity: Proof.** A defendant who pleads that he or she is not responsible by reason of insanity has the burden to prove the defense by a preponderance of the evidence.
18. **Mental Competency: Proof.** The fact that a defendant has some form of mental illness or defect does not by itself establish insanity.
19. **Homicide: Intent.** The elements of first degree murder are listed in Neb. Rev. Stat. § 28-303 (Reissue 1995), which states that a person commits murder in the first degree if he kills another person purposely and with deliberate and premeditated malice.
20. **Intent: Words and Phrases.** Deliberate means not suddenly, not rashly, and requires that the defendant considered the probable consequences of his or her act before doing the act.
21. **Homicide: Intent: Words and Phrases.** One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification.
22. **Homicide: Intent: Time.** The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed.
23. **Criminal Law: Statutes.** A fundamental principle of statutory construction requires that penal statutes be strictly construed.
24. **Homicide: Statutes.** Nothing in Neb. Rev. Stat. § 28-303 (Reissue 1995) or in the Nebraska Supreme Court's interpretation of § 28-303 requires that a defendant must

rationally consider the probable consequences of his or her actions or rationally determine to kill the victim without legal justification.

Appeal from the District Court for Nemaha County: DANIEL BRYAN, JR., Judge. Affirmed.

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

I. INTRODUCTION

Russell W. Harms was convicted of first degree murder and use of a deadly weapon to commit a felony in connection with the December 10, 1999, death of Tennyson Kelsay. Harms was sentenced to life in prison on the murder charge and not less than nor more than 20 years' imprisonment for use of a weapon. Harms appeals.

II. FACTUAL BACKGROUND

At approximately 12:10 p.m. on December 10, 1999, Harms shot 84-year-old Kelsay 15 times with a .22-caliber semiautomatic rifle in the parking lot of a shopping center in Auburn, Nebraska. Harms was alone in his white pickup truck when he saw Kelsay, a stranger to him, in the parking lot. Harms picked up his rifle, pointed it out the window of his truck, and fired one shot at Kelsay, who was standing 5 to 8 feet away. There was a brief pause in the shooting as Kelsay "recoiled" and then started to fall backward to the ground. As Kelsay was falling, Harms resumed firing his rifle in a rapid succession of shots that continued after Kelsay was on the ground. Kelsay died as a result of the multiple gunshot wounds.

After the shooting, Harms slowly drove a half block to his trailer home, which was located in a trailer park across the highway from the shopping center and visible from the scene of the shooting. At approximately 12:14 p.m. Holly Plager, a dispatcher for the Nemaha County Sheriff's Department, received a 911

emergency dispatch service (911) call from a cellular telephone. The caller identified himself as Russell Harms. Harms asked Plager for his lawyer's telephone number. Plager attempted to keep Harms on the telephone line, but for an unknown reason, the call was soon lost. Plager called Harms back and resumed speaking with him.

Auburn police officers Daniel White and Eric Adams had been called to the shopping center parking lot within minutes of the shooting. Witnesses at the scene described a white pickup truck and provided a license plate number. After Adams radioed in the license plate number, Harms' ownership of the truck was confirmed. The officers could see Harms' trailer from where they stood in the parking lot, so they immediately went to the trailer.

While the officers were in front of Harms' trailer, Plager called White on the radio and notified him that Harms had called 911 and was on the telephone requesting his attorney. White then advised Plager to tell Harms that "Officer Adams and [White] were out front, that we wouldn't hurt him and we would take him up to [the police station] and have contact with his attorney." Plager did so, and Harms again requested to speak with his attorney. White then spoke to Harms utilizing his cruiser's "public address system" in an attempt to get Harms to come out from the trailer. White repeated the assurances to Harms that he would not be hurt and would be taken to see his attorney. At that point, Harms told Plager he would step outside.

Harms stepped outside of the trailer without any weapons, closed the door, and stood on the stairs. White spoke to Harms, reassuring him as he had previously. Adams then told Harms to step away from the trailer and lie down on the asphalt. When Harms did so, White handcuffed him and verbally informed him of his *Miranda* rights. Harms again requested an attorney.

Harms was transferred to the police station. He sat in a chair next to White while the police attempted to contact his attorney. During this time, White advised Harms again of his *Miranda* rights through a written *Miranda* advisement form, which Harms signed. After approximately 1 hour had elapsed, Harms' attorney arrived and spoke to Harms. Harms was then placed in jail.

On February 2, 2000, Harms was charged with first degree murder and use of a deadly weapon to commit a felony. On May

11, Harms gave notice pursuant to Neb. Rev. Stat. § 29-2203 (Reissue 1995) of his intention to rely upon the insanity defense and to plead not responsible by reason of insanity at the time of the offense.

A bench trial was held on August 15 and 16, 2000. At trial, Harms presented the expert testimony of Dr. William Logan, together with Dr. Logan's written psychiatric evaluation of Harms. Dr. Logan discussed Harms' lengthy history of mental illness and, specifically, Harms' condition as a paranoid schizophrenic. Dr. Logan testified that Harms often went to his attorney to discuss his delusional thoughts about "people bothering him" and had previously felt urges to "kill somebody at random." Dr. Logan stated that in the weeks prior to the shooting, Harms had experienced "command voices" telling him to shoot someone. Dr. Logan defined a "command voice" as a "voice that is experienced and instructs you to do something or [is] harassing you to do something." Dr. Logan also described Harms' numerous hospitalizations and difficulties with antipsychotic medication since 1987.

Dr. Logan further testified that Harms was having a psychotic episode at the time of the shooting. According to Dr. Logan, Harms told him during their meeting after Harms was arrested that he "remembered hearing the words 'not a baby' going on in his head" prior to shooting Kelsay. Specifically, Dr. Logan testified:

> And [Harms] said he heard voices that said, "looks like that older fella had enough years under his belt." He said he perceived them— they came from outside of himself. He then grabbed the rifle and shot. And that's what he described having happened right at that period of time.

Dr. Logan stated that he did not know whether Harms was also experiencing command voices on the morning of the shooting in addition to hearing these other voices.

Finally, Dr. Logan testified that Harms had not previously had a specific delusion about Kelsay, but he was "sure that Mr. Kelsay intersected Mr. Harms' delusional system at some point either by the fact that he was at the shopping center and there was some delusion about the shopping center or something about Mr. Kelsay himself intersected his delusion." In Dr.

Logan's opinion, Harms' delusional thinking at the time of the shooting prevented Harms from rationally considering whether the act of shooting Kelsay was right or wrong. On this basis, Dr. Logan concluded that Harms was insane at the time of the shooting.

The State responded by offering the expert testimony of Dr. Sanat Roy, together with Dr. Roy's written evaluation of Harms. Dr. Roy testified that Harms was legally sane at the time of the shooting because he understood the nature of the act he had committed and was able to distinguish right from wrong with respect to the shooting. Dr. Roy stated, "Based on my evaluation with him, certainty [sic] he was responsible for his behavior at the time of his alleged act." Dr. Roy disputed any contention that Harms' thought of " 'this old guy looks like he had a lot of good years' " was a command voice or command hallucination. Dr. Roy stated, "Command hallucination tells you, Roy, go out, kill that man. Kill that man. Kill that man. Roy, this person is holding your soul. If you don't kill him, you'll be dead. Kill him, kill him. That is command hallucination." Dr. Roy testified that individuals experiencing a command hallucination are "so disturbed they cannot function." He concluded that based on his personal meetings with Harms, as well as others' accounts of Harms' actions before, during, and after the shooting, Harms did not behave like a person who was hallucinating or experiencing command voices at the time of the shooting.

The State also presented the testimony of two eyewitnesses who described the shooting and Harms' actions afterward. One witness, Shawn Clark, testified that Harms left the parking lot in his truck at a normal rate of speed and was "[n]ot [in] a real big hurry." The other witness, Kenneth Hatten, testified that Harms did not appear to be in a hurry to leave the area, since he drove away "[s]low, deliberate, like watching."

Plager, the dispatcher, also testified at trial. She described the details of her conversation with Harms after the shooting, including Harms' requests for his attorney. Plager testified that Harms was not excited or agitated when she spoke with him on the telephone and that he was "just kind of okay." She noted that Harms did talk "kind of choppy" and that he sounded as if he were "confused," "distracted," "disoriented," and not focused.

Harms never told Plager during their conversation that he was experiencing command voices or hallucinating.

White and Adams testified at trial. Both officers described their involvement in arresting Harms on the day of the shooting. They discussed Harms' behavior at the time of arrest, including Harms' request for his attorney and the fact that during and after the arrest, Harms did not tell the officers that he was hallucinating or experiencing command voices.

The district court found Harms guilty on both counts and sentenced Harms to life in prison for the murder charge and not less than nor more than 20 years' imprisonment for use of a weapon. Both sentences were to be served consecutively. Harms filed a notice of appeal and a poverty affidavit and was granted leave to proceed in forma pauperis on appeal.

III. ASSIGNMENTS OF ERROR

Harms assigns, rephrased, that the district court erred in (1) admitting and considering evidence of Harms' silence and requests for counsel in violation of the U.S. Supreme Court's decision in *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986); (2) finding that Harms was not insane at the time of the shooting; and (3) improperly interpreting and applying the elements of first degree murder.

IV. STANDARD OF REVIEW

[1] 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. VanAckeren, ante* p. 222, 639 N.W.2d 112 (2002).

[2] 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. Campbell*, 260 Neb. 1021, 620 N.W.2d 750 (2001); *State v. Beyer*, 260 Neb. 670, 619 N.W.2d 213 (2000). 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. *Campbell, supra*; *Beyer, supra.*

[3] In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence in a case tried without a jury. *State v. Lara*, 258 Neb. 996, 607 N.W.2d 487 (2000). The appellant must show that the trial court made a finding of guilt based exclusively on the erroneously admitted evidence. *Id.* If there is other sufficient evidence to support the finding of guilt, the conviction will not be reversed. *Id.*

[4] The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support such a finding. *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989).

V. ANALYSIS

1. JURISDICTION

[5] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001). The State contends that this court lacks jurisdiction because the district court's order granting Harms' request to proceed in forma pauperis does not comply with Neb. Rev. Stat. § 29-2306 (Cum. Supp. 2000). Section 29-2306 states:

> 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. . . . 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.

The State argues that jurisdiction is lacking because the district court judge did not sign the order granting Harms' application to proceed in forma pauperis within 30 days after the entry of Harms' sentence. This argument is without merit. The relevant date under § 29-2306 is the date the defendant files the application to proceed in forma pauperis, not the date on which the court grants the application. The record shows, and the State acknowledges, that Harms timely filed his notice of appeal, application to proceed in forma pauperis, and poverty affidavit within 30 days after the entry of his sentence. Since the district court granted Harms' application to proceed in forma pauperis, the "Supreme Court shall acquire jurisdiction of the case when the notice of appeal is filed with the clerk of the district court." See § 29-2306. We determine that the requirements of § 29-2306 have been satisfied. Accordingly, we determine that we have jurisdiction over Harms' appeal.

2. Constitutional Right to Silence and Counsel

In his first assignment of error, Harms argues that the district court erred in allowing and considering evidence of Harms' silence and his requests for counsel as substantive evidence of his guilt and sanity. He asserts that the State violated the U.S. Supreme Court's rulings in *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), and *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986), by introducing evidence of Harms' silence and requests for counsel as a means to contest his insanity defense. We note that while this court has addressed alleged violations of *Doyle* on several occasions, this case presents the first opportunity for us to consider the *Wainwright* decision, which applied the *Doyle* rule in a case involving an insanity defense.

In *Doyle, supra*, the U.S. Supreme Court held that the State may not "seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings at the time of his arrest." 426 U.S. at 611. The Supreme Court found that a defendant's postarrest, post-*Miranda* silence is "insolubly

ambiguous" as to whether the defendant is guilty or merely exercising his rights in accordance with the implicit assurance in the *Miranda* warnings that "silence will carry no penalty." 426 U.S. at 617-18. The Supreme Court thus determined that the State's use of a defendant's postarrest, post-*Miranda* silence to impeach the defendant would be "fundamentally unfair" and a violation of the Due Process Clause of the 14th Amendment. 426 U.S. at 618.

The Supreme Court extended the due process rationale of *Doyle* in *Wainwright, supra*, a case in which the State introduced a defendant's postarrest, post-*Miranda* silence as substantive evidence of his sanity. At the defendant's jury trial in *Wainwright*, the defendant did not testify; however, police officers involved with the defendant's arrest did testify, at the State's request, about how the defendant "had exercised his right to remain silent and had expressed a desire to consult counsel before answering any questions." 474 U.S. at 287. The State referred to the officers' testimony again in closing arguments to the jury, arguing that the defendant's refusal to answer and his requests for an attorney showed that the defendant was sane.

In analyzing *Wainwright*, the Supreme Court declined to distinguish the case from *Doyle*:

> We find no warrant for the claimed distinction in the reasoning of *Doyle* and of subsequent cases. The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the State gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations.

Wainwright v. Greenfield, 474 U.S. 284, 292, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986). The Court found in *Wainwright*, as it did in *Doyle*, "the problem of fundamental unfairness that flows from the State's breach of its implied assurances." 474 U.S. at 294. In

so finding, the Court confirmed and reiterated its prior holdings in *Jenkins v. Anderson*, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980), and *Fletcher v. Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982), which determined that the State's impeachment use of a defendant's pre-*Miranda* silence, whether prearrest or postarrest, does not violate the 14th Amendment. See *Wainwright, supra.*

[6,7] We also note that requests for counsel, as well as actual silence, constitute "silence" for purposes of analyzing potential *Wainwright* violations. In *Wainwright*, the U.S. Supreme Court stated that "[w]ith respect to post-*Miranda* warnings 'silence,' we point out that silence does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." 474 U.S. at 295 n.13. The Eighth Circuit Court of Appeals has similarly stated that "we must treat a defendant's invocation of his *Miranda* rights not as a statement, but as post-*Miranda* warnings silence." *Fields v. Leapley*, 30 F.3d 986, 990 (8th Cir. 1994). Additionally, this court has found that refusal to give a statement constitutes silence. *State v. Woods*, 249 Neb. 138, 542 N.W.2d 410 (1996). Accordingly, we will consider Harms' requests for counsel, as well as his actual silence, as "silence" for purposes of determining whether a *Wainwright* violation has occurred.

[8] As an initial matter, Harms invites this court to expand the *Doyle* and *Wainwright* protections to bar any use by the State of a defendant's prearrest, pre-*Miranda* silence. We decline to do so. In *State v. Lofquest*, 223 Neb. 87, 388 N.W.2d 115 (1986), this court adopted *Doyle*'s prohibition against use of a defendant's silence during the postarrest, post-*Miranda* time period. Since that time, this court has had additional occasions to consider *Doyle*, and it has not precluded the admissibility of pre-*Miranda* silence. See, e.g., *Woods, supra*; *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998); *State v. Wells*, 229 Neb. 89, 425 N.W.2d 338 (1988); *State v. Lofquest*, 227 Neb. 567, 418 N.W.2d 595 (1988). See, also, *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981). We agree with the U.S. Supreme Court that it is not a violation of fundamental fairness for the State to use a defendant's pre-*Miranda* silence as

impeachment or as substantive evidence of sanity. See, *Wainwright, supra*; *Fletcher, supra*; *Jenkins, supra*; *Thomas v. State of Ind.*, 910 F.2d 1413, 1414 (7th Cir. 1990) (admission of pre-*Miranda* silence and request for counsel as evidence of sanity "raises no problems"). Prior to a defendant's receipt of *Miranda* warnings, there is "no governmental action induc[ing] [the defendant] to remain silent before arrest." *Jenkins*, 447 U.S. at 240. We therefore limit our analysis to evidence elicited by the State at trial referring to Harms' post-*Miranda* silence.

Harms challenges portions of the testimony given by five witnesses at trial: Plager, Dr. Logan, Dr. Roy, White, and Adams. Harms contends that the district court, in admitting this testimony, considered Harms' silence as evidence of *both* his guilt and sanity. The district court's responses to Harms' objections based on *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), however, do not support Harms' contention that such evidence was considered by the court as evidence of his guilt. In response to Harms' first *Doyle* objection, the district court stated:

> Well, I'm going to overrule the objection and enter a finding that I feel that he's waived that particular right based on his affirmative defense presented to the Court at this time period and this is basically now being brought in for a limited purpose. And the limited purpose of the State is bringing this particular point in for the question of his sanity, so overruled on the objection.

Later, in response to another objection by Harms, the district court stated, "[A]s the Court indicated, I'm receiving it for a limited purpose and that's to determine insanity and not to prove his guilt or innocence as regarding that particular right that he has." The record clearly demonstrates that the district court's sole purpose in receiving testimony regarding Harms' silence and requests for counsel was to aid the court in determining whether Harms was sane at the time of the shooting. It was not used as substantive evidence of Harms' guilt. Therefore, the allegation that the district court used Harms' silence as evidence of his guilt is without merit. We thus analyze the testimony of each witness solely to determine whether the district court improperly considered Harms' silence as substantive evidence of his sanity.

(a) Plager

Plager's telephone conversation with Harms took place before Harms was arrested and had received *Miranda* warnings. Therefore, pursuant to *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986), Plager's testimony regarding her conversation with Harms, including Plager's references to Harms' requests for his attorney, was admissible.

(b) Dr. Logan

During recross-examination, defense counsel objected on the basis of *Doyle* to the State's attempt to elicit Dr. Logan's opinion regarding Harms' mental state at the time Harms called the dispatcher and requested his attorney. The district court overruled the objection and allowed Dr. Logan to testify as follows:

> [Prosecution:] When Russell Harms called 911 after the shooting and he returned to his mobile home and asked for his attorney, have you expressed an opinion as to whether he was sane or insane at this time?
>
> . . . .
>
> [Dr. Logan:] In terms of making an opinion determination on his sanity, I don't know how the criteria of nature and quality and lawfulness of his actions would be to call an attorney. I don't know how to answer this. But whether this was a product of his mental illness or not, I did not ask him specifically the reasons for him calling the attorney afterwards, but noted that he often went to his attorney with some of his ideas that people were harassing him and stealing things from his trailer and ideas about the t.v. or they were making comments about his behavior.
>
> Q Doctor, thank you. So the fact that he drives over to his trailer, calls 911 and makes the comment that he makes, is that significant to you or is it not?
>
> A It's significant to me.
>
> Q Does it indicate a period then that he knows what he is doing?
>
> A He certainly knows in the same way that he knew he was shooting a gun at Mr. Kelsay. He knew what he was doing. He certainly knew the number he was dialing. It doesn't tell me that he was thinking rationally about it at

that time or that it was done with any kind of clear recognition of the situation.

Q It doesn't tell you that if he was acting rationally or not because you didn't inquire of that with him, did you?

A I didn't inquire of him about the 911 conversation, but I inquired about the events of that morning. I asked him about—

Q You have said that several times. Please just answer the question. You didn't inquire of him concerning his dialing 911?

A Right. I did not inquire about that call.

The record shows that the subject matter of the State's questions and Dr. Logan's comments did not extend beyond Dr. Logan's interpretation of Harms' telephone call to the dispatcher and Harms' requests for his attorney during the telephone call. Since Harms' requests for his attorney while speaking with the dispatcher clearly occurred in the prearrest, pre-*Miranda* time period, Dr. Logan's statements were admissible. See *Wainwright, supra.*

(c) Dr. Roy

As the State was preparing to call Dr. Roy to testify at trial, defense counsel objected to any questioning of Dr. Roy that would violate *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). The court overruled the objection and permitted Dr. Roy's testimony. Dr. Roy testified regarding Harms' prearrest, pre-*Miranda* call to the dispatcher and his requests for counsel at that time. As previously noted, such testimony was properly admitted under *Wainwright.*

However, Dr. Roy also testified regarding Harms' refusal to speak with police officers after receiving *Miranda* warnings. Dr. Roy stated, "[W]hen he was explained his Miranda rights, he said, 'I'm not going to talk without my lawyer.' " This statement by Dr. Roy commented on Harms' post-*Miranda* silence and was thus inadmissible as evidence of Harms' sanity pursuant to *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986).

In addition, Dr. Roy's written psychiatric evaluation was admitted as an exhibit at trial. The written evaluation stated in part:

> Mr. Harms refused to talk to the police officer without the present [sic] of his lawyer. This also was suggestive that he knew the role of his lawyer and the consequences of the alleged offense. Mr. Harms did understand the nature of what he was doing and he did know the difference between right and wrong with respect to what he was doing.

While these portions of Dr. Roy's evaluation utilized Harms' post-*Miranda* silence as evidence of sanity, counsel did not object to their admission. When the State offered the evaluation as an exhibit, defense counsel stated, "No objection, Judge." As a result, Harms has waived his "right on appeal to assert prejudicial error concerning the evidence received without objection." *State v. Harris, ante* p. 331, 339, 640 N.W.2d 24, 33 (2002).

(d) White

White testified at trial regarding his communications with the dispatcher as he was stationed in front of Harms' trailer. White testified that the dispatcher had advised him that Harms was on the telephone requesting an attorney. As discussed *supra*, these conversations and events occurred pre-*Miranda* and were properly admitted under *Wainwright*.

The State, however, also asked White how Harms had reacted after being arrested and receiving the *Miranda* warnings. The following dialog occurred at trial:

> [Prosecution:] Did [Harms] say anything to you at that time?
>
> [White:] Officer Adams— we did what they call a— like a felony arrest situation. He gave the commands, had him walk out towards him and go down to the asphalt. I came around and handcuffed him and verbally gave him his Miranda rights. And at that time he asked for an attorney.
>
> [Defense counsel]: Your Honor, I'm going to renew my objection again regarding commenting about his right to remain silent and Miranda warnings and him invoking his right to remain silent.
>
> [Court]: All right. Overruled. You may proceed.
>
> [White:] I advised him, verbally advised him of his Miranda rights. He asked for Mr. Cain. I told him we would get Mr. Cain and put him in the cruiser and took him to the law enforcement building.

Q . . . . Now, Mr. Cain, who do you understand that to be?
A That's his attorney or was his attorney. . . .
. . . .
Q So what period of time were you with Russell Harms on the date in question, December 10?
A From the time the arrest was made until he was locked in the jail.
. . . .
Q At any time that you were with him on that date, did Mr. Harms indicate to you that he was hearing any command voices?
A No, sir.
Q Did he indicate to you that he was having any hallucinations of any kind?
A No, sir.

The State's questions to White elicited testimony about Harms' post-*Miranda* requests for his attorney and his failure to speak with police officers regarding his mental state. When the police officers gave Harms his *Miranda* warnings, they gave him an "implicit promise" that his decision to remain silent or request his attorney would not be used to penalize him. See *Wainwright v. Greenfield*, 474 U.S. 284, 292, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986). However, by commenting on this silence at trial, the State "breach[ed] that promise by using silence to overcome [Harm's] plea of insanity." See 474 U.S. at 292. We determine, therefore, that the above portions of White's testimony which discussed Harms' post-*Miranda* silence were inadmissible and error pursuant to *Wainwright*.

(e) Adams

(i) Testimony Regarding 1999 Arrest

Adams' testimony at trial was very similar to White's description of Harms' post-*Miranda* behavior. In its examination of Adams, the State elicited from Adams the fact that Harms, after receiving *Miranda* warnings, requested his attorney and did not mention anything about hearing voices or having hallucinations. However, Harms did not object to Adams' testimony. Although all *Wainwright* errors were properly preserved by Harms in similar testimony by White, such objection

made during White's testimony does not preserve the objection as to Adams' testimony.

[9,10] Where an objection has once been made to the admission of testimony and overruled by the court, it is unnecessary to repeat the same objection to further testimony of the same nature by the same witness in order to preserve alleged error in the admission of the testimony to which the objection was made. *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998). Adams' testimony at trial was of the "same nature" as White's testimony, but Adams was not the "same witness." Thus, it was necessary for Harms to object to any alleged error in Adams' testimony in order to properly preserve it for appeal. See *id.* "A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection." *State v. Harris, ante* p. 331, 339, 640 N.W.2d 24, 33 (2002). Since Harms did not object to Adams' testimony, we determine that Harms has waived the right to assert prejudicial error regarding Adams' testimony on appeal.

(ii) Testimony Regarding 1994 Arrest

Harms also argues that it was a violation of *Wainwright* for the court to admit evidence at trial of Harms' silence following a prior arrest by Adams in 1994. The challenged testimony, which was initiated by Harms' counsel, is as follows:

> [Defense counsel:] When you contacted [Harms] in 1994 regarding the assault, did Mr. Harms indicate to you that he thought he was being falsely arrested?
>
> [Adams:] No, because— can I go on? Our policy is contact, interview, if you believe there's an arrest. He was read his rights and he was not willing to talk to me without the services of an attorney.
>
> Q All right, thank you. No further questions.

Harms' allegation is without merit because defense counsel elicited the response from Adams. While the State, in its direct examination of Adams, initiated the questioning regarding the 1994 arrest of Harms, the State did not inquire into Harms' post-*Miranda* silence at the time of that arrest. The State asked Adams whether Harms' "behavior was different at that time than other times that you have seen him." Adams responded that Harms was

"somewhat upset" and "angry" during the 1994 arrest. Such questioning is permissible under *Wainwright* because it "avoided any mention of the defendant's exercise of his constitutional rights to remain silent and to consult counsel." *Wainwright v. Greenfield*, 474 U.S. 284, 295, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986).

[11,12] 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. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001). Also, one may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001). For the foregoing reasons, we determine that Adams' testimony describing Harms' silence during a 1994 arrest was properly admitted.

3. Harmless Error

[13,14] Having determined that portions of the testimony of Dr. Roy and White were improperly admitted pursuant to *Wainwright*, the issue becomes whether the erroneously admitted evidence is harmless. In this court's prior cases analyzing *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), we have stated that " '[b]ecause the nature of a *Doyle* error is so egregious and so inherently prejudicial, reversal is the norm rather than the exception.' " *State v. Lofquest*, 227 Neb. 567, 571, 418 N.W.2d 595, 597 (1988), quoting *Williams v. Zahradnick*, 632 F.2d 353 (4th Cir. 1980). However, *Doyle* and *Wainwright* violations constitute "trial error" and are subject to a harmless error analysis. *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). See, also, *Lofquest*, 227 Neb. at 570-71, 418 N.W.2d at 597 (applying " ' "harmless beyond a reasonable doubt" standard to *Doyle* violations' ").

[15] Generally, " 'erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.' " *State v. Ildefonso*, 262 Neb. 672, 686, 634 N.W.2d 252, 265 (2001). At Harms' trial, the trier of fact was the district court. In such a context, this court has stated:

> In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not

> reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence in a case tried without a jury. . . . The appellant must show that the trial court made a finding of guilt based exclusively on the erroneously admitted evidence. . . . If there is other sufficient evidence to support the finding of guilt, the conviction will not be reversed.

State v. Lara, 258 Neb. 996, 1002, 607 N.W.2d 487, 491-92 (2000). We examine the evidence and the district court's findings in accordance with these standards. Therefore, the issue is whether the district court resolved the question of Harms' sanity exclusively through the use of the impermissible testimony of Dr. Roy and White. If the record contains other sufficient evidence to support the district court's finding that Harms was sane beyond a reasonable doubt, the conviction will not be reversed. In Nebraska, the test of responsibility for crime is a defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act. *State v. Smith*, 256 Neb. 705, 592 N.W.2d 143 (1999). For an insanity defense, the insanity must be in existence at the time of the alleged criminal act. *Id.*

We begin our analysis by examining those portions of the testimony of Dr. Roy and White that were inadmissible pursuant to *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986). Erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact. *Ildefonso, supra.* Dr. Roy's testimony that "when [Harms] was explained his Miranda rights, he said, 'I'm not going to talk without my lawyer,' " is essentially identical to the statement in Dr. Roy's written evaluation, admitted without objection, that "Mr. Harms refused to talk to the police officer without the present [sic] of his lawyer." Accordingly, we find Dr. Roy's testimony cumulative. Similarly, White's testimony

regarding Harms' post-*Miranda* requests for counsel and failure to mention anything about hearing voices or having hallucinations is repeated without objection in Adams' testimony, which provides virtually the same answers to the same questions posed by the State. Because of this repetition, we also find White's testimony cumulative.

Since the inadmissible portions of the testimony of Dr. Roy and White are cumulative, we must determine next whether " 'other relevant evidence, properly admitted, supports the finding by the trier of fact.' " See *State v. Ildefonso*, 262 Neb. 672, 686, 634 N.W.2d 252, 265 (2001). At trial, the State offered a substantial amount of evidence regarding Harms' sanity. Several individuals testified to Harms' calm demeanor immediately after the shooting. Clark, an eyewitness to the shooting, stated that Harms drove away after the shooting at a normal rate of speed and was "[n]ot [in] a real big hurry." Hatten, another eyewitness, also testified that Harms did not hurry to leave the area after shooting Kelsay, but, rather, drove away "[s]low, deliberate, like watching." Both White and Adams, the police officers, described how Harms behaved calmly, normally, and without agitation at the time of his arrest. Adams specifically noted that Harms' "normal" demeanor on the day of the shooting differed significantly from an angry encounter Adams had had with Harms in 1994. Plager, the dispatcher, discussed how Harms was not excited or agitated when she spoke with him after the shooting, and how he had asked for his attorney without any mention of hallucinations or command voices.

Dr. Roy's statements at trial and in his written evaluation of Harms, excluding inadmissible portions in violation of *Wainwright*, also provided the court with evidence of Harms' sanity at the time of the shooting. Dr. Roy found that Harms' thoughts prior to the shooting, such as " 'this old guy looks like he had a lot of good years,' " were distinguishable from command voices ordering Harms to kill someone. He testified that when he interviewed Harms, Harms denied "any auditory hallucination, delusional thinking, or any paranoia related to" Kelsay because "he has no connection with that man."

Dr. Roy also compared the behavior of someone who was actively hallucinating with Harms' behavior on the day of the

shooting. Dr. Roy testified that an individual in Harms' circumstance who was actively hallucinating or experiencing delusions would have exhibited "bizarre" behavior, such as engaging in a random shooting spree with multiple victims or driving at an extremely high rate of speed, and would have been incapable of acting rationally. Dr. Roy contrasted this scenario with Harms' actions, specifically, Harms' ability to slowly drive to his trailer, pick up the telephone, dial 911, speak with the dispatcher, and ask the dispatcher for his attorney. In sum, Dr. Roy testified that a person who was actively hallucinating could not have behaved the way Harms did after the shooting. Dr. Roy further testified that Harms' call to the dispatcher with a request for his attorney demonstrated that Harms knew that shooting Kelsay was wrong and would subject him to legal proceedings.

In addition, portions of the testimony offered by Dr. Logan, Harms' expert witness, support a finding of sanity. Dr. Logan stated that Harms, in shooting Kelsay, "knew he was firing a gun," "knew he was shooting an elderly gentleman," and was acting with deliberation and premeditation "[t]o the extent that he had to take out a rifle and shoot him numerous times." Dr. Logan also concluded that Harms "knew what he was doing" and "certainly knew the number he was dialing" when he called 911 with a request for his attorney.

The district court in its findings does not refer to Harms' post-*Miranda* silence, either as a basis for its finding of sanity or for any other purpose. The court stated:

> There's two elements in the insanity defense, and one being that defendant had a mental disease, defect, disorder at the time that the act is charged. Again, the State concedes that, at least as to this part of the defense, the defendant has that particular disorder. That would be the schizophrenia of paranoid type.
>
> We get into the next part of that and that is that— and which means not only do you have to prove that the person has that particular disease, but the defense must also show that the mental disease, the paranoid schizophrenia impaired his mental capacity to such an extent that either (1) he did not understand the nature or consequences of what he was doing or (2) that he did not know that— he did not know the

difference between right or wrong with respect to what he was doing.

Now, either one of those has to be proved by the greater weight of the evidence. And if that's the case, the defense has met their burden of proving by preponderance of the evidence that he was insane. Like most of these cases, you have two experts with credentials coming into this room and they both give opposite opinions. And, of course, it has to be confusing to the lay witnesses from the standpoint that how two professionals can come up with two different types of opinion. On the other hand, I think it's pointed out by [defense counsel], his expert relied heavily— remember there was actually— well, they talked about four particular phases which didn't include the interview but they talked about his history prior to the actual incident and then the actions thereafter as part of the mix in making their determination regarding his— the issue of his knowing the nature and consequences of what he was doing or the difference between right and wrong.

Again, I know that Dr. Logan emphasized strongly the historical pattern up to the shooting which would leave a basis for his opinion as to the actual, you know, state of mind of the defendant at the time of the shooting. Now, we know the actions of the defendant at the time based on the evidence that's been submitted. And we don't know what was going on in his mind and that's the problem the Court has. Okay, we've got— somebody's got to make a decision as to what was going on in his mind at the time. We know his actions thereafter and, of course we know the cliches are brought about because they're generally there for all of us to hear, like the cliche actions speak louder than words. What he did do at the time, what he did do thereafter and, of course, [defense counsel] is saying what have we also got in the beginning of this, also to look from the standpoint of his actions, Judge, also to consider it.

There's no question that he did have a history of some delusions. And it seems like the historical pattern— now [defense counsel]'s explaining the reason and maybe given the facts and reason, he didn't— Well, let me go back here.

> The historical pattern seems to suggest that when Mr. Harms had a problem and felt a— whatever he called that, anxiety coming on, he usually was able to control it to some extent and maybe it was his own feeling that the mental professionals had let him down, to not help himself any further, I don't know.
>
> But it seems like from the history that was given, that throughout that history he was constantly telling them that he had these hallucinations or delusions and yet what I note in this particular case is, is that even Dr. Logan testified that there were no command voices that he was given at the time of the incident. And yet he, for whatever reason, he said he didn't know whether— said he believed he was— he said he was guarded. One's left to speculate as to what was going on in his mind. It's odd to me that the person that's been able to talk about all these voices all of a sudden, you know, does not— clams up when it comes to a particular factual pattern that's now very serious now confronting him.
>
> Even after time passes he's not communicating that at least to the satisfaction of the doctor. I know that Dr. Roy on the other hand disregarded the historical context and didn't put as much weight on it and put more weight on the actual incident and he weighed also, I'm sure, his actions thereafter.
>
> To be quite honest with both parties, it's the Court's opinion that both these professionals have left me with a lot more questions than I have answers for. And I guess what I'm saying to the defendant is that I do not believe you met your burden you have of proving yourself insane even by the greater weight of the evidence.

Given the court's findings and the admissible evidence as evaluated in this opinion, we determine that the district court did not resolve the issue of Harms' sanity "based exclusively on the erroneously admitted evidence." See *State v. Lara*, 258 Neb. 996, 1002, 607 N.W.2d 487, 492 (2000). We find that the erroneously admitted testimony of Dr. Roy and White in violation of *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986), is cumulative to other relevant and properly

admitted evidence regarding Harms' sanity. Furthermore, we find that the properly admitted evidence contained in the record is sufficient to support the district court's finding that Harms was not insane at the time of the shooting. For these reasons, we determine that the *Wainwright* errors which occurred at trial were harmless beyond a reasonable doubt.

4. Insanity Defense

[16,17] In his second assignment of error, Harms argues that the district court erroneously concluded that he was not insane at the time of the shooting.

> Nebraska follows the *M'Naghten* rule as to the defense of insanity. The test of responsibility for crime is a defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act. . . . For an insanity defense, the insanity must be in existence at the time of the alleged criminal act.

(Citation omitted.) *State v. Smith*, 256 Neb. 705, 710, 592 N.W.2d 143, 147 (1999). A defendant who pleads that he or she is not responsible by reason of insanity has the burden to prove the defense by a preponderance of the evidence. See § 29-2203.

[18] It is undisputed that Harms is a paranoid schizophrenic with a long history of mental illness, failed medications, and hospitalizations. However, the fact that a defendant has some form of mental illness or defect does not by itself establish insanity. See, *State v. Lesiak*, 234 Neb. 163, 449 N.W.2d 550 (1989); *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983).

As discussed previously, two eyewitnesses, two police officers, and a dispatcher testified at trial regarding their encounters with Harms' calm and normal demeanor after the shooting. Dr. Logan, Harms' expert, and Dr. Roy, the State's expert, presented opposing opinions as to Harms' sanity. Both experts submitted detailed written evaluations of Harms based on their examination of his medical records and their individual meetings with him.

The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support such a finding. *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989). Also, an appellate court does not resolve conflicts in evidence,

pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. *State v. Campbell*, 260 Neb. 1021, 620 N.W.2d 750 (2001). This court will not reevaluate the testimony of Dr. Roy or Dr. Logan, or reweigh such testimony against the testimony of others at trial. We conclude that the issue of sanity was fairly presented to the district court and that the record contains sufficient admissible evidence for the finder of fact to conclude that Harms was not insane at the time of the shooting. See *Ryan, supra.* Harms' second assignment of error is without merit.

5. First Degree Murder

In his final assignment of error, Harms argues that the district court erred in interpreting and applying the elements of first degree murder. In enumerating its findings of fact, the district court stated:

> The Court has reviewed the evidence. And pursuant to the fact-finder's deliberations, normally the first course would be to go through each one of these elements and make sure that the State has presented evidence regarding that. And the first count being that on December 10, 1999, Russell W. Harms in the County of Nemaha and State of Nebraska, did then and there kill Tennyson E. Kelsay purposely and with deliberate and premeditated malice. Those are the separate elements. There's been no dispute regarding those facts except in the case of Dr. Logan's testimony earlier that, well, deliberation, premeditation, he may have had; but it was not rational.
>
> Deliberation is defined under our law and that is not suddenly or rationally [sic] but after first considering the probable consequences. . . .
>
> . . . I don't think that Nebraska law says that your deliberate premeditation has to be rational. I'm not quite sure that's a relative term. If there's any way you're going to define it, that's probably back in the affirmative defense of insanity.

[19] The elements of first degree murder are listed in Neb. Rev. Stat. § 28-303 (Reissue 1995), which states, "A person commits murder in the first degree if he kills another person (1)

purposely and with deliberate and premeditated malice . . . ." Accord *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001). Relying on *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990), *disapproved on other grounds, State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991), Harms argues that Nebraska law requires the trier of fact to find that a defendant's deliberation and premeditation were rational. He asserts:

> The lesson of *Reynolds* is that the State bears the burden of proving first degree murder and its essential elements of rational, intentional consideration of the probable consequences. The trial court never considered the possibility that the State had not proven these elements beyond a reasonable doubt. The evidence at trial is to the effect that Mr. Harms lacked the rational, intentional consideration of the probable consequences to meet the elements of first degree murder.

Brief for appellant at 48.

Based on this argument that "rational" intent is a required element of first degree murder, Harms argues that the district court erred in impermissibly placing the burden of proving "rational" premeditation and deliberation on him as part of his insanity defense. He further maintains that since the State did not prove that his premeditation and deliberation were rational, there was insufficient evidence to convict him of first degree murder and use of a deadly weapon to commit a felony.

[20-22] This court has determined that "deliberate" means not suddenly, not rashly, and requires that the defendant considered the probable consequences of his or her act before doing the act. See *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996). We have also determined that one kills with "premeditated malice" if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification. *Id.* The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed. *Id.*

[23,24] A fundamental principle of statutory construction requires that penal statutes be strictly construed. *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001). We find nothing in

§ 28-303 or in this court's interpretation of § 28-303 which requires that a defendant must *rationally* consider the probable consequences of his or her actions or *rationally* determine to kill the victim without legal justification. See, e.g., *McLemore, supra*; *McBride, supra*; *Reynolds, supra*. Therefore, in stating its findings, the district court did not err in determining that "rational" was not a required element of "premeditation" or "deliberation." As a result, we also find that the district court did not impermissibly shift the burden of proof to Harms or err in finding that there was sufficient evidence to convict Harms of first degree murder and use of a deadly weapon to commit a felony. We determine that this assignment of error is without merit.

VI. CONCLUSION

For the foregoing reasons, Harms' convictions are affirmed.

AFFIRMED.

GREG HENRIKSEN, APPELLEE, V. JIM GLEASON, DOING BUSINESS AS JIM'S BODY SHOP, APPELLANT.

643 N.W.2d 652

Filed May 10, 2002. No. S-00-1233.

1. **Judgments: Collateral Estoppel: Res Judicata.** The applicability of the doctrines of collateral estoppel and res judicata is a question of law.
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. ____: ____. In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. The appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
4. **Collateral Estoppel: Jurisdiction.** Collateral estoppel should not apply when a new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them.
5. **Judgments.** It is inappropriate to give any issue preclusive effect to any small claims court judgment in a later proceeding brought in county or district court.
6. **Parties: Standing: Appeal and Error.** Only a person aggrieved or injured by a judgment may take an appeal from it.

7. **Actions: Contracts: Torts: Pleadings.** To determine whether an action is based on a contract or a tort, a court must examine and construe a petition's essential and factual allegations by which the plaintiff requests relief, rather than the legal terminology utilized in the petition or the form of a pleading.
8. **Actions: Breach of Contract: Torts: Words and Phrases.** Contract actions, which arise from a breach of a duty imposed on one by an agreement, protect a plaintiff's interest in or right to performance of another's promises, whereas tort actions, which arise from a breach of a duty imposed by law, protect a plaintiff's interest or right to be free from another's conduct which causes damage or loss to the plaintiff's person or property.
9. **Breach of Contract: Pleadings: Proof.** In order to recover in an action for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that activate the defendant's duty.
10. **Breach of Contract: Proof.** In order to prove a breach of a service contract, the plaintiff must show that the defendant failed to exercise the skill and knowledge normally possessed by members of that trade in good standing in similar communities.
11. **Appeal and Error.** A claimed prejudicial error must not only be assigned, but must also be discussed in the brief of the asserting party, and an appellate court will not consider assignments of error which are not discussed in the brief.

Appeal from the District Court for Nance County, MICHAEL OWENS, Judge, on appeal thereto from the County Court for Nance County, CURTIS H. EVANS, Judge. Judgment of District Court affirmed.

John Morgan, of Morgan & Morgan, for appellant.

Steffi A. Swanson, P.C., L.L.O., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

In this breach of contract action, Jim Gleason, doing business as Jim's Body Shop (Gleason), appeals from a decision of the district court for Nance County affirming the decision of the county court for Nance County. The county court found Gleason "negligent" and awarded damages to Greg Henriksen. Gleason contends that because of a prior action between Gleason and Henriksen in Nance County Small Claims Court, the instant action is barred by the doctrine of res judicata.

BACKGROUND

Henriksen is the sole proprietor of a construction business in Eagle, Nebraska. As part of his business, Henriksen constructs buildings for a business known as Battery Patrol and its franchises and also installs fascia panel systems on Battery Patrol's stores.

In the fall of 1998, Henriksen contracted to install fascia panel systems on two of Battery Patrol's stores: one located in Ames, Iowa, and the other in Des Moines, Iowa. Henriksen contacted Gleason about painting 22 panels, and Gleason agreed to paint the panels. Henriksen delivered the panels to Gleason in early November, as well as primer, cleaner, paint, and other materials needed to complete the task.

Sometime in mid-November, Gleason completed the 8 panels to be used for the Ames store. Henriksen notified Gleason that he would pick up the panels on a Friday. On that Friday, Gleason waited for Henriksen to arrive for some time after closing hours. When Henriksen did not appear, Gleason left the panels outside his shop to allow Henriksen to pick them up. Henriksen arrived the following morning, at which time he noticed that leaves were stuck to some of the panels, leaving an imprint on the panels. Henriksen loaded the panels on his trailer for transport, separating them with cardboard and cloth. As they loaded the panels, Gleason advised Henriksen that his method of transport was not appropriate. The painting had only been completed in the last 24 hours, and the paint had not had a sufficient amount of time to cure.

When unloading the panels in Ames, Henriksen noticed that the cardboard used as a divider between the panels had stuck to the paint. The effects of the cardboard and the leaves left the panels with indentations, a dull finish, and a "fish scale look." Henriksen incurred expenses of $632 to repair the damage caused by the leaves and the cardboard.

One week later, the remaining panels for the Des Moines store were completed. After the panels were installed, Henriksen noticed that some of the panels were discolored and varied in darkness. The manager of the Des Moines Battery Patrol store complained to Henriksen about the inconsistency, and the manager agreed to accept a 25-percent discount off Henriksen's total bid price of $12,420.

On January 20, 1999, Gleason filed a claim against Henriksen in the small claims court for Nance County. Gleason's claim alleged that on November 28, 1998, at "[p]laintiff's place of business, work was completed for the Defendant and payment was never received by the Plaintiff." Gleason sought damages in the amount of $867.70. Henriksen was properly served with notice of Gleason's claim. Henriksen failed to appear in the small claims court, and a default judgment was entered against Henriksen on March 19, 1999. Henriksen subsequently satisfied the judgment.

On June 7, 1999, Henriksen initiated the present action in Nance County Court. Henriksen alleged in his petition, inter alia, that the parties entered into a verbal agreement in which Gleason agreed to paint numerous panels for Henriksen. Henriksen further alleged that as a result of Gleason's "negligence" and failure to properly paint the panels, Henriksen suffered damages. A bench trial was held, and the county court entered its findings on March 14, 2000.

Regarding the panels for the Ames store, the county court found that Gleason was negligent in leaving the panels outside overnight and allowing the leaves to attach to the panels. The court also found that Henriksen was negligent in improperly transporting the panels. The court was unable to apportion damages to the parties' respective acts of negligence and therefore awarded no damages for those panels.

Regarding the panels for the Des Moines store, the county court found that Gleason was negligent in failing to match different batches of paint provided by Henriksen and also in applying the paint in an uneven manner. The court awarded damages to Henriksen in the amount of $3,486, the difference between Henriksen's bid price of $12,420 and the amount he was actually paid by Battery Patrol, $8,934.

The county court also overruled Gleason's motion to dismiss, finding that Henriksen's action was not barred by res judicata. Gleason had argued at trial that res judicata barred the action because of the prior action in small claims court.

After the county court entered its order in this action, Gleason appealed to the district court for Nance County. The district court affirmed the judgment of the county court. The court found that

Neb. Rev. Stat. § 25-814 (Reissue 1995) did not require Henriksen to plead a counterclaim in the small claims court and that Henriksen was not precluded from filing a subsequent action against Gleason based on any possible counterclaim. Gleason appealed from the district court's order, and we moved the case to our docket.

ASSIGNMENTS OF ERROR

Gleason assigns six errors which can be consolidated into the following four: (1) The district court erred in finding that res judicata did not bar Henriksen's action, (2) the district court erred in affirming the county court's finding that Gleason was "negligent" in leaving the panels for the Ames store outside overnight and allowing the leaves to imprint on the panels, (3) the district court erred in affirming the county court's findings that Gleason was "negligent" in painting the panels for the Des Moines store, and (4) the district court erred in affirming the county court's finding that Henriksen offered sufficient proof of damages.

STANDARD OF REVIEW

[1,2] The applicability of the doctrines of collateral estoppel and res judicata is a question of law. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

[3] In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. The appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Folgers Architects v. Kerns*, 262 Neb. 530, 633 N.W.2d 114 (2001); *Phipps v. Skyview Farms*, 259 Neb. 492, 610 N.W.2d 723 (2000).

ANALYSIS

Res Judicata and Collateral Estoppel

[4] We have previously recognized that collateral estoppel should not apply when a new determination of the issue is warranted by differences in the quality or extensiveness of the

procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them. *Flobert Industries v. Stuhr*, 216 Neb. 389, 343 N.W.2d 917 (1984), citing Restatement (Second) of Judgments § 28(3) (1982).

As the Restatement further explained:

> [T]here may be compelling reasons why preclusion should not apply. For example, the procedures available in the first court may have been tailored to the prompt, inexpensive determination of small claims and thus may be wholly inappropriate to the determination of the same issues when presented in the context of a much larger claim.

Restatement, *supra*, comment *d.* at 279.

[5] Small claims courts in Nebraska are governed by Neb. Rev. Stat. ch. 25, art. 28 (Reissue 1995, Cum. Supp. 2000 & Supp. 2001). Proceedings in small claims courts are conducted on a very informal basis, with a minimum of procedural requirements. *Harris v. Eberhardt*, 215 Neb. 240, 338 N.W.2d 53 (1983). For example, the jurisdiction of small claims court is currently limited to those cases where the amount in controversy does not exceed $2,400, § 25-2802(4); parties are not represented by counsel, § 25-2803; matters are tried without a jury, § 25-2805; few formal pleadings are required, § 25-2806; and the formal rules of evidence do not apply, *id.* The setting in small claims court affords parties the opportunity to obtain a prompt and just determination in an action involving small amounts while expending a minimum amount of resources. This setting is vastly different from the relatively more complex and time-consuming litigation that occurs in county or district courts. Given these procedural differences, we believe it is inappropriate to give any issue preclusive effect to any small claims court judgment in a later proceeding brought in county or district court. For that reason, the county court was not barred from litigating the issue of Gleason's performance under the contract.

GLEASON'S "NEGLIGENCE"

[6] In his second assignment of error, Gleason asserts that the district court erred in affirming the county court's finding that he was "negligent." The negligence consisted of Gleason's leaving the panels for the Ames store outside overnight and allowing the

leaves to imprint on the panels. However, the county court also found that Henriksen was "negligent" in transporting the panels. Being unable to apportion the respective acts of negligence by each party, the county court did not award damages for those panels. Thus, Gleason was not aggrieved by this portion of the county court's findings. Only a person aggrieved or injured by a judgment may take an appeal from it. *In re Interest of Alycia P.*, 258 Neb. 258, 603 N.W.2d 7 (1999). This assignment of error is without merit.

In his third assignment of error, Gleason argues that the district court erred in affirming the county court's finding that he was "negligent" in painting the panels for the Des Moines store. Henriksen's petition had alleged that the parties entered into a verbal agreement, but also alleged that Henriksen suffered damages because of Gleason's "negligence." The county court's order also referred to various acts of Gleason as acts of "negligence." Now on appeal, Gleason has repeatedly and inaccurately characterized the present action as a negligence action grounded in tort law.

[7] Although the dividing line between breaches of contracts and torts is often dim and uncertain, it has been said that the character of an action as one in tort or on contract is determined by the nature of the grievance, not by the form of the pleadings, with consideration being given to the facts which constitute the cause of action. *L. J. Vontz Constr. Co. v. State*, 230 Neb. 377, 432 N.W.2d 7 (1988). To determine whether an action is based on a contract or a tort, a court must examine and construe a petition's essential and factual allegations by which the plaintiff requests relief, rather than the legal terminology utilized in the petition or the form of a pleading. *Id.*

[8] Contract actions, which arise from a breach of a duty imposed on one by an agreement, protect a plaintiff's interest in or right to performance of another's promises, whereas tort actions, which arise from a breach of a duty imposed by law, protect a plaintiff's interest or right to be free from another's conduct which causes damage or loss to the plaintiff's person or property. *Id.*

No duty was imposed upon Gleason by law, but, rather, was imposed upon him by an agreement he made with Henriksen

whereby Gleason agreed to paint a number of panels for Henriksen. The nature of Henriksen's grievance by which he requests relief is clearly one based on a contract. Thus, we interpret the county court's decision as one finding that Gleason breached the contact, and we consider whether the county court erred in doing so.

[9,10] In order to recover in an action for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that activate the defendant's duty. *Phipps v. Skyview Farms*, 259 Neb. 492, 610 N.W.2d 723 (2000). In order to prove a breach of a service contract, the plaintiff must show that the defendant failed to exercise the skill and knowledge normally possessed by members of that trade in good standing in similar communities. See, *Schwarz v. Platte Valley Exterminating*, 258 Neb. 841, 606 N.W.2d 85 (2000); *Doupnik v. Usher Pest Control Co.*, 217 Neb. 1, 346 N.W.2d 699 (1984).

Henriksen offered the testimony of his brother Brian Henriksen, an employee at a paint store whose job duties included mixing paint. Brian had 15 years of experience in painting cars and motorcycles. Brian testified regarding the recommended procedures to paint panels such as the ones Gleason painted. He testified as to the recommended mill thickness of paint, the method of measuring the thickness on panels such as these, and the recommended drying time and environment for each coat of paint. Brian further testified that the discoloration of the panels for the Des Moines store could have been caused by incomplete coverage or inconsistencies in the method of spraying the paint.

In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. The appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.

Given Brian's testimony, we agree with the district court and conclude that the county court was not clearly erroneous in entering judgment for Henriksen. This assignment of error is without merit.

PROOF OF DAMAGES

[11] Gleason also assigns that the district court erred in awarding Henriksen damages because there was not sufficient proof to allow such an award. However, Gleason fails to argue this assignment of error in his brief. A claimed prejudicial error must not only be assigned, but must also be discussed in the brief of the asserting party, and an appellate court will not consider assignments of error which are not discussed in the brief. *Kirchner v. Wilson*, 262 Neb. 607, 634 N.W.2d 760 (2001).

CONCLUSION

We conclude that given the differences in the procedures followed by small claims courts and county courts, no issue preclusive effect should be given to the small claims court's judgment in Gleason's favor. The district court did not err in finding that the county court could litigate the issue of Gleason's performance under the contract. For the reasons stated above, Gleason's remaining assignments of error are likewise without merit. Accordingly, we affirm.

AFFIRMED.

HONGNING FU, APPELLANT AND CROSS-APPELLEE, V. STATE OF NEBRASKA, STATE OF NEBRASKA BOARD OF REGENTS, UNIVERSITY OF NEBRASKA, DOING BUSINESS AS UNIVERSITY OF NEBRASKA MEDICAL CENTER, APPELLEE AND CROSS-APPELLANT.

643 N.W.2d 659

Filed May 17, 2002. No. S-01-037.

1. **Judgments: Appeal and Error.** 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. **Tort Claims Act: Appeal and Error.** In actions brought pursuant to the State Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.

3. **Negligence.** The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff. If there is no legal duty, there is no actionable negligence.
4. ____. Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
5. ____. In determining whether a legal duty exists, an appellate court employs a risk-utility test, considering (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution.
6. **Tort Claims Act: Proof.** In order to recover in a negligence action brought pursuant to the State Tort Claims Act, the plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.
7. **Negligence.** Foreseeability, in the context of a legal duty, is a question of law.
8. **Negligence: Proximate Cause.** Foreseeability in the context of proximate cause is a question of fact.
9. **Negligence: Proximate Cause: Words and Phrases.** Proximate cause is a cause that (1) produces a result in a natural and continuous sequence and (2) without which the result would not have occurred.
10. **Negligence: Proximate Cause.** Foreseeability in the context of proximate cause relates to the question of whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff reasonably flowed from the defendant's breach of duty.
11. **Judgments: Appeal and Error.** In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. An appellate court will not reweigh the testimony or reevaluate the credibility of the witnesses, but it will review the evidence to determine whether the trial court made findings which are clearly wrong.
12. **Negligence.** The standard of care generally requires one to act as a reasonable person of ordinary prudence would have done in the same or similar circumstances.
13. ____. Determining the standard of care to be applied in a particular case is a question of law, and the duty of care does not exist in the abstract, but must be measured against a particular set of facts and circumstances.

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

Steven H. Howard, of Law Offices of Ronald J. Palagi, P.C., for appellant.

David D. Ernst and Lisa M. Meyer, of Gaines, Pansing & Hogan, for appellee.

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

HENDRY, C.J.

INTRODUCTION

Hongning Fu, a former graduate student at the University of Nebraska Medical Center College of Pharmacy (UNMC), brought suit against UNMC pursuant to the State Tort Claims Act seeking to recover for injuries he sustained in a laboratory explosion. The court found in favor of UNMC. In its order, the court concluded that although Fu's dissertation chairperson, Jonathan Vennerstrom, Ph.D., was negligent in failing to monitor Fu more closely, Vennerstrom's negligence was not a proximate cause of the explosion which injured Fu. Fu appealed, and UNMC cross-appealed. 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).

FACTUAL BACKGROUND

In 1981, Fu received a bachelor's degree in pharmaceutical studies from the West China University of Medical Sciences. In 1984, Fu was awarded a master's degree in medical pharmaceutical sciences from Shandong Medical University in China and thereafter worked as an organic chemistry instructor at the Shandong University Department of Pharmacy from 1984 to 1990. In 1990, Fu was admitted as a graduate student at UNMC.

Vennerstrom, an associate professor at UNMC since 1987, was Fu's advisor and the chairperson of Fu's doctoral dissertation committee. Vennerstrom's main area of research was focused upon the creation of a synthetic antimalarial drug and involved experiments with chemical compounds known as tetraoxanes. While serving as Fu's chairperson, Vennerstrom prepared a grant proposal for the World Health Organization (WHO) involving his antimalarial research. Fu was identified in the WHO grant proposal as a student researcher working under Vennerstrom.

In order to be admitted as a doctoral student in the College of Pharmacy, one must prepare a dissertation proposal which sets out the intended area of research he or she will pursue. Fu's dissertation topic was related to the WHO grant and dealt with the "Activity Relationship of 1,2,4,5-Tetraoxanes." Fu's written dissertation proposal set out intended experiments with both "bridged" and "unbridged" tetraoxanes. Bridged tetraoxanes are

unstable and more likely to explode than unbridged tetraoxanes. Vennerstrom's tetraoxane research, in association with the WHO grant, and Fu's dissertation proposal both involved the use of concentrated hydrogen peroxide (peroxide). Concentrated peroxide can explode if not handled properly.

Fu studied at UNMC from 1990 to 1993. His studies included both classwork and laboratory work related to his dissertation and the WHO grant. As part of his laboratory work, Fu kept notebooks in which he recorded the experiments performed, the procedures utilized, and the experiment results. Fu completed three notebooks and was working in a fourth when the explosion occurred. All of the experiments undertaken by Fu related to creating unbridged tetraoxanes, except for four experiments recorded in the fourth notebook between May 28 and June 11, 1993. These four experiments were labeled "HF-4-13," "HF-4-18," "HF-4-20," and "HF-4-21." Fu began HF-4-13 on May 28. The experiment which caused the explosion was HF-4-21. Fu began HF-4-21 on June 11, and it exploded that same day.

According to Fu, HF-4-13, HF-4-18, HF-4-20, and HF-4-21 were attempts to create bridged tetraoxanes and were a component of Fu's area of research. Fu asserted that Vennerstrom designed all the experiments contained in the four notebooks and directed Fu to perform them.

At trial, Fu contended that Vennerstrom directed Fu to perform HF-4-21 as part of the WHO grant, without providing Fu with adequate supervision, protective safety gear, or information or warning that HF-4-21 could result in an explosive compound. Fu also asserted that he had no knowledge that HF-4-21 had been previously attempted by other researchers or that HF-4-21 could result in an explosive substance. Fu further claimed that he was not wearing gloves when the explosion occurred on June 11, 1993, because there were no gloves in the laboratory.

Fu testified that while in China, he had never worked with high concentrations of peroxide or conducted experiments involving tetraoxanes. Fu explained that his dissertation proposal was undertaken in conjunction with the WHO grant and that HF-4-21 was part of Vennerstrom's research for the WHO grant. Fu testified that no one besides himself wrote in his four laboratory notebooks or performed the experiments recorded.

Fu stated that when he began his studies with Vennerstrom, Vennerstrom gave him a large quantity of articles and other information to read regarding Vennerstrom's tetraoxane research. However, Fu asserted that Vennerstrom had never given him exhibit 17, a German article specifically describing HF-4-21. This article states that HF-4-21 produces an explosive triperoxide. Fu stated he had never seen exhibit 17 until he brought suit against UNMC, when Vennerstrom produced the article in response to a discovery request. Fu also stated he could not read German. Fu explained that if he had read the German article, he would have asked Vennerstrom why he was directing him to do such a dangerous experiment. Fu also testified that two previous experiments in the course of his work for Vennerstrom, involving unbridged tetraoxanes and recorded in laboratory notebooks one and three, had resulted in explosions.

On cross-examination, Fu agreed that he was able to translate German with the help of a dictionary and did some German translation work for Vennerstrom. However, Fu maintained that Vennerstrom never gave him the German article. He agreed that HF-4-21 was "probably" what caused the explosion, but stated that he did not know himself which experiment exploded. Fu explained that his intention in performing HF-4-21 was to synthesize a bridged tetraoxane in conjunction with the WHO grant and that he did not know that HF-4-21 would produce an explosive compound. Fu also agreed that Vennerstrom gave him information on the type of protective gear to wear when working with concentrated peroxide. He further testified, however, that such gear was not always available in the laboratory.

Vennerstrom's testimony, for the most part, presents a completely different version of the facts. Vennerstrom testified that he gave Fu a large amount of written material concerning Vennerstrom's work with tetraoxanes when Fu began his studies and that he expected Fu to read all this material. Included in this material was the German article on HF-4-21 (exhibit 17). Vennerstrom further testified that although experiments involving bridged tetraoxanes were included in Fu's dissertation proposal, it was later agreed that Fu's experiments would involve only unbridged tetraoxanes.

Vennerstrom went on to explain that the decision to exclude bridged tetraoxanes from Fu's work was based on the fact that Vennerstrom had already completed sufficient experiments on bridged tetraoxanes for purposes of his research for the WHO grant proposal. Vennerstrom testified he discussed this with Fu and that they agreed that Fu's dissertation would therefore involve only unbridged tetraoxanes.

Notwithstanding this agreement, Vennerstrom testified that in mid-May 1993, Fu requested permission from Vennerstrom to attempt some bridged tetraoxane experiments. Vennerstrom explained he instructed Fu not to undertake any such experiments. During the 2-week period preceding the explosion on June 11, Fu continued to seek authorization from Vennerstrom to conduct such experiments, and Vennerstrom continued to direct him not to attempt them.

Vennerstrom's office was located across the hall from the laboratory where Fu performed his experiments. Vennerstrom testified that he typically spoke with Fu two to three times a week about his work and periodically checked the experiments and results recorded in Fu's notebooks. Vennerstrom did not check Fu's notebooks between May 28, 1993, and the time of the explosion. Vennerstrom testified he had no knowledge that Fu began doing experiments on May 28 in which he attempted to create bridged tetraoxanes. Vennerstrom acknowledged that he knew Fu was working in the laboratory during this time period, but stated that he had no knowledge of Fu's specific experiments other than the fact that Fu was "generally working in the area of chemistry."

According to Vennerstrom, HF-4-21 was an unauthorized experiment which Fu undertook without Vennerstrom's knowledge. Vennerstrom stated that he believed and trusted that Fu would accept his directions and not conduct experiments related to bridged tetraoxanes and that he had no reason to believe Fu would attempt HF-4-21.

Regarding the circumstances surrounding the accident, the evidence showed that Fu began working on HF-4-21 on June 11, 1993. This reaction involved mixing 70 percent peroxide with dichloromethane, methanesulfonic acid, and acetonylacetone.

There was further evidence that after combining the above ingredients, Fu carried HF-4-21 in a glass beaker to an adjoining laboratory to use the "roto-vapper." Another student working in the adjoining laboratory, Sudha Vippagunta, testified that Fu used the "roto-vapper" to evaporate the liquid in the beaker, resulting in a substance that was thick and looked somewhat like a "cotton ball." According to Vippagunta, Fu seemed surprised by the result, showing the beaker to Vippagunta while stirring it with a glass rod. Vippagunta testified that the only protective gear Fu was wearing at the time was a pair of gloves.

Shortly thereafter, Fu returned to his laboratory with the beaker, and within 2 or 3 minutes, the explosion occurred. At the time of the explosion, Fu was wearing glasses and a face shield, but no gloves.

Several people arrived soon after the explosion. First was William Elmquist, Ph.D., who was on the same floor and heard a loud bang. He wrapped Fu's left hand, which was bleeding, in a laboratory coat. Vennerstrom arrived next. Shortly thereafter, John Hauser, who was the director of safety for UNMC, and James Rhone, who was the director of the hazardous materials program for the University of Nebraska, also arrived. Emergency personnel were called, and Fu was taken to the hospital. As a result of the injuries sustained in the explosion, Fu's left ring finger and half of his left middle finger were amputated. The tip of his left little finger was also damaged.

After Fu was taken to the hospital, Hauser, Rhone, and Vennerstrom examined the laboratory and discovered Fu's notebook, opened to HF-4-21. Vennerstrom looked at the notebook and, according to the testimony of Rhone and Hauser, expressed surprise that Fu was working on this experiment.

Two expert witnesses testified on behalf of Fu: Kevin Woller, Ph.D., and Jeffrey Aube, Ph.D. Woller testified that although a portion of his graduate studies in chemistry involved working with peroxides, he had never himself worked with tetraoxanes. He agreed that it was "lore" among chemistry students, professors, and researchers that peroxides can be dangerous, stating that "[w]henever I had mentioned I was doing peroxide chemistry, they've asked if I had all ten fingers."

Woller testified that in his opinion, HF-4-13, HF-4-18, HF-4-20, and HF-4-21 were all experiments within the scope of Fu's dissertation proposal and the WHO grant. He based this opinion upon his belief that all four experiments were intended to produce a bridged tetraoxane. However, Woller also testified that there were differences between HF-4-21 and the three previous experiments. He testified that the "first three [experiments] are the same reaction. The last one [HF-4-21] is different." In comparing the chemical composition of the experiments, Woller stated, "HF-4-21 is just a straight chain aliphatic diketone, whereas the previous three, all being the same, involve a cyclic diketone." Woller also testified that while the reaction involved in HF-4-13, HF-4-18, and HF-4-20 was listed in Fu's dissertation proposal and the WHO grant, the reaction involved in HF-4-21 was "not specifically described" in either Fu's dissertation proposal or the WHO grant proposal.

Finally, Woller acknowledged that the literature regarding the reaction involved in HF-4-21 showed that the resulting compound was either a "triperoxide" or "polymeric peroxide" and that HF-4-21 had never produced a bridged tetraoxane. Woller stated during cross-examination:

> [Defense counsel:] You think HF-4-21 in theory could make a bridged tetraoxane, instead of one of these [other two compounds]?
>
> [Woller:] That's right.
>
> Q. It's never been done, has it?
>
> A. It has never been done.
>
> Q. You've never tried it?
>
> A. I certainly haven't tried it.
>
> Q. You wouldn't try it, would you?
>
> A. I don't have any plans to try it, no.
>
> Q. It would be a dangerous experiment, wouldn't it?
>
> A. It would be, but a lot of experiments are dangerous.

Woller further stated that during his research regarding HF-4-21, he found exhibit 17 (the German article) within a half hour to an hour. Woller also testified that had Fu researched HF-4-21, Woller would have expected Fu to realize that HF-4-21 would produce a "shock-sensitive compound." Finally, Woller agreed that it was a "bad idea" for Fu to walk around with a

compound containing acetonylacetone and peroxide and that graduate students generally are expected to do their own independent research on the experiments they perform.

Aube, Fu's other expert, was a professor of medicinal chemistry. Aube had never worked directly with peroxides or tetraoxanes. He testified that in his opinion, most of the experiments conducted by Fu for Vennerstrom throughout Fu's studies were inherently unsafe because of the "scale" or amount of material being used. Aube testified that when working with inherently dangerous compounds, the smallest amount of material necessary should be used because the amount of material affects the severity of any possible explosion. He opined that 20 grams of peroxide, as was used in HF-4-21, was an unsafe quantity of material. He also opined that HF-4-21 was "within the scope" of Fu's dissertation and the WHO grant because he believed HF-4-21 was intended to produce a bridged tetraoxane.

On cross-examination, Aube agreed that it was "lore" in the chemistry field that peroxides are dangerous. He testified that he would expect someone in Fu's position to know that HF-4-21 could be unstable and that a good chemist would find the relevant articles dealing with the experiments being attempted. He also agreed with Woller that the reaction involved in HF-4-21 was not listed in either Fu's dissertation proposal or in the WHO grant proposal, in that neither document contained a "recipe or formula or specific description of [HF-]4-21." Finally, he described Fu's actions in walking around with the HF-4-21 compound and stirring it with a glass rod as "dangerous" and "possibly" reckless.

In its defense, UNMC presented testimony from various witnesses, including, inter alia, Edward Clennan, Ph.D.; Rhone; James Wood, Ph.D.; and Hauser. Clennan, a chemist and "worldwide" lecturer on peroxides, opined that there was no relationship between Fu's dissertation proposal, the WHO grant, and HF-4-21 for two reasons. First, Clennan testified that the German article made it clear that HF-4-21 would not produce a bridged tetraoxane, but a triperoxide. Second, the ratio of the chemical ingredients in HF-4-21 could not possibly result in the formation of a bridged tetraoxane. Therefore, Clennan opined that HF-4-21 was clearly outside the scope of Fu's dissertation and the WHO grant.

Clennan also opined that the scale of Fu's experiments throughout the four notebooks was safe. He testified that although the scale of some of the experiments was "fairly large," the scale was "quite" appropriate in the context of the methodology employed. Clennan explained that the general pattern followed by Fu was to initially run the experiment on a small scale and then run it again on a larger scale. He agreed that HF-4-21 was not initially attempted on a small scale, but stated this was a mistake on Fu's part. He also agreed that the more concentrated the peroxide, the more likely it is to explode, and that it was "lore" in the chemistry field that concentrated peroxide was dangerous to work with without proper safety precautions. Finally, Clennan testified that Fu should not have picked up the beaker containing HF-4-21.

Rhone testified that he held a bachelor's degree in chemistry and a master's degree in organic chemistry. Rhone opined that HF-4-21 was outside the scope of Vennerstrom's research and that Vennerstrom would never authorize a student to undertake HF-4-21 because it was dangerous. Rhone stated that when Vennerstrom saw the notebook, Vennerstrom seemed surprised that Fu was conducting this type of experiment. Rhone also testified regarding the manner in which graduate students are expected to conduct themselves, stating "the student should leave no stones unturned to read up on the chemicals that he's mixing, that he's working with."

Wood, a member of Fu's dissertation committee, testified that concentrated peroxide, whether at 50 percent strength or higher, was a dangerous substance. He further testified that graduate students do not typically run all of the experiments set out in a dissertation proposal, as the proposals often evolve and change over the course of a student's studies.

Finally, Hauser testified that there had been no safety violations or reported explosions in Vennerstrom's laboratory prior to the explosion in this case. He also testified that when he, Vennerstrom, and Rhone found the notebook opened to HF-4-21 on June 11, 1993, Vennerstrom indicated that Fu was not supposed to be working on this type of experiment.

On November 30, 2000, the trial court issued a written order finding in favor of UNMC. In its order, the trial court made

findings that generally adopted Vennerstrom's version of the facts surrounding the explosion and rejected Fu's. The court found that although Vennerstrom was negligent in "failing to monitor Plaintiff's activities more closely," such negligence was not a proximate cause of Fu's injuries. The court specifically found in its order that although "[t]he experiment was part of Plaintiff's dissertation . . . Dr. Vennerstrom would not have been able to foresee Plaintiff conducting this experiment in the manner in which it was performed, and, therefore, could not foresee the risk of injury." (Emphasis in original.) The court went on to find:

> Did Dr. Vennerstrom direct the Plaintiff to perform the experiment? The Court believes not. . . .
>
> . . . .
>
> . . . [E]ven if Dr. Vennerstrom had done a better job of monitoring Plaintiff, Dr. Vennerstrom would not have known what experiment Plaintiff was performing on June 13 [sic], 1993 unless Dr. Vennerstrom's monitoring schedule happened to have coincided with the date of the explosion, or unless he checked on Plaintiff everyday [sic], which is clearly not the norm for students of Plaintiff's knowledge and history.
>
> . . . .
>
> . . . Would the explosion have occurred had Dr. Vennerstrom done a better job of monitoring his student? Plaintiff did not advise his supervisor he was conducting this experiment and even had Dr. Vennerstrom checked Plaintiff's workbook 2 days prior to the explosion, rather than 2 weeks, Dr. Vennerstrom would not have been able to foresee Plaintiff conducting this experiment in the manner in which it was performed, and, therefore, could not foresee the risk of injury.

The court made additional findings concluding that Fu should have known HF-4-21 was dangerous, that Vennerstrom had given Fu the German article stating that HF-4-21 produced an explosive triperoxide, and that Fu had been told by Vennerstrom not to do the experiment.

Finally, the court found that Fu's actions in walking around with HF-4-21 and stirring it with a glass rod were "hazardous and reckless," noting:

> Plaintiff was clearly not a freshman chemistry student, but a [graduate student] working towards his doctorate, and, at this point in time, had over 10 years of research experience. Plaintiff's supervisor did not have a duty to watch every move Plaintiff made in the lab. . . . Plaintiff made a mistake in judgment and this Court finds that this mistake in judgment was not limited to Plaintiff's failure to wear the proper gloves, but to the entire span of Plaintiff's activities on June 13 [sic], 1993. . . .
>
> The Court, therefore, finds that that [sic] the risk was not foreseeable by the Defendants and that the proximate cause of Plaintiff's damage was Plaintiff's negligence.

ASSIGNMENTS OF ERROR

Fu asserts, rephrased, summarized, and renumbered, that the trial court erred in (1) finding that Vennerstrom's negligent supervision of Fu was not a proximate cause of the explosion, (2) finding that Vennerstrom did not instruct Fu to conduct HF-4-21, (3) making other factual determinations which are clearly wrong, (4) finding that Fu was aware of the dangers associated with the experiments he conducted, (5) holding Fu to the same standard of care as Vennerstrom in finding Fu negligent, and (6) finding that Fu assumed the risk involved in conducting HF-4-21.

CROSS-APPEAL

UNMC asserts in its cross-appeal, rephrased, that the trial court erred in finding (1) Vennerstrom had a legal duty toward Fu with regard to the explosion caused by HF-4-21 and (2) Vennerstrom breached a legal duty in failing to monitor Fu's activities more closely.

STANDARD OF REVIEW

[1] When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, 628 N.W.2d 697 (2001); *Claypool v. Hibberd*, 261 Neb. 818, 626 N.W.2d 539 (2001).

[2] In actions brought pursuant to the State Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when

determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence. See, *Cerny, supra*; *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000).

ANALYSIS

Legal Duty

[3,4] The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff. *Claypool, supra.* If there is no legal duty, there is no actionable negligence. *Id.* We therefore determine at the outset to address UNMC's first assignment of error in its cross-appeal, in which UNMC contends the trial court erred in finding that UNMC owed a legal duty to Fu regarding the explosion, for if there is no legal duty, there can be no actionable negligence. See *id.* Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Id.*

[5] In determining whether a legal duty exists, this court employs a risk-utility test, considering (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution. *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000). We have further stated:

> " 'Foreseeability as it impacts duty determinations refers to " 'the knowledge of the risk of injury to be apprehended. The risk reasonably to be perceived defines the duty to be obeyed; it is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account in determining the existence of the duty to exercise care.' " . . .' "
>
> . . . .
>
> . . . "[T]he law does not require precision in foreseeing the exact hazard or consequence which happens; it is sufficient if what occurs is one of the kinds of consequences which might reasonably be foreseen."

Id. at 179, 181, 615 N.W.2d at 900-01 (quoting *Knoll v. Board of Regents*, 258 Neb. 1, 601 N.W.2d 757 (1999)).

The evidence in this case shows that explosions are a foreseeable risk in the context of a chemistry student's graduate research involving concentrated peroxide. Regarding the relationship of the parties, instructors generally have a legal duty to supervise students in a nonnegligent manner. See, *Norman, supra*; *Johnson v. School Dist. of Millard*, 253 Neb. 634, 573 N.W.2d 116 (1998); *Brahatcek v. Millard School District*, 202 Neb. 86, 273 N.W.2d 680 (1979). This duty is illustrated in the present case from the evidence that when Fu began his work, Vennerstrom gave Fu materials about tetraoxane research and the safety precautions Fu should take when conducting experiments. Vennerstrom also monitored Fu's work regularly. We determine that UNMC owed a legal duty to Fu and, accordingly, turn to the errors raised on appeal by Fu.

PROXIMATE CAUSE

[6,7] In his first assignment of error, Fu asserts the trial court erred in finding that Vennerstrom's negligent supervision of Fu was not a proximate cause of the explosion. In order to recover in a negligence action brought pursuant to the State Tort Claims Act, the plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages. See *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, 628 N.W.2d 697 (2001). Foreseeability, in the context of a legal duty, is a question of law. *Sharkey, supra*. See, also, *Cerny, supra*. Fu, however, raises no error with regard to the trial court's finding that Vennerstrom owed a legal duty to Fu or that Vennerstrom breached that legal duty. Instead, Fu challenges the trial court's factual finding that there was no causation in that Vennerstrom's negligence was not a proximate cause of the explosion.

[8] Foreseeability in the context of proximate cause is a question of fact. *Sharkey, supra*. In actions brought pursuant to the State Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. Every controverted fact

must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence. See, *Cerny, supra*; *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000).

[9] The question at issue in evaluating Fu's first assignment of error is whether the trial court was clearly wrong in finding that Vennerstrom's negligent supervision was not a proximate cause of Fu's injuries. See *Johnson, supra*. Proximate cause is a cause that (1) produces a result in a natural and continuous sequence and (2) without which the result would not have occurred. *Norman, supra*. The general test of causation is whether, after the occurrence, the injury appears to be the reasonable and probable consequence of the defendant's negligent acts or omissions. *Brown v. Social Settlement Assn.*, 259 Neb. 390, 610 N.W.2d 9 (2000). Fu argues in his brief that the trial court's finding that the explosion was not foreseeable is clearly wrong because "Dr. Vennerstrom knew or should have known it was possible (even likely) that Mr. Fu was performing experiments he had supposedly been told not to conduct." Brief for appellant at 26.

[10] Foreseeability in the context of proximate cause relates to the question of whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff reasonably flowed from the defendant's breach of duty. *Knoll v. Board of Regents*, 258 Neb. 1, 601 N.W.2d 757 (1999).

The trial court in its order stated:

> [E]ven if Dr. Vennerstrom had done a better job of monitoring Plaintiff, Dr. Vennerstrom would not have known what experiment Plaintiff was performing on June 13 [sic], 1993 unless Dr. Vennerstrom's monitoring schedule happened to have coincided with the date of the explosion, or unless he checked on Plaintiff everyday [sic], which is clearly not the norm for students of Plaintiff's knowledge and history.
>
> . . . .
>
> . . . [T]here must be a legal duty on the part of the Defendant to protect the Plaintiff from injury, a failure to discharge that duty, and damage proximately caused by the failure to discharge that duty. As Plaintiff has argued, the

> Defendant had a duty to protect the [Plaintiff] from injury. Was the risk of injury foreseeable and did the Defendant fail to see the risk, thereby failing to discharge its duty?
>
> . . . [E]ven had Dr. Vennerstrom checked Plaintiff's workbook 2 days prior to the explosion, rather than 2 weeks, Dr. Vennerstrom would not have been able to foresee Plaintiff conducting this experiment in the manner in which it was performed . . . .
>
> . . . .
>
> . . . by carrying this unstable solution in a hazardous and reckless manner [and] disregarding all safety procedures, precautionary measures and warnings.

The trial court's conclusion that the explosion was not foreseeable was based on two factual findings. The first was its finding that Vennerstrom "would not have known what experiment Plaintiff was performing on June 13 [sic], 1993 unless Dr. Vennerstrom's monitoring schedule happened to have coincided with the date of the explosion, or unless he checked on Plaintiff everyday [sic], which is clearly not the norm for students of Plaintiff's knowledge and history."

The record is undisputed that Vennerstrom had not checked Fu's notebook from May 28 to June 10, 1993. The issue presented is whether the record supports the trial court's finding that even had Vennerstrom checked Fu's notebook at any time between May 28 and June 10 and observed that Fu was performing HF-4-13, HF-4-18, or HF-4-20, Vennerstrom would not have foreseen Fu attempting HF-4-21 on June 11.

We find that the record supports such finding, given the dissimilarities between the experiments. Woller, one of Fu's experts, acknowledged that HF-4-21 was "different" from the prior three experiments. He testified that the three earlier experiments all involved the same reaction, essentially mixing concentrated peroxide and ketone. In contrast, HF-4-21 involved mixing concentrated peroxide with a different ingredient, acetonylacetone. Woller also testified that the reaction involved in the three earlier experiments was listed in the WHO grant. However, as Woller acknowledged, the WHO grant, in conjunction with which Fu was supposedly conducting HF-4-21, contained no reaction involving concentrated peroxide and acetonylacetone. Furthermore, Woller

acknowledged that while the reaction involved in the three earlier experiments was intended to produce a bridged tetraoxane, HF-4-21 had never produced a bridged tetraoxane. Aube agreed with Woller that HF-4-21 involved the mixture of concentrated peroxide with acetonylacetone, a reaction not described in the WHO grant. Clennan, UNMC's expert, testified that while the reaction involved in HF-4-13, HF-4-18, and HF-4-20 was an attempt to create a bridged tetraoxane, HF-4-21 was not. According to Clennan, HF-4-21 would produce a triperoxide, not a bridged tetraoxane.

The second factual finding made by the trial court was that Vennerstrom could not have foreseen Fu's "conducting this experiment in the manner in which it was performed . . . by carrying this unstable solution in a hazardous and reckless manner, disregarding all safety procedures, precautionary measures and warnings." Again, we find the record supports such finding.

With respect to the manner in which Fu conducted HF-4-21, Woller, Aube, and Rhone testified that a graduate student should research an experiment before attempting it. Woller also testified that proper research would have informed Fu that HF-4-21 would produce an explosive compound. Woller, Aube, and Clennan all agreed that it was a mistake for Fu to carry the mixture and stir it. Aube, Fu's own expert, agreed that Fu's actions in conducting HF-4-21 could be considered dangerous and possibly reckless.

The trial court found that Vennerstrom's negligence was not a proximate cause of the explosion. In considering the evidence in the light most favorable to UNMC and giving to UNMC the benefit of every reasonable inference that can be deduced from the evidence, we cannot conclude that the trial court's factual finding on the issue of proximate cause was clearly wrong. See *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000). Fu's first assignment of error is without merit.

Remaining Assignments of Error

[11] In his second assignment of error, Fu argues the court erred in finding that Vennerstrom did not direct Fu to conduct HF-4-21.

> In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. . . . This court will not reweigh the testimony or reevaluate the credibility of the witnesses, but it will review the evidence to determine whether the trial court made findings which are clearly wrong.

Johnson v. School Dist. of Millard, 253 Neb. 634, 637, 573 N.W.2d 116, 119 (1998).

At trial, Vennerstrom testified that he did not direct Fu to conduct HF-4-21. Rhone and Hauser testified that when they discovered Fu's notebook after the explosion, Vennerstrom expressed surprise that Fu was attempting HF-4-21. While Fu's testimony on this issue directly contradicted Vennerstrom's, questions regarding credibility are solely the province of the trier of fact. See *Johnson, supra*. Based on our review of the record, the trial court's finding that Vennerstrom did not instruct Fu to do HF-4-21 is not clearly wrong.

In his third assignment of error, Fu asserts the trial court "made several factual determinations regarding Mr. Fu's past training and experience that are clearly wrong." Brief for appellant at 35. Fu first asserts that the court erroneously found Fu had been a medical doctor in China. Although the order does state that "[i]n his Application to Graduate College (Exhibit #117), Plaintiff stated he had a medical degree," the trial court's order does not contain a finding that Fu was a medical doctor in China, nor does the order refer to Fu as a medical doctor or physician. Also, as noted in the factual background, Fu does have a medical degree in pharmaceutical sciences. This contention by Fu is without merit.

Fu also contends that the trial court erred in finding Fu had extensive experience with peroxides. Fu cites in his brief to pages 16 and 17 of the trial court's order for this alleged error, but the court makes no such finding on those pages or elsewhere in the order. On page 17 of the order, the court noted, "[Fu] also stated that he never worked with high concentrations of peroxide in China, nor did he ever do unbridged or bridged tetraoxides [sic] in China." Fu's assertion that the court found Fu had extensive experience with peroxides is without merit.

Fu also asserts that the trial court erred in finding Fu's experiment was flawed because of the concentration of the peroxide when, according to Fu, the flaw was the scale or quantity of the chemicals used. The trial court's order reads:

> Dr. Woller stated that if Plaintiff had done the experiment correctly rather than adjusting the variables, the experiment would have been safe, even with a higher percent peroxide. . . .
>
> Professor Aube believed that Plaintiff was conducting his experiments on too large a scale. Dr. Wood stated that 50% peroxide was very high and dangerous, and Dr. Clennon [sic] testified that the chance of a bigger explosion was greater the higher the peroxide used.

The trial court's order lists several factors which contributed to the dangerousness of HF-4-21. The trial court's order shows that the court considered the variables in the experiment, the scale of the experiment, and the concentration of the peroxide in assessing the dangerousness of the experiment. The court's basis for finding that HF-4-21 was a flawed experiment was not clearly wrong.

In his fourth assignment of error, Fu contends the trial court erred in finding that Fu was aware of the dangers associated with the experiments he conducted. The trial court's order states, "[Fu] claims to have had other explosions . . . . The Plaintiff, therefore, knew of the danger involved in his work, yet paraded around the lab with a shock sensitive substance." As indicated in the above-quoted language from the trial court's order, the court found that Fu was aware of the risks of his work based on Fu's testimony that he had run two previous experiments which resulted in explosions prior to June 11, 1993. There is also evidence from Woller, Aube, and Clennan that experiments involving peroxides are, as a matter of "lore," known to be dangerous in the field of chemistry. Finally, the trial court found that Fu had been given the German article discussing the explosive triperoxide produced by HF-4-21. Based on the record, we cannot say that the trial court's finding that Fu was aware of the dangers associated with the experiments he conducted was clearly wrong.

[12] In his fifth assignment of error, Fu asserts that the trial court erred by holding Fu to the same standard of care as Vennerstrom in finding Fu negligent. The standard of care generally requires one to act as a reasonable person of ordinary prudence would have done in the same or similar circumstances. *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, 628 N.W.2d 697 (2001). In *Cerny*, we noted:

> This basic standard, however, is not invariably applied in all negligence cases. For example, the standard is modified in circumstances in which the alleged tort-feasor possesses special knowledge, skill, training, or experience pertaining to the conduct in question that is superior to that of the ordinary person. Such a person is not held to the standard of a reasonably prudent person, but, rather, to a standard consistent with his or her specialized knowledge, skill, and other qualities.

(Citations omitted.) 262 Neb. at 73, 628 N.W.2d at 704.

[13] Determining the standard of care to be applied in a particular case is a question of law, and the duty of care does "not exist in the abstract, but must be measured against a particular set of facts and circumstances." *Id.* at 74, 628 N.W.2d at 704. Therefore, the standard of care applicable to Fu is that of a reasonably prudent graduate student with Fu's level of education and experience. The trial court in its order evaluated Fu's conduct based on the standard of care expected of a graduate student "working toward his doctorate . . . [with] over 10 years of research experience." Accordingly, we determine the trial court applied the proper standard of care to Fu. This assignment of error is without merit.

In his final assignment of error, Fu asserts the court erred in finding Fu assumed the risk involved in conducting HF-4-21. However, a review of the trial court's order does not reveal any finding that Fu assumed the risk of conducting HF-4-21. Instead, the order finds that Vennerstrom's negligence was not a proximate cause of the explosion, and as a result, UNMC was not liable for Fu's injuries. Any finding on the issue of assumption of risk would have been unnecessary in light of the trial court's determination that Fu had failed to show that his injuries

were proximately caused by UNMC. This assignment of error is similarly without merit.

Because this court determines that Fu's assignments of error are without merit, it is not necessary to reach UNMC's second assignment of error in its cross-appeal.

CONCLUSION

The decision of the trial court finding in favor of UNMC is affirmed.

AFFIRMED.

STEPHAN, J., not participating.

KELLY MACKE, APPELLEE, V.
EDDIE PIERCE, APPELLANT.
643 N.W.2d 673

Filed May 17, 2002. No. S-01-207.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **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. ____: ____. Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
4. **Motions for New Trial.** A motion for new trial pursuant to Neb. Rev. Stat. § 25-1144.01 (Cum. Supp. 2000) must be filed within 10 days after an entry of judgment, as defined in Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2000).
5. **Motions for New Trial: Final Orders.** A motion for new trial directed to a nonfinal order is a nullity, as is any ruling on such a motion.
6. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a valid final order entered by the court from which the appeal is taken.
7. ____: ____: ____. In the absence of a judgment or a valid order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal.

Appeal from the District Court for Box Butte County: BRIAN SILVERMAN, Judge. Order vacated, appeal dismissed, and cause remanded for further proceedings.

William R. Settles, of Lamson, Dugan & Murray, L.L.P., for appellant.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellee.

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

GERRARD, J.

NATURE OF CASE

Kelly Macke sued Dr. Eddie Pierce, alleging that Pierce tortiously interfered with a business expectancy when Pierce informed Macke's prospective employer, Burlington Northern Railroad Company, of findings Pierce made during a physical examination of Macke. After a jury verdict in favor of Pierce, Macke filed a motion for new trial, which was sustained by the district court. Pierce appealed. Because Macke's motion for new trial was premature, we dismiss this appeal for lack of jurisdiction.

PROCEDURAL BACKGROUND

DISTRICT COURT PROCEEDINGS

Macke filed the petition in the instant case on February 25, 1999, alleging that Pierce tortiously interfered with a business expectancy, because Pierce's communication with Burlington Northern Railroad Company resulted in the disapproval of Macke's application for employment. The matter proceeded to jury trial, and the jury returned a verdict in favor of Pierce. Macke filed a motion for new trial, which the district court granted on the basis that the evidence was insufficient to sustain the verdict.

Both the bill of exceptions and the district court docket sheet, present in the transcript, show that the jury reached a verdict in favor of Pierce on August 9, 2000. The district court accepted the verdict and entered a "finding" for Pierce in open court on that date, as reflected in the bill of exceptions and on the court's docket sheet. The docket sheet is not file stamped, and no file-stamped judgment of dismissal, pursuant to the jury verdict, appears in the record.

On August 11, 2000, Macke filed a motion for new trial. The matter came on for hearing on September 26, and on January 26, 2001, the district court sustained the motion for new trial. Pierce filed a notice of appeal on February 16.

APPELLATE COURT PROCEEDINGS

On March 16, 2001, before this appeal was moved to our docket, the Nebraska Court of Appeals issued an order to show cause why the appeal should not be dismissed for lack of jurisdiction, based on the absence from the record of a file-stamped judgment of dismissal pursuant to the jury verdict. In response, Pierce filed a praecipe for a supplemental transcript. On March 28, Pierce also filed a written response to the show cause order, in which he stated that he had contacted the clerk of the district court and had been informed that no district court order entering judgment on the jury's verdict existed. The supplemental transcript was filed on March 29; the filings contained in the supplemental transcript, however, all relate to Macke's motion for new trial.

On June 14, 2001, the Court of Appeals determined that cause had been shown and ordered that the case proceed. On August 29, we moved the case to our docket by granting Macke's petition to bypass the Court of Appeals.

ASSIGNMENTS OF ERROR

As relevant to the jurisdictional issue that is the basis of our disposition of this appeal, Pierce assigns that the district court erred in sustaining Macke's motion for new trial.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Douglas Cty. Bd. of Comrs. v. Civil Serv. Comm.*, *ante* p. 544, 641 N.W.2d 55 (2002).

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. *Waite v. City of Omaha*, *ante* p. 589, 641 N.W.2d 351 (2002). Notwithstanding whether the

parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte. *Id.* The questions presented by the record in this case are whether a judgment was entered in the manner provided by statute prior to the filing of Macke's motion for new trial, and thus whether Macke's motion for new trial was filed prematurely.

Entry of a judgment "occurs when the clerk of the court places the file stamp and date upon the judgment, decree, or final order." Neb. Rev. Stat. § 25-1301(3) (Cum. Supp. 2000). Although the district court's order sustaining Macke's motion for new trial was properly entered pursuant to § 25-1301, the transcript does not contain an entry of judgment on the jury verdict prior to the filing of Macke's motion for new trial.

The order to show cause entered by the Court of Appeals, as relevant, stated the following:

> The contents of the transcript causes the Court concern as to whether it has jurisdiction by reason of the failure of the judge to render a judgment of dismissal pursuant to the jury's verdict in accordance with Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2000). Because an order of dismissal was not entered, it appears that the motion for new trial which was purportedly granted by the court was prematurely filed under Neb. Rev. Stat. § 25-1144.01 [Cum. Supp. 2000], thus making the granting of that motion premature.

In Pierce's response to the order to show cause, Pierce conceded that no judgment of dismissal, pursuant to the jury's verdict, was present in the district court file. The supplemental transcript filed pursuant to Pierce's praecipe bears out this concession, as it contains only filings relating to Macke's motion for new trial. In short, the record, even after the filing of the supplemental transcript, contains no entry of judgment pursuant to the jury verdict, and Pierce concedes that none exists.

Pierce argued, however, that an application for new trial, pursuant to Neb. Rev. Stat. § 25-1143 (Reissue 1995), need only be filed "within ten days, either within or without the term, after the verdict, report or decision was rendered." Pierce contended that pursuant to § 25-1143, an entry of judgment was not necessary in order for a motion for new trial to be filed. Since Macke's motion for new trial was filed within 10 days after the

verdict, Pierce argued that the motion was timely and that appellate jurisdiction had been conferred. But see *Wicker v. Vogel*, 246 Neb. 601, 521 N.W.2d 907 (1994).

However, 2000 Neb. Laws, L.B. 921, repealed § 25-1143 and replaced it with Neb. Rev. Stat. § 25-1144.01 (Cum. Supp. 2000), which provides that "[a] motion for a new trial shall be filed no later than ten days after the *entry of the judgment*." (Emphasis supplied.) The effective date of § 25-1144.01 and the repeal of § 25-1143 was July 13, 2000—27 days before the jury's verdict in this case. It is § 25-1144.01, and not the repealed § 25-1143, that is controlling in the instant case.

[4,5] A motion for new trial pursuant to § 25-1144.01 must be filed within 10 days after an entry of judgment, as defined in § 25-1301, and the record reflects that such an entry of judgment has not occurred. Because the jury's verdict, standing alone (i.e., in the absence of a file-stamped order entered pursuant to the verdict), did not constitute a final judgment, Macke's premature motion for new trial filed on August 11, 2000, was a nullity, as was the district court's ruling on the motion for new trial. See *Wicker v. Vogel, supra* (motion for new trial directed to nonfinal order is nullity, as is any ruling on such motion).

[6,7] For an appellate court to acquire jurisdiction of an appeal, there must be a valid final order entered by the court from which the appeal is taken. See *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001). While generally a district court's order ruling on a party's motion for new trial constitutes a final order, a district court's ruling on a motion for new trial is not a valid final order where, as here, both the premature motion and the ruling thereon are nullities. In the absence of a judgment or a valid order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal. See *Waite v. City of Omaha, ante* p. 589, 641 N.W.2d 351 (2002).

CONCLUSION

Because the district court order granting Macke a new trial was a nullity, we vacate the January 26, 2001, order of the court, dismiss this appeal, and remand the cause to the district court for entry of judgment pursuant to the jury verdict. At that time, Macke can file a timely motion for new trial, and the district

court's disposition of that motion may form the basis for an appropriately perfected appeal. We also note that after remand and subsequent perfection of an appeal, either party may file, pursuant to Neb. Ct. R. of Prac. 11B(3) (rev. 2000), a motion with the appellate court, and showing in support of said motion, requesting that the case be advanced for argument.

ORDER VACATED, APPEAL DISMISSED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT and STEPHAN, JJ., not participating.

RICHARD F. TYMA, APPELLANT, V.
JUDITH ANN TYMA, APPELLEE.
644 N.W.2d 139

Filed May 17, 2002. No. S-01-267.

1. **Divorce: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.
2. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
4. **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. **Divorce: Property Division.** In a divorce action, the purpose of a property division is to distribute the marital assets equitably between the parties.
6. **Property Division.** Equitable property division under Neb. Rev. Stat. § 42-365 (Reissue 1998) is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
7. ____. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
8. ____. The marital estate includes property accumulated and acquired during the marriage through the joint efforts of the parties.
9. ____. The date upon which the marital estate is valued should be rationally related to the property composing the marital estate.

10. **Property Division: Alimony.** How property, inherited by a party before or during the marriage, will be considered in determining division of property or award of alimony must depend upon the facts of the particular case and the equities involved. If the inheritance can be identified, it is to be set off to the inheriting spouse and eliminated from the marital estate.
11. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.
12. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
13. **Divorce: Property Division: Pensions.** Although Neb. Rev. Stat. § 42-366(8) (Reissue 1998) requires that any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party be included as part of the marital estate, the plain language of the statute does not require that such included assets be valued at the time of dissolution. The expression "at the time of dissolution" in § 42-366(8) qualifies the date at which the marital estate is divided but does not provide that pension-type property must be valued on such date. The pension-type property may be valued as of another date that is rationally related to the property.
14. ____: ____: ____. In dissolution actions, district courts have broad discretion in valuing pension rights and dividing such rights between the parties.

Appeal from the District Court for Sherman County: RONALD D. OLBERDING, Judge. Reversed and remanded for further proceedings.

John O. Sennett and Julianna S. Jenkins, of Sennett, Duncan & Borders, for appellant.

Larry W. Beucke and Marc J. Odgaard, of Parker, Grossart, Bahensky & Beucke, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Richard F. Tyma appeals from the decree of dissolution entered by the district court for Sherman County which dissolved his marriage to Judith Ann Tyma and divided the marital estate. Richard asserts that the district court erred in its valuation and division of marital property. We reverse, and remand for further proceedings.

STATEMENT OF FACTS

Richard and Judith were married on April 4, 1970. Richard filed for dissolution of the marriage on June 8, 2000. None of the parties' children were minors at the time of the dissolution. Trial was held December 15, 2000, to determine, inter alia, the extent and amount of the marital estate and the division of marital property. In view of our reversal and remand, we do not repeat the evidence in detail. Reference to the evidence is incorporated in the analysis as needed.

At the time of trial, Richard worked as a self-employed general repairman who also bought and sold equipment. Judith had been employed by Litchfield Public Schools since 1983. During the marriage, in 1992 and 1993, Richard inherited money from an uncle and from an aunt. Richard testified that he had used approximately $3,000 of the inheritance from his uncle to build an addition to the family home and approximately $2,000 to $3,000 of the inheritance from his aunt to build a carport onto the family home.

In November 1997, Judith moved out of the family home in Litchfield. At trial, Judith testified that Richard "threw [her] out" of the home and that her departure was not voluntary. Judith moved in with a daughter in Kearney and was living there at the time of the trial.

Richard continued to live in the family home. In interrogatories and at trial, Richard estimated the value of the home to be $17,000. Judith testified that the value of the family home was from $15,000 to $20,000. The documentary evidence of the value of the home was limited to a statement from the Sherman County assessor dated December 15, 2000, which showed a current assessed value of $18,525 for the home.

Judith inherited a half-interest in a house in Silver Creek after her mother died in August 1999. Judith continued to own her portion of the inherited house as a rental property at the time of trial. In addition, Judith had a retirement account through her employment with Litchfield Public Schools. She presented evidence that the value of the account was $17,000.09 when she moved out of the family home in November 1997 and $24,383.91 at the time of the trial.

On January 18, 2001, the district court entered a decree of dissolution in which it found that the marriage was irretrievably broken and should be dissolved. Regarding property division, the district court found that the parties had been separated since November 1997 and determined that because of the "lengthy separation," it would divide the assets and debts as of the date of separation.

The district court found that each party should retain the property currently in his or her possession, except that Judith should receive certain pieces of personal property in Richard's possession which were brought by her into the marriage. The district court assigned values to the marital property possessed by each party according to a chart in the order not repeated here. To equitably divide the property, the district court ordered Richard to pay $2,403 to Judith.

On January 25, 2001, Richard moved for a new trial on the basis, inter alia, that the district court had erred and abused its discretion in the division of property. On February 22, the district court denied the motion for new trial. Richard appeals.

ASSIGNMENTS OF ERROR

Richard generally asserts that the district court abused its discretion in its division of property. Richard asserts, restated, that the district court abused its discretion by (1) valuing the marital estate as of the date of separation rather than the date of dissolution, using inconsistent valuation dates for different properties, and failing to properly "credit" Richard for money he inherited and used to make improvements to the family home and (2) failing to value Judith's pension as of the date of dissolution in contravention of Neb. Rev. Stat. § 42-366(8) (Reissue 1998).

STANDARDS 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. *Carter v. Carter*, 261 Neb. 881, 626 N.W.2d 576 (2001).

[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.*

[3] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id.*

[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. *Douglas Cty. Bd. of Comrs. v. Civil Serv. Comm.*, *ante* p. 544, 641 N.W.2d 55 (2002).

ANALYSIS

Valuation of Marital Estate.

Richard argues that the district court abused its discretion by using the date the parties separated, rather than the date of trial, to value the marital estate. Richard also argues that it was error for the district court to use inconsistent dates in valuing assets. Finally, he claims that the district court abused its discretion by failing to "credit" him for moneys he inherited and used to make improvements to the family home.

[5-7] In a divorce action, "[t]he purpose of a property division is to distribute the marital assets equitably between the parties." Neb. Rev. Stat. § 42-365 (Reissue 1998). Equitable property division under § 42-365 is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Gibilisco v. Gibilisco, ante* p. 27, 637 N.W.2d 898 (2002). The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000).

[8,9] The marital estate includes property accumulated and acquired during the marriage through the joint efforts of the parties. *Brunges v. Brunges*, 260 Neb. 660, 619 N.W.2d 456 (2000). The date upon which the marital estate is valued should be rationally related to the property composing the marital estate. *Id.*

In the present case, the district court found that the parties "kept separate finances throughout the marriage" and that they separated in November 1997. The record supports this finding. Under the facts of this case, it was reasonable for the district court to conclude that no property was "accumulated and acquired . . . through the joint efforts of the parties," see *id.* at 665, 619 N.W.2d at 461, after the date of their separation, and the district court did not err in using the date of the separation in November 1997, as opposed to the date of dissolution, as the date upon which to identify the composition of the marital estate. The November 1997 date used for valuation was "rationally related to the property composing the marital estate." See *id.* at 667, 619 N.W.2d at 462. We conclude that the district court did not abuse its discretion by choosing the date of separation to identify and value the property composing the marital estate.

Richard argues that even if November 1997 was an appropriate date upon which to value the marital estate, the district court erred by using inconsistent dates in valuing items of property. By way of example, he notes that the district court valued Judith's pension as of November 1997, whereas it valued the family home as of the date of trial.

A review of the record shows that during discovery, the parties focused on current valuations rather than valuations as of the date of separation. There is no pretrial order advising the parties that the district court would base its order regarding property division on valuations as of the date of the separation of the parties. At trial, with minor exception, the parties presented evidence regarding the values of assets and debts as of the date of dissolution. Other than the documentary evidence of the value of Judith's pension as of November 1997, there appears to be no direct evidence of values of any assets or debts at the date of separation. The record does not contain evidence supporting the district court's determination of November 1997 values.

We conclude that the valuation of assets and debts of the marital estate by the district court was untenable, unfairly depriving the parties of a substantial right and denying just results in the matter submitted for disposition. *Carter v. Carter*, 261 Neb. 881, 626 N.W.2d 576 (2001). It was an abuse of discretion for the district court to assign date-of-separation values to marital

assets and debts where such valuations were not supported by the record. The order valuing and dividing the marital property must be reversed, and the cause remanded to the district court for further proceedings to allow the parties to present evidence of values of assets and debts as of the date of separation.

[10] As part of his challenge to the district court's valuation of the marital estate, Richard argues that the district court abused its discretion by failing to "credit" him for moneys he inherited and used to make improvements to the family home. How property, inherited by a party before or during the marriage, will be considered in determining division of property or award of alimony must depend upon the facts of the particular case and the equities involved. *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986). If the inheritance can be identified, it is to be set off to the inheriting spouse and eliminated from the marital estate. *Preston v. Preston*, 241 Neb. 181, 486 N.W.2d 902 (1992). See *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000) (stating that with some exceptions, property acquired by one party through gift or inheritance is not to be included in marital estate).

In view of our ruling reversing the district court's order and remanding the cause regarding the identification, valuation, and division of the marital estate, we need not resolve this claim. On remand, Richard may present evidence in support of this claim. The district court may then rule, based on the facts before it, on Richard's claim involving his inheritances.

Judith's Pension.

[11] Although we have concluded that the district court's division of property must be reversed and the cause remanded for further proceedings, we will address Richard's remaining assignment of error to the extent it involves an issue likely to recur on remand. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *Gestring v. Mary Lanning Memorial Hosp.*, 259 Neb. 905, 613 N.W.2d 440 (2000).

Richard claims that the district court abused its discretion by failing to include in the marital estate the entire value of Judith's pension at the date of the dissolution trial. Although, as we concluded above, the date of separation was rationally related to the

property composing the marital estate and may be used as the date upon which to value marital assets, Richard argues that § 42-366(8) requires that a pension invariably be valued at the date of dissolution. We do not agree.

Section 42-366(8) states in part, "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." Richard claims that this language requires that any pension owned by a party at the time of dissolution must not only be included in the marital estate but must also be valued as of the dissolution trial.

[12,13] We reject Richard's interpretation of § 42-366(8). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Haber v. V & R Joint Venture, ante* p. 529, 641 N.W.2d 31 (2002). Although § 42-366(8) requires that "any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party" be included as part of the marital estate, the plain language of the statute does not require that such included assets be valued at the time of dissolution. The expression "at the time of dissolution" in § 42-366(8) qualifies the date at which the marital estate is divided but does not provide that pension-type property must be valued on such date. The pension-type property may be valued as of another date that is rationally related to the property. *Brunges v. Brunges*, 260 Neb. 660, 619 N.W.2d 456 (2000).

[14] Richard refers to our decision in *Brunges v. Brunges, supra*, in which we concluded, based in part on § 42-366(8), that one party was entitled to one-half of the value of the other party's 401K plan computed as of the date of the decree of dissolution. Although under the facts of *Brunges*, we concluded that the plan should be valued as of the date of dissolution, we did not hold that the date of dissolution must invariably be used to value pension-type property. Instead, we have stated that in dissolution actions, district courts have broad discretion in valuing pension rights and dividing such rights between the parties. *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001).

In the present case, the district court complied with § 42-366(8) by including Judith's pension "as part of the marital estate, for

purposes of the division of property at the time of dissolution." As discussed in the previous section of this opinion, the date of separation was rationally related to the property composing the marital estate and the district court would not abuse its discretion on remand by valuing the marital estate including Judith's pension as of the date of the separation. There is no merit to this assignment of error.

CONCLUSION

We conclude there was no abuse of discretion in the district court's use of the date of separation to value marital property including Judith's pension. However, we conclude that the district court abused its discretion by assigning date-of-separation values to the parties' assets and debts when such values were not supported by evidence in the record. We therefore reverse the district court's order dividing the marital estate and remand the cause to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., participating on briefs.

JEANINE M. BAUERLE, APPELLEE, V.
DIRK A. BAUERLE, APPELLANT.
644 N.W.2d 128

Filed May 17, 2002. No. S-01-318.

1. **Divorce: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.
2. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
3. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.

4. **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 refrains from acting, and 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.
5. **Alimony.** In considering the specific criteria of Neb. Rev. Stat. § 42-365 (Reissue 1998) concerning an award of alimony, a court's polestar must be fairness and reasonableness as determined by the facts of each case.
6. ____. In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is reasonableness.
7. ____. Alimony should not be used to equalize the incomes of the parties or to punish one of the parties.
8. ____. Alimony may be used to assist the other party during a reasonable time to bridge that period of unavailability for employment or during that period to get proper training for employment.
9. ____. In awarding alimony, a court should consider, in addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 1998), the income and earning capacity of each party as well as the general equities of each situation.
10. ____. Disparity in income or potential income may partially justify an award of alimony.
11. **Divorce: Alimony.** In entering a decree awarding alimony, the court may take into account all of the property owned by the parties at the time of entering the decree, whether accumulated by their joint efforts or acquired by inheritance, and make such award as is proper under all the circumstances disclosed by the record.
12. **Alimony: Appeal and Error.** An appellate court is not inclined to disturb the trial court's award of alimony unless it is patently unfair on the record.
13. **Alimony.** Serious health problems experienced by either party may support an award of alimony which does not terminate according to the default provisions of Neb. Rev. Stat. § 42-365 (Reissue 1998).
14. ____. An alimony recipient's inability to work or improve his or her earning capacity is a circumstance which may support an award of alimony which does not terminate according to the default provisions of Neb. Rev. Stat. § 42-365 (Reissue 1998).
15. ____. An obligor spouse's tenuous financial condition or unique economic circumstances may support an award of alimony which does not terminate according to the default provisions of Neb. Rev. Stat. § 42-365 (Reissue 1998).
16. ____. The specific criteria in Neb. Rev. Stat. § 42-365 (Reissue 1998), such as duration of the marriage, contributions to the marriage, and contributions to the care and education of the children are also circumstances which may support an award of alimony which does not terminate according to the default provisions of Neb. Rev. Stat. § 42-365 (Reissue 1998).

Appeal from the District Court for Chase County: JOHN J. BATTERSHELL, Judge. Affirmed as modified.

Larry R. Baumann, of Kelley, Scritsmier & Byrne, P.C., for appellant.

George M. Zeilinger for appellee.

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

HENDRY, C.J.

INTRODUCTION

Jeanine M. Bauerle and Dirk A. Bauerle were divorced pursuant to a decree of dissolution entered by the Chase County District Court on February 23, 2001. In its decree, the district court approved the Bauerles' property settlement agreement and awarded alimony to Jeanine. The court ordered Dirk to pay alimony in the sum of $1,500 per month for 120 months. The court further ordered that Dirk's alimony obligation would not terminate upon Dirk's death or Jeanine's remarriage. Dirk appealed. 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).

FACTUAL BACKGROUND

Jeanine filed for divorce on June 23, 1999. At the trial on January 8, 2001, Dirk and Jeanine presented a property settlement agreement covering all issues regarding marital property and debt. The district court then resolved the three remaining issues: (1) alimony, (2) delinquent temporary support payments, and (3) attorney fees. The only issue raised by Dirk on appeal is the district court's award of alimony.

Dirk and Jeanine were married on October 18, 1980, in Longmont, Colorado. Shortly after their marriage, they moved from Colorado to Chase County, Nebraska, where they lived on a farm owned by Dirk's family, and in which Dirk had received an ownership interest from his parents. Although Dirk and Jeanine lived on the farm for only 3 to 4 months, they continued to farm this property after moving into town.

Prior to the marriage, Jeanine had obtained a 2-year associate of applied science secretarial degree from a junior college in Colorado. However, Jeanine did not pursue outside employment when the couple relocated to Nebraska. Instead, she worked on the farm with her husband, driving tractors and trucks. She also cleaned her in-laws' home and tended to their yardwork. In

addition, she generally bore sole responsibility for maintaining the family home, which involved cleaning, washing, cooking, and managing the couple's farm and personal bookkeeping.

After approximately 2 years, Jeanine stopped cleaning her in-laws' home, but she did not cease her work on the farm. Jeanine continued to drive a truck and a grain cart for the farm's corn and wheat harvests. She also operated tractors, pulled anhydrous ammonia tanks, helped irrigate fields, and ran farm errands. Jeanine received some payment for this work, but such payment was not made every year. When Jeanine was paid, she usually received $8 per hour. It was Jeanine's understanding that she was paid for her work because her compensation could be deducted from the farm's tax returns.

In 1988 or 1989, Jeanine enrolled in a quilting class. Soon after, she and her mother-in-law began to teach quilting. For approximately 10 years, Jeanine taught classes in quilting during the winter months when she had fewer farm and household duties.

In 1998, approximately 4 years prior to the divorce, Jeanine began part-time employment at a liquor store where she worked as a clerk and stocked shelves. She worked 10 to 20 hours per week and received the minimum wage, approximately $5.50 per hour. Jeanine's time at the liquor store was in addition to the hours she spent working on the farm and maintaining the family home. Jeanine managed this dual employment until filing for divorce in 1999, at which time she ceased working on the farm.

After filing for divorce in June 1999, Jeanine secured temporary employment with the Farm Service Agency (FSA) office in Imperial, Nebraska. Her initial position with FSA involved filing and labeling map slides for $10 per hour. Although Jeanine had an opportunity "to stay on a little longer" with FSA, such extended employment would have necessitated "knowledge in computer work," which Jeanine felt she did not possess. Jeanine's employment with FSA ended in September 1999.

Near the time Jeanine left FSA, she also ceased her employment at the liquor store in order to assist area farmers with the fall harvest. She helped the farmers defoliate beets by operating farm trucks and tractors.

In March 2000, Jeanine returned to her part-time position at the liquor store. In addition, she secured a temporary seasonal

job with a golf course, which paid $6 per hour. At the golf course, Jeanine mowed the lawn and worked in the clubhouse assisting customers. Between these two part-time jobs, Jeanine worked a combined total of 40 to 42 hours per week.

In January 2001, Jeanine was no longer working at the golf course because her position had ended with the arrival of winter weather. However, she was still working at the liquor store and had resumed teaching quilting classes. Jeanine charged approximately $30 per student for a 3-week course. Although the income from these classes varied depending upon the number of students, her class just prior to the divorce hearing consisted of 16 students, which netted approximately $350. Jeanine planned to continue teaching quilting on a monthly basis.

At the time of trial, Jeanine had not received any formal education since earning her 2-year secretarial degree almost 20 years earlier. Her secretarial experience was also limited to the time she had spent maintaining the couple's farm and personal records.

After filing for divorce, Jeanine considered pursuing employment possibilities at an insurance agency and a local school. However, the position with the insurance agency required "computer skills and computer knowledge" and would have resulted in less income than what she could earn at the golf course. The opportunity with the local school was not pursued after learning that the job description indicated that applicants with computer experience would be given preference.

Jeanine testified she desired business and computer training so she could secure a better job and start her own quilting business. She also testified she had limited financial resources and was waiting for funds from the divorce before enrolling in computer classes. She estimated the cost of these computer classes to be approximately $40 per credit hour at a local community college. Another option Jeanine testified she was considering was computer classes through the Internet which could result in a 4-year degree. She estimated this cost at $3,000 to $4,000.

Jeanine further testified that she had been living in a low-rent housing unit in Imperial since January 2000. The apartment rent was $225 per month, but Jeanine anticipated that the rent would probably change once she obtained her share of the property settlement agreement. She estimated that her income was $700 per

month and that her expenses were $1,742.66, resulting in a shortfall of $1,042.66.

At the time of trial, Dirk was still working on the family farm with his brother and his parents. The family farming operation included livestock, together with crops consisting of corn, pinto beans, and wheat. Several farming entities, referred to as "D & D Bauerle, JV," "3-D Farms, JV," "Champion Valley Enterprises, LLC," and "B Barr Farms, Inc.," contained the various family members' interests in the farming operation. Many of Dirk's interests in these entities were given to him by his parents. In addition to these entities, Dirk and Jeanine also maintained their own personal farm account.

According to Dirk's balance sheet, his net worth at the time of trial, which included his interests in the farming entities, was $422,177. Dirk estimated that his living expenses were $1,936.60 per month. He also offered an amortization schedule for payments he is obligated to make on a $110,000 loan at 9 percent interest. Dirk stated that he must pay $1,393.43 per month for 10 years to retire the loan he incurred as a result of agreeing to provide Jeanine $110,000 as part of the parties' property settlement. Dirk also testified that his personal finances would be impacted due to the overall rising costs of fuel, fertilizer, pesticides, irrigation, repairs, and harvesting between 1999 and 2000.

Robert McChesney, a certified public accountant, testified on behalf of Jeanine regarding the Bauerles' tax returns from previous years. He testified that the Bauerles' 1998 and 1999 tax returns showed a significant decrease in adjusted gross income due to losses passing through the farming entities in which the Bauerles held interests. McChesney further explained that the cause of a reflected loss in Champion Valley Enterprises, one of the entities, was due to counting prepayments for feed and pigs as expenses without reflecting the market values on the entity's inventories. McChesney found that such prepaying of expenses distorted the Bauerles' recent tax returns because the losses were reflected but the income had not yet been included. Excluding the Champion Valley Enterprises loss, McChesney stated that the Bauerles' farm income was "fairly consistent with ranges" between $45,000 and $60,000 per year. McChesney also testified that the Bauerles would receive approximately

$17,500 in refunds from prior tax returns due to "carry back loss" that resulted from their decisions in 1998 and 1999 not to claim "outright" the depreciation on purchases of new equipment, which differed from previous years in which they had claimed the depreciation "outright."

The district court entered the decree of dissolution on February 23, 2001. In it, the court approved the Bauerles' property settlement agreement. The agreement stated that Jeanine brought $1,500 in assets into the marriage, while Dirk brought approximately $41,000 in assets into the marriage. The agreement awarded Jeanine a 1996 Ford Explorer, household goods valued at approximately $12,000, a $2,700 debt owed to her, and a bank account, for a total award of approximately $32,500. Dirk received the remaining property and liabilities in the marriage, which taken together, were valued at over $350,000. As part of the agreement, Dirk also agreed to pay Jeanine $110,000.

In the decree, the court further found that alimony should be awarded to Jeanine based on its findings that (1) the marriage was one of long duration, (2) most of the Bauerles' assets were accumulated after the marriage, (3) most of the Bauerles' income was used to purchase assets Dirk uses in the farming operation, and (4) Dirk's net monthly income was approximately $4,632. The court ordered that an award of alimony in the sum of $1,500 per month for 120 months would be paid to Jeanine and would not terminate upon the death of Dirk or the remarriage of Jeanine. Dirk appealed.

ASSIGNMENTS OF ERROR

Dirk assigns, rephrased, that the district court erred in (1) determining the amount and duration of Dirk's alimony obligation and (2) ordering that Dirk's obligation to pay alimony would not terminate upon Dirk's death or Jeanine's remarriage.

STANDARD OF REVIEW

[1] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. 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. *Carter v. Carter*, 261 Neb. 881, 626 N.W.2d 576 (2001).

[3] In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000); *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997).

[4] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and 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. *Crawford v. Crawford, ante* p. 37, 638 N.W.2d 505 (2002).

ANALYSIS

Grant of Alimony

In his first assignment of error, Dirk argues that the district court abused its discretion by awarding Jeanine alimony in the sum of $1,500 per month for 120 months. He contends that an award of such an amount and duration "cannot possibly be considered reasonable or fair" under the specific criteria for alimony awards in Neb. Rev. Stat. § 42-365 (Reissue 1998). Brief for appellant at 13. Section 42-365 states:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. . . .

> . . . The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate.

[5,6] In considering the specific criteria of § 42-365 concerning an award of alimony, a court's "polestar" must be "fairness and reasonableness as determined by the facts of each case." See *Meints v. Meints*, 258 Neb. 1017, 1022, 608 N.W.2d 564, 568 (2000). Stated another way, in determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is reasonableness. *Kalkowski, supra.*

As the district court noted, Dirk and Jeanine's marriage was one of long duration. The record reflects that they were married and worked together on the family farm for almost 20 years. Dirk and Jeanine are each 42 years old. They did not have children during their marriage, so they will be able to engage in gainful employment without interfering with the interests of any minor children. While Dirk is able to continue working on the farm with machinery and other resources purchased during the marriage, Jeanine must find a new career. She desires to start a quilting business and work with computers. However, the skills she attained two decades ago while earning her secretarial degree are of minimal use to her at the present time. Jeanine has had little opportunity to utilize these secretarial skills, having spent the past 20 years primarily working with Dirk on the family farm.

Jeanine's contributions to the marriage were significant. She maintained the family household by cleaning, washing, cooking, and doing the couple's farm and personal bookkeeping. On the farm, she operated tractors, pulled anhydrous ammonia tanks, helped irrigate fields, ran farm errands, and drove a truck and a grain cart for the family's various harvests. Dirk brought approximately $41,000 in assets into the marriage in 1980, but he leaves the marriage with over $240,000. Jeanine's efforts played a significant role in that increase. As Jeanine stated at trial, "I feel like I've sacrificed a lot of years of my life helping him, working on the farm."

[7,8] Any award of alimony to Jeanine should not be used to equalize the incomes of the parties or to punish Dirk. See *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000).

However, it may be used to assist Jeanine during a reasonable time to bridge that period of unavailability for employment or during that period to get proper training for employment. See, *Murrell v. Murrell*, 232 Neb. 247, 440 N.W.2d 237 (1989); *Kimbrough v. Kimbrough*, 228 Neb. 358, 422 N.W.2d 556 (1988). Jeanine desires to secure employment beyond her minimum-wage, part-time jobs which will allow her to achieve a standard of living that resembles the one she helped maintain in her marriage to Dirk. In order to do this, she will need time and money to receive additional education.

[9] Dirk argues that the district court's alimony award was excessive when considering the incomes of the parties and Jeanine's ability to work. This court has previously noted that "in awarding alimony, a court should consider, in addition to the specific criteria listed in § 42-365, the income and earning capacity of each party as well as the general equities of each situation." *Kelly v. Kelly*, 246 Neb. 55, 64, 516 N.W.2d 612, 617-18 (1994).

The district court found that Dirk's net income was $4,632 per month, or $55,584 per year. This is consistent with the testimony of McChesney, the certified public accountant, who testified that the Bauerles' farm income ranged between $45,000 and $60,000 per year. According to the budget Dirk offered at trial, Dirk's monthly expenses are $1,936.60. Thus, Dirk's income without any alimony obligation would exceed his expenses by $2,695.40 per month. Dirk argues, however, that this court should also include in its calculations Dirk's monthly payment of $1,393.43 on the $110,000 loan he incurred to satisfy his obligations to Jeanine pursuant to the property settlement agreement. The record shows that Dirk voluntarily chose to borrow the $110,000 and incur this expense rather than liquidate $110,000 of the assets he received under the property settlement agreement. Having voluntarily determined to utilize a portion of his assets in this manner, we determine that under this record, Dirk's argument is without merit.

According to Jeanine's budget, her net income was $700 per month, or $8,400 per year. Her estimated monthly expenses were $1,742.66. Thus, Jeanine's expenses exceed her income by $1,042.66 per month. Dirk argues that Jeanine's budget is inaccurate because it contained "guesses" of certain expenses, inter

alia, apartment rent and utilities, and included an automobile loan obligation she did not have. Dirk testified that Jeanine's budget should have included interest income at a "safe return" of "six and a half" percent on the $110,000 Jeanine received under the property settlement agreement.

[10] Even if one were to eliminate the car payment and further "adjust" Jeanine's budget by the difference between her claimed and actual expenses for apartment rent and utilities, and add $596 of interest income using Dirk's "safe return" of "six and a half" percent, we find that Jeanine's "adjusted" income exceeds her expenses by only $148 per month. This sum does not include any consideration of costs for Jeanine's computer classes. Even with this "adjustment" of Jeanine's budget, there is a significant disparity between Dirk's monthly income after expenses of $2,695.40 and Jeanine's monthly income after expenses of $148. " 'Disparity in income or potential income may partially justify an award of alimony.' " *Ainslie v. Ainslie*, 249 Neb. 656, 660-61, 545 N.W.2d 90, 94 (1996) (quoting *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995)).

[11] In *Ainslie*, 249 Neb. at 661, 545 N.W.2d at 94, the court stated:

> " 'In entering a decree for alimony, the court may take into account all of the property owned by the parties at the time of entering the decree, whether accumulated by their joint efforts or acquired by inheritance, and make such award as is proper under all the circumstances disclosed by the record.' "

(Quoting *Hefti v. Hefti*, 166 Neb. 181, 88 N.W.2d 231 (1958).) As a result of the property settlement agreement, Dirk received property valued in excess of $240,000, whereas Jeanine received property valued at approximately $142,500. Dirk's property allocation contained significant income producing assets such as savings bonds, interests in farming entities, and farm machinery, including 21 antique tractors that Dirk uses in his farmwork. This disparity in potential income may also partially justify the award of alimony. See *Ainslie, supra.*

[12] In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's

award is untenable such as to deprive a party of a substantial right or just result. *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000); *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997). Furthermore, an appellate court is not inclined to disturb the trial court's award of alimony unless it is patently unfair on the record. *Priest v. Priest*, 251 Neb. 76, 554 N.W.2d 792 (1996). Considering Dirk and Jeanine's circumstances under the "ultimate criterion . . . of reasonableness," see *Kalkowski*, 258 Neb. at 1044, 607 N.W.2d at 525, we determine the award of alimony by the district court was not an abuse of discretion, as it neither deprived Dirk of a substantial right or just result, nor was it patently unfair. Dirk's first assignment of error is without merit.

TERMINATION OF ALIMONY

In his second assignment of error, Dirk argues that the district court abused its discretion in ordering that Dirk's obligation to pay alimony would not terminate upon Dirk's death or Jeanine's remarriage. Dirk asserts there is nothing in his or Jeanine's circumstances that would support a departure from the default provisions of § 42-365, and he maintains that the district court's provisions are "unreasonably harsh and burdensome." Brief for appellant at 20.

Section 42-365 states in part, "Except as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient." The statute specifically allows a court to determine "by order of the court" that an alimony award will *not* "terminate upon the death of either party or the remarriage of the recipient." Although § 42-365 lists specific circumstances which are to be considered in making any alimony award, it does not provide specific guidance for determining when it is appropriate for a court to determine that such award will not terminate on the parties' deaths or the recipient's remarriage. However, this court and other courts have found certain circumstances significant in cases with similar termination provisions. While it is impossible to provide an exhaustive list of such circumstances, we discuss some of them below.

[13] Serious health problems experienced by either party may support an award of alimony which does not terminate according to the default provisions of § 42-365. For example, in *Cole v. Cole*, 208 Neb. 562, 304 N.W.2d 398 (1981), this court modified an alimony award to provide $800 per month for 25 years and ordered that the award would not terminate on the obligor spouse's death. In that case, the recipient spouse had been seriously injured while riding as a passenger on a motorcycle. She was paralyzed from the chest down and had only partial use of her arms and hands. Similarly, in *Hafer v. Hafer*, 3 Neb. App. 129, 524 N.W.2d 65 (1994), the recipient spouse contracted multiple sclerosis during the marriage and, as a result, was completely unemployable. The Court of Appeals determined that the recipient spouse should receive an alimony award of $300 per month until the death of either party. The court specifically found that "[t]his award of alimony is not to terminate automatically upon the remarriage of the [recipient spouse]." *Id.* at 137, 524 N.W.2d at 71.

[14] Another circumstance which may support a trial court's decision to vary the termination provisions of § 42-365 is the recipient spouse's inability to work or improve his or her earning capacity. See, e.g., *Hafer, supra* (recipient spouse unemployable because of multiple sclerosis); *Sommer v. Sommer*, 636 N.W.2d 423, 429 (N.D. 2001) (permanent spousal support appropriate where disadvantaged spouse is at such an age where it is impossible to restore him or her " 'to independent economic status or to equalize the burden of divorce by increasing the disadvantaged spouse's earning capacity' ").

[15] An obligor spouse's tenuous financial condition or unique economic circumstances have also been considered in evaluating an alimony award that will not terminate on the obligor's death or the recipient spouse's remarriage. For example, in *Hildebrand v. Hildebrand*, 239 Neb. 605, 477 N.W.2d 1 (1991), this court increased an alimony award to $400 per month for the recipient spouse's life, even if she remarried. The court found that since the parties had been married to each other previously, a lifetime award of alimony was an appropriate method of dealing with the obligor spouse's pension funds,

which were not considered as marital property in the first divorce proceeding.

In *Pyke v. Pyke*, 212 Neb. 114, 321 N.W.2d 906 (1982), the obligor husband was a lieutenant colonel in the U.S. Air Force who planned to retire from the service in 2 years. The district court awarded the wife $850 per month until the death of either party "'or until further order of the court.'" *Id.* at 117, 321 N.W.2d at 909. The district court also ordered that the alimony award would not terminate on the remarriage of the wife, "but that such remarriage could be considered as a change of circumstance to be considered by the court at some future time, together with any other relevant circumstances in regard to the earning capacity of either of the parties." *Id.* In reviewing the district court's award, this court noted the husband's anticipated retirement in 2 years and stated:

> It would appear that where, as here, the court is now mindful that a significant event is to occur in the near future which may alter the earning abilities of either of the parties, but the court is unable to determine what that amount is, an order such as that entered by the court in this case is appropriate.

Id. at 120, 321 N.W.2d at 910. See, also, *Vandal v. Vandal*, 31 Conn. App. 561, 626 A.2d 784 (1993) (upholding award of alimony which did not terminate on wife's remarriage based on finding that husband, due to significant personal debt, was financially unable at time of dissolution to pay alimony in amount to which wife was rightfully entitled).

[16] The specific criteria in § 42-365, such as duration of the marriage, contributions to the marriage, and contributions to the care and education of the children, are also appropriate circumstances for consideration in determining that alimony not terminate on the obligor's death or the recipient spouse's remarriage. In *Erickson v. Erickson*, 202 Neb. 345, 275 N.W.2d 287 (1979), we found each of the statutory factors listed in § 42-365 significant in granting a nonmodifiable and nonterminable award of alimony. This court stated:

> [T]he trial court did not adequately consider the fact that respondent interrupted her nursing education by her marriage to petitioner and her subsequent raising of the

> children; and that she has now had to leave the family home, establish a new home for herself and the children, and undertake a 3-year program of education before she will be able to provide sufficient earnings to make up the difference between the actual cost of supporting the two small children and the meager amount petitioner is able to pay. She will have a difficult and expensive period of readjustment and no assets with which to pay for it. In addition, petitioner paid no temporary child support or temporary alimony after the December 1976 separation, and he has had the use and possession of the farm home and the 80 acres since that time.

Id. at 350-51, 275 N.W.2d at 291.

In the present case, the district court made no specific findings in support of its determination that the alimony award not terminate on Dirk's death or Jeanine's remarriage. Furthermore, in our de novo review of the record, we do not find facts to support the imposition of such conditions. We recognize that Dirk and Jeanine's marriage was of long duration and that Jeanine contributed significantly to the marriage. However, there were no children as a result of this marriage, nor is there any evidence in the record that Jeanine or Dirk have health problems or economic circumstances which would justify departing from the default termination provisions of § 42-365. For these reasons, we determine the district court abused its discretion. The court's determination that Dirk's alimony obligation would not terminate upon Dirk's death or Jeanine's remarriage was untenable and unfairly deprived Dirk of a substantial right and a just result. See *Crawford v. Crawford, ante* p. 37, 638 N.W.2d 505 (2002). Accordingly, we modify the decree of dissolution to provide that Dirk's alimony obligation "shall terminate upon the death of either party or the remarriage of the recipient." See § 42-365.

CONCLUSION

For the foregoing reasons, the district court's decree of dissolution is affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V.
JIM R. TURNER, APPELLANT.
644 N.W.2d 147

Filed May 17, 2002. No. S-01-707.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.
2. **Blood, Breath, and Urine Tests: Implied Consent: Due Process.** The giving of a sample under Neb. Rev. Stat. § 60-6,197 (Reissue 1998) does not involve a question of involuntariness, want of due process, or self-incrimination.
3. **Drunk Driving: Blood, Breath, and Urine Tests.** The right of a person suspected of driving under the influence to refuse a chemical test is a matter governed purely by statute.
4. ____: ____. Under Neb. Rev. Stat. § 60-6,197(10) (Reissue 1998), a person arrested for driving under the influence must be advised that refusal to submit to a chemical test is a separate crime for which the person may be charged, but he or she need not be advised of any additional consequences of a refusal to submit to a chemical test.
5. **Constitutional Law: Appeal and Error.** A constitutional issue that has not been presented to or passed upon by the trial court is not appropriate for consideration on appeal.

Appeal from the District Court for Johnson County, DANIEL BRYAN, JR., Judge, on appeal thereto from the County Court for Johnson County, STEVEN BRUCE TIMM, Judge. Judgment of District Court affirmed.

David E. Veath for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

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

CONNOLLY, J.

The appellant, Jim R. Turner, was convicted in county court for driving under the influence of alcohol, refusing to submit to a chemical test, and refusing to submit to a preliminary breath test for alcohol. The district court affirmed. On appeal, he argues that Neb. Rev. Stat. § 60-6,197(10) (Reissue 1998) is unconstitutional because the advisement by the arresting officer was inadequate and violated his right to due process. Under § 60-6,197(10), the arresting officer was required to advise Turner that a refusal to

submit to a chemical test is a separate crime for which he could be charged. Turner was so advised. We affirm.

BACKGROUND

On March 7, 1999, Stanley Osterhoudt, the Johnson County sheriff, received a dispatch about an incident which occurred in Cook, Nebraska. Osterhoudt was told that a man was lying in the street and that two people involved in the incident had left in a 1980 blue Chevrolet pickup truck with county plates numbered 64. As Osterhoudt drove toward Cook, he observed a truck matching that description.

Osterhoudt stopped the truck and identified the driver as Turner, observing that Turner's eyes were bloodshot and watery. He also detected an odor of alcohol coming from the truck.

Osterhoudt asked Turner to exit the truck and observed him stagger and sway as he got out of the truck. He handcuffed Turner and placed him in his patrol vehicle. He asked Turner about the incident in Cook, and Turner replied that he did not know about the incident. Osterhoudt observed that Turner's speech was slurred and delayed. He also noticed a strong odor of alcohol emanating from Turner.

Turner refused to submit to field sobriety tests and a preliminary breath test. Osterhoudt testified that he believed Turner was under the influence of alcohol. He testified that he then placed Turner under arrest and read him a postarrest chemical test advisement form. The advisement form stated that refusal to submit to a chemical test is a separate crime for which the suspect may be charged. Turner refused to submit to a chemical test.

Turner was charged with driving under the influence of alcohol, refusing to submit to a chemical test, and refusing to submit to a preliminary breath test for alcohol. Before trial, he filed a plea in abatement alleging that he was arrested and then refused a chemical test. Without being specific, he contended that the postarrest advisement was constitutionally infirm. Turner then filed a motion to quash, alleging that the advisement was a misrepresentation. He also filed a demurrer and a motion to suppress the chemical test.

Regarding the advisement, the county court addressed only due process considerations and overruled the plea in abatement,

motion to quash, demurrer, and motion to suppress the chemical test results. The county court concluded that there was no constitutional right to refuse to submit to a chemical test or to be warned that a refusal could be used against the driver at trial. The court determined that any right to be warned of the consequences of a refusal was purely statutory. The court further concluded that an amendment to § 60-6,197(10) removed the need to advise a driver of the consequences for refusing to submit to a chemical test.

Turner next filed a second motion to suppress, alleging that the sheriff unconstitutionally stopped him. The motion was overruled. At the start of trial, Turner objected to the proceedings based on those asserted in his previous motions. The county court overruled the objection. During trial, Turner moved for a directed verdict at the end of the State's case. Turner then testified and did not renew his motion for a directed verdict. The county court found Turner guilty on all counts.

The district court affirmed. The district court addressed only due process concerns regarding the advisement and agreed with the conclusions of the county court. Additionally, the district court factually found that Turner had been arrested before he was read the advisement. The court concluded that the sheriff had reasonable suspicion to stop Turner and request a preliminary breath test. The court also determined that there was sufficient evidence to convict him. Turner appeals.

ASSIGNMENTS OF ERROR

Turner assigns, rephrased, that the county court erred in (1) determining that the advisement was constitutional and overruling his plea in abatement, motion to quash, demurrer, motion to suppress chemical test results, and objection at the start of trial; (2) overruling his second motion to suppress; (3) finding that he had been arrested before being read the postarrest advisement; (4) determining that the sheriff lawfully requested a preliminary breath test; and (5) determining there was sufficient evidence to convict him and overruling his motion for a directed verdict.

STANDARD OF REVIEW

[1] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach

a conclusion independent of the decision reached by the trial court. *State v. Hynek, ante* p. 310, 640 N.W.2d 1 (2002).

ANALYSIS

Turner contends that the postarrest advisement he was given was inadequate and violated his right to due process. Turner argues that the advisement fails to specifically state whether the suspect will actually be charged. He also argues that the advisement fails to advise of any civil penalties that may occur as a result of the refusal to submit to a chemical test.

Section 60-6,197(1) provides:

> Any person who operates or has in his or her actual physical control a motor vehicle in this state shall be deemed to have given his or her consent to submit to a chemical test or tests of his or her blood, breath, or urine for the purpose of determining the concentration of alcohol or the presence of drugs in such blood, breath, or urine.

Under § 60-6,197(2), an officer may require a chemical test when he or she has reasonable grounds to believe that a defendant was driving under the influence of alcohol. Section 60-6,197(10) provides: "Any person who is required to submit to a chemical blood, breath, or urine test or tests pursuant to this section shall be advised that refusal to submit to such test or tests is a separate crime for which the person may be charged."

[2,3] We have held that the giving of a sample under § 60-6,197 does not involve a question of involuntariness, want of due process, or self-incrimination. See *State v. Williams*, 189 Neb. 127, 201 N.W.2d 241 (1972). Thus, a suspect's right to refuse a chemical test is a matter governed purely by statute. See *South Dakota v. Neville*, 459 U.S. 553, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983). Accordingly, we address the question whether the advisement was adequate under § 60-6,197(10).

[4] An earlier version of § 60-6,197(10) required that a suspect be advised of the "consequences" of refusing to submit to a chemical test. See § 60-6,197(10) (Reissue 1993). Applying the 1993 version of § 60-6,197(10), we held that a suspect must be advised of the civil penalties that could apply if he or she refused to submit to a chemical test. See *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995). The current version, however, requires only

that a suspect be advised that "refusal to submit to such test or tests is a separate crime for which the person may be charged." We recently held that under the current version of § 60-6,197(10), a defendant need not be advised of any additional consequences of a refusal to submit to a chemical test. *Davis v. Wimes, ante* p. 504, 641 N.W.2d 37 (2002).

Under § 60-6,197(10), Osterhoudt was required to advise Turner only that a refusal to submit to a chemical test was a separate crime for which Turner could be charged. That is exactly what Turner was advised of. The advisement was adequate, and Turner was not denied due process.

Turner next argues that § 60-6,197(10) is vague and overbroad. Turner, however, did not specifically present this issue in his pleading to the county or district courts. Additionally, both courts considered only issues of due process raised by Turner.

[5] A constitutional issue that has not been presented to or passed upon by the trial court is not appropriate for consideration on appeal. *State v. Bainbridge*, 249 Neb. 260, 543 N.W.2d 154 (1996). Because the trial court did not pass on the issue of the facial validity of § 60-6,197, we do not address the issue on appeal.

Finally, Turner raises several additional assignments of error. We have reviewed the remaining assignments of error and determine that they are without merit. Accordingly, we affirm.

AFFIRMED.

RANDY L. SMEAL, APPELLANT, V.
RICKARD W. OLSON, APPELLEE.
644 N.W.2d 550

Filed May 24, 2002. No. S-00-834.

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

3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Limitations of Actions: Notice.** The main purpose of a statute of limitations is to notify the defendant of a complaint against him or her within a reasonable amount of time so that the defendant is not prejudiced by having an action filed long after the time he or she could have had to prepare a defense against a claim.
5. **Limitations of Actions: Pleadings: Notice.** For the purpose of applying the relation-back doctrine to a defendant named for the first time in an amended petition, the period during which the new defendant must be shown to have had the requisite knowledge of the suit includes the statutory period prescribed for the filing of the original petition plus the additional 6-month period in which summons could be served pursuant to Neb. Rev. Stat. § 25-217 (Reissue 1995).
6. **Limitations of Actions: Pleadings.** If a petition alleges a cause of action ostensibly barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute.
7. **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.
8. **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.
9. ____: ____. In the absence of a prima facie showing that the movant is entitled to summary judgment, the opposing party is not required to reveal evidence which he or she expects to produce at trial to prove the allegations contained in the petition.

Petition for further review from the Nebraska Court of Appeals, HANNON, SIEVERS, and MOORE, Judges, on appeal thereto from the District Court for Buffalo County, JOHN P. ICENOGLE, Judge. Judgment of Court of Appeals reversed with directions.

Terry M. Anderson and Timothy J. O'Brien, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellant.

Jeffrey H. Jacobsen and Nicole M. Mailahn, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellee.

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

STEPHAN, J.

In this appeal, we examine the rules governing when an amended petition naming a new defendant in a civil action relates

back to the date on which the original petition was filed for purposes of determining whether the statute of limitations bars the claim against the new defendant. Based upon its determination that the relation-back doctrine did not apply, the Nebraska Court of Appeals affirmed an order of the district court for Buffalo County entering summary judgment in favor of appellee, Rickard W. Olson, the defendant below. *Smeal v. Olson*, 10 Neb. App. 702, 636 N.W.2d 636 (2001). We granted the petition for further review filed by appellant, Randy L. Smeal, the plaintiff below.

BACKGROUND

On December 15, 1998, Smeal filed a petition alleging that Rickard K. Olson negligently caused a December 15, 1994, motor vehicle accident. The petition was filed 1 day prior to the expiration of the 4-year statute of limitations. See Neb. Rev. Stat. § 25-207 (Reissue 1995). Rickard K. was served with summons on June 11, 1999, after the period of limitations had run and 4 days before the expiration of the 6-month period for service of process allowed by Neb. Rev. Stat. § 25-217 (Reissue 1995). He filed an answer on June 28, in which he admitted that a vehicle operated by him collided with a vehicle operated by Smeal on December 15, 1994, but denied the remaining allegations in the petition.

On October 14, 1999, Rickard K. moved for leave to file an amended answer in order to "clearly reflect the fact that he was not the operator of a vehicle involved in a collision with the plaintiff as alleged in the plaintiff's Petition, said vehicle having been operated by Rickard W. Olson, Rickard K. Olson's son." Smeal was granted leave to file an amended petition naming Rickard W. as defendant and did so on November 17. Rickard W. was served with a summons on February 1, 2000.

Rickard W. filed a demurrer to the amended petition, averring that the claim against him was barred by the statute of limitations. The district court sustained the demurrer but granted leave to file a second amended petition. Smeal did so on March 6, 2000, naming Rickard W. as defendant and specifically alleging that the second amended petition related back to the filing of the original petition, "since Rickard W. Olson, Defendant, had notice of Plaintiff's original Petition prior to the time bar." Rickard W. filed another demurrer, which was overruled.

Rickard W. then filed an answer in which he admitted that he was the driver of the vehicle at the time of the accident but generally denied Smeal's remaining allegations. He affirmatively alleged that the statute of limitations barred the claim against him. On the same day he filed his answer, Rickard W. filed a motion for summary judgment.

The evidence offered at the hearing on the motion for summary judgment consisted of copies of the pleadings which had been filed in the action and the proof of service of process on both Rickard K. and Rickard W. On July 18, 2000, the district court granted Rickard W.'s motion for summary judgment, reasoning on the basis of *Zyburo v. Board of Education*, 239 Neb. 162, 474 N.W.2d 671 (1991), that the second amended petition could not relate back to the original petition as a matter of law because Rickard W. did not have notice of the original action until after the statute of limitations had run.

Smeal appealed, arguing that an amended petition naming a new defendant can relate back to the filing date of the original petition under Nebraska law if the new defendant had notice of the original action within the prescribed limitations period plus the 6-month period permitted under § 25-217 for obtaining service following the filing of the original action. Assuming without deciding that this proposition was correct, the Court of Appeals determined that Smeal had failed to prove that Rickard W. had notice by means other than service within this time period and, therefore, affirmed the judgment of the district court. *Smeal v. Olson*, 10 Neb. App. 702, 636 N.W.2d 636 (2001).

ASSIGNMENTS OF ERROR

On further review, Smeal assigns that the Court of Appeals erred in allocating the burden of proof on the summary judgment motion.

STANDARD OF REVIEW

[1,2] 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. *McCarson v. McCarson, ante* p. 534, 641 N.W.2d 62 (2002);

Altaffer v. Majestic Roofing, ante p. 518, 641 N.W.2d 34 (2002). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Polinski v. Sky Harbor Air Serv., ante* p. 406, 640 N.W.2d 391 (2002).

[3] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Sydow v. City of Grand Island, ante* p. 389, 639 N.W.2d 913 (2002).

ANALYSIS

Relation Back

At all times relevant to this action, Nebraska had no statute or court rule specifying when an amended petition relates back to the filing of a prior petition for purposes of determining whether a claim is time barred. This court has held that for limitations purposes, an amended pleading in the same cause of action ordinarily relates back to the original pleading. *Meyer Bros. v. Travelers Ins. Co.*, 250 Neb. 389, 551 N.W.2d 1 (1996); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993). A more complicated issue arises when the amendment seeks to add or substitute a new defendant. We addressed this issue in *Zyburo v. Board of Education*, 239 Neb. 162, 474 N.W.2d 671 (1991), upon which both the district court and the Court of Appeals relied in this case.

In *Zyburo*, a school guidance counselor who claimed he was unlawfully terminated from his employment filed a petition in error naming the school board as defendant. The petition was timely filed within the required 30 days of the board's order discharging the counselor. The district court, however, sustained the board's special appearance, finding that the proper party defendant was the school district, not the school board. After the limitations period had expired, the counselor filed an amended petition naming the school district as defendant. The district court found the petition untimely and dismissed the action. On appeal, we held that the school board was the alter ego of the school district and that it was thus proper in an error proceeding to name either or both as parties defendant. In addressing whether the

amended petition related back to the date of filing of the original petition, we cited and discussed *Schiavone v. Fortune*, 477 U.S. 21, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986).

In *Schiavone*, the plaintiffs filed libel suits naming Fortune as the defendant prior to the expiration of the statute of limitations. Service was not attempted until after the limitations period had expired. The plaintiffs subsequently learned that Fortune was merely a division of Time, Inc., and amended their complaints to name Time as the proper defendant. The lower court found that the amended complaints were barred by the statute of limitations. On appeal to the U.S. Supreme Court, the plaintiffs argued (1) that institution of the action against Fortune was equivalent to institution of an action against Time due to the close relationship between the two and (2) that the amended petitions nevertheless related back under Fed. R. Civ. P. 15(c). In addressing the plaintiffs' first argument, the Court recognized that the "[t]imely filing of a complaint, and notice within the limitations period to the party named in the complaint, permit imputation of notice to a subsequently named and sufficiently related party." *Schiavone*, 477 U.S. at 29. However, the Court found that such a rule could not benefit the plaintiffs because "neither Fortune nor Time received notice of the filing until after the period of limitations had run [and t]hus, there was no proper notice to Fortune that could be imputed to Time." *Id.*

The Court then addressed the application of rule 15(c), summarizing the rule as follows:

> (1) [t]he 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.*

(Emphasis supplied.) *Schiavone*, 477 U.S. at 29. The language of rule 15(c) as it existed at the time of *Schiavone* did not actually contain the phrase "within the prescribed limitations period," but, rather, the language "'within the period provided by law for commencing the action against' Time." 477 U.S. at 30. The Court

concluded that the plain meaning of this language required a substituted party to have notice within the statute of limitations only and made it impossible to extend the notice period to include the time for service of process. *Id.*

We stated in *Zyburo v. Board of Education*, 239 Neb. 162, 474 N.W.2d 671 (1991), that because of the similarity between rule 15(c) and our case law, we look to federal decisions for guidance in applying the relation-back doctrine. Relying primarily on *Schiavone*, we stated, "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." *Zyburo*, 239 Neb. at 169, 474 N.W.2d at 676. We concluded that because the school board and the school district were "one and the same," service upon the board gave the district notice within the limitations period, and thus the amended petition related back. *Id.* at 169-70, 474 N.W.2d at 676.

It is unclear from the *Zyburo* opinion whether the requisite service upon the board and thus notice to the board occurred during the 30-day limitations period or whether it occurred during the additional period for service of process following the 30 days. *Zyburo* thus does not expressly address the specific issue presented in this case, i.e., whether the relation-back doctrine applies in the circumstance where the party added by amendment is alleged to have acquired notice of a timely filed original petition after the prescribed limitations period has expired but within the statutory period for obtaining service of process on a defendant named in the original petition. In this regard, § 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 addressing this issue, the Court of Appeals looked to current federal law for guidance, as we did in *Zyburo*. Subsequent to the Supreme Court's decision in *Schiavone v. Fortune*, 477 U.S. 21, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986), rule 15(c) was amended and currently provides:

> An amendment of a pleading relates back to the date of the original pleading when . . . (2) the claim or defense asserted in the amended pleading arose out of the conduct,

> transaction, or occurrence set forth or attempted to be set forth in the original pleading, or (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, *within the period provided by Rule 4(m) for service of the summons and complaint*, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

(Emphasis supplied.) The Court of Appeals correctly noted that this rule as amended "does not require actual service upon a late-added defendant in order for the notice requirement to be satisfied, nor does the rule require that the notice issue directly from the plaintiff." *Smeal v. Olson*, 10 Neb. App. 702, 708, 636 N.W.2d 636, 642 (2001). Rather, "[i]nformal notice to the new party of commencement of the action is sufficient." *Id.* Accordingly, the Court of Appeals assumed without deciding that the period in which actual notice of the suit on the part of the substituted defendant would trigger the relation-back doctrine included the limitations period plus the 6-month period allowed for service of process under § 25-217, which is this state's equivalent of Fed. R. Civ. P. 4(m).

[4,5] We agree with this reasoning. The main purpose of a statute of limitations is to notify the defendant of a complaint against him or her within a reasonable amount of time so that the defendant is not prejudiced by having an action filed long after the time he or she could have had to prepare a defense against a claim. *Becker v. Hobbs*, 256 Neb. 432, 590 N.W.2d 360 (1999); *Hullinger v. Board of Regents*, 249 Neb. 868, 546 N.W.2d 779 (1996). Under our statutory scheme, a properly named defendant might not have actual knowledge of a suit filed on the last day of the prescribed limitations period until served with summons up to 6 months later as permitted by § 25-217. If it is shown that the original defendant was named in error and that the party who should have been named had actual knowledge of the suit within the same time period, we see no logical reason why that party

cannot be substituted as a defendant by an amended petition which relates back to the filing of the original petition for purposes of the statute of limitations. See, *West v. Buchanan*, 981 P.2d 1065 (Alaska 1999); *Ritchie v. Grand Canyon Scenic Rides*, 165 Ariz. 460, 799 P.2d 801 (1990). Accordingly, we hold that for the purpose of applying the relation-back doctrine to a defendant named for the first time in an amended petition, the period during which the new defendant must be shown to have had the requisite knowledge of the suit includes the statutory period prescribed for the filing of the original petition plus the additional 6-month period in which summons could be served pursuant to § 25-217.

We are aware that during the pendency of the petition for further review in this case, L.B. 876 was enacted which includes provisions dealing with relation back of amended pleadings. See 2002 Neb. Laws, L.B. 876. This new law does not apply to the present case, and we express no opinion as to how the issues now before us would be determined under its provisions.

SUMMARY JUDGMENT

The Court of Appeals determined that because Rickard W. was "sued outside the statute of limitations and served outside the grace period . . . the burden shifted to Smeal to prove by evidence that the factual predicates for application of the doctrine of relation back existed." *Smeal*, 10 Neb. App. at 712, 636 N.W.2d at 644. The court concluded that Rickard W. was entitled to summary judgment because Smeal offered no evidence that Rickard W. acquired notice of the suit within the limitations period. We disagree with this allocation of the burden of production.

[6-9] If a petition alleges a cause of action ostensibly barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute. *Teater v. State*, 252 Neb. 20, 559 N.W.2d 758 (1997); *Meyer Bros. v. Travelers Ins. Co.*, 250 Neb. 389, 551 N.W.2d 1 (1996). Smeal met this pleading requirement by alleging in his second amended petition that it arose out of the same conduct which was the subject of his original petition; that Rickard W. "had notice of Plaintiff's original Petition prior to the time bar" and "will not be prejudiced maintaining a defense"; and that Rickard W. "must or should have known that, but for a mistake concerning identity, the action was being brought against him."

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. *City State Bank v. Holstine*, 260 Neb. 578, 618 N.W.2d 704 (2000); *Moore v. American Charter Fed. Sav. & Loan Assn.*, 219 Neb. 793, 366 N.W.2d 436 (1985). 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. *Polinski v. Sky Harbor Air Serv., ante* p. 406, 640 N.W.2d 391 (2002); *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, 619 N.W.2d 432 (2000); *City State Bank v. Holstine, supra.* In the absence of a prima facie showing that the movant is entitled to summary judgment, the opposing party is not required to reveal evidence which he or she expects to produce at trial to prove the allegations contained in the petition. *Fackler v. Genetzky*, 257 Neb. 130, 595 N.W.2d 884 (1999); *Melick v. Schmidt*, 251 Neb. 372, 557 N.W.2d 645 (1997); *Harrison v. Seagroves*, 250 Neb. 495, 549 N.W.2d 644 (1996).

The evidence offered by Rickard W. in support of his motion for summary judgment consisted solely of copies of pleadings, motions, and orders which had been previously filed in this action. This evidence shows that Rickard W. was first served with summons on February 1, 2000, and thus had notice of the action on that date. However, there is no affidavit or other evidence demonstrating that contrary to Smeal's allegations, Rickard W. had no prior notice of the action by other means. Rickard W. thus did not make a prima facie showing to pierce the allegation in the second amended petition that he "had notice of Plaintiff's original Petition prior to the time bar." Therefore, Smeal had no burden at this stage in the proceedings to offer evidence on the issue of when Rickard W. first became aware of the action. The motion for summary judgment should have been overruled.

CONCLUSION

The Court of Appeals correctly determined that the relation-back doctrine would make Smeal's claim against Rickard W. timely if it were shown that Rickard W. had notice of the suit by

means other than service of process within a period which included the 4-year limitations period prescribed by § 25-207 plus the additional 6-month period for service of summons permitted by § 25-217. However, the court erred in concluding that the absence of any evidence to establish whether and when Rickard W. received such notice warranted the entry of summary judgment in his favor. Because Rickard W. failed to make a prima facie showing that he did not receive notice of suit within the applicable time period, the entry of summary judgment in his favor was error. We therefore reverse the judgment of the Court of Appeals with directions to reverse the judgment of the district court and remand the cause for further proceedings.

REVERSED WITH DIRECTIONS.

LENORA RUSH, LEGAL GUARDIAN OF THEODORE BLAND, JR., AN INCAPACITATED PERSON, APPELLANT, V. WILLIAM D. WILDER, INDIVIDUALLY, AND DOUGLAS COUNTY, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEES.

644 N.W.2d 151

Filed May 24, 2002. No. S-00-929.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment: 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. **Pleadings.** The issues in a case are framed by the pleadings.
4. **Pleadings: Appeal and Error.** An appellate court is obligated to dispose of cases on the basis of the theory presented by the pleadings.
5. **Constitutional Law: Actions.** In order to state a cause of action under 42 U.S.C. § 1983 (1994), a plaintiff must allege facts establishing conduct by a person acting under color of state law which deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States.
6. **Constitutional Law: Prisoners: Medical Assistance.** Deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment, whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally

denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.

7. **Constitutional Law: Public Officers and Employees: Prisoners: Medical Assistance: Liability.** A prison official cannot be found liable under the Eighth Amendment for failure to attend to a prisoner's medical needs unless the official knows of and disregards an excessive risk to inmate health or safety; the official must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and the official must also draw the inference.
8. **Constitutional Law: Prisoners: Medical Assistance: Due Process.** While a convicted prisoner's claim alleging inadequate medical care is brought under the Eighth Amendment to the U.S. Constitution, a pretrial detainee's claim alleging inadequate medical care is a due process claim.
9. **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.
10. ____: ____. In the absence of a prima facie showing by the movant that he or she is entitled to summary judgment, the opposing party is not required to reveal evidence which he or she expects to produce at trial to prove the allegations contained in his or her petition.
11. **Public Officers and Employees: Prisoners: Medical Assistance.** One type of deliberate indifference is evidenced when prison officials prevent an inmate from receiving treatment or deny the inmate access to medical personnel capable of evaluating the need for treatment.
12. **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.
13. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.
14. **Negligence: Liability: Public Officers and Employees.** A local government cannot be held liable under 42 U.S.C. § 1983 (1994) solely because of injury inflicted by its employees or agents; rather, it can be liable only when the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury.
15. **Supreme Court: Courts: Appeal and Error.** Upon further review from a judgment of the Nebraska Court of Appeals, the Nebraska Supreme Court will not reverse a judgment which it deems to be correct simply because its reasoning differs from that employed by the Court of Appeals.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and INBODY and CARLSON, Judges, on appeal thereto from the District Court for Douglas County, W. MARK ASHFORD, Judge. Judgment of Court of Appeals affirmed.

D.C. Bradford and James R. Welsh, of Bradford, Coenen & Welsh, for appellant.

Joseph S. Daly, Kelly K. Brandon, and P. Shawn McCann, of Sodoro, Daly & Sodoro, for appellee Douglas County.

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

GERRARD, J.

NATURE OF CASE

Lenora Rush, legal guardian of Theodore Bland, Jr., sued Douglas County for injuries Bland suffered while incarcerated by Douglas County. The district court entered summary judgment for Douglas County, but the Nebraska Court of Appeals reversed the judgment of the district court. Because Douglas County's evidence did not establish a prima facie case for summary judgment, we affirm the judgment of the Court of Appeals.

BACKGROUND

Rush filed a petition alleging that on June 24, 1996, while Bland was an inmate at the Douglas County correctional facility, William D. Wilder, another inmate, assaulted Bland with a food tray and caused Bland to suffer a traumatic brain injury. Rush's petition alleged causes of action against Wilder for assault and against Douglas County for depriving Bland of his "right . . . to timely and appropriate medical care while in the custody of the defendant, Douglas County, under the Fourth and Fourteenth Amendments to the Constitution of the United States."

Douglas County filed a motion for summary judgment supported by the affidavit of Robert N. Brown, M.D., a physician employed by Douglas County who treated Bland during Bland's incarceration. Brown averred that he had reviewed the records of Douglas County's treatment of Bland, and based on that review of the record, as well as his own knowledge of the care given to Bland, Brown opined that all the employees of Douglas County met the relevant standard of medical care. The affidavit of Rush's expert witness, a professor of criminal justice, was rejected as a discovery sanction. The district court determined that without expert testimony for Rush, there was no issue of material fact, and entered summary judgment for Douglas County.

Rush appealed, arguing that the district court erred in requiring her to produce an expert witness and in striking the affidavit

of her expert witness. The Court of Appeals reversed the summary judgment, determining that Rush's petition was not intended to state a cause of action for medical malpractice, but instead stated a cause of action for simple negligence. See *Rush v. Wilder*, No. A-00-929, 2001 WL 1643585 (Neb. App. Dec. 26, 2001) (not designated for permanent publication). The Court of Appeals determined that the negligence of corrections officers did not require expert testimony to establish a case and, therefore, that the district court had erred in entering summary judgment. See *id.* The Court of Appeals reversed the decision and remanded the cause for a new trial, without reaching the question whether the district court erred in striking the affidavit of Rush's expert witness. See *id.* Douglas County filed a petition for further review, which we granted.

ASSIGNMENT OF ERROR

Douglas County assigns, as consolidated and restated, that the Court of Appeals erred in determining that Rush was not required to produce expert medical testimony to rebut Douglas County's prima facie showing for summary judgment.

STANDARD OF REVIEW

[1,2] 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. *McCarson v. McCarson, ante* p. 534, 641 N.W.2d 62 (2002). The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Id.*

ANALYSIS

Initially, we note that Rush's petition pleads two causes of action, the first of which is a cause of action against Wilder. The record on appeal does not reflect any proceedings with respect to Rush's claim against Wilder. At oral argument, Rush's counsel stated that the cause of action against Wilder had been dismissed for failure to serve process. Moreover, the district court's order of summary judgment dismisses Rush's petition in its entirety, and

Rush does not assign any error with respect to the apparent dismissal of the assault cause of action. Absent any other suggestion that the order appealed from is not a final order, we conclude that we have jurisdiction over the instant appeal.

Nature of Rush's Cause of Action

The primary dispute between the parties relates to the appropriate characterization of Rush's second cause of action. On appeal, Rush characterizes this claim as one of simple negligence on the part of Douglas County. Douglas County claims that the cause of action involves medical malpractice and constitutional claims, thus requiring Rush to produce expert testimony in response to Douglas County's motion for summary judgment. The Court of Appeals adopted Rush's position in reversing the district court judgment.

[3,4] The issues in a case are framed by the pleadings. *City State Bank v. Holstine*, 260 Neb. 578, 618 N.W.2d 704 (2000). An appellate court is obligated to dispose of cases on the basis of the theory presented by the pleadings. See, *Ashland State Bank v. Elkhorn Racquetball, Inc.*, 246 Neb. 411, 520 N.W.2d 189 (1994); *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993). Rush's petition, in relevant part, alleges the following:

> 11. This action arises under the United States Constitution, particularly under the provisions of the Fourth, Sixth, and Fourteenth Amendments to the Constitution of the United States, and under federal law, particularly the Civil Rights Act, Title 42 of U.S.C. § 1983.
>
> 12. This Court has jurisdiction of this cause under and by virtue of 28 U.S.C. § 1343. Each and all of the acts of defendant, Douglas County, alleged herein, were done by defendant, Douglas County, under the color of the statutes, ordinances, regulations, customs and usages of the State of Nebraska, by and through its agents, employees and/or representations while acting in the course of their employment, agency and/or representation of defendant, Douglas County.
>
> 13. That the defendant, William D. Wilder, intentionally and forcibly struck Theodore Bland Jr., across the head with a food tray, without justification or cause, with the intent to inflict unnecessary harm upon the plaintiff. Such

use of force caused physical and mental injuries to Theodore Bland Jr., as described in more detail below.

14. That the defendant, Douglas County, by and through its agents, employees and/or representatives, failed and/or refused to make available to Theodore Bland Jr. medical treatment for injuries sustained as a result of the assault for a period from 11:30 A.M. until 7:30 P.M., at which time Theodore Bland Jr. was taken to St. Joseph Hospital wherein he underwent emergency medical treatment for traumatic brain injury.

15. That the conduct of the defendant, Douglas County, by and through its agents, employees and/or representatives, while acting in the scope of their employment with the defendant, deprived Theodore Bland Jr. of the following rights, privileges, and immunities given to him by the Constitution of the United States:

a. The right of Theodore Bland to timely and appropriate medical care while in the custody of the defendant, Douglas County, under the Fourth and Fourteenth Amendments to the Constitution of the United States;

b. The acts, conducts and behavior of the defendant, Douglas County, by and through its agents, employees and/or representatives, were performed knowingly, intentionally and maliciously, by reason of which plaintiff is entitled to punitive damages in the sum of $1,000,000.

[5] Based on our reading of Rush's petition, as set forth above, we agree with Douglas County insofar as it argues that the Court of Appeals erred in characterizing Rush's cause of action against Douglas County as simple negligence. Rush's petition clearly sets forth a single cause of action against Douglas County, brought under 42 U.S.C. § 1983 (1994): the failure to provide Bland with adequate medical care in violation of the Constitution of the United States. At oral argument, the parties agreed that the petition sets forth a cause of action under § 1983. In order to state a cause of action under § 1983, a plaintiff must allege facts establishing conduct by a person acting under color of state law which deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Claypool v. Hibberd*, 261 Neb. 818, 626 N.W.2d 539 (2001).

[6,7] Deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment, whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. See *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983. *Estelle, supra.* A prison official cannot be found liable under the Eighth Amendment for failure to attend to a prisoner's medical needs unless the official knows of and disregards an excessive risk to inmate health or safety; the official must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and the official must also draw the inference. See, *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994); *Wilson v. Seiter*, 501 U.S. 294, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991).

[8] Allegations of deliberate indifference to a prisoner's medical needs are generally analyzed pursuant to the 8th Amendment, applied to the states through the Due Process Clause of the 14th Amendment. See, generally, *Wilson, supra.* While Rush's petition variously invokes the 4th, 6th, and 14th Amendments, Rush's complaint is more accurately characterized as a claim pursuant to *Estelle, supra.* See *Oxendine v. Kaplan*, 241 F.3d 1272 (10th Cir. 2001). We also note that the record does not reflect the reason for Bland's incarceration. While a convicted prisoner's claim alleging inadequate medical care is brought under the Eighth Amendment, a pretrial detainee's claim alleging inadequate medical care is a due process claim. See *Chavez v. Cady*, 207 F.3d 901 (7th Cir. 2000), citing *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). In general, however, the claims are analyzed in the same manner, guided by the propositions of law set forth above. See *id.* Thus, the analysis to be conducted would be the same regardless of whether Bland's claim is brought under the 8th or 14th Amendments. See *Chavez, supra.*

NEED FOR EXPERT TESTIMONY

Based on this understanding of Rush's cause of action, Douglas County argues that Rush is required to prove her claim with expert medical testimony. We need not, however, consider so expansive a rule in the context of the present case. The question presented to us is not whether all cases of deliberate indifference to a prisoner's medical needs require substantiation by expert medical testimony, but simply whether Rush was, in this case, required to present expert opinion testimony to respond to Brown's affidavit supporting Douglas County's motion for summary judgment.

[9,10] 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. *City State Bank v. Holstine*, 260 Neb. 578, 618 N.W.2d 704 (2000). In the absence of a prima facie showing by the movant that he or she is entitled to summary judgment, the opposing party is not required to reveal evidence which he or she expects to produce at trial to prove the allegations contained in his or her petition. *Fackler v. Genetzky*, 257 Neb. 130, 595 N.W.2d 884 (1999).

The only exhibits received in evidence by the district court in support of Douglas County's motion for summary judgment were Brown's affidavit and Rush's responses to interrogatories. The responses to interrogatories contain no admissions that are relevant to this issue. Brown's affidavit, as relevant, states the following:

> [Y]our affiant has reviewed the Douglas County Department of Corrections' medical record concerning the care and treatment of Mr. Bland, and based upon his review of the record, his knowledge of the medical care given to Mr. Bland, and his training, education and experience as a medical doctor, he is of the opinion that he and all of the employees of Douglas County, Nebraska, met the standard of medical care applicable in Omaha, Douglas County, Nebraska, or similar communities under similar circumstances at all times material herein.

[11] If this case presented a medical malpractice cause of action, Brown's affidavit might suffice to establish a prima facie case for summary judgment. See, generally, *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999). However, Rush's petition in this case does not allege that the quality of medical care eventually provided by Douglas County was inadequate; rather, Rush alleges that Douglas County did not make timely medical care available at all. One type of deliberate indifference is evidenced when prison officials prevent an inmate from receiving treatment or deny the inmate access to medical personnel capable of evaluating the need for treatment. *Oxendine v. Kaplan*, 241 F.3d 1272 (10th Cir. 2001).

Brown's affidavit does not sufficiently controvert this allegation. Taken in the light most favorable to Douglas County, Brown's affidavit, as quoted above, could be read to infer that all of Douglas County's employees provided timely and appropriate medical care. However, in reviewing a summary judgment against Rush, we view the evidence in the light most favorable to Rush and give Rush the benefit of all reasonable inferences deducible from the evidence. See *McCarson v. McCarson, ante* p. 534, 641 N.W.2d 62 (2002). Brown's affidavit states that his opinion was based on his review of Bland's medical records and Brown's own knowledge of the medical care given to Bland. While this would establish that the medical care eventually provided to Bland was appropriate, taken in the light most favorable to Rush, Brown's affidavit does not establish that Douglas County made medical care available to Bland in a timely fashion.

[12] This is particularly so because the record does not contain any of Bland's medical records, nor does it contain any depositions, affidavits, or other testimony describing what happened to Bland on June 24, 1996, or how Douglas County responded to Wilder's assault of Bland. We conclude that a review of such records is required before a determination is made against Rush in this case. See *Smith v. Jenkins*, 919 F.2d 90 (8th Cir. 1990). Whether a prison official had the requisite knowledge of a substantial risk to an inmate's health is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence. See *Oxendine, supra*. The record in this case sets forth none of the circumstances surrounding Bland's

injuries. 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. See *City State Bank v. Holstine*, 260 Neb. 578, 618 N.W.2d 704 (2000). The evidence presented by Douglas County, taken in the light most favorable to Rush, does not pierce the allegations made in Rush's pleadings and does not establish that Douglas County is entitled to summary judgment.

[13] Rush argued before the Court of Appeals that the district court erred in refusing to accept the affidavit of her expert witness, a professor of criminal justice. The Court of Appeals did not reach this assignment of error, nor do we, as we conclude, albeit for reasons different from those of the Court of Appeals, that Rush was not required to present expert testimony to rebut the evidence offered by Douglas County. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Crawford v. Crawford, ante* p. 37, 638 N.W.2d 505 (2002).

[14] We note, in passing, that Rush's second cause of action is directed solely at Douglas County, and not at any employees of Douglas County in their individual capacities. Rush, however, did not allege that Douglas County's treatment of Bland was pursuant to any policy or custom of Douglas County. A local government cannot be held liable under § 1983 solely because of injury inflicted by its employees or agents; rather, it can be liable only when the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury. *Claypool v. Hibberd*, 261 Neb. 818, 626 N.W.2d 539 (2001), citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Thus, Rush's petition in its current form may not state a cause of action against Douglas County, the only defendant in her second cause of action. However, since this defect could have been remedied, if raised, by amendment of the pleadings, it is not plain error and does not affect our disposition of the appeal.

CONCLUSION

[15] Douglas County did not establish a prima facie case for summary judgment; thus, Rush was not required to present

evidence to rebut Douglas County's evidence in support of its motion for summary judgment. Upon further review from a judgment of the Court of Appeals, this court will not reverse a judgment which it deems to be correct simply because its reasoning differs from that employed by the Court of Appeals. See *Reinsch v. Reinsch*, 259 Neb. 564, 611 N.W.2d 86 (2000). For reasons different from those stated by the Court of Appeals, we conclude that the summary judgment entered by the district court should be reversed, and we affirm the judgment of the Court of Appeals to that effect.

AFFIRMED.

ERNIE CHAMBERS, APPELLANT, V. SCOTT LAUTENBAUGH, DOUGLAS COUNTY ELECTION COMMISSIONER, APPELLEE.

644 N.W.2d 540

Filed May 24, 2002. No. S-01-110.

1. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
2. ____: ____. In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action must be overruled.
3. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
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. **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.
6. **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.
7. **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.

8. **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.
9. **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.
10. **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.
11. **Moot Question: Appeal and Error.** An appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. This exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.
12. **Standing: Jurisdiction: Justiciable Issues.** As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.
13. **Standing.** In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy.
14. **Public Officers and Employees: Actions.** A person seeking to restrain the act of a public board or officer must show special injury peculiar to himself or herself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation.
15. **Actions: Taxation: Injunction.** A resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.
16. **Actions: Standing: Taxation: Municipal Corporations.** To assert standing, a resident taxpayer must allege that a demand was made upon the municipal or public corporation and that the demand was refused, or facts which show that such a demand would be useless.
17. **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.
18. **Political Subdivisions.** Neb. Rev. Stat. § 32-553 (Reissue 1998) does not limit redrawing of district boundaries to only once every 10 years.
19. **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.

Robert V. Broom and Vard R. Johnson, of Broom, Johnson & Clarkson, for appellant.

Thomas G. Incontro, of Raynor, Rensch & Pfeiffer, for appellee.

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

HENDRY, C.J.

INTRODUCTION

In August 2000, Ernie Chambers brought suit against Scott Lautenbaugh, Douglas County election commissioner, seeking declaratory judgment and injunctive relief relating to Lautenbaugh's act of redrawing the Omaha City Council district boundaries in August 2000 based on 1990 federal decennial census data. Lautenbaugh demurred, and on January 17, 2001, the Douglas County District Court sustained Lautenbaugh's demurrer. The court dismissed Chambers' petition with prejudice, finding that it could not be amended to allege sufficient facts to state a cause of action. Chambers appealed.

FACTUAL BACKGROUND

In his operative petition, Chambers alleged that on August 30, 2000, despite Chambers' demands that Lautenbaugh cease and desist from his announced plans to redraw the boundaries, Lautenbaugh proceeded to draw "new boundaries for the election of members of the City Council at the primary election to be held April 3, 2001 and the general election to be held May 15, 2001." Chambers further alleged that Lautenbaugh drew the new boundaries for the stated purpose of "maintain[ing] substantial equality of population among the districts." The petition asserted that Lautenbaugh exceeded his authority by drawing the new district boundaries based on 1990 federal decennial census data, rather than waiting to use the data from the 2000 federal decennial census.

Chambers also alleged in his petition that "[t]he Election Commissioner has no authority to draw district boundaries for the Omaha City Council for the purpose of maintaining substantial population equality among the districts except as set forth" in Neb. Const. art. III, § 5, and Neb. Rev. Stat. §§ 14-201.03 (Reissue 1997) and 32-553 (Reissue 1998). The petition contended that Neb. Const. art. III, § 5, requires the Legislature to

redistrict the state into legislative districts after each federal decennial census. According to the petition, the election commissioner, pursuant to § 32-553, must, if necessary to maintain substantial equality of population within the districts, redraw the boundaries within 6 months after passage and approval of the Legislature's bill which redistricts the state on the basis of the most recent federal decennial census.

Chambers' petition asked the district court to declare that Lautenbaugh's redrawing of the Omaha City Council district boundaries in August 2000 was unlawful, since it was done before the data from the 2000 federal decennial census was available and before the Legislature had passed legislation redistricting the state in 2001. The petition also asked the district court to declare unlawful any implementation of the new district boundaries and the consequent expenditures of employee time and public tax money. Finally, the petition requested that the court declare unlawful any Omaha City Council elections held under the new city council district boundaries.

On December 15, 2000, Lautenbaugh filed a demurrer alleging that (1) the district court had no jurisdiction over the subject matter of the action, (2) the district court had no jurisdiction over Lautenbaugh, (3) Chambers had no legal capacity to sue, (4) there was a defect of parties, and (5) the petition did not state facts sufficient to constitute a cause of action.

The district court held a hearing on the demurrer on January 8, 2001. On January 17, the court entered its order overruling allegations one through four of Lautenbaugh's demurrer, but sustaining allegation five on the basis that Chambers' petition failed to state a cause of action. In its order, the district court analyzed the arguments presented by Chambers and Lautenbaugh:

> [Chambers] alleges that the second portion of Section 32-553 of the Nebraska Revised Statutes not only requires redistricting if necessary but also limits redistricting to the six month period of time referred to therein. [Lautenbaugh] argues that Section 14-201.03 requires the election commissioner to redraw the boundaries of Omaha's city council districts whenever they are no longer substantially equal in population and, therefore, that the election commissioner has a statutory duty and obligation to redraw the boundaries

> of the districts when their population is no longer substantially equal. The commissioner further argues that the basis to use to determine a redrawing of the districts was the most recent decennial census which in this case is the census taken in 1990.
>
> The initial question is the meaning of the language in Neb. Rev. Stat. 14-201.03 which requires the commissioner to redraw the boundaries when the districts are no longer substantially equal in population **pursuant to Section 32-553** (emphasis added). Does the redrawing of the districts pursuant to Section 32-553 simply mean that the redistricting is to be determined by the most recent federal decennial census or does it mean that the redistricting is to be determined by the most recent federal decennial census but only within six months after the passage and approval of the legislative bill providing for reestablishing the states [sic] legislative districts?
>
> If the Court follows the logic and argument of [Chambers] then redistricting is to occur once every ten years, if necessary. If the Court follows the logic and argument of [Lautenbaugh] the redistricting is to occur whenever the districts are substantially unequal in population as determined by the most recent decennial census.

(Emphasis in original.)

The district court found it significant that the Legislature "in drafting Section 14-201.03 and Section 32-553 did not use limiting or restrictive terms such as 'only' when mandating the redrawing of districts by the election commissioner when they became substantially unequal in population." The district court stated:

> Since there is no language limiting the redrawing of districts by the election commissioner the Court further finds that the election commissioner can redraw, if necessary, districts more than the one time required in the year that the census figures are submitted to the State by the United States Department of Commerce.

On this basis, the district court found that Lautenbaugh's actions as election commissioner were lawful and that Chambers' petition could not be amended to state a cause of action against Lautenbaugh. The court sustained Lautenbaugh's

demurrer and dismissed Chambers' petition with prejudice. Chambers appealed.

ASSIGNMENTS OF ERROR

Chambers assigns, rephrased, that the district court erred in (1) determining that his petition did not state facts sufficient to constitute a cause of action and (2) determining that Lautenbaugh, as Douglas County election commissioner, had the authority to redraw the Omaha City Council district boundaries before the data from the 2000 federal decennial census was available.

STANDARD OF REVIEW

[1] In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Malone v. American Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001).

[2,3] In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action must be overruled. *Id.* 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. *Id.*

[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. *Premium Farms v. County of Holt*, *ante* p. 415, 640 N.W.2d 633 (2002).

[5,6] 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. *Wilcox v. City of McCook*, 262 Neb. 696, 634 N.W.2d 486 (2001). Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999).

ANALYSIS

MOOTNESS

[7,8] 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. *Tri-Par Investments v. Sousa, ante* p. 209, 640 N.W.2d 371 (2002). 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. *Wilcox, supra.*

Lautenbaugh argues that Chambers' case is moot due to several events which have occurred since the district court sustained Lautenbaugh's demurrer in January 2001. On April 3, 2001, Omaha City Council primary elections were held pursuant to the new district boundaries Lautenbaugh drew in August 2000. On May 15, the general election for the Omaha City Council was held utilizing the same boundaries. On May 16, an amendment to § 14-201.03 became operative, which, inter alia, removed the election commissioner's authority to redraw city council district boundaries and placed the responsibility with the Omaha City Council. See 2001 Neb. Laws, L.B. 71. In November 2001, the Omaha City Council passed, and Omaha Mayor Mike Fahey approved, city ordinance No. 35781, redrawing the Omaha City Council district boundaries based on data from the 2000 federal decennial census. Lautenbaugh claims that "because of LB 71, the completion of the elections at issue, the second redrawing of the Omaha City Council Districts and the passage of time, [Chambers'] appeal is now inconsequential, unsubstantial and moot."

[9,10] " '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.' " *Wilcox*, 262 Neb. at 699, 634 N.W.2d at 489 (quoting *Hron v. Donlan*, 259 Neb. 259, 609 N.W.2d 379 (2000)). 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. *Greater Omaha Realty Co. v. City of Omaha*, 258 Neb. 714, 605 N.W.2d 472 (2000).

[11] Assuming without deciding that all issues raised in Chambers' petition are moot, we determine that these issues

qualify for review under the public interest exception to the mootness doctrine. See *Wilcox, supra.* This court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. *Id.* This exception 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. *Id.*

Chambers' petition raises the public issue of how often city council district boundaries may be redrawn pursuant to § 32-553. This issue, if adjudicated, would provide future guidance for public officials, including members of the Omaha City Council who, as a result of the amendment to § 14-201.03, are now responsible for redrawing city council district boundaries. Furthermore, the similar question of whether § 32-553 limits the Omaha City Council or other appropriate legal entities to redrawing district boundaries only once every 10 years will likely arise prior to the federal decennial census in 2010. For these reasons, we determine the public interest exception to the mootness doctrine applies to this case. However, before we may consider the issues Chambers raises on appeal, we must address another jurisdictional defect asserted by Lautenbaugh.

STANDING

[12-14] Lautenbaugh challenges Chambers' standing to bring this declaratory judgment action. Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999). As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf. *State ex rel. Steinke v. Lautenbaugh, ante* p. 652, 642 N.W.2d 132 (2002). In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy. *Id.* With regard to declaratory actions against public officials, we have specifically stated:

> " '[A] person seeking to restrain the act of a public board or officer must show special injury peculiar to himself or herself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation.' "

Id. at 657-58, 642 N.W.2d at 138. Accord, *Hagan v. Upper Republican NRD*, 261 Neb. 312, 622 N.W.2d 627 (2001); *Neb. Against Exp. Gmblg. v. Neb. Horsemen's Assn.*, 258 Neb. 690, 605 N.W.2d 803 (2000); *Ritchhart, supra.*

[15] It is unnecessary for us to determine whether Chambers' petition shows "special injury" because the petition clearly alleges "an illegal expenditure of public funds." See *State ex rel. Steinke, supra.* A resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes. *Fitzke v. City of Hastings*, 255 Neb. 46, 582 N.W.2d 301 (1998). In paragraph 2 of his petition, Chambers states that he is a resident of the city of Omaha. In paragraph 10, Chambers alleges, "Employees in the office of the Douglas County Election Commissioner have spent and will spend in the future public time and money to implement the new district boundary lines, when such new boundary lines are not authorized by law." Finally, in his prayer for relief, Chambers asks the district court to "declar[e] that the commitment of employee time and the expenditure of tax monies for such purposes is unlawful and not authorized by law . . . ."

[16] However, a mere allegation of illegal expenditures by public officials is not sufficient in itself to confer standing on a resident taxpayer. To assert standing, a resident taxpayer must also allege that a demand was made upon the municipal or public corporation and that the demand was refused, or facts which show that such a demand would be useless. See *Fitzke, supra.* " ' "Ordinarily a demand upon the responsible officers of the governmental subdivision or municipal corporation that they take action is necessary and a condition precedent to the right of a taxpayer to maintain an action for the recovery of funds on behalf of the governmental entity." ' " *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. 887, 899-900, 327 N.W.2d 595, 602 (1982). In paragraph 12 of his petition, Chambers asserts that he

has "on his own behalf" and "by and through legal counsel, made demand upon [Lautenbaugh] that [Lautenbaugh] cease and desist from his announced plans to redraw the boundaries of the city council districts in the year 2000." Chambers goes on to state, "Notwithstanding such demands, [Lautenbaugh] has drawn new district boundary lines for the seven City Council districts using 1990 census data." Thus, Chambers has alleged that a demand was made to Lautenbaugh and that such demand was refused.

We determine that Chambers has satisfied the conditions necessary to assert standing as a resident taxpayer in this action, and thus this court has jurisdiction to consider Chambers' assignments of error.

STATUTORY INTERPRETATION

Having determined that Chambers has standing on the basis of his status as a resident taxpayer, we now examine whether the district court erred in sustaining Lautenbaugh's demurrer on the basis that Chambers' petition did not state facts sufficient to constitute a cause of action. In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Northwall v. State, ante* p. 1, 637 N.W.2d 890 (2002).

We begin with Chambers' request that the district court declare unlawful any implementation of the new district boundaries and the consequent expenditure of employee time and public tax money. In order to address this issue, we must first determine whether Lautenbaugh had the authority to redraw the district boundaries in August 2000.

Chambers asserts that § 32-553 permits the election commissioner to redraw district boundaries only once every 10 years. Section 32-553 states in part:

> (1) When any political subdivision except a public power district nominates or elects members of the governing board by districts, such districts shall be substantially equal in population as determined by the most recent federal decennial census. Any such political subdivision

> which has districts in place on the date the census figures used in drawing district boundaries for the Legislature are required to be submitted to the state by the United States Department of Commerce, Bureau of the Census, shall, if necessary to maintain substantial population equality as required by this subsection, have new district boundaries drawn within six months after the passage and approval of the legislative bill providing for reestablishing legislative districts. Any such political subdivision in existence on the date the census figures used in drawing district boundaries for the Legislature are required to be submitted to the state by the United States Department of Commerce, Bureau of the Census, and which has not established any district boundaries shall establish district boundaries pursuant to this section within six months after such date. If the deadline for drawing or redrawing district boundary lines imposed by this section is not met, the procedures set forth in section 32-555 shall be followed.

We recognize that § 32-553 was amended during the pendency of this appeal by L.B. 71; however, the amendment does not change or affect the above-quoted language from § 32-553.

Chambers alleges that "[a]s a matter of law the Election Commissioner is without authority to redraw Omaha's City Council Districts 'to maintain substantial population equality' until a federal decennial census is effected and the Legislature has redistricted itself pursuant to the census figures." Brief for appellant at 10. Chambers further argues that the election commissioner "has been granted no power to periodically, on his own initiative, in less than the ten year framework, redraw the boundaries whether they may no longer be substantially equal in population or not." Brief for appellant at 7. Finally, Chambers contends that "[t]o use 1990 census data to justify redrawing in 2000 for a 2001 election is arbitrary. To claim in the 2000 redrawing that the districts now maintain substantial equality when the data is 10 years old is equally arbitrary." Brief for appellant at 11.

[17] Chambers' allegations raise an issue of statutory interpretation. Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an

independent, correct conclusion irrespective of the determination made by the court below. *Premium Farms v. County of Holt, ante* p. 415, 640 N.W.2d 633 (2002). 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.*

[18] Section 32-553 requires the appropriate legal entity to draw districts which are "substantially equal in population as determined by the most recent federal decennial census." The only reference in § 32-553 to a specific time period for redrawing districts appears in the requirement that the appropriate entity must, if necessary to maintain substantial equality of population within the districts, redraw the districts within 6 months after passage and approval of the Legislature's bill which redistricts the state on the basis of the most recent federal decennial census. This decennial redistricting is mandatory if necessary to maintain substantial equality of population within the districts. However, there is no language in § 32-553 which prohibits the appropriate legal entity from redrawing district boundaries at other times to maintain substantial equality. We thus determine that § 32-553 does not limit redrawing of district boundaries to only once every 10 years.

In his petition, Chambers alleges that Lautenbaugh's stated purpose for redrawing the city council district boundaries was "to maintain substantial equality of population among the districts" and that Lautenbaugh "drew such new districts by using the 1990 decennial census data." "Accept[ing] as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom," we determine that Lautenbaugh's actions in redrawing the district boundaries complied with § 32-553. See *Northwall v. State, ante* p. 1, 5, 637 N.W.2d 890, 894 (2002). Therefore, Chambers' petition fails to state a cause of action in that the petition alleges actions by Lautenbaugh that we have determined were lawful. In addition, we conclude that Chambers' remaining allegations likewise do not state a cause of action against Lautenbaugh because they, too, are based solely on Lautenbaugh's authority to draw the district boundaries.

[19] Since Chambers' petition fails to state a cause of action against Lautenbaugh, the district court did not err in sustaining Lautenbaugh's demurrer. The district court also did not err in dismissing Chambers' petition with prejudice since there is no reasonable possibility that an amendment could state a cause of action against Lautenbaugh under the facts alleged in the petition. 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. *Northwall, supra.*

CONCLUSION

For the foregoing reasons, we conclude the district court did not err in sustaining Lautenbaugh's demurrer and dismissing the action with prejudice.

AFFIRMED.

TONIA FALES, PERSONAL REPRESENTATIVE OF THE ESTATE OF VIRGINIA NORINE, APPELLEE, V. IRWIN J. NORINE, APPELLANT.

644 N.W.2d 513

Filed May 24, 2002. No. S-01-349.

1. **Verdicts: Appeal and Error.** A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact.
2. **Verdicts: Juries: Appeal and Error.** A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party.
3. **Directed Verdict: Evidence: Appeal and Error.** Concerning the overruling of a motion for a directed verdict made at the close of all the evidence, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds can draw but one conclusion from the evidence, where an issue should be decided as a matter of law.
4. **Negotiable Instruments: Evidence: Proof.** In an action to recover upon lost, destroyed, or stolen instruments, a plaintiff must prove the elements of the claim by clear and convincing evidence.
5. ____: ____: ____. In addition to the elements stated in Neb. U.C.C. § 3-309 (Reissue 2001), a claimant must also prove by clear and convincing evidence the terms of the instrument.
6. **Decedents' Estates: Negotiable Instruments: Evidence: Proof.** Under Neb. Rev. Stat. § 30-2456 (Reissue 1995) and Neb. U.C.C. § 3-309 (Reissue 2001), a successor

personal representative may enforce a lost note made payable to his or her decedent if the successor proves by clear and convincing evidence that (1) the predecessor personal representative was in possession of the notes and entitled to enforce them when the loss of possession occurred; (2) the loss of possession was not the result of a voluntary transfer by predecessor or lawful seizure; and (3) possession of the notes cannot be obtained because they were either destroyed, their whereabouts cannot be determined, or they are in the wrongful possession of an unknown person or a person who cannot be found or is not amenable to service of process.

7. **Directed Verdict: Negotiable Instruments: Evidence: Proof: Appeal and Error.** When considering the denial of a defendant's motion for a directed verdict in an action to enforce a lost, stolen, or destroyed instrument, an appellate court must affirm the denial unless, as a matter of law, the claimant has failed to prove his or her case by clear and convincing evidence.
8. **Evidence: Proof: Words and Phrases.** Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.
9. **Judgments: Negotiable Instruments.** Under Neb. U.C.C. § 3-309(b) (Reissue 2001), a "court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument."
10. **Decedents' Estates: Limitations of Actions: Judgments: Negotiable Instruments.** Where an estate has insufficient funds to provide for an indemnification bond, a court's withholding of judgment from the personal representative until the statute of limitations for enforcing negotiable instruments expires is a reasonable exercise of discretion in providing adequate protection for the defendant under Neb. U.C.C. § 3-309(b) (Reissue 2001).
11. **Appeal and Error.** A claimed prejudicial error must not only be assigned, but must also be discussed in the brief of the asserting party, and an appellate court will not consider assignments of error which are not discussed in the brief.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed as modified.

John P. Weis, of Sorensen, Zimmerman & Mickey, P.C., for appellant.

Brenda L. Bartels, of Douglas, Kelly, Meade, Ostdiek, Bartels & Neilan, P.C., for appellee.

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

CONNOLLY, J.

Following a jury verdict, the district court entered judgment for appellee, Tonia Fales, on two lost promissory notes. Fales is the successor personal representative of the estate of Virginia

Norine (Virginia). The notes were executed by appellant, Irvin J. Norine (Norine), Virginia's son, payable to Virginia.

The district court entered judgment after finding there was sufficient evidence to support the verdict under Neb. U.C.C. § 3-309 (Reissue 2001). That section allows a claimant to enforce a lost, stolen, or destroyed instrument if the person was in possession of the note when the loss occurred and the instrument was not voluntarily transferred or lawfully seized. Under § 3-309(b), the court must also find that the defendant is adequately protected against future claims on the instrument before entering judgment. Further, a court is permitted to provide adequate protection by any reasonable means. The district court restricted payment to Fales on the judgment until January 2003, after the statute of limitations for enforcing the notes had expired.

We affirm the court's judgment that under § 3-309, there was sufficient competent evidence that a jury could reasonably conclude that after Virginia's death, Norine had possession of the notes and had either lost or destroyed them. We modify, however, the court's provision for adequate protection.

ASSIGNMENTS OF ERROR

Norine assigns that the district court erred in (1) failing to sustain his motion for directed verdict made at the close of all the evidence, (2) finding that Virginia was in possession of the promissory notes at the time of her death and that she was entitled to enforce them, (3) finding that Fales had the right to enforce payment on the notes when she could not account for the loss of the originals, (4) overruling Norine's motion for new trial or judgment notwithstanding the verdict, (5) entering judgment when there is no reasonable means of protecting Norine from the enforcement of the lost promissory notes in question, and (6) entertaining Fales' motion to correct the calculation of interest when it was procedurally inaccurate and untimely filed.

BACKGROUND

Virginia died intestate on September 7, 1997. She was survived by Norine; another son; and two granddaughters, Fales and Mindy Medina, the daughters of Virginia's predeceased daughter. After Virginia died, Norine was appointed as personal representative of Virginia's estate.

In March 1999, while Norine was the personal representative, he prepared an inventory of Virginia's estate in which he listed as assets two promissory notes dated January 16, 1996, that he had executed payable to Virginia. The first note was in the amount of $67,615.48, plus 8.5 percent interest calculated at $8,877.08. The second note was in the amount of $115,000 plus 8.5 percent interest calculated at $16,042.50. Both notes were payable on January 16, 1998, 2 years from the date they were executed. According to Norine's inventory, the combined total value of the notes plus interest equaled $208,089.88 at the time of Virginia's death. In May 1999, he prepared a proposal for the distribution of Virginia's estate, which also included the notes as assets. Both documents were signed by Norine and filed with the county court.

Norine was removed as personal representative of Virginia's estate for mismanagement of the estate, and Fales was appointed to succeed him in June 2000. Fales then filed suit against Norine to enforce payment of the missing notes under § 3-309. Norine filed a general denial, and the case was tried to a jury.

At trial, during Fales' case in chief, copies of both promissory notes were shown to Norine. He admitted that each was a true and accurate copy of the respective promissory note he had executed on January 16, 1996, payable to Virginia. He admitted that he had signed the notes and had not made any payments on them, and he verified his signatures on the copies. He also admitted that he had testified during a deposition in October 1999 that he had the original notes.

He denied owing money on either note. He stated that the notes were executed to protect his assets from his ex-wife during his divorce, apparently by showing more debt than actually existed. He admitted, however, that Virginia had assisted him in paying a judgment to his ex-wife and that the first promissory note partially reflected the payment Virginia had made to him for the judgment. He was shown a copy of a real estate mortgage to secure both notes, and he admitted that he had executed the mortgage on January 16, 1996. Finally, he was shown a copy of a financing statement and security agreement, which he admitted to signing on February 16. The financing statement secured all of Norine's debts to Virginia with several items of personal

property. He admitted that Virginia had never told him that she was destroying the notes.

On cross-examination by his attorney, Norine stated that Virginia kept her important papers in a cardboard box in a locked room in the basement and that he last saw the box 4 to 5 months before Virginia's death. He stated that Virginia was hospitalized during the last 2 to 3 months of her life and that for 2 to 3 weeks of this time, Medina and Fales lived at the house. Photographs were received into evidence which showed that the lock had been removed from the room in which Virginia kept her papers. He stated that he did not look for the box again until after Virginia died and that he believed the box disappeared during the last 3 weeks Virginia was hospitalized. He stated that he did not know that the originals were missing when he prepared the inventory. Finally, he also stated that he had learned from his son about 3 weeks before trial that Virginia might have destroyed the notes.

Fales testified that she, Medina, and Medina's children had gone to see Virginia while she was in the hospital. They had stayed in a hotel all but one night because the house was not large enough for them all. She denied knowing about the cardboard box or missing lock, and she stated that Norine did not allow her back into the house after Virginia's death. After she was appointed personal representative, she went back to the house to search for the original promissory notes and make inquiries. There was a metal box in the house with titles and loan records, but the originals were not in the box. She obtained copies of the notes from Norine's attorney. She stated that Virginia had told her about making the loan to Norine but had never told her that she had destroyed the notes. Finally, Fales stated that no payments had been made on the notes.

At the close of Fales' testimony, photocopies of both of the promissory notes, the mortgage, and the financing statement were offered into evidence. Norine objected because Fales had failed to show that the documents were not destroyed by Virginia. The court found that Fales was required to show only that the originals could not be produced. The court noted that both Fales and Norine, the only authorized representatives of the estate, had testified that they could not locate the originals. The

court then received the exhibits as evidence of the terms of the promissory notes.

During Norine's case in chief, his son testified that in June 1996, Virginia had told him that the promissory notes were intended only to protect Norine during his divorce. He said that she intended to destroy them because she did not want Norine to have to repay them. He admitted that Virginia had never mentioned the notes again and that he had no confirmation that she had destroyed them.

At the close of the evidence, Norine moved for a directed verdict because the only evidence presented which would account for the disappearance of the notes was Norine's son's testimony that Virginia may have destroyed them. Norine further argued that the burden of proof was on Fales to show that Virginia had not destroyed the notes. He argued that she had failed to prove that the notes were still in existence and could have been enforced by Virginia during her lifetime. Fales also moved for directed verdict because all of the elements to enforce the missing promissory notes had been proved under § 3-309. The court stated that the governing provision of the law was § 3-309. It found that whether Virginia had destroyed the notes was an issue of fact and denied both motions.

The jury returned a verdict against Norine on both causes of action. It awarded the estate $79,598.64 on the first promissory note and $135,380.87 on the second note. On December 21, 2000, Fales filed two motions. The first motion asked the court under § 3-309(b) to postpone entering a judgment in the case until January 26, 2001, at which time—she mistakenly believed—the statute of limitations for enforcing a contract would expire. The second motion asked the court to correct the jury's calculation of interest. Norine filed a motion for new trial or judgment notwithstanding the verdict. He argued that the evidence was insufficient to support a reasonable basis for the jury's verdict. He also argued that using the statute of limitations was insufficient security for him because the notes could be enforced against him later than the time limitations if they were being held by a minor. The court found that there was sufficient evidence to support the verdict. The court also found that it had a duty to correct the interest calculated by the jury, and did so.

Concerning the issue of security, the court commented that the chance of a minor bringing a suit on the notes after the statute of limitations had expired "is just about as likely as the three of us getting knocked dead by lightning right now. And that didn't happen." Because the estate had insufficient funds to cover an indemnification bond, the court rendered judgment in the full amount of principal plus interest but restricted the payment to the estate until the statute of limitations had expired, in January 2003. The court ordered that the judgment be held by the court until that time. In a written order, the motion for new trial was overruled.

STANDARD OF REVIEW

[1,2] A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact. *Gagne v. Severa*, 259 Neb. 884, 612 N.W.2d 500 (2000). A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party. *Id.*

[3] Concerning the overruling of a motion for a directed verdict made at the close of all the evidence, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds can draw but one conclusion from the evidence, where an issue should be decided as a matter of law. *Id.*

ANALYSIS

This appeal presents two issues. The first is whether Fales presented sufficient evidence to satisfy the requirements of § 3-309. The second issue is whether the judgment adequately protected Norine against a future claim by a holder in due course of the lost promissory notes.

Norine contends that Fales failed to prove by clear and convincing evidence that (1) Virginia was in possession of the notes and entitled to enforce them when the loss of possession occurred; (2) Virginia did not transfer the notes before her death; and (3) the whereabouts of the notes cannot be reasonably obtained. Fales contends there was sufficient evidence for the jury to find that Virginia was in possession of the notes and had not destroyed them or transferred them before her death. Further, she contends

that the evidence showed that she could not determine the whereabouts of the notes.

[4] In an action to recover upon lost, destroyed, or stolen instruments, a plaintiff must prove the elements of the claim by clear and convincing evidence. *Castellano v. Bitkower*, 216 Neb. 806, 346 N.W.2d 249 (1984). An instrument means a negotiable instrument under Neb. U.C.C. § 3-104(a) (Reissue 2001), which is an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, at a definite time or on demand. See § 3-104(a) (setting forth additional definitions and conditions). The notes were made payable to Virginia at the time they were executed, and Norine promised to pay them 2 years from the date they were executed. They were therefore due on January 16, 1998. There were no conditions placed on the payments, and the parties have not disputed that the instruments were negotiable. Thus, the enforcement of the notes is governed by § 3-309. Section 3-309(a) provides:

> A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

[5] Although one of the stated excuses for the note's absence under § 3-309(a) is the destruction of the note, obviously, the destruction must not be a voluntary act of the payee or the obligation would be discharged. See Neb. U.C.C. § 3-604 (Reissue 2001) (discharge by cancellation or renunciation). In addition to the elements stated in § 3-309, under *Castellano, supra*, a claimant must also prove by clear and convincing evidence "the terms of the instrument." *Id.* at 810, 346 N.W.2d at 252.

Section 3-309 is part of the revised article 3 of the Uniform Commercial Code governing negotiable instruments and was adopted by Nebraska in 1991, operative January 1, 1992. See

Neb. U.C.C. § 3-102, comment 1 (Reissue 2001). It is a modification of the former Neb. U.C.C. § 3-804 (Reissue 1980), intended to clarify that the plaintiff need not satisfy the definition of "owner" to enforce an instrument. See § 3-309, comment.

Section 3-309 was designed to deal with the typical situation of a lost, destroyed, or stolen check or other type of instrument being enforced against the maker by the payee. See 2 James J. White & Robert S. Summers, Uniform Commercial Code § 18-2 (4th ed. 1995). Although § 3-309 does not deal specifically with lost instruments in the context of probate administration, its application in this context is not entirely without precedent. See *Good v. Good*, 72 N.C. App. 312, 324 S.E.2d 43 (1985) (applying article 3, § 804, of Uniform Commercial Code to enforce promissory note made to decedent).

Under Neb. Rev. Stat. § 30-2464(c) (Cum. Supp. 2000), "a personal representative of a decedent domiciled in this state at his or her death has the same standing to sue and be sued . . . as his or her decedent had immediately prior to death." Thus, if a personal representative comes into possession of an instrument made payable to the decedent after his or her death, the personal representative may enforce the instrument on behalf of the estate. If the personal representative loses possession of the note after he or she was entitled to enforce it, then the personal representative may enforce the note under § 3-309 if all of the elements of the claim are proved by clear and convincing evidence.

On the other hand, if a personal representative alleges that the decedent lost possession of an enforceable instrument before the decedent's death, then the personal representative must prove the elements under § 3-309(a), as they relate to the decedent, by clear and convincing evidence.

[6] Fales did not allege that the loss of possession occurred while the notes were in Virginia's possession. There was evidence, however, that Virginia did not destroy or transfer the notes before her death because Norine had possession of them after her death. Evidence was also adduced that after Norine was the personal representative and entitled to enforce the notes, neither he nor Fales, after she was appointed his successor, had been able to determine the whereabouts of the notes. Fales was not personally in possession of the notes when the loss occurred. But as the

successor personal representative, she has the same "powers and duties in respect to the continued administration which the former personal representative would have had if his appointment had not been terminated." See Neb. Rev. Stat. § 30-2456 (Reissue 1995). Thus, the right to enforce the notes under § 3-309 transferred to her by operation of law upon her appointment if she proved by clear and convincing evidence that (1) Norine was in possession of the notes and entitled to enforce them when the loss of possession occurred; (2) the loss of possession was not the result of a voluntary transfer by Norine or lawful seizure; and (3) possession of the notes cannot be obtained because they were either destroyed, their whereabouts cannot be determined, or they are in the wrongful possession of an unknown person or a person who cannot be found or is not amenable to service of process.

Norine claims there was insufficient evidence to submit this case to the jury and that the district court erred in failing to direct a verdict in his favor. We disagree.

At trial, Norine admitted that he had testified in an October 1999 deposition that he had possession of the original notes at that time. He also stated that he was mistaken in that belief. But the evidence also showed that he had listed the notes as assets on both the inventory of the estate and the proposed distribution. Both documents were signed by Norine and filed with the county court. In the estate inventory, he certified the notes were part of the "true and complete inventory of the property owned by decedent at the time of her death." This evidence conflicted with Norine's statements that the notes were sham instruments, intended to shield his assets during his divorce. Norine's son testified that Virginia had told him that she intended to destroy the notes because she did not want Norine to have to repay them. Norine's son also stated, however, that he had never seen the notes or heard anything else about them apart from this one comment. Norine also admitted that Virginia had never told him she had destroyed the notes.

[7] Conflicting evidence does not mean that the evidence is insufficient to submit to a jury. This court has previously considered the denial of a defendant's motion for a directed verdict in an action to enforce a lost, stolen, or destroyed instrument. We concluded that the denial must be affirmed unless, as a matter of

law, the claimant has failed to prove his or her case by clear and convincing evidence. See *Castellano v. Bitkower*, 216 Neb. 806, 346 N.W.2d 249 (1984). As a general rule, this is a matter best left to the jury's determination based on all the facts, including the credibility of the witnesses. *Id.* See, also, *In re Estate of Brionez*, 8 Neb. App. 913, 603 N.W.2d 688 (2000).

Under these facts, this court cannot conclude as a matter of law that Fales has failed to prove by clear and convincing evidence that Norine was in possession of the notes after Virginia's death. Norine's own admissions, through earlier deposition testimony and submission of the estate's assets and distribution proposal, strongly indicate that he was in possession of the notes after Virginia's death. Although Norine's son testified that Virginia stated she did not intend to enforce the notes, this testimony is contrary to evidence that she secured the notes with a mortgage and financing statement.

The evidence also showed that Norine was Virginia's personal representative and, thus, entitled to enforce the notes after her death despite the fact that he was the maker. He admitted that he had executed and delivered the notes, along with the mortgage and security agreement, and verified that the copies were accurate representations of the notes and that the signatures were his. He stated that he was unable to locate the notes after Virginia's death. But given the evidence showing that he was in possession of the notes, the jury could have reasonably concluded that this testimony indicated that he had either lost the notes after her death or intentionally destroyed them.

[8] The jury was properly instructed that clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved. See *Castellano, supra*. Under these facts, this court cannot conclude the jury's verdict was clearly wrong.

Determination of Adequate Protection

[9] Section 3-309(b) provides that a "court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument." The comment to

§ 3-309 provides: "The court is given discretion in determining how adequate protection is to be assured. . . . Under section 3-309 adequate protection is a flexible concept. . . . [T]he type of adequate protection that is reasonable in the circumstances may depend on the degree of certainty about the facts in the case."

[10] In this case, by the time the court entered a judgment on the verdict, 5 years had passed since the notes were executed. The court concluded that it was highly unlikely a stranger in possession of the notes would have waited that long to attempt to enforce them. Nonetheless, the court recognized that the notes were negotiable and took the additional precaution of withholding the judgment from Fales until the statute of limitations for enforcing the notes had expired, or January 16, 2003. Given the status of the estate, the court's purported use of the statute of limitations for adequate protection was a reasonable exercise of its discretion. However, contrary to Fales' contention, the applicable statute of limitations for negotiable instruments is not governed by Neb. Rev. Stat. § 25-205 (Reissue 1995). That section imposes a time limitation for actions on a written contract. Under Neb. U.C.C. § 3-118 (Reissue 2001), an action to enforce the obligation of a party to pay a negotiable instrument must be commenced within 6 years of the due date or the accelerated due date stated in the note. We conclude that the judgment should be withheld from Fales until January 16, 2004, or 6 years from the date the notes were due. The court's judgment is corrected to that extent. See *First Const. Co. v. Tri-South Mortg. Investors*, 308 N.W.2d 298 (Minn. 1981) (concluding that trial court erred in failing to extend surety's liability for indemnification bond until statute of limitations for enforcing note had expired).

Motion to Calculate Interest

[11] Although Norine assigns that the court erred in entertaining Fales' motion to correct the calculation of interest in the jury verdict, he did not discuss this assignment in his brief. A claimed prejudicial error must not only be assigned, but must also be discussed in the brief of the asserting party, and an appellate court will not consider assignments of error which are not discussed in the brief. *Kirchner v. Wilson*, 262 Neb. 607, 634 N.W.2d 760 (2001).

CONCLUSION

The district court did not err in submitting this case to the jury when the evidence was sufficient to create a firm belief or conviction that (1) the loss of possession occurred after Norine had possession of the notes and while he was entitled to enforce them, (2) the loss of possession did not occur because of a transfer or lawful seizure, and (3) neither Norine nor Fales was able to account for the whereabouts of the notes. For the same reason, the court did not err in denying Norine's motion for new trial or judgment notwithstanding the verdict. However, the court erred in its determination of adequate protection for Norine before entering the judgment by failing to use the correct statute of limitations in determining the time that the judgment would be withheld from Fales.

AFFIRMED AS MODIFIED.

WRIGHT, J., not participating.

KAREN L. MANKER, APPELLEE, V.
JAMES I. MANKER, APPELLANT.
644 N.W.2d 522

Filed May 24, 2002. No. S-01-736.

1. **Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **Limitations of Actions.** The determination of which statute of limitations applies is a question of law.
4. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.
5. **Pleadings: Limitations of Actions: Demurrer: Waiver.** The statute of limitations is an affirmative defense which is waived if not asserted by demurrer or answer.
6. **Pleadings.** Where both general and specific allegations are made in a pleading with respect to the same matter, the latter controls.
7. **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.

8. **Words and Phrases.** A nullity is something that is legally void.
9. **Marriage: Presumptions: Words and Phrases.** Nullity of marriage refers to the invalidity of a presumed or supposed marriage because it is void on its face or has been voided by court order.
10. **Trusts: Property: Title: Equity.** A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his or her acquisition or retention of the property would constitute unjust enrichment.
11. **Trusts: Real Estate.** Real property may be the subject of a constructive trust.
12. **Trusts: Property: Stock.** Intangible property and liquid assets such as stocks and bank and investment accounts may also be held subject to a constructive trust.
13. **Trusts: Property: Title: Equity.** Regardless of the nature of the property upon which the constructive trust is imposed, a party seeking to establish the trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained.
14. **Limitations of Actions: Trusts: Property.** Neb. Rev. Stat. § 25-207 (Reissue 1995) is the applicable statute of limitations with regard to the establishment of a constructive trust on personal property.
15. **Limitations of Actions.** A period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit.
16. **Limitations of Actions: Trusts.** The statute of limitations does not begin to run against the rights of the beneficiary of a constructive trust until he or she is apprised of the fact that the trustee does not intend to carry out the provisions of the trust.
17. **Pleadings: Limitations of Actions: Demurrer.** A petition which makes apparent on its face that the cause of action it asserts is ostensibly barred by the statute of limitations fails to state a cause of action and is demurrable unless the petition alleges some excuse which tolls the operation and bar of the statute.
18. **Fraud: Estoppel: Limitations of Actions: Malpractice.** The doctrine of fraudulent concealment may estop a defendant from asserting a statute of limitations defense when the defendant has, either by deception or by a violation of a duty, concealed from the plaintiff material facts which prevent the plaintiff from discovering professional negligence.
19. **Estoppel: Fraud: Limitations of Actions.** The equitable doctrine of estoppel in pais may, in a proper case, be applied to prevent a fraudulent or inequitable resort to a statute of limitations, and a defendant may, by his or her representations, promises, or conduct, be so estopped where the other elements of estoppel are present.
20. **Estoppel.** The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or

inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice.

21. **Equity: Estoppel: Limitations of Actions.** The first prong of the equitable estoppel test is met when one lulls his or her adversary into a false sense of security, thereby causing that person to subject his or her claim to the bar of the statute of limitations, and then pleads the very delay caused by his or her conduct as a defense to the action when it is filed.
22. ____: ____: ____. The doctrine of equitable estoppel may be applied to prevent an inequitable resort to a statute of limitations, and a defendant may, by his or her representations, promises, or conduct, be so estopped where the other elements of estoppel are present.
23. **Trusts: Equity.** A constructive trust is an equitable remedy intended to prevent unjust enrichment.
24. **Estoppel: Equity: Appeal and Error.** A claim of equitable estoppel rests in equity, and in an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the trial court.
25. **Equity: Fraud.** Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue.

Appeal from the District Court for Chase County: JOHN J. BATTERSHELL, Judge. Affirmed in part, and in part reversed and vacated.

Thomas Blount, of Bertolini, Schroeder & Blount, for appellant.

Daylene A. Bennett, of Burger & Bennett, P.C., for appellee.

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

PER CURIAM.

I. NATURE OF CASE

Karen L. Manker and James I. Manker were married in 1979 and lived together until 1998. On August 13, 1999, Karen filed this action alleging she had learned for the first time in 1994 that James had dissolved the marriage in 1980. In her petition, Karen claimed she was a putative spouse within the meaning of Neb. Rev. Stat. § 42-378 (Reissue 1998) and sought relief in the form of an equitable division of assets, alimony, and child support. In the alternative, Karen requested that she be granted the same relief through the imposition of a constructive trust. James asserted various defenses, including an allegation that Karen's

claims were barred by the statute of limitations. The district court entered an order rejecting James' defenses and awarding Karen her requested relief. James perfected this timely appeal, and we granted his petition to bypass.

II. BACKGROUND

The parties were married in Kearney, Nebraska, on September 4, 1979. On February 21, 1980, James filed a petition in the district court for Buffalo County seeking to dissolve the marriage. Karen signed a voluntary appearance at the office of James' attorney on March 5. On April 18, Karen again accompanied James to his attorney's office to sign a property settlement agreement.

Notice of the final hearing on James' petition for dissolution was mailed to Karen at her address in Kearney on or about April 24, 1980. On May 8, James and his counsel appeared at the final hearing, but Karen did not appear personally or through counsel. The district court ordered the marriage dissolved after finding it to be irretrievably broken and then accepted the parties' property settlement agreement and incorporated it in the decree. On May 9, the clerk of the district court for Buffalo County mailed notice of the judgment to Karen at the address in Kearney where she and James resided.

Notwithstanding the legal dissolution of their marriage, James and Karen continued to reside together and hold themselves out as husband and wife. In late June or early July 1980, the couple moved to Loup City, Nebraska, so James could take a job as an industrial arts teacher. When James began his employment, he listed Karen as his "spouse" on his health insurance forms. James purchased a house in Loup City, and the warranty deed to the home referred to James and Karen as "husband and wife." In 1980, the parties filed their state and federal income tax returns under the status "Married, filing joint return" and continued to do so until 1997.

In 1988, the couple sold the house in Loup City and moved to Wauneta, Nebraska, so James could take a position as a school principal. When James began this employment, he again listed Karen as his "spouse" on his health insurance forms. In 1992, the parties visited an attorney for the purpose of executing wills. James executed a will that referred to Karen as his "wife" and left

Karen the entirety of his property in the event of his death. Karen executed a will that referred to James as her "husband" and left the entirety of her property to James in the event of her death.

In 1998, the parties' relationship ended, and James moved out of the rented home in which the family had resided. On August 13, 1999, Karen filed this action in the district court for Chase County. In her petition, Karen alleged that she was "completely and innocently ignorant of the actual status of her marriage until the fall of 1994." Karen prayed that the district court declare her to be James' putative spouse under § 42-378 and equitably distribute the assets accumulated by the parties during the alleged putative marriage or, in the alternative, for the imposition of a constructive trust. She further prayed for a determination that James is the father of a child born October 10, 1983, during their cohabitation, an award of legal custody of the child, and an award of child support.

After his general demurrer was overruled, James filed an answer in which he affirmatively stated that he has "always acknowledged [the child] to be his son and has supported him since the date of his birth." He further alleged that Karen "was well aware that the parties were divorced in 1980," that her petition failed to state facts sufficient to state a cause of action, and that her purported cause of action was barred by the statute of limitations and laches.

At trial, Karen admitted executing the voluntary appearance and property settlement agreement in 1980 but claimed that James subsequently told her that "he was just thinking about" a divorce and that "[h]e had time to stop it." Karen further testified that sometime between April and June 1980, James informed her that he had, in fact, dismissed the divorce proceedings on the day after the parties signed the property settlement agreement.

Karen denied ever receiving a copy of the notice of the final hearing on James' petition for dissolution or the notice of final judgment. She testified that James always retrieved the mail and surmised that he must have concealed these documents from her. Karen testified that at the time, she did not check with the court or James' attorney to verify that the dissolution proceeding had been dismissed. Karen stated that she simply "believed [James]" in this regard.

Karen testified that she had no reason to suspect her marriage to James had been dissolved until James made a suspicious comment during an argument in 1994. Based on this comment, Karen consulted an attorney who made inquiries and confirmed that the decree had, in fact, been entered in 1980. Karen testified that she was "shocked" to learn of this fact.

On direct examination, Karen was questioned about why she had continued living with James after discovering in 1994 that the marriage had been dissolved. She stated that she attempted to move out on one occasion in 1994 but that James said he would move out instead. According to Karen, James did not move out until 1998, despite her repeated requests that he do so. Asked why she did not disclose the dissolution to others after learning of it in 1994, Karen testified that James told her they "couldn't do that . . . because . . . it would alert the IRS and we'd be into a lot of trouble. And he'd lose his job."

Additional testimony from both parties established that James handled all of the couple's finances and that nearly all of the property accumulated during their relationship was titled in James' name. As of 1997, the only property held by Karen was $800 deposited in a checking account, an IRA worth $16,501.55 that Karen cashed for living expenses following the separation, a savings bond valued at $5,542 which was given to Karen by James' father and subsequently cashed by Karen, and a 1997 Buick LeSabre automobile purchased by James but titled in Karen's name. The remainder of the property, including James' substantial retirement account, numerous stocks and bonds, a pickup, a boat, and a camper, was all titled in James' name. James testified that he purchased all of these assets with his own funds.

In an order entered June 12, 2001, the district court stated:

> The Court finds that the very difficult issue in this case is the credibility of the parties. The question comes down to who does the Court believe. The Court finds that based upon the testimony, the demeanor of the witnesses, particularly Karen and James and the facts surrounding the dissolution of marriage in 1980 and the actions of the parties since 1980, [that] the plaintiff herein presented the more credible evidence. The Court finds specifically that the plaintiff herein believed, in good faith, that the defendant

> had stopped the dissolution of marriage in 1980 and that she was married to the defendant in 1980 and remained married to the defendant up until 1994. The Court further finds that in the fall of 1994, Karen found out the truth and [sic] that she had, in fact, been divorced from James since May 8, 1980.

Based upon these findings, the district court concluded that Karen should be considered James' putative spouse pursuant to § 42-378.

In reaching its conclusion, the district court relied on the decision of the California Court of Appeals in *In re Marriage of Monti*, 135 Cal. App. 3d 50, 185 Cal. Rptr. 72 (1982), which held that a person who continues to live with a former spouse in ignorance of a final dissolution decree and with a good faith belief in the continued validity of the marriage is a putative spouse under California law. The district court reasoned that because the California putative spouse statute construed in *In re Marriage of Monti* was similar to § 42-378, the same result was warranted in this case.

The district court acknowledged that more than 4 years had elapsed between the date in 1994 when Karen discovered that the marriage had been dissolved and the filing of her petition on August 13, 1999. Nevertheless, the district court reasoned that because the parties had lived together until the fall of 1998 and because of certain statements James had made to Karen after 1994, her claim was not time barred. Based upon its determination that Karen was a putative spouse and its alternative determination that Karen was entitled to relief through the imposition of a constructive trust, the district court divided the parties' assets and ordered James to "transfer to Karen . . . accounts, money, or monies worth [or] valued at one hundred thirty-eight thousand five hundred twenty-seven dollars ($138,527.00)," as part of a "property settlement." The district court then entered a judgment in that amount, with interest from and after June 1, 2001, until paid in full.

The district court also ordered Karen and James to execute a qualified domestic relations order and any other documents necessary to accomplish a division of James' interest in a teacher retirement program. In addition, the court found that James had

acknowledged paternity of the parties' minor child and ordered that custody of the child be awarded to Karen, subject to James' right of reasonable visitation, and that James pay $958 per month in child support to Karen commencing June 1, 2001, and continuing until the child reaches the age of majority, dies, or becomes emancipated. Finally, the court ordered James to pay alimony in the amount of $700 per month for 60 months commencing July 1, 2001, and terminating on the death or remarriage of Karen.

III. ASSIGNMENTS OF ERROR

James assigns, restated and consolidated, that the district court erred (1) in concluding that Karen was a putative spouse within the meaning of § 42-378; (2) in finding that Karen held a good faith belief in the existence of her marriage until 1994; (3) in concluding that Karen could, in the alternative, be compensated through the imposition of a constructive trust; (4) in concluding that Karen's cause of action under § 42-378, her action for the imposition of a constructive trust, and her actions for paternity and child support were all not barred by their applicable statutes of limitations; (5) in dividing James' property and awarding it to Karen; and (6) in awarding Karen alimony.

IV. STANDARD OF REVIEW

[1] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Ruzicka v. Ruzicka*, 262 Neb. 824, 635 N.W.2d 528 (2001); *In re Estate of Mecello*, 262 Neb. 493, 633 N.W.2d 892 (2001).

[2] Statutory interpretation presents a question of law. *Sydow v. City of Grand Island, ante* p. 389, 639 N.W.2d 913 (2002); *In re Interest of Sabrina K.*, 262 Neb. 871, 635 N.W.2d 727 (2001).

[3,4] The determination of which statute of limitations applies is a question of law. *Blankenau v. Landess*, 261 Neb. 906, 626 N.W.2d 588 (2001); *Adkins v. Burlington Northern Santa Fe RR. Co.*, 260 Neb. 156, 615 N.W.2d 469 (2000). The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.

Blankenau v. Landess, supra; *Nebraska Popcorn v. Wing*, 258 Neb. 60, 602 N.W.2d 18 (1999).

V. ANALYSIS

The relief awarded by the district court falls into two distinct categories. The first involves the court's finding that James was the father of the parties' minor child. Based upon this determination of paternity, the district court awarded custody to Karen subject to James' reasonable rights of visitation and ordered James to pay child support. The second category of relief relates to the court's finding that Karen was entitled to an equitable division of property and alimony under either of her alternative theories of relief. Because these two categories of relief are not interdependent, we analyze them separately.

1. Paternity, Custody, Visitation, and Child Support

The only assignment of error directed toward the determination of paternity and the award of custody and child support is James' assertion that these claims are barred by the statute of limitations. The procedure for obtaining a judicial determination of paternity is set forth in Neb. Rev. Stat. §§ 43-1401 to 43-1418 (Reissue 1998 & Cum. Supp. 2000). Section 43-1411 provides that a paternity action may be instituted "by (1) the mother or the alleged father of such child, either during pregnancy or within four years after the child's birth . . . or (2) the guardian or next friend of such child or the state, either during pregnancy or within eighteen years after the child's birth." James argues that the paternity action was initiated by the mother more than 4 years after the child's birth and is now time barred.

[5,6] The statute of limitations is an affirmative defense which is waived if not asserted by demurrer or answer. *Welsch v. Graves*, 255 Neb. 62, 582 N.W.2d 312 (1998). In his answer, James alleged generally that "the Plaintiff's Petition fails to state facts upon which a cause of action may be maintained by her and, further, that any action otherwise maintainable by her is barred by the Statute of Limitations." However, this assertion was preceded in the answer by a specific affirmative allegation that James "has always acknowledged [the minor child] to be his son and has supported him since the date of his birth." James' general statute of limitations allegation is inconsistent with his specific allegation

that he has always acknowledged paternity and his obligation to support the minor child. Where both general and specific allegations are made in a pleading with respect to the same matter, the latter controls. *Sickler v. City of Broken Bow*, 143 Neb. 542, 10 N.W.2d 462 (1943). Moreover, James' affirmative allegation that he had acknowledged paternity and the corresponding obligation of parental support prior to the filing of this action is a judicial admission which constitutes a waiver of all controversy with respect to those issues. *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998). Accordingly, there is no merit to James' contention that the district court erred in not determining these claims to be time barred.

2. Division of Property and Alimony

Karen also sought an equitable division of the property acquired during the period of cohabitation and an award of alimony on the theory that she was a putative spouse under § 42-378 or the alternative theory that James had committed fraud warranting the imposition of a constructive trust on the assets. James denied the material allegations pertaining to these claims and asserted a statute of limitations defense. The district court determined that Karen was entitled to relief under either of her theories of recovery and held that the claims were not time barred.

(a) Putative Spouse Doctrine—§ 42-378

[7] In his second assignment of error, James contends the district court erred in determining Karen was a putative spouse within the meaning of § 42-378. The specific issue presented is whether the statute applies in the circumstance of a party who continues to live with an ex-spouse in good faith ignorance of the fact that their once-valid marriage has been dissolved. We have not previously had an opportunity to address this issue, but we do so now guided by the familiar principle that 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).

[8,9] Section 42-378 provides:

> When the court finds that a party entered into the contract of marriage in good faith supposing the other to be capable of contracting, and the marriage is declared a nullity, such fact shall be entered in the decree and the court may order such innocent party compensated as in the case of dissolution of marriage, including an award for costs and attorney fees.

A "nullity" is "[s]omething that is legally void." Black's Law Dictionary 1095 (7th ed. 1999). "Nullity of marriage" refers to "[t]he invalidity of a presumed or supposed marriage because it is void on its face or has been voided by court order." *Id.* at 1096. The marriage in this case was never void; it was legally valid from its inception in 1979 until its dissolution in 1980.

In determining that § 42-378 applied in this case notwithstanding the fact that the marriage was never declared a nullity, the district court relied on *In re Marriage of Monti*, 135 Cal. App. 3d 50, 185 Cal. Rptr. 72 (1982). In *In re Marriage of Monti*, the California Court of Appeals applied California's putative spouse statute in a circumstance where the parties were both lawfully married and then lawfully divorced, but the woman continued living with the man based upon his representation that the divorce was never finalized. The relevant California statute provided: " 'Whenever a determination is made that a marriage is void or voidable and the Court finds that either party or both parties believed in good faith that the marriage was valid, the Court shall declare such party or parties to have the status of a putative spouse . . . .' " *In re Marriage of Monti*, 135 Cal. App. 3d at 52 n.1, 185 Cal. Rptr. at 73 n.1. The court noted that this statute codified but did not change the substantive common law which existed prior to its enactment. Although the court acknowledged that under California common law, the putative spouse principle "is usually applied in situations where a ceremonial marriage becomes void or voidable," it cited two cases decided prior to the enactment of the statute in which a person who continued to live with a former spouse in good faith ignorance of a divorce was deemed to be a putative spouse. *Id.* at 55, 185 Cal. Rptr. at 74, citing *Lazzarevich v. Lazzarevich*, 88 Cal. App. 2d 708, 200 P.2d 49 (1948), and *Feig v. Bank of Italy etc. Assn.*, 218 Cal. 54, 21 P.2d 421 (1933). On the

basis of this preexisting common law, the *In re Marriage of Monti* court concluded that the statute "must be interpreted to include as a putative spouse a divorced spouse who continues to live with the ex-spouse in ignorance of the final divorce decree and with a good faith belief in the continuing validity of the marriage." 135 Cal. App. 3d at 56, 185 Cal. Rptr. at 75.

Section 42-378 was enacted in 1972. 1972 Neb. Laws, L.B. 820, § 32. Neither the briefs of the parties nor our own research has disclosed any opinion of this court applying the putative spouse doctrine prior to the enactment of the statute. Thus, the common-law predicate upon which the *In re Marriage of Monti* court relied in interpreting the California statute does not exist in this state. This court's discussion of § 42-378 since its enactment has always been in the context of void or voidable marriages. For example, in *Randall v. Randall*, 216 Neb. 541, 345 N.W.2d 319 (1984), we concluded that a woman could not be considered a putative spouse under § 42-378 because the evidence established that she had always known that the parties' civil and religious marriage ceremonies performed in Mexico were invalid. Also, in *Hicklin v. Hicklin*, 244 Neb. 895, 509 N.W.2d 627 (1994), we noted that § 42-378 was properly applied to a woman whose marriage was void because she married a man whose divorce was not yet final.

A plausible argument can be made that putative spouse principles should be applied in the circumstance where one lives with a former spouse in the good faith belief that their valid marriage has not been dissolved and, indeed, some statutes do so provide. For example, the Uniform Marriage and Divorce Act provides:

> Any person who has cohabited with another to whom he is not legally married in the good faith belief that he was married to that person is a putative spouse until knowledge of the fact that he is not legally married terminates his status and prevents acquisition of further rights.

Unif. Marriage and Divorce Act § 209, 9A U.L.A. 192 (1998). See, also, Colo. Rev. Stat. Ann. § 14-2-111 (West 1997); 750 Ill. Comp. Stat. Ann. 5/305 (Lexis 1999); Minn. Stat. Ann. § 518.055 (West 1990). The only prerequisite to a party's recovery under these statutes is cohabitation with another person in the good faith belief that they were married. However, that is not

how the putative spouse doctrine is statutorily defined in this state by § 42-378. If expansion of the statutory doctrine is deemed warranted, it is the province of the Legislature and not this court to do so. We conclude that because the parties' marriage was valid during its duration and never void or voidable, § 42-378 is not applicable to the facts presented and thus does not provide a legal basis for the alimony and property division awarded to Karen by the district court.

(b) Constructive Trust

[10-13] As noted, the district court held that Karen was also entitled to relief, in the alternative, through the imposition of a constructive trust. A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his or her acquisition or retention of the property would constitute unjust enrichment. *ProData Computer Servs. v. Ponec*, 256 Neb. 228, 590 N.W.2d 176 (1999); *Hanigan v. Trumble*, 252 Neb. 376, 562 N.W.2d 526 (1997). Real property may be the subject of a constructive trust. *Id.* See, also, *VonSeggern v. Willman*, 244 Neb. 565, 508 N.W.2d 261 (1993); *Kuhlman v. Cargile*, 200 Neb. 150, 262 N.W.2d 454 (1978). Intangible property and liquid assets such as stocks and bank and investment accounts may also be held subject to a constructive trust. See, *Andrews v. Schram*, 252 Neb. 298, 562 N.W.2d 50 (1997); *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990). Regardless of the nature of the property upon which the constructive trust is imposed, a party seeking to establish the trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained. *ProData Computer Servs. v. Ponec, supra*; *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994).

[14] On appeal, James contends the district court erred in determining that Karen's constructive trust claim was not time barred. We must first determine, as a matter of law, which statute of limitations applies. See, *Blankenau v. Landess*, 261 Neb. 906,

626 N.W.2d 588 (2001); *Adkins v. Burlington Northern Santa Fe RR. Co.*, 260 Neb. 156, 615 N.W.2d 469 (2000). In its division of property, the district court relied upon three exhibits listing the assets of each party. All of the listed assets were personal property, with the exception of a tract of land in Missouri which James had purchased prior to the marriage and which was therefore determined by the district court to be his sole property. Thus, we treat Karen's claim as seeking to impose a constructive trust on personal property including vehicles, household items, stocks, bonds, mutual fund shares, and bank accounts. Neb. Rev. Stat. § 25-207 (Reissue 1995) is the applicable statute of limitations with regard to the establishment of a constructive trust on personal property. *Nemaha Nat. Resources Dist. v. Neeman*, 210 Neb. 442, 315 N.W.2d 619 (1982). Section 25-207 provides in pertinent part: "The following actions can only be brought within four years: . . . (2) an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property . . . ."

[15,16] We must next determine when the 4-year limitation period prescribed by § 25-207 began to run. Generally, a period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit. *Blankenau v. Landess, supra*; *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999). The statute of limitations does not begin to run against the rights of the beneficiary of a constructive trust until he or she is apprised of the fact that the trustee does not intend to carry out the provisions of the trust. *Nemaha Nat. Resources Dist. v. Neeman, supra.* Karen alleged in her petition that in the belief they were married, she held James "in a trusting fiduciary capacity as her husband [and] did not inquire into or object to [his] financial decisions as to how the investments and assets were titled or held." She further alleged that after learning of the divorce in the fall of 1994, she repeatedly demanded that James agree to an accounting and equitable distribution of the assets, but James refused. Therefore, it is clear from these allegations that Karen was aware by the fall of 1994 that James did not intend to fulfill any fiduciary duty owed to Karen. Thus, unless tolled, the 4-year limitation period began in the fall of 1994.

[17] A petition which makes apparent on its face that the cause of action it asserts is ostensibly barred by the statute of limitations fails to state a cause of action and is demurrable unless the petition alleges some excuse which tolls the operation and bar of the statute. *Tilt-Up Concrete v. Star City/Federal*, 261 Neb. 64, 621 N.W.2d 502 (2001); *Giese v. Stice*, 252 Neb. 913, 567 N.W.2d 156 (1997). Here, it is apparent from the face of the petition that it was filed more than 4 years after the alleged cause of action accrued, and there are no allegations that would toll the operation and bar of the applicable statutes of limitation. Nevertheless, the district court overruled James' demurrer, determining that "pursuant to the case of Schendt v. Dewey, 246 Neb. 573, [520 N.W.2d 541 (1994)], the plaintiff has started [sic] a cause of action and has pled facts that may create an equitable estoppel against the defendant, which would prevent the running of the statute of limitations." Following trial, the district court made a specific finding that "in the fall of 1994, Karen found out the truth and [sic] that she had, in fact, been divorced from James since May 8, 1980. Karen continued to reside with James until the fall of 1998 and filed this action on August 13, 1999." While it acknowledged that the filing occurred more than 4 years after Karen's discovery of the divorce, the district court concluded that the action would not be barred by the statute of limitations because of the fact that the parties resided together until the fall of 1998 and "because of the statements made to her by James."

[18-21] By its references to *Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541 (1994), and the theory of "equitable estoppel," we understand the district court to have applied either the doctrine of fraudulent concealment or the doctrine of equitable estoppel in pais, or both, to prevent a time bar. In *Schendt* and other professional negligence cases, we have recognized that the doctrine of fraudulent concealment may estop a defendant from asserting a statute of limitations defense when the defendant has, either by deception or by a violation of a duty, concealed from the plaintiff material facts which prevent the plaintiff from discovering professional negligence. See, also, *Gering - Ft. Laramie Irr. Dist. v. Baker*, 259 Neb. 840, 612 N.W.2d 897 (2000); *Muller v. Thaut*, 230 Neb. 244, 430 N.W.2d 884 (1988). We have also recognized that the equitable doctrine of estoppel in pais may, in

a proper case, be applied to prevent a fraudulent or inequitable resort to a statute of limitations, and a defendant may, by his or her representations, promises, or conduct, be so estopped where the other elements of estoppel are present. *Hullinger v. Board of Regents*, 249 Neb. 868, 546 N.W.2d 779 (1996); *Reifschneider v. Nebraska Methodist Hosp.*, 233 Neb. 695, 447 N.W.2d 622 (1989). The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice. *Hullinger v. Board of Regents, supra*; *Hamilton v. Hamilton*, 242 Neb. 687, 496 N.W.2d 507 (1993); *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991); *Reifschneider v. Nebraska Methodist Hosp., supra*. The first prong of this test is met when one lulls his or her adversary into a false sense of security, thereby causing that person to subject his or her claim to the bar of the statute of limitations, and then pleads the very delay caused by his or her conduct as a defense to the action when it is filed. *Woodard v. City of Lincoln*, 256 Neb. 61, 588 N.W.2d 831 (1999).

Karen did not specifically plead any statements by James as grounds for tolling the limitations period on the basis of fraudulent concealment or equitable estoppel in pais. On appeal, she relies on the following testimony she gave at trial:

> [Plaintiff's counsel:] Do you recall having any conversations with Mr. Manker about telling people that you were not married?
>
> [Karen:] Yeah, he said we couldn't do that. And we kept filing taxes the same, because he said if we changed our

> filing of our income tax then it would alert the IRS and we'd be into a lot of trouble. And he'd lose his job.

The district court made a specific finding regarding this testimony and noted that it was not disputed or denied by James. It is clear from the record that these statements were made by James *after* his disclosure of the dissolution in the fall of 1994, and therefore, they cannot be characterized as an effort to fraudulently conceal that fact.

[22] But equitable estoppel is not limited to circumstances of fraud. The doctrine of equitable estoppel may be applied to prevent an inequitable resort to a statute of limitations as well, and a defendant may, by his or her representations, promises, or conduct, be so estopped where the other elements of estoppel are present. *Hullinger v. Board of Regents*, 249 Neb. 868, 546 N.W.2d 779 (1996); *Reifschneider v. Nebraska Methodist Hosp.*, 233 Neb. 695, 447 N.W.2d 622 (1989).

[23] In this regard, it is important to remember that a constructive trust is an equitable remedy intended to prevent unjust enrichment. The general principles of law governing constructive trusts are collected in the Restatement of Restitution § 163 (1937). Section 148 of the Restatement deals with laches and statutes of limitations as they relate to equitable actions for restitution. The comments provide that "in the absence of evidence of other circumstances the complainant normally is barred if the period of the statute of limitations applicable to actions at law in analogous situations would have run . . . ." *Id.*, § 148, comment *b.* at 590. But the comments list several circumstances that will excuse the complainant's delay including

> the fact that the respondent stood in a fiduciary or confidential relationship to the complainant who, because of that, hesitated to begin proceedings; the fact that the respondent was in a superior economic position to the complainant as where he was the complainant's creditor or employer; the fact that the complainant could not secure proper advice or that he was ignorant and did not understand his rights; the fact that the respondent fraudulently concealed the facts; the fact that the conduct of the respondent delayed proceedings, as where he could not be located, or where he sought to prevent action or caused

> delay by promises of satisfaction; or the fact that evidence was not available.

Id. at 590-91. We do not imply that every reason listed in the comments will toll the statute of limitations in an action for restitution. However, under the unique circumstances of this case, the issue is whether James' conduct prevents him from asserting the statute of limitations as a defense. The district court concluded that the action was not time barred because of the statements James made to Karen.

Equity is not a rigid concept, and its principles are not applied in a vacuum. Equity is determined on a case-by-case basis when justice and fairness so require. Equity may be used under appropriate circumstances, and equitable principles may prevent one from asserting a particular defense when it would be unfair or unjust to allow that person to do so.

[24,25] The doctrine of equitable estoppel may be applied to prevent an injustice or a harsh and unfair result. A claim of equitable estoppel rests in equity, and in an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the trial court. *State ex rel. Neb. Health Care Assn. v. Dept. of Health*, 255 Neb. 784, 587 N.W.2d 100 (1998). Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue. *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994).

James' conduct is summarized as follows: From 1980 to 1994, Karen believed the parties were married because James did not tell her they were divorced. For 14 years, James accumulated valuable assets in his name alone. After Karen discovered the fraud, James said to her that if she told anyone that they were not married, they would both be in trouble with the Internal Revenue Service and he would lose his job. Karen testified about having conversations with James about telling people that they were not married. James told Karen she could not tell anyone and that they kept filing taxes the same "because he said if we changed our filing of our income tax then it would alert the IRS and we'd be into a lot of trouble. And he'd lose his job."

James did not dispute making these statements, and the district court specifically found that it was clear from the record that these statements were made after Karen discovered that the parties were not married. It is not when Karen discovered they were not married that is important, but what James told her after she knew. These representations were made by James with the intent to induce Karen not to take any action because of the threat of trouble, including the loss of his job, and these inducements continued because the parties kept filing their taxes the same way or "we'd be into a lot of trouble." Karen commenced her action in 1999 after James moved out of the house.

As a result of James' statements, the district court imposed a constructive trust and denied application of the statute of limitations as a defense. James occupied the superior position in the relationship. He controlled all the assets. Although the parties considered separating at times, this does not mean that when the parties had an argument, Karen was no longer influenced by James' statements about the trouble they both would incur. The fact that they did not separate indicates some intent to remain together. In addition, James handled all of the business transactions, and Karen was dependent upon him for her support and income. This dependency put James in a position to exert influence over Karen to his own benefit.

Statements made concerning trouble with the Internal Revenue Service and the loss of a means of support were made as strong inducements to Karen to take no action. It is highly significant that after Karen discovered that the parties were not married, James induced Karen not to take any action to protect her interests with the threat of legal and financial trouble. The strong inference is that he intended to deter her from seeking outside advice. Under these circumstances, we conclude that the district court did not err in applying equitable principles to prevent James from asserting a statute of limitations defense. See *Baker v. Pattee*, 684 P.2d 632, 636 (Utah 1984) ("in cases of undue influence and duress the limitation period begins with the termination of the influence").

The application of equitable estoppel in this case is consistent with the requirements of a constructive trust. A person seeking a constructive trust must prove by clear and convincing evidence

that the individual holding the property obtained it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under such circumstances, such individual should not, according to the rules of equity and good conscience hold and enjoy the property so obtained.

The facts of this case support the district court's finding of a constructive trust and that James was estopped from asserting the statute of limitations as an affirmative defense. The court did not err in finding that the evidence supported an equitable duty and a constructive trust regarding the property acquired by James.

VI. CONCLUSION

For the reasons discussed herein, we affirm that portion of the district court's order which determined that James was the father of the minor child, awarded custody of the child to Karen subject to James' reasonable rights of visitation, and required James to pay child support in the amount of $958 per month. We also affirm that portion of the order which requires James to furnish health insurance for the minor child and pay three-fourths of all noncovered medical, dental, eyeglass, optometric, and prescription medicine expenses incurred by or for such child which are not paid by insurance. We reverse and vacate the award requiring James to pay alimony. We affirm the award of personal property to Karen, including the judgment in the amount of $138,527 in favor of Karen, the qualified domestic relations order, and the constructive trust on James' assets ordered by the district court in order to effectuate such transfer. That portion of the order determining the sole and separate property held by each party is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND VACATED.

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

I agree with the majority that the paternity, custody, visitation, and child support claims in this action are not time barred, and I concur in the affirmance as to those issues. I also agree with the majority that Karen cannot be considered a "putative spouse" under Neb. Rev. Stat. § 42-378 (Reissue 1998) because her marriage to James was never void. If I could reach the merits of the constructive trust claim, I would agree with the majority and the

district court that it is supported by the evidence. I cannot reach the merits, however, because in my opinion, the constructive trust claim is barred by the 4-year limitations period prescribed by Neb. Rev. Stat. § 25-207 (Reissue 1995).

While this case involves highly unusual facts, it must nevertheless be considered and adjudged by applying the basic rules of pleading and proof which we apply in all civil actions. The issues in a case are framed by the pleadings. *City State Bank v. Holstine*, 260 Neb. 578, 618 N.W.2d 704 (2000). Nebraska law defines pleadings as the written statements by the parties of the facts constituting their respective claims and defenses. *Sydow v. City of Grand Island, ante* p. 389, 639 N.W.2d 913 (2002); *Christianson v. Educational Serv. Unit No. 16*, 243 Neb. 553, 501 N.W.2d 281 (1993). The purpose of pleadings is to frame the issues upon which a cause is to be tried, and the issues in a given case will be limited to those which are pled. *V.C. v. Casady*, 262 Neb. 714, 634 N.W.2d 798 (2001); *Alegent Health Bergan Mercy Med. Ctr. v. Haworth*, 260 Neb. 63, 615 N.W.2d 460 (2000).

In her petition, Karen alleged that James concealed the fact of their 1980 divorce and that because of the trust she placed in him, she did not discover the truth concerning the divorce until the fall of 1994. Her right to maintain an action for recovery based upon a constructive trust theory accrued at the time of this discovery, but her petition was not filed until August 13, 1999, well outside the 4-year limitations period. A petition which makes apparent on its face that the cause of action it asserts is ostensibly barred by the statute of limitations fails to state a cause of action and is demurrable unless the petition alleges some excuse which tolls the operation and bar of the statute. *Tilt-Up Concrete v. Star City/Federal*, 261 Neb. 64, 621 N.W.2d 502 (2001); *Giese v. Stice*, 252 Neb. 913, 567 N.W.2d 156 (1997); *Vanice v. Oehm*, 247 Neb. 298, 526 N.W.2d 648 (1995). Karen's petition alleged no specific reason why she was prevented or legally excused from filing her petition within 4 years after discovering that she and James were divorced. Therefore, in my opinion, James' demurrer to the petition should have been sustained.

When the demurrer was overruled, James filed an answer alleging that all of Karen's claims were barred by the statute of

limitations. The record does not reflect that Karen filed a reply denying this allegation or alleging any factual basis or theory upon which the running of the limitations period would be tolled. At trial, Karen admitted that she became aware of the divorce in the fall of 1994 when she consulted a lawyer who determined from court records that the decree had been entered in 1980. Karen was not asked, and she did not testify, why she waited until August 1999 to initiate this action.

In concluding that James was equitably estopped from asserting a statute of limitations defense, the district court and the majority focus on the fact that after Karen learned of the divorce, James told her that public disclosure of that fact would cause problems with the Internal Revenue Service and his employer. While the record reflects that these statements were made, there is no evidence to suggest that they influenced Karen's decision to forgo filing this lawsuit in a timely manner. Karen testified unequivocally that upon learning of the divorce in 1994, she distrusted and disliked her former spouse, and that beginning in the fall of 1994, she asked him on several occasions to move out of the family home, which he eventually did in 1998. After learning of the divorce, Karen declined James' offers of remarriage because, in her words, "I didn't trust him, I didn't—I mean after that, you just don't believe anything he's ever going to say." She admitted that she was at all times free to speak with a lawyer and in fact did obtain legal advice concerning the status of her marriage after James first mentioned the divorce in 1994. She also discussed the divorce with her sister and a personal friend in 1994. At trial, Karen was not asked why she waited more than 4 years after learning of the divorce to initiate this action, and she offered no testimony which could fairly be interpreted as an explanation or justification for the delay. On appeal, Karen did not argue equitable estoppel as a basis for tolling the limitations period, but, rather, contended that "a putative spouse is not subject to any statute of limitations." Brief for appellee at 20.

Based upon my reading of the record, the issue of whether James was equitably estopped from asserting a statute of limitations defense to the claim for distribution of property under a constructive trust theory was neither framed by the pleadings

nor resolved in Karen's favor by the evidence adduced at trial. Because it is undisputed that the claim was filed outside the limitations period and no grounds for tolling were alleged or proved, I respectfully dissent from that portion of the majority opinion affirming the award of personal property to Karen. I recognize that this result runs contrary to how many might view the equities of this case, but for the reasons stated, I believe it is nevertheless required by the law.

NOEL HEATHMAN, APPELLANT, V.
MICHAEL KENNEY, APPELLEE.
644 N.W.2d 558

Filed May 24, 2002. No. S-01-1260.

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.** An order on "summary application in an action after judgment" under Neb. Rev. Stat. § 25-1902 (Reissue 1995) is an order ruling on a postjudgment motion in an action.
3. **Affidavits: Final Orders.** An order denying a request for reimbursement pursuant to the in forma pauperis statutes entered after the judgment is an order affecting a substantial right made upon a summary application in an action after judgment and is therefore a final, appealable order under Neb. Rev. Stat. § 25-1902 (Reissue 1995).
4. **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.
5. **Statutes: Appeal and Error.** When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
6. **Actions: Costs: Affidavits.** The expense of photocopying is included in the expense of "printing," which is required under Neb. Rev. Stat. § 25-2307 (Cum. Supp. 2000) to be paid by the county when a party has been permitted to proceed in forma pauperis.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded.

Noel Heathman, pro se.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Noel Heathman appeals the order of the district court for Lancaster County denying his request for reimbursement of photocopying expenses he incurred in reproducing appellate briefs required to be filed and served in connection with an in forma pauperis appeal to this court. We reverse, and remand.

STATEMENT OF FACTS

Heathman filed a petition for a writ of habeas corpus in the district court for Lancaster County against Michael Kenney, warden of the Nebraska State Penitentiary where Heathman is incarcerated. The district court dismissed Heathman's petition, and Heathman appealed the dismissal in case No. S-01-718 currently pending before this court. On June 20, 2001, the district court granted Heathman in forma pauperis status to proceed with his appeal in case No. S-01-718.

Heathman prepared his brief on appeal in case No. S-01-718 and filed it with this court on September 4, 2001. As required by the rules of this court, Heathman filed an original and 16 copies of the brief. See Neb. Ct. R. of Prac. 9B(7) (rev. 2000). As further required by the rules of this court, Heathman served two copies of his appellate brief on the appellee. See rule 9B(6). On October 30, Heathman filed a "Voucher and Request for Reimbursement" with the district court, in which he asserted that he had incurred $108 in photocopying expenses for duplication of his appellate brief and requested that the district court authorize payment from Lancaster County to reimburse him the $108. On October 31, the district court entered an order denying Heathman's request for reimbursement after concluding that Neb. Rev. Stat. § 25-2307 (Cum. Supp. 2000) required the county to pay the costs of only "printed briefs, not the cost of photocopies." (Emphasis in original.) Heathman appeals.

ASSIGNMENT OF ERROR

Heathman claims that the district court erred in concluding that § 25-2307 does not provide for reimbursing appellants

proceeding in forma pauperis for the expenses of photocopied appellate briefs.

STANDARD 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. *Douglas Cty. Bd. of Comrs. v. Civil Serv. Comm.*, *ante* p. 544, 641 N.W.2d 55 (2002).

ANALYSIS

Jurisdiction.

As an initial matter, Kenney questions whether Heathman's request for reimbursement was filed at the appropriate juncture of these proceedings. Kenney concedes that the in forma pauperis statutes, Neb. Rev. Stat. § 25-2301 et seq. (Cum. Supp. 2000), do not indicate the appropriate time to request expenses pursuant to § 25-2307. Kenney suggests that the conclusion of litigation would be a more appropriate time for Heathman to seek reimbursement of expenses. The inference from Kenney's argument is that this court lacks jurisdiction of this appeal.

We have long held that "[a]lthough 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." *Flora v. Escudero*, 247 Neb. 260, 264, 526 N.W.2d 643, 647 (1995). The duty of ruling on a request for reimbursement of the expense of appellate briefs was required of the lower court notwithstanding the pendency of the appeal, and the time at which Heathman sought a ruling on reimbursement was not incorrect.

The order from which Heathman has taken appeal was an order of the district court denying his request for reimbursement which was entered subsequent to the final judgment in his habeas corpus action. Neb. Rev. Stat. § 25-1902 (Reissue 1995) provides:

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

[2,3] As a general matter, an order on "summary application in an action after judgment" under § 25-1902 is an order ruling on a postjudgment motion in an action. We conclude that the order denying Heathman's request for reimbursement pursuant to the in forma pauperis statutes was "an order affecting a substantial right made . . . upon a summary application in an action after judgment" and was therefore a final, appealable order. We see nothing in the in forma pauperis statutes or § 25-1902 to the contrary. Accordingly, we determine we have jurisdiction of this appeal.

Expenses of Photocopied Appellate Briefs.

Heathman asserts that the district court erred in concluding that § 25-2307 does not require the county to pay the expenses of photocopied as opposed to printed appellate briefs in an appeal in which in forma pauperis status has been granted. Kenney asserts that this court's rules refer variously to "[p]rinted," "[c]omputer-generated," and "typewritten" briefs, see rule 9B(1) and (2), and that under § 25-2307, the county is only required to pay for "printed" briefs. We reject Kenney's argument.

Section 25-2307 provides:

> In any civil or criminal case in which a party is permitted to proceed in forma pauperis, on appeal the court shall direct that the expense of printing of the appellate briefs, if such printing is required by the court, be paid by the county in the same manner as other claims are paid.

The district court concluded, "It is clear that [§ 25-2307] refers only to printed briefs, not the cost of photocopies." On this basis, the district court denied Heathman's request for reimbursement. The district court erred in its interpretation of § 25-2307.

[4,5] 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. *City of Lincoln v. Central Platte NRD, ante* p. 141, 638 N.W.2d 839 (2002). When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Henery v. City of Omaha, ante* p. 700, 641 N.W.2d 644 (2002).

The language of § 25-2307 specifically provides that the county must pay "the expense of printing of the appellate briefs, if such printing is required by the court." Pursuant to rule 9B(7), an appellant is required to file an original and 16 copies of the appellant's brief. Pursuant to rule 9B(6), the appellant is required to serve two copies on the appellee. Thus, in order for an appellant to proceed in the Supreme Court or the Nebraska Court of Appeals, the appellant "is required by the court," § 25-2307, to file and serve the requisite number of briefs.

[6] The obvious intent of the in forma pauperis statutes is to allow parties access to the courts even though they are unable to pay the costs and associated expenses required to prosecute an action or an appeal. Section 25-2307 specifically provides for reimbursement for the expense associated with mechanically producing the copies of appellate briefs which are required by this court to be filed in the Supreme Court or Court of Appeals and served on the opposing party. A reasonable construction of § 25-2307 is that the expense for which reimbursement is provided covers the copies required by court rules, which copies at this time may be "[p]rinted," "[c]omputer-generated," or "typewritten." See rule 9B(1) and (2). We construe § 25-2307 to refer to the expense of mechanical production of the number of appellate briefs required by this court's rules to be filed and provided to opposing parties in an appeal. We therefore conclude that the expense of photocopying is included in the expense of "printing," which is required under § 25-2307 to be paid by the county when a party has been permitted to proceed in forma pauperis.

Because the district court concluded that the expenses of photocopied briefs were not covered by § 25-2307, it denied Heathman's request for reimbursement without determining what expenses were supported by Heathman's evidence. We therefore reverse, and remand to the district court to determine, consistent with this opinion, the appropriate expense that must be paid by the county to Heathman pursuant to § 25-2307.

CONCLUSION

We conclude that Heathman's request for reimbursement was not premature and that the order denying such reimbursement was a final, appealable order. We further conclude that the expenses of

photocopying the number of appellate briefs required by this court's rules are included in the expenses of "printing" which are required under § 25-2307 to be paid by the county when a party has been permitted to proceed in forma pauperis. We therefore reverse the order of the district court denying the reimbursement requested by Heathman and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

THE KANSAS BANKERS SURETY COMPANY, APPELLANT, V. LINDA HALFORD, APPELLEE.

644 N.W.2d 865

Filed May 31, 2002. No. S-00-1214.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
2. **Attorney Fees.** As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Dismissal and Nonsuit.** A plaintiff may enter a dismissal as a matter of right at any time before final submission of the case.
5. **Judgments: Costs.** An award of costs in a judgment is considered a part of the judgment.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Vacated and dismissed.

Edmond E. Talbot, III, of Talbot Law Office, and Stephen D. Lanterman and Alan V. Johnson, of Sloan, Listrom, Eisenbarth, Solan & Glassman, L.L.C., for appellant.

David S. Houghton and William G. Garbina, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellee.

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

WRIGHT, J.

NATURE OF CASE

The Kansas Bankers Surety Company (KBS), which is the surety company for Fort Calhoun State Bank (the Bank), brought an action against Linda Halford (Halford) claiming fraud and conversion of funds. After KBS voluntarily dismissed its action against Halford, the district court awarded Halford attorney fees pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1995). KBS timely appealed.

SCOPE OF REVIEW

[1] The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court. *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

FACTS

In December 1997, the Bank made demand upon KBS for repayment of a loss, pursuant to the terms and conditions of a financial institution bond issued by KBS to the Bank. The Bank asserted that Halford, its former employee, had committed fraudulent and dishonest acts which caused the Bank to sustain a loss in the amount of $35,085.41. After it paid the bond, KBS took an assignment of the Bank's claim against Halford and sued her for fraud and conversion.

The Bank's president, John Ramsey, and its vice president, Paul Oestmann, signed a sworn statement dated October 30, 1998, which alleged that on July 8, 1991, a 12-month renewable certificate of deposit, No. 711640, was opened by Dorothy Sievers with an initial deposit of $25,200. The authorizing signature for the Bank on the certificate of deposit was that of Halford, who was the head teller of the Bank until her resignation in April 1996. The Bank's trial balance dated July 11, 1991, listed the certificate of deposit under Sievers' name, and the trial balance indicated a " 'Last Dep Date' of '07/07/91.' "

The sworn statement alleged that in October 1997, when Sievers presented a request to change the title on the certificate of deposit, bank records indicated there was no certificate of deposit No. 711640 outstanding. An investigation revealed that on July 8, 1991, certificate of deposit No. 711640 was issued to

" 'RF Broadband,' " which was a doing-business-as name used by Darrell Halford, the brother-in-law of Halford. Ramsey and Oestmann claimed that the authorizing signature for the Bank on the certificate of deposit was Halford's.

The sworn statement further alleged that two of the Bank's " 'Proof of Deposit Listing[s]' " dated March 8, 1996, noted that a debit was made to "account #711640 for $29,701.60" and that a credit was made to "Firstier (First Bank) - Omaha account number 112151" for the same amount. The Bank's " 'General Ledger Transaction Register' " noted a credit to First Bank account No. 112151 on March 8 which allowed account No. 112151 to balance with the general ledger and reflect no reconciling items. First Bank's statements for March 4 through 15 do not note a transaction for the amount in question.

According to the Bank's " 'Certificate of Deposit Maintenance Journal' " dated April 8, 1996, the name on certificate of deposit No. 711640 was changed to Darrell Halford, and the change was made from Halford's computer terminal. On July 16, 1996, an " 'Indemnity Agreement for Missing Instrument' " was executed for certificate of deposit No. 711460 in the amount of $1,407.77, which closed the account.

The sworn statement of Ramsey and Oestmann further alleged that dishonest and fraudulent acts were committed by Halford with the intent to cause the Bank a loss. The Bank reimbursed Sievers in the amount of $35,085.41, which represented the original certificate of deposit amount plus interest earned from July 8, 1991, through December 31, 1997.

The Bank hired an accounting firm to conduct an examination and assist the Bank with filing an employee dishonesty claim under the terms of the Bank's financial institution bond with KBS. The report was intended for use by the Bank's board of directors, KBS, and other authorities in the investigation of the claim. The report stated in part:

> In summary, bank management feels that the $29,701.60 noted above has been taken from the bank. In addition, bank management feels the $1,409.03 redeemed to Darrell Halford was in error. Bank management believes that there were two Certificate of Deposits [sic], the original issued to Ms. Dorothy Sievers in July 1991 and a second, fraudulent

> certificate of deposit issued in the name of RF Broadband. Management believes only Linda Halford is involved in the fraudulent activities as supported by: (1) Ms. Halford's signature on each of the Certificates of Deposits [sic] issued, (2) the change in the Certificate of Deposit name initiated by Ms. Halford as indicated on the "Certificate of Deposit Maintenance Journal", and (3) the discrepancies noted in reconciling the First Bank of Omaha and First National Bank accounts.
>
> Bank management wrote-off $35,085.41 at December 31, 1997, which represents the original Certificate of Deposit amount plus interest earned through December 31.

In October 1998, KBS paid the Bank $30,085.41, which represented the Bank's payment to Sievers less a $5,000 deductible. On November 19, an attorney for KBS wrote to Halford informing her that the Bank believed she was responsible for an unauthorized transfer of funds from Sievers' certificate of deposit. KBS formally demanded that Halford repay the $30,085.41 and informed her that it was preparing to file a lawsuit against her. KBS also requested any information that "would indicate any matters contrary to those set forth in this correspondence."

Through her attorney, Halford denied any wrongdoing and noted the lack of detail contained in the claim. Her lawyer stated: "We assume that such serious allegations have not been made without some independent investigation on behalf of the Bank and by your client." Halford requested access to information from any investigations conducted and the names of any persons to whom the allegations had been communicated.

Upon review of the documents in KBS' possession, Halford denied the allegations and specifically denied that her signature was on the certificate of deposit issued to RF Broadband. Both Halford and her brother-in-law, Darrell Halford, agreed to submit handwriting exemplars. Halford maintained that after a full and complete investigation, both the Bank and KBS would conclude that she was not involved in any loss or defalcation.

In a memo to KBS and the Bank, Darrell Halford stated that he and his wife had questioned an interest statement they received on June 11, 1996. He stated that Oestmann "assured [them] that [the $1,409.03 payment] was a past interest error on

the bank's fault from a previously redeemed CD and that it needed to be closed out ASAP." Darrell Halford returned the money prior to the filing of this lawsuit on August 24, 1999.

In his deposition, Ramsey stated that he initially reported the loss via a suspicious activity report to federal regulators without mentioning any names. After the Federal Deposit Insurance Corporation informed him that he had to provide a name, the report was amended to include Halford's name. Ramsey stated he believed Halford had taken the money because her signature appeared on both the original and the duplicate certificates of deposit and because she was in charge of reconciling the accounts that were out of balance. He had no knowledge of any money that was wrongfully taken from the Bank and admitted that the Bank did not lose funds in connection with the RF Broadband certificate of deposit.

Oestmann stated in his first deposition that the Bank lost money "from the standpoint that cash went out of teller drawers that [the Bank] didn't receive credit back from either correspondent banks, or from customers, or whatever the transactions involved." Oestmann was responsible for checking the reconcilements of the general ledger accounts, but he had no evidence that Halford was responsible for any of the "cash-outs" posted against the general ledger accounts that did not have offsetting entries.

In Oestmann's second deposition, he admitted that he had previously reported false information to make a reconciliation appear to be accurate when in January 1996, he told the accountants that $27,800 had been withdrawn from a certificate of deposit on October 30, 1995, when no withdrawal had actually been made. He reiterated his belief that Halford caused the Bank to lose $35,085.41 because it was her responsibility to reconcile the general ledger accounts and that the Bank suffered a loss because the accounts were out of balance.

On May 25, 2000, Halford proposed a settlement in which KBS would dismiss the lawsuit with prejudice and KBS and the Bank would issue a letter of apology and pay Halford $25,000. After Oestmann admitted on June 12 to "fudg[ing] a reconciliation" to "get the auditors out of the bank," Halford offered to dismiss her claims against KBS and seal the records in exchange for $100,000.

In a letter dated July 20, 2000, KBS rejected Halford's offer. Because the Bank could directly trace only $21,527.65 of the $29,701.60 KBS believed was taken, it proposed that Halford pay $21,527.65 and that she would not have to admit to any wrongdoing. Halford refused the offer.

KBS then offered to settle for $1,600.85, which offer was also rejected. Halford's subsequent counteroffer included a $250,000 payment to her and a written apology.

In mid-July 2000, KBS' certified document examiner provided a preliminary opinion that the duplicate certificate of deposit contained Halford's signature. However, on August 2, the document examiner concluded that Halford had not signed the duplicate certificate. The examiner was unable to rule out the possibility that Oestmann's handwriting was on the duplicate certificate.

On August 2, 2000, KBS mailed its motion to dismiss this action with prejudice, and the district court filed the order on August 4. On August 10, Halford filed a motion for attorney fees and costs pursuant to § 25-824. At the hearing on Halford's motion, KBS claimed the court lacked jurisdiction because the motion had not been filed until after the action had been dismissed.

The district court found that the lawsuit against Halford was frivolous as a matter of law and awarded fees and costs in the amount of $59,211.74. This award included attorney fees for the services of Frank Starr III, an attorney who, at the time of this lawsuit, was not licensed to practice law in Nebraska. KBS appeals.

ASSIGNMENTS OF ERROR

KBS assigns as error that the district court erred (1) in failing to find that it lacked jurisdiction to consider the motion requesting attorney fees and costs, (2) in making any award of attorney fees and costs, and (3) in awarding attorney fees for the services of Starr.

ANALYSIS

[2] Halford sought attorney fees and related costs pursuant to § 25-824, which provides in part:

> [I]n any civil action commenced or appealed in any court of record in this state, the court shall award as part of its

> judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.

As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. *Salkin v. Jacobsen, ante* p. 521, 641 N.W.2d 356 (2002).

Halford claims that KBS is responsible for her costs, including attorney fees, and that the dismissal was ineffective because KBS did not pay any costs, as required by Neb. Rev. Stat. § 25-602 (Reissue 1995). Alternatively, Halford argues that the district court had the power to vacate and modify the judgment. She asserts her motion was an attempt to modify the judgment of dismissal to include attorney fees and costs.

[3] KBS argues that the district court lacked jurisdiction to consider the motion for attorney fees and costs because the motion was not filed until after the action had been dismissed and Halford failed to move to vacate the dismissal. 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. *Trainum v. Sutherland Assocs., ante* p. 778, 642 N.W.2d 816 (2002). The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court. *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

At the time the action was dismissed, Halford had not filed a motion for attorney fees based on her claim that the action was frivolous. Halford's motion for summary judgment was pending, and KBS had requested an extension to August 4, 2000, to file its brief. On August 4, KBS' motion to dismiss was filed, and the district court (without assigning costs) entered an order dismissing the action with prejudice. Halford did not attempt to set aside the dismissal.

[4] In deciding whether the district court had jurisdiction to enter an award for attorney fees after KBS' action had been dismissed, we must first address whether KBS had the right to

dismiss its action. We have previously held that a plaintiff may enter a dismissal as a matter of right at any time before final submission of the case. See, *Collection Specialists v. Vesely*, 238 Neb. 181, 469 N.W.2d 549 (1991); *Miller v. Harris*, 195 Neb. 75, 236 N.W.2d 828 (1975); *Feight v. Mathers*, 153 Neb. 839, 46 N.W.2d 492 (1951). In *Horton v. State*, 63 Neb. 34, 40, 88 N.W. 146, 148 (1901), the court, in seeking to clarify when the court may exercise its discretion in refusing to dismiss an action, stated: "This discretion has been exercised to require payment of costs." In *Blue River Power Co. v. Hronik*, 116 Neb. 405, 217 N.W. 604 (1928), the court held that the injury occasioned by the dismissal must be such as to deprive a defendant of some substantial right not available in a second suit, or that may be endangered by the dismissal.

This court has recognized exceptions to the right of a plaintiff to dismiss an action where it is necessary for the protection of any rights which have accrued to the defendant as a result of the bringing of the action. See *Feight v. Mathers, supra*. In *Mathers*, we stated:

> "We are of the opinion that the only discretion which may be exercised in the matter is the protection of any rights which have accrued to defendant as a result of the bringing of the action, such as the preservation of a counterclaim, the restitution of property of which he has been deprived, the recovery of his costs, and the like; that in the absence of such considerations the right to dismiss is absolute; that the expense of employing attorneys in defending the action, or the liability to further litigation over the same matter, are not subjects calling for the exercise of discretion by the court as constituting legal prejudice to defendant."

153 Neb. at 845, 46 N.W.2d at 495. See, also, *United States Fire Ins. Co. v. Affiliated FM Ins. Co.*, 225 Neb. 218, 403 N.W.2d 383 (1987); *Miller v. Harris, supra*; *Gebhart v. Tri-State G. & T. Assn.*, 181 Neb. 457, 149 N.W.2d 41 (1967), *overruled on other grounds, Neumeyer v. Omaha Public Power Dist.*, 188 Neb. 516, 198 N.W.2d 80 (1972); *Giesler v. City of Omaha*, 175 Neb. 706, 123 N.W.2d 650 (1963).

In *Giesler*, an action was commenced for a declaratory judgment to have an Omaha city ordinance declared unconstitutional. Two parties intervened. The City of Omaha was the only defendant. After the issues were determined and the case was set for trial, the plaintiff and the intervenors dismissed their respective petitions, and the city objected. The court dismissed the petitions but directed the trial to proceed on the issues raised by the amended answers of the city. This court reversed with directions to dismiss the entire action. We stated that the nature of the city's pleading was controlling in determining the correctness of the court's order retaining the case for trial. The answer prayed for an order dismissing the plaintiff's petition and a denial of the plaintiff's requested relief. In an amended answer, no prayer for relief was included.

We noted that by the terms of Neb. Rev. Stat. § 25-603 (Reissue 1995), a defendant who has presented a setoff or counterclaim may proceed with the trial of his claim irrespective of the plaintiff's dismissal, but the setoff or counterclaim must state a cause of action against the plaintiff. In *Giesler*, the defendant's answer stated no cause of action against the plaintiff and asserted only a defense. We concluded that the dismissal by the plaintiff and the intervenors had the effect of withdrawing the entire case from the trial court's consideration and that the court erred in proceeding with the case after the filing of the dismissals.

Accordingly, we conclude that KBS had a right to dismiss the lawsuit because Halford had not filed a setoff or counterclaim. There was no relief requested by Halford that was pending at the time of KBS' dismissal other than her motion for summary judgment requesting that KBS' action be dismissed.

Next, we address whether the district court could properly order payment of attorney fees after dismissal. In *Salkin v. Jacobsen, ante* p. 521, 641 N.W.2d 356 (2002), we specifically addressed the time in which a party may move for attorney fees pursuant to § 25-824. We deemed it significant that § 25-824(2) authorizes a court to award attorney fees as part of a judgment in addition to other costs when it determines that an action or defense is frivolous or made in bad faith.

[5] An award of costs in a judgment is considered a part of the judgment. See *In re Application of SID No. 384*, 256 Neb. 299, 589 N.W.2d 542 (1999). "It logically follows that a party seeking an award of attorney fees pursuant to § 25-824 for services rendered in a trial court must make such request prior to the judgment in order for the award of fees, if deemed appropriate, to be made a part thereof." *Salkin, ante* at 526, 641 N.W.2d at 360. *Salkin* therefore requires that a party seeking attorney fees in the trial court must make the request prior to the judgment in order for any award of fees to be a part of the judgment.

Halford asserts that the dismissal was ineffective because KBS did not pay any costs. Section 25-602 provides:

> The plaintiff, in any case pending in the district or Supreme Court of the state, shall, when no counterclaim or setoff has been filed by the opposite party, have the right in the vacation of any of said courts to dismiss his said action without prejudice, upon payment of costs, which dismissal shall be, by the clerk of any of said courts, entered upon the journal and take effect from and after the date thereof.

We have recognized the discretion of the trial courts to refuse such a dismissal or to require the payment of costs. See, *Feight v. Mathers*, 153 Neb. 839, 46 N.W.2d 492 (1951); *Blue River Power Co. v. Hronik*, 116 Neb. 405, 217 N.W. 604 (1928). However, no Nebraska case addressing the right of a party to dismiss pursuant to Neb. Rev. Stat. § 25-601 (Reissue 1995) has required the party to pay costs pursuant to § 25-602.

We conclude that § 25-602 is not applicable in this case because the district court entered the order dismissing the action without assessing costs to KBS. Furthermore, without a motion for attorney fees pending, such fees would not have been part of the costs to be paid under either § 25-601 or § 25-602.

The district court did not require the payment of costs or refuse to grant the dismissal. Halford's answer prayed for dismissal at KBS' costs and such other relief as may be just and equitable. Halford had no pending motion for attorney fees, nor did she allege that KBS' cause of action was frivolous. Once the court dismissed KBS' action with prejudice, nothing remained

for the court to decide. Thus, the court lacked jurisdiction to award Halford attorney fees and costs.

CONCLUSION

For the reasons set forth herein, the district court's award of attorney fees and costs is vacated, and the appeal is dismissed.

VACATED AND DISMISSED.

GERRARD, J., participating on briefs.

IN RE GRAND JURY OF DOUGLAS COUNTY. JAMES S. JANSEN, APPELLANT, V. HONORABLE MARY G. LIKES, JUDGE, DISTRICT COURT FOR DOUGLAS COUNTY, NEBRASKA, APPELLEE.

644 N.W.2d 858

Filed May 31, 2002. No. S-00-1272.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Juries.** It has long been the policy of courts which employ grand juries to maintain the secrecy of their proceedings.
3. **Appeal and Error: Words and Phrases.** Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
4. **Statutes: Appeal and Error.** 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.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Affirmed.

James S. Jansen, Douglas County Attorney, pro se.

Sean J. Brennan, of Brennan & Nielsen Law Office, P.C., for appellee.

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

WRIGHT, J.

NATURE OF CASE

Douglas County Attorney James S. Jansen (County Attorney) filed a motion in district court requesting the release of the minutes, transcript, and exhibits of a Douglas County grand jury that had been convened to review the circumstances surrounding the death of a person who died while being apprehended by law enforcement personnel. The district court denied the request, and the County Attorney appeals.

SCOPE OF REVIEW

[1] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Sydow v. City of Grand Island, ante* p. 389, 639 N.W.2d 913 (2002).

FACTS

On July 19, 2000, George D. Bibins died while being apprehended by Omaha police. The County Attorney certified to the district court that the cause of death was a single penetrating gunshot wound. Pursuant to Neb. Rev. Stat. § 29-1401 (Cum. Supp. 2000), the court directed that a grand jury be convened to review the circumstances surrounding the death. The court appointed a special prosecutor and an assistant special prosecutor, in accordance with § 29-1401(4)(b).

On July 26, 2000, the County Attorney filed charges of manslaughter and use of a firearm to commit a felony against Omaha police officer Jerad Kruse in connection with Bibins' death. A preliminary hearing was scheduled for August 18. However, on August 16, the special prosecutors filed a petition for a writ of mandamus directing the County Attorney to dismiss the charges against Kruse. The special prosecutors claimed that under § 29-1401(4)(b), they had exclusive authority to investigate and pursue criminal charges in cases arising out of the death of a person in police custody or while being apprehended by police. They alleged that the specific nature of § 29-1401(4)(b) overrides the general authority granted to the County Attorney

under Neb. Rev. Stat. § 23-1201 (Reissue 1997). The County Attorney demurred to the mandamus action, alleging that the mandamus petition sought to prevent him from performing a discretionary duty.

The special prosecutors also sought injunctive relief to prevent the County Attorney from presenting and publishing evidence at a preliminary hearing. They alleged the preliminary hearing could prevent the impaneling of a fair and impartial grand jury and impair the integrity of the grand jury process. The district court granted the special prosecutors' request for a temporary injunction on August 17, 2000. On August 18, the Douglas County Court dismissed the manslaughter and firearm charges against Kruse over the County Attorney's objection.

The grand jury commenced hearing evidence on August 24, 2000, and on September 1, it returned a "no true bill," which indicated that at least 12 of the 16 grand jurors found no probable cause to believe that a crime had been committed. The special prosecutors then filed a motion to dismiss the petition for writ of mandamus, and the district court dissolved the temporary injunction.

On September 14, 2000, the County Attorney requested that the district court release the grand jury minutes, transcript, and exhibits. He claimed that he was legally and ethically constrained from refiling charges against Kruse unless he could demonstrate the existence of relevant additional evidence not considered by the grand jury. He asserted that he needed to review the grand jury documents in order to determine if there was additional evidence not disclosed in his investigative reports. He requested a protective order which would prevent anyone other than the County Attorney from seeing or revealing the contents of the grand jury records.

At a hearing on the motion, the County Attorney argued that in order to make an informed decision about the facts of the case, he could not assume that the witnesses who appeared before the grand jury and the evidence presented to the grand jury were the same as that which he had previously reviewed. He expressed that he found himself "in a very precarious situation in terms of coming to one conclusion based on my review of the reports, and then a fact finding body who is charged with the

responsibilities of determining probable cause comes to a different conclusion." He claimed that in order to refile the charges, he must be able to show additional relevant evidence that was not previously submitted to the grand jury and that to do so, he needed to review the grand jury's records.

Since state law does not expressly provide for the review of grand jury testimony, the County Attorney referred the district court to Fed. R. Crim. P. 6(e), which provides three exceptions to the general rule of secrecy regarding grand jury proceedings. One exception allows for the disclosure of materials presented to the grand jury to attorneys for the government for use in the performance of their duties. The County Attorney has suggested that his authority to file criminal charges is a performance of his duties.

The special prosecutors objected to release of the grand jury's records, asserting that state law governing grand juries, Neb. Rev. Stat. § 29-1401 et seq. (Reissue 1995 & Cum. Supp. 2000), does not permit the release of such information. They claimed that the County Attorney had access to all of the information made available to the special prosecutors from the same sources and that the County Attorney had not demonstrated a legal and compelling reason for the district court to release the information. The County Attorney denied he had access to all the information made available to the special prosecutors because they had their own team of investigators who conducted an independent investigation.

The district court refused to release the grand jury records. It found that the State had failed to show the court a particularized need for the documents. The court noted that the U.S. Supreme Court has delineated a long-established policy of secrecy regarding disclosure of grand jury proceedings. Under rule 6(e), parties seeking grand jury transcripts must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed. The showing is required even when the grand jury has concluded its operations, because disclosure may impact future grand jury proceedings. See *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 99 S. Ct. 1667, 60 L. Ed. 2d 156 (1979).

The district court stated that the County Attorney had resources at his disposal too numerous to list, including deputy county attorneys; hundreds of investigators in the Omaha Police Department; technical assistance, locally and nationally; and various criminal investigation agencies. It concluded that with his vast resources, the County Attorney should be able to conduct an investigation as thorough as that conducted by the special prosecutors, who had time constraints and limited resources. The court rejected the County Attorney's argument that the requested material was needed to avoid a possible injustice in another proceeding.

The district court found that after the grand jury returned a no true bill, the County Attorney was free to continue the initial investigation because the constraints of the laws governing grand juries were moot at that point. It concluded that the County Attorney's articulated need was insubstantial and did not meet the burden dictated in case law. The County Attorney appeals from the court's refusal to release the grand jury records. There was no request to advance this appeal.

ASSIGNMENTS OF ERROR

The County Attorney assigns three errors, which we have summarized as follows: (1) The district court erred in finding that disclosure of the grand jury materials was not appropriate, even though the County Attorney showed that release of such materials will not damage the integrity of the grand jury or its interests in secrecy; (2) the court erred in finding that disclosure of the grand jury materials was unnecessary because the County Attorney had not shown a particularized need that would outweigh the inherent secrecy required in grand jury proceedings; and (3) the court erred in finding that the County Attorney had not shown a particularized need for the requested grand jury materials.

ANALYSIS

The County Attorney's request for release of the minutes, transcript, and exhibits of the grand jury convened pursuant to § 29-1401 appears to be an issue of first impression in Nebraska. Section 29-1401 provides in relevant part:

> (4) District courts shall call a grand jury in each case upon certification by the county coroner or coroner's physician that a person has died while being apprehended by or

> while in the custody of a law enforcement officer or detention personnel. In each case subject to this subsection:
>
> . . . .
>
> (b) Except as provided in subdivision (d) of this subsection, as soon as practicable, the court shall appoint a special prosecutor who has had at least five years experience in criminal litigation, including felony litigation. The special prosecutor shall select a team of three peace officers, trained to investigate homicides, from jurisdictions outside the jurisdiction where the death occurred. The team shall examine all evidence concerning the cause of death and present the findings of its investigation to the special prosecutor;
>
> (c) A grand jury shall be impaneled within thirty days after the certification by the county coroner or coroner's physician, unless the court extends such time period upon the showing of a compelling reason . . . .

Thus, when a person dies while being apprehended by or while in the custody of a law enforcement officer or detention personnel, the district court is required to call a grand jury and appoint a special prosecutor. This statutory scheme removes the county attorney from the process. The case is investigated by law enforcement officers from outside the jurisdiction who are chosen by the special prosecutor, and the investigation must be completed within 30 days after the death.

Generally, a county attorney conducts grand jury investigations and therefore is fully informed concerning the evidence and testimony presented to the grand jury. If an indictment is returned, an information may be filed. However, because § 29-1401(4) requires a special prosecutor in specific cases, the county attorney has no access to the grand jury information.

This legislation requires us to determine whether following the return of a no true bill by the grand jury, a county attorney may be given access to the records, evidence, and testimony adduced at the grand jury hearing.

Section 29-1420 provides:

> (1) The report of the grand jury shall not be made public except when the report is filed, including indictments, or when required by statute or except that all of the report or a portion thereof may be released if the judge of the district

court finds that such a release will exonerate a person or persons who have requested such a release.

(2) A district judge under whose direction a grand jury has been impaneled may, upon good cause shown, transfer to a court of competent jurisdiction in another county or jurisdiction any evidence gathered by the grand jury that offenses have been committed in such other county or jurisdiction.

Our review of the statutes governing grand juries reveals only limited access to grand jury records. Section 29-1407.01 provides in part: "No release or destruction of the notes or transcripts shall occur without prior court approval." However, this section does not describe the circumstances under which the release may occur. Section 29-1407.01(2) allows a witness to be furnished with a transcript of his or her own grand jury testimony, or minutes, reports, or exhibits relating thereto "for good cause." Under § 29-1420(2), a district judge, upon good cause shown, may transfer to a court of another county or jurisdiction evidence gathered by a grand jury regarding offenses that may have been committed in another county or jurisdiction. Good cause appears to be the criteria for the release of certain grand jury records, but the case at bar does not present any of the situations described above.

Although the Nebraska Legislature has enacted statutes regarding grand juries, it has not provided for disclosure of grand jury materials except as previously described. Section 29-1420 allows for the release of a grand jury report, but as the special prosecutors note, this grand jury did not prepare a report, but, rather, returned a no true bill and nothing more.

The district court applied the standard used by federal courts to determine that the County Attorney had not demonstrated " 'a particularized need' " for the grand jury documents. See *Pittsburgh Plate Glass Co. v. U.S.*, 360 U.S. 395, 400, 79 S. Ct. 1237, 3 L. Ed. 2d 1323 (1959). The County Attorney urges this court to rely on rule 6(e) in order to determine that the grand jury records should be released to him. Rule 6(e) provides that no proceedings of a grand jury may be disclosed except in certain instances, such as for a government attorney to use in the performance of the attorney's duty. The County

Attorney suggests that the grand jury records may be disclosed to him based on this rule.

In the federal system, the sole method of bringing felony criminal charges against an individual is by a grand jury indictment. In Nebraska, a county attorney may bring charges by filing a complaint or information. A county attorney may proceed by or independently of a grand jury proceeding. See § 29-1402. In the instant case, the County Attorney had proceeded independently of the grand jury until the district court issued the temporary injunction.

[2] One of the general principles of grand juries is that their hearings are not open to the public. It has long been the policy of courts which employ grand juries to maintain the secrecy of their proceedings. See *United States v. Procter & Gamble*, 356 U.S. 677, 78 S. Ct. 983, 2 L. Ed. 2d 1077 (1958). Secrecy has been held to be vital "to encourage all witnesses to step forward and testify freely without fear of retaliation." *Procter & Gamble*, 356 U.S. at 682. "The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow." *Id.*

In *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 99 S. Ct. 1667, 60 L. Ed. 2d 156 (1979), the U.S. Supreme Court reiterated that the proper functioning of the grand jury system depended upon the secrecy of grand jury proceedings and that for such reasons, courts have been reluctant to unnecessarily lift the veil of secrecy from the grand jury. The Court set forth standards for determining when the traditional secrecy of the grand jury may be broken: The material sought is needed to avoid a possible injustice in another judicial proceeding, the need for disclosure is greater than the need for continued secrecy, and the request is structured to cover only material so needed.

We conclude that the arguments advanced by the County Attorney for obtaining the grand jury records are not persuasive. The failure of the grand jury to return an indictment does not prevent the County Attorney from proceeding independently. It is not necessary to convene a second grand jury, but, rather, the County Attorney may proceed by filing a complaint or information in the district court.

Courts must consider not only any immediate effects upon a grand jury if its proceedings are disclosed, but they must consider the possible effect upon future grand juries.

> Persons called upon to testify will consider the likelihood that their testimony may one day be disclosed to outside parties. Fear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties. Concern as to the future consequences of frank and full testimony is heightened where the witness is an employee of a company under investigation. Thus, the interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities.

Douglas Oil Co., 441 U.S. at 222.

The County Attorney's request for release of the grand jury documents presents a question of law, which we resolve independently of the conclusion reached by the trial court. See *Sydow v. City of Grand Island, ante* p. 389, 639 N.W.2d 913 (2002). We conclude that the district court did not err in denying the County Attorney's request.

We also address whether the district court, at the request of a special prosecutor, may enjoin a county attorney from proceeding with a separate preliminary hearing during the time that the grand jury is proceeding on the same matter. In the case at bar, the district court enjoined the County Attorney from presenting and publishing evidence at a preliminary hearing because the special prosecutors alleged such action would prevent the impaneling of a fair and impartial grand jury and impair the integrity of the grand jury process. As a result of the injunction, the county court dismissed the criminal charges against Kruse over the County Attorney's objection because the State was not able to present evidence at the preliminary hearing.

[3] Because of the importance of this issue, we note plain error in the entry of the temporary injunction. Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage

to the integrity, reputation, and fairness of the judicial process. *State v. Davlin, ante* p. 283, 639 N.W.2d 631 (2002).

[4] Section 29-1402 provides: "The convening of a grand jury shall in no way limit the right of prosecution on information or complaint during the time the grand jury is in session." 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. *Henery v. City of Omaha, ante* p. 700, 641 N.W.2d 644 (2002).

The purpose of § 29-1401(4) is to provide for an independent investigation when an individual dies while in custody or being apprehended. We find nothing in the law that permits a special prosecutor to ask a court to enjoin the activity of a county attorney who has elected to proceed with a complaint or an information simultaneously with the grand jury investigation. We note that § 29-1416 prohibits a subsequent grand jury inquiry "into the same transaction or events . . . unless the court finds, upon a proper showing by the prosecuting attorney, that the prosecuting attorney has discovered additional evidence relevant to such inquiry." That situation is not before us. Therefore, we conclude that it was plain error for the district court to issue a temporary injunction limiting the right of the prosecution to proceed on information or complaint against a criminal defendant during the time the grand jury was in session.

CONCLUSION

The district court did not err in denying the County Attorney's motion for release of the grand jury documents. However, we note plain error in the district court's entry of the temporary injunction which prevented the County Attorney from presenting evidence at the preliminary hearing and from proceeding on information or complaint against a criminal defendant during the time the grand jury was in session. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. DON STENBERG, ATTORNEY GENERAL OF THE STATE OF NEBRAKA, RELATOR, V. OMAHA EXPOSITION AND RACING, INC., A NEBRASKA NONPROFIT CORPORATION, ET AL., RESPONDENTS.

644 N.W.2d 563

Filed May 31, 2002. No. S-01-973.

1. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
2. **Constitutional Law: Statutes: 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: Gaming.** Wagering which takes place outside a licensed racetrack enclosure or a detached facility cannot logically occur within a licensed racetrack enclosure as required by the Nebraska Constitution.
4. **Constitutional Law: Statutes: Legislature: Intent.** Several factors must be considered in determining whether an unconstitutional provision is severable from the remainder of a statute: (1) whether, absent the invalid portion, a workable plan remains; (2) whether the valid portions are independently enforceable; (3) whether the invalid portion was such an inducement to the valid parts that the valid parts would not have passed without the invalid part; (4) whether severance will do violence to the intent of the Legislature; and (5) whether a declaration of separability indicating that the Legislature would have enacted the bill absent the invalid portion is included in the act.
5. **Constitutional Law: Intent.** Constitutional provisions, like statutes, are not open to construction as a matter of course; construction of a constitutional provision is appropriate only when it has been demonstrated that the meaning of the provision is not clear and that construction is necessary.
6. **Constitutional Law: Legislature.** The Legislature may not circumvent or nullify the constitution by defining terms in statutes.
7. ____: ____. The Legislature's power to define terms is limited, since (1) the Legislature cannot abrogate or contradict an express constitutional provision and (2) the legislative definition must be reasonable, and cannot be arbitrary or unfounded.
8. ____: ____. Nebraska's Constitution is not a grant, but, rather, is a restriction on legislative power, and the Legislature is free to act on any subject not inhibited by the constitution.
9. **Constitutional Law: Statutes.** An unconstitutional statute is a nullity, is void from its enactment, and is incapable of creating any rights or obligations.

Original action. Judgment for relator.

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

Michael J. Lehan and Michael A. Kelley, of Kelley & Lehan, P.C., for respondents.

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

WRIGHT, J.

NATURE OF CASE

In this original action, the Attorney General (relator) asks the court to declare (1) that the conduct of "telephonic wagering" pursuant to Neb. Rev. Stat. §§ 2-1230 to 2-1242 (Reissue 1997) violates Neb. Const. art. III, § 24, and (2) that licenses to conduct telephonic wagering are void due to the unconstitutionality of the statutes under which they were issued. The relator also seeks to permanently enjoin the respondents from acting pursuant to licenses granted by the Nebraska State Racing Commission (Commission).

SCOPE OF REVIEW

[1] The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000).

[2] Statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void. *Id.*

FACTS

The respondents are entities licensed by the Commission to conduct parimutuel wagering on live horseracing and on horseracing events conducted both within and outside the state, including simulcast wagering. Named as respondents are Omaha Exposition and Racing, Inc., which operates Horsemen's Park Racetrack in Omaha; the Nebraska State Board of Agriculture, which operates State Fair Park Racetrack in Lincoln; the Hall County Livestock Improvement Association, which operates Fonner Park Racetrack in Grand Island; the Platte County Agricultural Society, which operates Columbus Agricultural Park Racetrack in Columbus; and South Sioux City Exposition and Racing, Inc., which operates Atokad Downs Racetrack in South Sioux City. In May 2001, the Commission, acting pursuant to §§ 2-1232 and 2-1241, approved licenses for the respondents which allow them to conduct telephonic wagering at the respective racetracks. Omaha Exposition and Racing,

Inc., began operating telephonic wagering pursuant to its license on October 24.

The relator asserts that a portion of 1992 Neb. Laws, L.B. 718, now codified at §§ 2-1230 to 2-1242, violates article III, § 24, which states in pertinent part:

> Nothing in this section shall be construed to prohibit (a) the enactment of laws providing for the licensing and regulation of wagering on the results of horseraces, wherever run, either within or outside of the state, by the parimutuel method, when such wagering is conducted by licensees within a licensed racetrack enclosure . . . .

Sections 2-1230 to 2-1242 purport to authorize telephonic wagering which does not occur within the confines of a licensed racetrack enclosure in the state.

In Nebraska, betting on the outcome of horseraces is authorized when conducted by the parimutuel method. Bettors attempt to predict the outcome of one or more races. All wagers on any of the horses to win in a specific race constitute a pool. After deductions for taxes, for promotion of agriculture and breeder's awards, and for payment to the entity conducting the races, the amount remaining in the pool is paid out to the bettors in proportion to their bets, e.g., the winner who has wagered $20 receives 10 times as much as the winner who wagered $2. A combination of the total amount bet by all bettors and the total amount bet upon the same successful horse or combination of horses determines the amount won. A separate pool is used to collect more complicated bets, such as predicting the exact order of finish of horses in a race or of the winners in two or more races. That pool is divided among the successful bettors.

A computer known as a totalizator is used to manage the wagers. The computer continuously computes and recomputes the amount of each pool, the amount bet upon each prediction for each horse, and the amount that would theoretically be paid out for each $2 bet on each horse if the race is finished and that horse wins, places, or shows.

According to the parties, when telephonic wagering is not available, an individual who wishes to place a bet on a horserace is required to go to a licensed racetrack; select the race, the horse, and the order of finish; and then place the bet at a terminal station,

which is either operated by the bettor or a parimutuel clerk at a parimutuel window. When the bet is entered into the totalizator, a ticket showing the transaction is issued and given to the bettor. If the bettor is successful, the ticket is presented to the racetrack for payment.

As a result of the Commission's issuance of licenses for telephonic wagering, a person outside the confines of a licensed racetrack enclosure may place a telephone call to a racetrack and give instructions to an employee of the racetrack concerning the wager of money that the individual has on deposit at a telephone deposit center in his or her own deposit account. After the racetrack employee at the telephone deposit center has received a call and determined that the individual has sufficient funds in the deposit account, the employee places the wager on behalf of the caller. The wager is entered into the totalizator, which records the transaction and places the money in the applicable parimutuel pool. Any winnings are credited to the individual's deposit account, and any losses are deducted from the account. The employee is allowed to enter a wager only if the individual has sufficient funds available in the deposit account at the time the wager is placed by the employee.

ISSUES BEFORE COURT

The court is asked to determine (1) whether the authorization of telephonic wagering on horseraces pursuant to §§ 2-1230 to 2-1242 violates article III, § 24, which authorizes parimutuel wagering on the results of horseraces within or outside the state only "when such wagering is conducted by licensees within a licensed racetrack enclosure"; (2) whether licenses issued by the Commission authorizing the respondents to conduct telephonic wagering are void due to the unconstitutionality of the statutes under which they were issued; and (3) whether the respondents should be permanently enjoined from acting pursuant to the telephonic wagering licenses issued by the Commission.

ANALYSIS

L.B. 718

The statutes in question were passed by the Legislature as 1992 Neb. Laws, L.B. 718. The Legislature stated that "horseracing, horse breeding, and parimutuel wagering industries are important

sectors of the agricultural economy of the state, provide substantial revenue for state and local governments, and employ many residents of the state." § 2-1230(1)(a). Teleracing facilities provide a potential for strengthening the horseracing industry and its economic contributions to the state. § 2-1230(1)(b). The Legislature found that "it is in the best interests of the state to encourage experimentation with parimutuel wagering through licensed teleracing facilities" and telephonic wagering. § 2-1230(1)(b) and (c). The experimentation would determine whether teleracing and telephonic wagering would promote growth of the horseracing industry and provide additional revenue to the state. § 2-1230(1)(d). The Legislature also found that teleracing and telephonic wagering should be authorized and regulated so that it would not jeopardize horseracing or employment opportunities. § 2-1230(1)(e).

Telephonic wagering is defined as "the placing of parimutuel wagers by telephone to a telephone deposit center at a licensed racetrack as authorized by the commission." § 2-1231(5). A teleracing facility is "a detached, licensed area occupied solely by a licensee for the purpose of conducting telewagering and containing one or more betting terminals, which facility is either owned or under the exclusive control of the licensee during the period for which it is licensed." § 2-1231(6). Telewagering is "the placing of a wager through betting terminals electronically linked to a licensed racetrack, which . . . instantaneously transmits the wagering information to the parimutuel pool for acceptance and issues tickets as evidence of such wager." § 2-1231(7).

At the present time, the Commission issues licenses to racetracks for the operation of telephonic wagering facilities. § 2-1232. A licensee may deduct up to 5 percent from the winnings of any winning ticket purchased through telephonic wagering. § 2-1236. A licensed racetrack that conducts live races may establish a telephonic wagering system if the racetrack establishes and maintains a telephone deposit center. All wagers must be entered into the parimutuel pool and are subject to all laws and conditions applicable to any other wagers. § 2-1239.

Under the law, only the holder of the deposit account may place a telephonic wager. § 2-1240. Any violation of that rule constitutes a Class II misdemeanor. *Id.* Telephonic wagering is allowed at licensed racetracks which conduct either intrastate

simulcasting or interstate simulcasting as approved by the Commission. § 2-1241. The racetracks must pay one-half of 1 percent of the amount wagered through telephonic wagering to the Department of Revenue for credit to the Commission's cash fund. § 2-1242.

CONSTITUTIONALITY OF L.B. 718

This court has previously been asked to consider the constitutionality of portions of L.B. 718. In 1994, upon an original action filed by the relator, we held that the provisions of L.B. 718 which authorized teleracing facilities to conduct telewagering were unconstitutional in violation of article III, § 24. See *State ex rel. Stenberg v. Douglas Racing Corp.*, 246 Neb. 901, 524 N.W.2d 61 (1994).

Douglas Racing Corp. was licensed to operate a teleracing facility in Bennington, Nebraska, at which terminals were electronically linked to its totalizator located in Omaha. The bets were entered by either the bettor or the parimutuel clerk and then sent to the totalizator at the racetrack. The bettors received tickets as evidence of their wagers. We held that the relator had met the burden to establish that certain statutes were unconstitutional to the extent they authorized telewagering.

In *Douglas Racing Corp.*, the relator argued that telewagering at a teleracing facility was unconstitutional because parimutuel wagering on horseraces must be conducted within a licensed racetrack enclosure and that telewagering was equivalent to off-track betting, which was not constitutionally authorized. The respondent unsuccessfully asserted that because the licensee conducted his end of the wagering within the confines of the licensed racetrack, telewagering was constitutional.

[3] We concluded that article III, § 24, was unambiguous and required no construction. *State ex rel. Stenberg v. Douglas Racing Corp., supra*, citing *State ex rel. Spire v. Conway*, 238 Neb. 766, 472 N.W.2d 403 (1991). The Constitution's provision that parimutuel wagering is authorized only when conducted within a licensed racetrack enclosure "plainly requires that (1) the wagering must be conducted by an entity licensed to do so and (2) the wagering must be conducted by licensees at a racetrack enclosure which is licensed to operate horseraces." *Douglas Racing Corp.*,

246 Neb. at 906, 524 N.W.2d at 64. Wagering which takes place outside a licensed racetrack enclosure or a detached facility "cannot logically occur within a licensed racetrack enclosure as required by our Constitution." *Id.* We determined that telewagering at teleracing facilities was the functional equivalent of off-track betting, which was not conducted within a licensed racetrack enclosure and which violated the state Constitution. *Id.*

We held that Douglas Racing Corp.'s license for the operation of the Bennington facility was void because it was licensed pursuant to an unconstitutional statute. We enjoined the respondent from acting pursuant to the license issued by the Commission. While we held that Neb. Rev. Stat. §§ 2-1203, 2-1203.01, 2-1207, 2-1208, 2-1216, 2-1221, 2-1222, and 2-1230 through 2-1242 (Cum. Supp. 1994) were all unconstitutional to the extent they authorized telewagering at teleracing facilities, we did not address any other portions of L.B. 718.

[4] Here, we are asked to consider the remainder of L.B. 718 as it purports to authorize telephonic wagering. We first address whether the remainder of L.B. 718 is severable from the provisions previously held to be unconstitutional. Several factors must be considered in determining whether an unconstitutional provision is severable from the remainder of a statute:

> "(1) whether, absent the invalid portion, a workable plan remains; (2) whether the valid portions are independently enforceable; (3) whether the invalid portion was such an inducement to the valid parts that the valid parts would not have passed without the invalid part; (4) whether severance will do violence to the intent of the Legislature; and (5) whether a declaration of separability indicating that the Legislature would have enacted the bill absent the invalid portion is included in the act."

Duggan v. Beermann, 249 Neb. 411, 427-28, 544 N.W.2d 68, 78 (1996), quoting *Jaksha v. State*, 241 Neb. 106, 486 N.W.2d 858 (1992).

There is no dispute between the parties concerning the severability of L.B. 718. The relator suggests that although L.B. 718 did not include a severability clause, the provisions relating to telephonic wagering are severable because a workable plan remains even if telewagering is prohibited. The provisions related to

telephonic wagering are independently enforceable, and it does not appear that passage of telewagering was contingent upon or an inducement to enact the telephonic wagering portions. Experimentation with parimutuel wagering through both teleracing facilities and telephonic wagering was authorized in § 2-1230(2). The relator asserts that the holding in *State ex rel. Stenberg v. Douglas Racing Corp.*, 246 Neb. 901, 524 N.W.2d 61 (1994), does not preclude severing the invalid provisions concerning telewagering from the provisions concerning telephonic wagering. Thus, we conclude that it is possible to sever the telewagering provisions from the telephonic wagering provisions.

[5] We next examine whether telephonic wagering is unconstitutional. The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000). Statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void. *Id.* Constitutional provisions, like statutes, are not open to construction as a matter of course; construction of a constitutional provision is appropriate only when it has been demonstrated that the meaning of the provision is not clear and that construction is necessary. *State ex rel. Stenberg v. Douglas Racing Corp., supra.*

As noted earlier, article III, § 24, does not prohibit wagering on horseracing by the parimutuel method "when such wagering is conducted by licensees *within a licensed racetrack enclosure*." (Emphasis supplied.) The key issue here is whether telephonic wagering occurs within a licensed racetrack enclosure.

Section 2-1231(5) defines telephonic wagering as "the placing of parimutuel wagers by telephone to a telephone deposit center at a licensed racetrack" as authorized by the Commission. For purposes of this opinion, the person placing the wager is not at the racetrack, but is calling from a telephone away from the facility. The parties stipulated that "a person located outside the confines of a racetrack will be allowed to place a call to a licensed racetrack enclosure to give instructions to an employee of the racetrack concerning the wager of money that the individual has on deposit at a telephone deposit center."

[6,7] In attempting to allow different forms of parimutuel wagering, the Legislature stated that "[w]agers placed . . . by approved telephonic wagering as authorized by sections 2-1230 to 2-1242 shall be deemed to be wagers placed and accepted within the enclosure of any racetrack." See § 2-1207 (Reissue 1997). However, as the relator notes, the Legislature may not circumvent or nullify the constitution by defining terms in statutes. In *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 571, 471 N.W.2d 734, 739 (1991), *cert. denied* 508 U.S. 960, 113 S. Ct. 2930, 124 L. Ed. 2d 681 (1993), we held that the Legislature's "power to define [terms] is limited, since (1) the Legislature cannot abrogate or contradict an express constitutional provision and (2) the legislative definition must be reasonable, and cannot be arbitrary or unfounded."

Pursuant to stipulation, under telephonic wagering, the person making the wager calls the licensed racetrack directly to instruct an employee on the placing of a wager. Thus, it is undisputed that the person placing the call is outside the licensed racetrack enclosure.

[8] Nebraska's Constitution is not a grant, but, rather, is a restriction on legislative power, and the Legislature is free to act on any subject not inhibited by the constitution. *State ex rel. Stenberg v. Douglas Racing Corp.*, 246 Neb. 901, 524 N.W.2d 61 (1994). The question is whether the wager is placed within the licensed racetrack enclosure when the telephone call is initiated outside the racetrack enclosure. Simply stated, does the constitution require that the person making the call to the licensee also be located within the licensed racetrack enclosure?

The respondents argue that the constitution requires only that the licensee's activity in conducting wagering on horseraces occur within a licensed racetrack enclosure. This is distinguished from wagers made at a teleracing facility, where at least a part of the licensee's activity occurs outside the racetrack enclosure. They assert that the wager occurs within the confines of the racetrack enclosure because the wager is placed by a racetrack employee pursuant to instructions from a person outside the enclosure. They conclude that it is only the actions of the licensee's employee that constitute the placing of the wager.

The respondents argue that telephonic wagering is substantially different from telewagering. They assert that the only action taken by a person who is outside the racetrack enclosure is to give instructions to an employee of the licensed racetrack, who then places the wager from within the enclosure. In their brief, they claim that telephonic wagering is conducted every day by persons who go to the racetrack with a cellular telephone and place wagers for friends who are located outside the racetrack enclosure. They argue that the wager occurs only when the person inside the racetrack enclosure places the wager with the licensee.

The relator argues that both telephonic wagering and telewagering involve the same conduct—placing wagers on horseraces from an offtrack location. The relator claims that it is the caller who directs the racetrack employee to follow his instructions and that, therefore, it is the offtrack caller who is engaged in wagering on the horserace.

Minnesota has faced a similar challenge to its constitution, which was amended in 1982 to provide that " '[t]he legislature may authorize on-track parimutuel betting on horseracing in a manner prescribed by law.' " *Rice v. Connolly*, 488 N.W.2d 241, 244 (Minn. 1992). In 1985, the Minnesota Racing Commission adopted rules implementing a telephone account wagering system, in which account holders maintained a minimum balance against which wagers were debited and winnings were credited. The account holder telephoned a licensed employee at a racetrack to place and record wagers on behalf of the account holder. "[T]he wagerer need not be present at the racetrack or a teleracing facility—all that is required is access to a telephone." *Id.* at 246.

When asked whether the constitution "contemplate[d] other than on-track, *i.e.*, on the racetrack premises, parimutuel betting," the Minnesota Supreme Court found that it did not. See *id.* The court found that "[i]n its literal sense, the word 'on' as a part of the phrase 'on-track' is more precisely defined as 'at' to denote a location for the placement of a parimutuel bet." *Id.* at 247. The state's voters had specifically approved " 'on-track parimutuel betting on horseracing,' " and the court found, as a practical matter, that "bets not physically placed at the racetrack cannot be, by definition, 'on-track,' no matter how they are

transmitted to the track, electronically recorded or accepted into the pool of funds." *Id.*

The Minnesota court noted, as the respondents had pointed out, that advances in technology facilitated remote wagering. However, the court found that its own mandate required it to "refrain from expansive interpretation by looking beyond the clear, unambiguous and ordinary meaning of the language of the constitutional provision." *Id.* at 248. It held: "Wagering at facilities remote from the racetrack or by telephonic means are beyond the scope of the activities authorized by the voters and are therefore impermissible." *Id.*

Following the rationale of the Minnesota Supreme Court, resolution of the case at bar is relatively simple. In the context of telephonic wagering, wagers are not placed by a licensee until the licensee has been instructed to do so by a caller, and the instructions do not originate from within a licensed racetrack enclosure. We conclude the constitution requires that the instructions to place the wager must originate from within the licensed racetrack enclosure.

Nebraska voters have previously rejected an attempt by the Legislature to change the constitutional provisions concerning parimutuel betting. In 1995, the Legislature adopted L.R. 24CA, which placed before the voters a constitutional amendment proposing the elimination of the location requirement in article III, § 24. The amendment provided that parimutuel wagering on racehorses could be conducted by licensees "at such locations and by such means as are authorized by the Legislature." The introducer's statement of intent noted this court's decision in *State ex rel. Stenberg v. Douglas Racing Corp.*, 246 Neb. 901, 524 N.W.2d 61 (1994), and stated that L.R. 24CA would delete the location provision and provide the Legislature with the authority to determine the location and means of wagering on horseraces. See Statement of Intent, L.R. 24CA, General Affairs Committee, 93d Leg., 2d Sess. (Jan. 23, 1995). At the general election in November 1996, the constitutional amendment was defeated by a vote of 388,462 against and 236,600 in favor.

Nebraska's Constitution permits wagers on horseracing when the "wagering is conducted by licensees within a licensed racetrack enclosure." See Neb. Const. art. III, § 24. As this court held

in *Douglas Racing Corp.*, the constitutional language allows wagering only by those who are within a racetrack enclosure. Telephonic wagering differs from telewagering only as to the form used to transmit the wager. It is a distinction without a difference. Telephonic wagering violates the constitution because it does not occur within a licensed racetrack enclosure. The relator has met the burden of establishing that the telephonic wagering statutes are unconstitutional.

CONCLUSION

[9] We have held that "[a]n unconstitutional statute is a nullity, is void from its enactment, and is incapable of creating any rights or obligations." *Douglas Racing Corp.*, 246 Neb. at 906, 524 N.W.2d at 65. The statutes purporting to authorize telephonic wagering, §§ 2-1230 to 2-1242, are unconstitutional. The licenses issued to the respondents to conduct telephonic wagering are void because they were issued pursuant to these statutes. The respondents are permanently enjoined from acting pursuant to the licenses issued by the Commission, and judgment is entered for the relator.

JUDGMENT FOR RELATOR.

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