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STATE OF NEBRASKA, APPELLEE, V. KENNETH JOHNSON, APPELLANT.

695 N.W.2d 165

Filed March 25, 2005. No. S-02-1503.

1. **Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Constitutional Law: Criminal Law: Statutes.** A claim that a statute fails to define a criminal offense with sufficient definiteness to put ordinary people on notice of the prohibited conduct is a facial challenge to the constitutionality of the statute.
3. **Criminal Law: Statutes: Jurisdiction: Presumptions: Waiver.** A facial challenge to a presumptively valid criminal statute does not raise an issue of subject matter jurisdiction in a criminal prosecution and thus may be waived if not timely asserted.
4. **Constitutional Law: Statutes: Demurrer: Waiver: Appeal and Error.** In order to bring a constitutional challenge to the facial validity of a statute, the proper procedure is to file a motion to quash or a demurrer. Absent plain error, the failure to do so waives the right to assert the constitutional challenge on appeal.
5. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
6. **Constitutional Law: Statutes: Proof.** The unconstitutionality of a statute must be clearly established before a court may declare it void.
7. **Statutes.** Statutory language is to be given its plain and ordinary meaning.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and MOORE, Judges, on appeal thereto from the District Court for Lancaster County, STEVEN D. BURNS, Judge. Judgment of Court of Appeals affirmed.

Brett McArthur and Franklin E. Miner for appellant.

Jon Bruning, Attorney General, and Susan J. Gustafson for appellee.

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

PER CURIAM.

NATURE OF CASE

Kenneth Johnson was tried in the district court for Lancaster County for incest and for first degree sexual assault on a child, based on acts allegedly committed against his stepdaughter. He was acquitted by a jury of the first degree sexual assault charge but convicted of incest. Johnson appealed to the Nebraska Court

of Appeals. Included in the issues raised on appeal relative to the incest statute, Neb. Rev. Stat. § 28-703(1) (Reissue 1995), was a consideration of the correct definition of "minor" under the incest statute for acts committed against a stepchild and whether § 28-703 is unconstitutionally vague for failing to define "minor." The Court of Appeals affirmed Johnson's conviction. *State v. Johnson*, 12 Neb. App. 247, 670 N.W.2d 802 (2003). We granted Johnson's petition for further review. We affirm.

STATEMENT OF FACTS

Johnson and his wife were married in 1991. Johnson's wife had four children from previous relationships, all of whom lived with the couple. Johnson had five children, two of whom lived periodically with the couple. At the time of the marriage, C.K., a stepdaughter of Johnson, was around 10 years old.

Johnson admitted to police that when C.K. was around the age of 17, Johnson and C.K. had sexual contact, and that they had sexual intercourse when C.K. was 18 years old. C.K., however, testified that the contact started at age 12 and that intercourse started a year later and continued until she contacted the police.

On November 30, 2001, Johnson was charged with first degree sexual assault on a child (count I), in violation of Neb. Rev. Stat. § 28-319 (Reissue 1995), and incest (count II), in violation of § 28-703(1). Section 28-703(1) provides, "Any person who shall knowingly intermarry or engage in sexual penetration with any person who falls within the degrees of consanguinity set forth in section 28-702 or any person who engages in sexual penetration with his or her minor stepchild commits incest."

Johnson filed a motion in limine asking the court to exclude the evidence of his statement made to police officers on October 4, 2001. Specifically, Johnson objected to any statement he made regarding sexual contact with the alleged victim when she was 16 years or older. At the hearing, Johnson argued, in part, that any alleged sexual contact with C.K. when she was above the age of consent would not constitute incest and that the statement would be unfairly prejudicial. The court overruled the motion in limine.

The case proceeded to a jury trial. Before the case was submitted to the jury, Johnson objected to jury instruction No. 4 which

stated in relevant part that an element of the charge of incest was that C.K. "was, at the time of the offense, less than nineteen (19) years old." The court overruled the objection and refused to give Johnson's proposed jury instruction No. 4 which would have stated in relevant part that an element of the charge of incest was that C.K. "was, at the time of the offense, less than sixteen (16) years old." The jury found Johnson not guilty of first degree sexual assault on a child but found him guilty of stepchild incest. The court entered judgment in conformity with the jury verdict and sentenced Johnson.

Johnson appealed to the Court of Appeals. He asserted that the district court erred in (1) overruling his motion for directed verdict for the reason that the State failed to make a prima facie showing of all the elements of its case and because the statute upon which the charge was based is unconstitutionally vague; (2) allowing the State to amend the information to include the word "minor" in the charge of incest; (3) overruling his motion for mistrial; (4) refusing to grant him a new arraignment after the information was amended, thereby denying him an opportunity to file a motion to quash; (5) overruling his objection to jury instruction No. 4; and (6) refusing to give his proposed jury instruction in place of jury instruction No. 4. The Court of Appeals rejected each of these assignments of error. *State v. Johnson*, 12 Neb. App. 247, 670 N.W.2d 802 (2003).

With respect to Johnson's claim that § 28-703 was unconstitutional, the Court of Appeals determined that Johnson had not complied with Neb. Ct. R. of Prac. 9E (rev. 2000) and therefore concluded that the claim had not been properly preserved for appellate review. Rule 9E generally provides for the filing of a separate notice challenging the constitutionality of a statute and serving a brief on the Attorney General. The Court of Appeals also rejected Johnson's assertions that the district court erred in giving the State's instruction No. 4 on the definition of "minor," as it pertained to the stepchild incest charge in count II, and in refusing to give Johnson's proposed instruction on the definition of "minor."

The Court of Appeals noted that § 28-703 does not define "minor" and that minors are described as being persons of different ages for different purposes in various Nebraska statutes. The

Court of Appeals concluded that Neb. Rev. Stat. § 43-2101 (Reissue 2004) provided the correct definition of the term "minor" in § 28-703. The Court of Appeals reasoned as follows:

> Use of § 43-2101 to define "minor" for purposes of the incest statute, § 28-703, is appropriate because the incest statute is obviously intended to protect the familial structure of both blood relatives and stepfamilies. Minor stepchildren are included in the incest statute because a stepparent and a minor stepchild can have the same relationship as a natural parent has with a natural child. Even if the relationship is not the same, the stepparent is still in a position of power, authority, and dominance vis-a-vis the stepchild.
>
> For parents and natural children, there is no age at which sexual relations become lawful. See § 28-703. In short, the law does not permit consent to such a relationship. However, for the crime of incest in a stepfamily, the stepchild must be a minor, meaning that an adult stepchild can consent to such a relationship. The Legislature apparently recognized that the makeup of a stepfamily may eventually change once a child becomes an adult and that a sexual relationship between an adult stepchild and a stepparent could occur, because it does not have the inherent criminality, danger to offspring, and destructiveness to the entire family that arises when sex occurs between parent and child. It is evident that the Legislature saw incest as a very serious crime and wanted to provide as much protection as possible for stepchildren and their families without denying the fact that the status of stepfamilies may change. While the Legislature did not define "minor" within the incest statute, it is reasonable to assume a legislative intent to provide the maximum degree of protection for stepchildren and their families while recognizing the difference between stepchildren and natural children and to construe the statute accordingly. For a sexual relationship between the latter to truly be consensual, the stepchild, of necessity, must be an adult. Thus, we reject the use of younger ages for minor children as found in other statutes we have listed and hold that for the crime of incest, any stepchild under the age of 19 is a minor. Thus, we hold that § 43-2101

> defines "minor" as a person under 19 years of age for purposes of the incest statute, § 28-703.
>
> Further support for § 43-2101 being applicable to the incest statute is found in its location in the statutes. Even though § 43-2101 is not contained in the criminal code, it is in the chapter entitled "Infants and Juveniles," and it is well known that the juvenile code has as its overriding concern the child's best interests. That chapter also provides the definition of stepparent that is applicable to the incest statute. See Judiciary Committee Hearing, L.B. 89, 89th Leg., 1st Sess. 43 (Jan. 30, 1985). It is appropriate for the term "minor" to be defined as under the age of 19 for purposes of the incest statute, as it is in the child's best interests to be protected from incest by a stepparent until adulthood.

State v. Johnson, 12 Neb. App. 247, 259-60, 670 N.W.2d 802, 813 (2003).

The Court of Appeals therefore concluded that the instruction given by the district court correctly stated the law and that the instruction proposed by Johnson did not correctly state the law. The Court of Appeals rejected all of Johnson's remaining assignments of error and affirmed his conviction. We granted Johnson's petition for further review.

ASSIGNMENTS OF ERROR

Johnson asserts that the Court of Appeals erred in rejecting his arguments that the district court had erred in (1) overruling his motion for directed verdict for the reason that the State failed to make a prima facie showing of all the elements of its case and for the further reason that § 28-703, the statute upon which the charge was based, is unconstitutionally vague; (2) allowing the State to amend the information; (3) overruling his motion for mistrial; (4) refusing to grant him a new arraignment after the information was amended; (5) overruling his objection to jury instruction No. 4; and (6) refusing to give his proposed jury instruction.

STANDARD OF REVIEW

[1] Interpretation of a statute presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Aguilar*, 268 Neb. 411, 683 N.W.2d 349 (2004).

ANALYSIS

Constitutionality of § 28-703.

We first consider Johnson's assertion that § 28-703 is unconstitutionally vague in its description of the offense of stepchild incest. We conclude that the constitutional issue has not been preserved for appeal, and we therefore make no determination whether or not the statute is unconstitutionally vague.

The Court of Appeals held that Johnson's claim that § 28-703 is unconstitutionally vague was not properly preserved for appellate review. *Johnson, supra.* The Court of Appeals stated:

> It has been established that the Nebraska Supreme Court insists upon strict compliance with Neb. Ct. R. of Prac. 9E (rev. 2000) before it will consider a constitutional challenge. [Citations omitted.] Johnson did not comply with rule 9E, which requires that when filing a brief, a party alleging unconstitutionality of a federal or state statute must file and serve a separate written notice of the challenge to the statute with the Clerk of the Supreme Court. Additionally, the Attorney General must be served a copy of the brief assigning unconstitutionality within 5 days of the filing of the brief with the Clerk of the Supreme Court. Johnson did not comply with either of these requirements of rule 9E.

12 Neb. App. at 253, 670 N.W.2d at 809.

We have held that rule 9E is applicable to a criminal defendant challenging the constitutionality of the statute defining the offense with which he or she was charged. *State v. Feiling*, 255 Neb. 427, 585 N.W.2d 456 (1998); *State v. Kelley*, 249 Neb. 99, 541 N.W.2d 645 (1996). See also, *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994). We have also insisted on strict compliance with the requirements of rule 9E. *Feiling, supra*; *McDowell, supra.*

We note that rule 9E requires the filing of "a *separate* written notice" to the Supreme Court Clerk that the appeal involves an issue of constitutionality of a statute as well as service of the brief on the Attorney General. We think that compliance with rule 9E requires "a *separate* written notice" to the Supreme Court Clerk and that such notice ordinarily ought not to be contained in a filing that has as its main purpose something other than giving notice to the clerk that constitutionality of a statute is at issue.

As set forth in the separate opinion in this case, some members of this court would find that Johnson in effect complied with rule 9E because he filed a "Petition to Bypass," in which he stated that in his appeal, he claimed the statute under which he was convicted was unconstitutionally vague. Although we have not insisted on rule 9E compliance where we have granted a petition to bypass for the explicit purpose of analyzing the constitutionality of a statute, we note that the petition to bypass in this case was denied and that therefore, the separate written notice requirement ought not to be forgiven.

We further observe that when the issue of the constitutionality of a statute is merely contained in an ordinary pleading, the Supreme Court Clerk is not put on notice that the case should be specially processed. We note that Neb. Const. art. V, § 2, requires that the "judges of the Supreme Court, sitting without division, shall hear and determine all cases involving the constitutionality of a statute" and that "[n]o legislative act shall be held unconstitutional except by the concurrence of five judges." The rule 9E notice to the Supreme Court Clerk assists the clerk and this court in ensuring that an appeal involving the constitutionality of a statute is heard by the full court. As the separate opinion notes and we acknowledge, the second requirement of rule 9E, that a copy of the brief be served on the Attorney General, has been met in this case. However, we would determine that Johnson failed to comply with rule 9E.

[2-4] We further note that it is undisputed that at the trial level, Johnson filed neither a motion to quash nor a demurrer challenging the constitutionality of § 28-703. A claim that a statute fails to define a criminal offense with sufficient definiteness to put ordinary people on notice of the prohibited conduct is a facial challenge to the constitutionality of the statute. *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. Hookstra*, 263 Neb. 116, 638 N.W.2d 829 (2002) (challenge to statute, asserting that no valid application exists, is facial challenge); *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001). We have recently clarified that a facial challenge to a presumptively valid criminal statute does not raise an issue of subject matter jurisdiction in a criminal prosecution and thus may be waived if not timely asserted. See *Thomas, supra.* "This court has repeatedly held that in order to

bring a constitutional challenge to the facial validity of a statute, the proper procedure is to file a motion to quash or a demurrer." *State v. Kanarick*, 257 Neb. 358, 362, 598 N.W.2d 430, 433 (1999). Absent plain error, the failure to do so waives the right to assert the constitutional challenge on appeal. *Thomas, supra.*

As set forth in a separate opinion, some members of this court would rule that because Johnson's conviction was based on § 28-703 and because this appeal cannot be fairly resolved without interpretation of § 28-703, the constitutionality of § 28-703 must be considered despite Johnson's failure to file a motion to quash or a demurrer challenging the statute. They cite to *State v. Goodseal*, 186 Neb. 359, 368, 183 N.W.2d 258, 263-64 (1971), in which this court stated that "where the invalidity of the act is plain, and such a determination is necessary to a reasonable and sensible disposition of the issues presented, we are required by necessity to notice the plain error in the premise on which the case was tried." Although we share some of the concerns expressed in the separate opinion, we would not invoke the *Goodseal* rationale because the Court of Appeals' opinion demonstrates that the issues in this appeal can be resolved without addressing the constitutionality of § 28-703 and, more important, the invalidity of § 28-703 is not plainly evident. See *Goodseal, supra* (Spencer and Boslaugh, JJ., dissenting).

[5,6] We have set forth well-recognized principles of statutory interpretation providing the framework within which the constitutionality of a statute is considered. " 'It is well established that all reasonable intendments must be indulged to support the constitutionality of legislative acts . . . .' " *State v. Ruzicka*, 218 Neb. 594, 597, 357 N.W.2d 457, 461 (1984). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004). A penal statute must be construed so as to meet constitutional requirements if such can reasonably be done. *State v. Hynek*, 263 Neb. 310, 640 N.W.2d 1 (2002). "When a statute is susceptible of two constructions, under one of which the statute is valid while under the other of which the statute would be unconstitutional or of doubtful validity, that construction which results in validity is to be adopted." *Hookstra*, 263 Neb. at 124, 638 N.W.2d at 836. The unconstitutionality of a statute must be clearly established before

a court may declare it void. *State v. Spady*, 264 Neb. 99, 645 N.W.2d 539 (2002). " 'The courts will not declare an act of the Legislature unconstitutional except as a last resort on the facts before the court.' " *Goodseal*, 186 Neb. at 369, 183 N.W.2d at 264 (Spencer and Boslaugh, JJ., dissenting), quoting *Stanton v. Mattson*, 175 Neb. 767, 123 N.W.2d 844 (1963).

Given this strong presumption of constitutionality, we cannot say that § 28-703 is plainly invalid. The fact that reasonable arguments can be made does not make a statute's unconstitutionality plainly evident, *State v. Garza*, 242 Neb. 573, 496 N.W.2d 448 (1993), and a statute is not vague merely because a reviewing court believes the Legislature could have drafted it with greater precision, *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001). Rather, the void-for-vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its applications. *Caddy, supra.* This is not a case in which the Legislature has failed to supply a material element; rather, it is a case in which the Legislature has failed to specifically define a term.

In our consideration of § 28-703, we note that there is weighty precedent which suggests that § 28-703 is not unconstitutionally vague for failing to specifically define "minor." The U.S. Supreme Court in *Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990), reviewed *State v. Young*, 37 Ohio St. 3d 249, 525 N.E.2d 1363 (1988), in which the Ohio Supreme Court applied the plain meaning of the term "minor" as being a person under the age of majority and then looked to the general civil statute specifying the age of majority. Although reversing the defendant's conviction on other grounds, the U.S. Supreme Court found no merit in the defendant's claim that the Ohio Supreme Court's resorting to Ohio Rev. Code Ann. § 3109.01 (Anderson 1989) could not save the statute from his vagueness claim. *Osborne, supra.*

The separate opinion concludes that although the reasoning in cases such as *Young, supra*, "may have merit, [the reasoning] is not applicable" as "the Nebraska statutes contain several provisions that define the term 'minor' for specific purposes." However, a statutory pattern similar to that in Nebraska existed in Ohio at the time that *Young* was decided. See, § 3109.01 (defining age of

majority as 18); Ohio Rev. Code Ann. § 2907.04(A) (Anderson 1987) (criminalizing adult's sexual conduct with person over 12 but under 15); Ohio Rev. Code Ann. § 2907.05(A)(3) (Anderson 1987) (criminalizing gross sexual imposition of person less than 13); Ohio Rev. Code Ann. § 2907.21(A)(2) (Anderson 1987) (criminalizing, inducing, or procuring minor under 16 to engage in sexual activity for hire).

We further note that various other courts have rejected vagueness challenges to penal statutes that fail to define the term "minor" when the meaning can be determined by reference to other statutes or to common law. See, *State v. Ehlers*, 252 Conn. 579, 750 A.2d 1079 (2000) (child pornography criminal statute not vague for failing to define "minor"; definition of "minor" as under age 16 could be found in closely related criminal statutes); *State v. Duggar*, 806 S.W.2d 407 (Mo. 1991) (statute making it crime to fail to support minor not vague for failing to define "minor"; common-law understanding was that 21 was age of majority); *State v. Jackson*, 280 N.C. 563, 187 S.E.2d 27 (1972) (statute criminalizing sale of narcotics to minor not vague for failing to define "minor"; common-law definition of "minor" as under age 21 applies to statute); *People v. Vassar*, 207 Cal. App. 2d 318, 24 Cal. Rptr. 481 (1962) (statute criminalizing furnishing narcotics to minor not vague for failure to define "minor"; definition of "minor" as under age 21 contained in civil code may be used to define "minor"). Both the reasoning set forth above and the reasoning set forth in the separate opinion present rational arguments supporting the respective views as to whether § 28-703 is unconstitutionally vague. Having come to such determination, we are unable to conclude that the unconstitutionality of § 28-703 is "plainly evident." Without deciding whether the statute is or is not unconstitutionally vague, we conclude that because the invalidity of the statute is not plainly evident, we cannot, under the standard set out in *State v. Goodseal*, 186 Neb. 359, 183 N.W.2d 258 (1971), consider the constitutionality of the statute where the defendant has failed to properly preserve the issue for appeal.

We note that the separate opinion concluding that § 28-703 is unconstitutionally vague sets forth the opinion of four of the seven members of this court. Despite the fact that this number is

a majority of the court which would normally control the outcome of a case, article V, § 2, of the Nebraska Constitution provides that "[n]o legislative act shall be held unconstitutional except by the concurrence of five judges." Therefore, our opinion that the constitutionality of the statute cannot be considered in this appeal controls the outcome of this case. We therefore will proceed to consider Johnson's other assignments of error on further review.

Definition of "Minor" Under § 28-703.

Johnson asserts that the Court of Appeals erred in concluding that "minor" as used in § 28-703 means a person under 19 years of age. The Court of Appeals determined that such definition was appropriate by reference to § 43-2101, and it therefore concluded that the district court did not err when it instructed the jury that an element of the charge of incest was that Johnson's stepdaughter "was, at the time of the offense, less than nineteen (19) years old." Although we use different reasoning than that used by the Court of Appeals, we agree that the district court did not err in so instructing the jury.

In concluding that § 43-2101 provides the correct definition of the term "minor" under § 28-703, the Court of Appeals reasoned that the incest statute, § 28-703, "is obviously intended to protect the familial structure of both blood relatives and stepfamilies" and that § 43-2101 is part of the juvenile code which "has as its overriding concern the child's best interests." *State v. Johnson*, 12 Neb. App. 247, 259, 260, 670 N.W.2d 802, 813 (2003). The Court of Appeals also noted that the juvenile code "provides the definition of stepparent that is applicable to the incest statute." *Id.* at 260, 670 N.W.2d at 813. Because the two statutes had similar goals and dealt with similar subject matter, the Court of Appeals concluded that the definition of "minor" in § 43-2101 was the proper definition of "minor" in § 28-703.

We think that a more straightforward construction of § 28-703 would follow the reasoning approved by the U.S. Supreme Court and initially articulated by the Ohio Supreme Court in *State v. Young*, 37 Ohio St. 3d 249, 525 N.E.2d 1363 (1988), *reversed in part on other grounds sub nom. Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990). In *Young*, defendants in

two separate cases were convicted for possession of child pornography under Ohio Rev. Code Ann. § 2907.323(A)(3) (Anderson 1987), which provided that no person shall "[p]ossess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity . . . ." The defendants asserted, among other things, that § 2907.323(A)(3) was unconstitutionally vague because the term "minor" was not defined. They argued that in using only the word "minor" without elaboration, the statute failed to limit its proscription to conduct involving children below a specified numeric age. The Ohio Supreme Court rejected the defendants' argument, concluding that while the statute did not define "minor," the omission was not fatal. The Ohio Supreme Court reasoned:

> Any term which is not defined by a statute is accorded its common ordinary meaning. [Citation omitted.] We encounter no difficulty in finding the term "minor" to be generally understood as signifying a person who has not yet attained the age of majority. See Webster's Third New International Dictionary, Unabridged (1986) 1439. The age of majority in Ohio is eighteen. R.C. 3109.01. Therefore, the term "minor," as employed in R.C. 2907.323(A)(3), connotes a person under eighteen years of age.

37 Ohio St. 3d at 252, 525 N.E.2d at 1368.

[7] We have stated that "[s]tatutory language is to be given its plain and ordinary meaning . . . ." *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 41, 680 N.W.2d 142, 149-50 (2004). Like the Ohio Supreme Court in *Young*, we believe that the plain and ordinary meaning of the term "minor" is "generally understood as signifying a person who has not yet attained the age of majority." The statute used by the Ohio Supreme Court in *Young* to define "minor" for purposes of § 2907.323 was § 3109.01, the Ohio statute generally defining the age of majority in that state. Nebraska's § 43-2101 is titled "Persons declared minors; marriage, effect" and is located in chapter 43, article 21, of the Nebraska Revised Statutes, which article is titled "Age of Majority." The plain and ordinary meaning of the term "minor" is a person who has not reached the age of majority, *Young, supra*, and in Nebraska, the age of majority is defined by § 43-2101 as age 19.

While we acknowledge that various other Nebraska statutes refer to "minor" as a person under an age other than 19, we think it is significant that § 43-2101 makes a general statement that "[a]ll persons under nineteen years of age are declared to be minors . . ." and does not limit its application to a specific section of the statutes. In contrast to § 43-2101, other statutes giving a different definition of "minor" do not purport to declare who is a "minor" as a general matter, and they imply or explicitly state that the definition of "minor" provided therein is for the purpose of a specific section of the statutes. See, Neb. Rev. Stat. § 53-103(23) (Supp. 2003) (stating that for purposes of Nebraska Liquor Control Act, minor means any person under 21 years of age, regardless of marital status); Neb. Rev. Stat. § 25-508.01(2) (Reissue 1995) (prescribing method of personal service for any person under 14 years of age and referring to such person as "minor," but does not purport to declare "minor" for other purposes); Neb. Rev. Stat. § 28-443 (Reissue 1995) (statute is titled "Delivery of drug paraphernalia to a minor; penalty" and proscribes delivery to a person under 18 years of age who is at least 3 years younger than actor, but does not purport to declare "minor" for other purposes); Neb. Rev. Stat. § 28-805 (Reissue 1995) (describing offense of "debauching a minor" as act involving a boy or girl under age of 17, but does not purport to declare "minor" for other purposes); Neb. Rev. Stat. § 28-1418 (Reissue 1995) (proscribing use of tobacco by person "being a minor under the age of eighteen years," but does not purport to declare "minor" for other purposes).

We think it is a proper reading of the Nebraska Revised Statutes that § 43-2101 sets the age of majority and that, except where a statute references a specific age, § 43-2101 defines "minor" for general purposes. Where the word "minor" is used elsewhere in the statutes without further definition, it may be presumed to have the general meaning declared under § 43-2101. Where the Legislature wishes to provide a different definition or wishes to proscribe conduct based on an age other than the age of majority, the Legislature will explicitly do so, as it has done in the statutes cited above.

Because our analysis leads us to determine that the proper definition of "minor" for purposes of § 28-703 is that provided in

§ 43-2101, we conclude that the Court of Appeals did not err in construing "minor" under § 28-703 to have the same meaning and in concluding that the district court did not err in instructing the jury as such.

Other Assignments of Error.

We have reviewed Johnson's remaining assignments of error, and we find no merit to such assignments. We therefore affirm the decision of the Court of Appeals.

CONCLUSION

We conclude that Johnson did not properly preserve the issue of the constitutionality of § 28-703 and that because the alleged invalidity of § 28-703 is not "plainly evident," we cannot consider the issue in this appeal. We further conclude that the Court of Appeals did not err in concluding that the proper definition of "minor" as used in § 28-703 is that provided in § 43-2101 and that the district court did not err in so instructing the jury. Having rejected Johnson's remaining assignments of error on further review, we affirm the Court of Appeals' decision affirming Johnson's conviction.

AFFIRMED.

GERRARD, J., dissenting.

The defendant argues the offense of stepchild incest under Neb. Rev. Stat. § 28-703 (Reissue 1995) is unconstitutionally vague and therefore violates the due process provisions of the U.S. Constitution and the Nebraska Constitution, because it prohibits incest with a "minor" stepchild but does not define "minor." I agree, as does a majority of this court. But the opinion of this court does not decide whether § 28-703 is unconstitutionally vague, based on the court's conclusion that the statute's unconstitutionality is not "plainly evident." Because this issue involves the constitutionality of a statute, the opinion of three judges of this court disposes of the appeal. However, I respectfully disagree with the court's reasoning, in both the interpretation of the plain error doctrine and the discussion on the constitutionality of § 28-703. Therefore, I respectfully dissent.

PLAIN ERROR

The Court of Appeals found that Johnson's claim that § 28-703 is unconstitutionally vague had not been properly preserved for

appellate review in this case, stating that Johnson did not comply with Neb. Ct. R. of Prac. 9E (rev. 2000) because he did not file and serve a separate written notice of the challenge to the statute and because he did not serve a copy of the brief assigning unconstitutionality on the Attorney General. The opinion of the court endorses that conclusion. However, on the same date that Johnson filed his appellate brief, he filed a "Petition to Bypass" with the Supreme Court Clerk's office, which stated, in relevant part, that "[f]or his appeal, Appellant has alleged that the statute under which he was convicted in [sic] unconstitutionally vague." Furthermore, rule 9E requires only that the Attorney General be served with a copy of the brief "[i]f the Attorney General is not already a party to an action where the constitutionality of the statute is in issue . . . ." In a criminal proceeding, the Attorney General, as the representative of the State of Nebraska, is a party to the proceeding. See Neb. Rev. Stat. § 84-205 (Cum. Supp. 2004). Beyond that, on the last page of Johnson's appellate brief, his counsel certifies that two copies of the brief were delivered to the Attorney General on the same date that the brief was filed with the Supreme Court Clerk's office. This suffices, by statute, as proof of service. See Neb. Rev. Stat. § 25-534 (Reissue 1995).

In short, I disagree with the Nebraska Court of Appeals' conclusion that Johnson failed to follow the requirements of rule 9E and obviously disagree with this court's endorsement of that conclusion. However, the State also argues that Johnson waived the issue of the constitutionality of § 28-703 because his counsel during pretrial proceedings, who was not his counsel at trial or on appeal, failed to file a motion to quash or a demurrer to either the original or amended information. See *State v. Kanarick*, 257 Neb. 358, 598 N.W.2d 430 (1999). Because I agree that Johnson should have raised his constitutional claim in a motion to quash, I also agree that consideration of that constitutional claim requires the court to find plain error.

But because Johnson's conviction was based on § 28-703 and because this appeal cannot be resolved without interpretation of § 28-703, the constitutionality of § 28-703 should be considered despite Johnson's procedural failures. This court has stated that "where the invalidity of the act is plain, and such a determination is necessary to a reasonable and sensible disposition of the issues

presented, we are required by necessity to notice the plain error in the premise on which the case was tried." *State v. Goodseal*, 186 Neb. 359, 368, 183 N.W.2d 258, 263-64 (1971). Because the assignments of error in this appeal require interpretation of § 28-703, the court cannot reach a sound and reasonable disposition of this appeal without confronting the constitutionality of the stepchild incest statute—i.e., whether the meaning of § 28-703 *can be* reasonably determined.

In other words, the court cannot resolve the arguments Johnson has preserved for appellate review without, at least implicitly, resolving those that he arguably did not. The court should not permit the mistakes of counsel to force it into making a determination that inevitably results from attempting to discern the meaning of statutory language that defies meaningful definition. In my opinion, the court's "interpretation" of § 28-703 does what the Due Process Clause was intended to prevent—it retroactively purports to give validity to a statute that, without the court's interpretation, is effectively meaningless.

The court avoids discussing the due process issue by stating that "the issues in this appeal can be resolved without *addressing* the constitutionality of § 28-703." (Emphasis supplied.) This is true, but the question is whether the issues *should* be resolved without addressing the constitutionality issue. The problem is that the resolution of the issues in this appeal *implicates* the constitutionality of § 28-703, regardless of whether it is openly addressed. It is simply not possible to construe a statute yet avoid determining whether the statute is capable of meaningful construction in the first instance. That the court includes a significant amount of discussion regarding the vagueness of § 28-703 provides some indication of how much the constitutional issue is a necessary concomitant to the other issues presented in this appeal.

The opinion of the court further concludes that the plain error doctrine is not satisfied in this case because the error is not "plainly evident from the record." See *State v. Mata*, 266 Neb. 668, 699, 668 N.W.2d 448, 477 (2003), *cert. denied* 543 U.S. 1128, 125 S. Ct. 1088, 160 L. Ed. 2d 1081 (2005). For reasons I will explain below, I respectfully disagree. But my initial dispute with the court's reasoning is that it is mistaken to invoke that proposition at all, because the constitutional issue the court is called

upon to decide is a necessary and intrinsic part of its analysis of § 28-703, regardless of whether the error is plainly evident from the record. See *State v. Goodseal, supra.* "The Nebraska Supreme Court will not pass upon the constitutionality of legislation *absent a need to do so in order to properly dispose of an action.*" (Emphasis supplied.) *State v. VanAckeren*, 263 Neb. 222, 229-30, 639 N.W.2d 112, 118 (2002). Consideration of plain error occurs at the discretion of an appellate court. *State v. Al-Zubaidy*, 257 Neb. 935, 602 N.W.2d 8 (1999). In my opinion, the court should exercise that discretion under these circumstances.

Beyond that, however, the court has conflated the plainness of error, and the degree of prejudice sustained by the defendant, with the difficulty of the legal question presented. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *State v. Bartholomew*, 258 Neb. 174, 602 N.W.2d 510 (1999). The court concludes that the error in this case was not "plainly evident" because statutes are presumably constitutional, and there is a rational argument supporting the constitutionality of § 28-703. The court seems to be saying that for error to be plain, it must be indisputable. But the foregoing standard for plain error does not say that. Instead, it refers to error "plainly evident *from the record.*" (Emphasis supplied.) See *State v. Bartholomew*, 258 Neb. at 180, 602 N.W.2d at 514. In other words, the record must plainly demonstrate that the error occurred. It is not required that the legal issue before the court be an easy one to decide. Whether error is plainly evident cannot be dependent on the mental exertion necessary for a judge to decide the issue.

The constitutionality of a statute is a question of law, and the Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Diaz*, 266 Neb. 966, 670 N.W.2d 794 (2003). While I agree that Johnson should have raised his constitutional claim with a timely motion to quash, see *State v. Kanarick*, 257 Neb. 358, 598 N.W.2d 430 (1999), it is worth noting that Johnson did make his constitutional argument, albeit belatedly, in the trial court and that the trial court ruled on his motion. We have said that generally, a constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal. See *State v. Diaz, supra.* While

Johnson's motion was untimely, he nonetheless made a record of his constitutional objection in the trial court, the parties were heard on the matter, and the trial court ruled on the objection. Moreover, whether a statute is unconstitutionally vague is determined from the language of the statute, which is obviously available to this court.

When a vagueness argument under the Due Process Clause is raised, the constitutionality or unconstitutionality of the statute is plainly evident one way or the other. Either a statute is unconstitutional or it is not—there is no middle ground. Whether § 28-703 is unconstitutional is a straightforward question of law that is as "plainly evident" in this case as it would be in any other.

VOID-FOR-VAGUENESS DOCTRINE

The void-for-vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its applications. *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001), citing *United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997). A statute is vague if its prohibitions are not clearly defined. *State v. Frey*, 218 Neb. 558, 357 N.W.2d 216 (1984).

Due process of law requires that criminal statutes be clear and definite. *State v. Pierson*, 239 Neb. 350, 476 N.W.2d 544 (1991). A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject to the statute as to what conduct will render them liable to punishment, and the dividing line between what is lawful and unlawful cannot be left to conjecture. *Id.* A crime and its elements must be so clearly expressed that an ordinary person can intelligently choose in advance what course of conduct he or she may lawfully pursue. *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992).

The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited. *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002). Because § 28-703 does not define "minor," it does not define the crime of incest with a stepchild with sufficient definiteness that ordinary people can be certain what conduct is prohibited. As Johnson notes, Nebraska

statutes, including criminal statutes, give varying definitions of when a person is a "minor." The Court of Appeals recognized that

> [t]he age of majority is set at different ages for different purposes. See, e.g., Neb. Rev. Stat. § 25-508.01 (Reissue 1995) (for purposes of personal service, minor is person under 14 years of age); Neb. Rev. Stat. § 28-443 (Reissue 1995) (in regard to prohibition of delivery of drug paraphernalia to minor, minor is person under 18 years of age who is at least 3 years younger than actor); Neb. Rev. Stat. § 28-805 (Reissue 1995) (debauching minor prohibits nonminor from debauching morals of boy or girl under age of 17); Neb. Rev. Stat. § 28-1418 (Reissue 1995) (prohibiting use of tobacco by minor under age of 18); Neb. Rev. Stat. § 53-103(23) (Cum. Supp. 2002) (for purposes of Nebraska Liquor Control Act, minor means any person under 21 years of age, regardless of marital status).

State v. Johnson, 12 Neb. App. 247, 257-58, 670 N.W.2d 802, 812 (2003). Despite this multitude of definitions, the Court of Appeals concluded that Neb. Rev. Stat. § 43-2101 (Reissue 2004), which defines "minor" generally as a person under 19 years of age, defined "minor" for purposes of § 28-703. The opinion of the court endorses that conclusion, although that conclusion does not command a majority of this court.

Because of the varying definitions of "minor" in Nebraska statutes, I do not believe that the use of the word "minor" in § 28-703 was sufficiently definite to give the ordinary person notice of whether sexual conduct involving a stepchild between the ages of 16 and 19 was prohibited. Although the Court of Appeals and the opinion of the court have articulated plausible reasons to choose the definition provided in § 43-2101, there is nothing in § 28-703 or elsewhere that would alert the ordinary person that such was the definition of "minor" for purposes of § 28-703. Indeed, the Court of Appeals and the opinion of the court could have used the definition from one of the criminal statutes, such as Neb. Rev. Stat. § 28-805 (Reissue 1995) (debauching or depraving morals of minor, defined as under age 17) or Neb. Rev. Stat. § 28-319(1) (Reissue 1995) (criminalizing adult's sexual conduct when actor is age 19 or older and victim is under age of 16), and stated reasons for such a selection that would have been just as persuasive

as the reasons they have given for selecting the definition from § 43-2101.

The Court of Appeals relied, in interpreting § 28-703, upon the familiar proposition that in reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. See *State v. Aguilar*, 268 Neb. 411, 683 N.W.2d 349 (2004). However, the issue in this appeal is not what the Legislature may have intended to do—rather, the issue is whether the Legislature's intent, whatever it may have been, was successfully translated into a statute that effectively defined the line between lawful and unlawful conduct.

But beyond that, other familiar maxims of statutory interpretation support contrary conclusions. The Court of Appeals cited the proposition that

> " ' "[an appellate court], in construing a statute, looks to the objects to be accomplished, the evils and mischief sought to be remedied, or the purposes to be served, and places upon the statute a *reasonable or liberal construction* which will best effect its purpose rather than one which will defeat it. . . " ' "

(Emphasis supplied.) *State v. Johnson*, 12 Neb. App. at 258, 670 N.W.2d at 812-13. Accord, e.g., *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004). But it is also a fundamental principle of statutory construction that penal statutes are to be *strictly construed* in favor of the defendant, and it is well understood that it is not for the courts to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not there. See, *State v. Hochstein and Anderson*, 262 Neb. 311, 632 N.W.2d 273 (2001); *State v. Jansen*, 241 Neb. 196, 486 N.W.2d 913 (1992). Simply stated, § 28-703 is meaningless unless a definition of the word "minor" is imported from another statute, and our familiar maxims of statutory interpretation are of little assistance in determining which definition, if any, is to be applied. But more to the point, § 28-703 provides nothing that would suffice to inform the ordinary citizen which definition was applicable.

I recognize that difficulty in determining the meaning of the language of a statute does not automatically render it unconstitutionally vague and ambiguous. See *State v. Sodders*, 208 Neb.

504, 304 N.W.2d 62 (1981). But when a court could reasonably give conflicting definitions to a term used in a penal statute, the statute does not give an ordinary citizen adequate notice of prohibited conduct because the citizen cannot know which definition the court will choose. While this court could authoritatively articulate a meaning for § 28-703, that determination could not be applied retroactively, as the opinion of the court would hold, unless such application provided fair warning to the defendant. See *State v. Ehlers*, 252 Conn. 579, 750 A.2d 1079 (2000), citing *Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965). All crimes in Nebraska are statutory in nature, *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999), and Nebraska's statutory scheme has not provided fair warning to the defendant of what conduct is prohibited under § 28-703.

I am aware, as noted by the opinion of the court, that courts in other jurisdictions have concluded that the failure to define the word "minor," under the respective statutory schemes presented in those cases, did not render those statutes unconstitutionally vague. See, *State v. Duggar*, 806 S.W.2d 407 (Mo. 1991) (en banc); *State v. Young*, 37 Ohio. St. 3d 249, 525 N.E.2d 1363 (1988), *reversed in part on other grounds sub nom. Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990); *State v. Jackson*, 280 N.C. 563, 187 S.E.2d 27 (1972); *People v. Vassar*, 207 Cal. App. 2d 318, 24 Cal. Rptr. 481 (1962). However, those conclusions are not persuasive in the instant case.

In each of those cases, the court found that the term "minor" could be defined by reference either to the common law, as in *Duggar* and *Jackson*, or to a civil statute that the court determined to be of general application, as in *Young* and *Vassar*. While that reasoning may have merit, it is not applicable to the circumstances of this case. As previously noted, the Nebraska statutes contain several provisions that define the term "minor" for specific purposes. While the court argues, as did the Court of Appeals, that § 43-2101 provides an applicable definition, I am not persuaded, for the reasons previously explained, that the ordinary citizen would have had sufficient reason to expect that definition, as opposed to any other, to be lifted from another chapter of the Nebraska Revised Statutes and used to provide clarity to an otherwise indefinite penal statute.

Because we assume that people are free to steer between lawful and unlawful conduct, we insist that laws give people of ordinary intelligence a reasonable opportunity to know what is prohibited, so that they may act accordingly. See *State v. Frey*, 218 Neb. 558, 357 N.W.2d 216 (1984), citing *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). Section 28-703, however, contains no definition for a critical term and provides no indication what definition, if any, is to be applicable. It does not meet the requirements of due process and is unconstitutionally vague. Johnson's conviction, pursuant to an unconstitutionally vague statute, was plain error.

CONCLUSION

I would conclude that the portion of § 28-703 dealing with conduct involving a minor stepchild is unconstitutionally vague because it does not define "minor" and that this error is plainly evident from the record. Consequently, I would reverse the judgment of the Court of Appeals and remand the cause with directions to reverse Johnson's conviction and sentence. Having determined that § 28-703 is unconstitutional, I would not reach Johnson's remaining assignments of error.

WRIGHT, CONNOLLY, and MCCORMACK, JJ., join in this dissent.

GEORGETT TADROS, APPELLANT AND CROSS-APPELLEE,
V. CITY OF OMAHA, A MUNICIPAL CORPORATION,
APPELLEE AND CROSS-APPELLANT.

694 N.W.2d 180

Filed March 25, 2005. No. S-03-1336.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong.
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. **Trial: Negligence: Proof: Appeal and Error.** Determining apportionment of negligence is solely a matter for the fact finder, and its action will not be disturbed on appeal if it is supported by credible evidence and bears a reasonable relationship to the respective elements of negligence proved at trial.

4. **Negligence: Damages.** The apportionment of damages is determined by considering the relative fault of the parties.
5. **Negligence: Liability.** An important factor to be considered in apportioning fault is the extent to which each person's risk-creating conduct failed to meet the applicable legal standard.
6. **Motor Vehicles: Highways.** Drivers are required to maintain a proper lookout for their own safety and the safety of others.
7. **Motor Vehicles: Highways: Right-of-Way.** A "go" signal at a street intersection confers no authority on the driver of an automobile who receives this signal to proceed across that intersection regardless of other persons or vehicles that may already be within it. It is not a command to go but a qualified permission to proceed lawfully and carefully in the direction indicated.
8. ____: ____: ____. A vehicle entering a street intersection with a traffic light in the driver of the vehicle's favor is under obligation to use due care and to yield the right-of-way to vehicles in the intersection. His right-of-way is subject to the rights of those already in the intersection.
9. **Pedestrians: Motor Vehicles: Highways: Words and Phrases.** A place of safety is any place established by the evidence that is occupied by a pedestrian just prior to sudden movement where he is then safe from injury, considering the facts and circumstances in each case then existing.
10. **Pedestrians: Motor Vehicles: Highways.** The determining element in a car-pedestrian accident is the pedestrian's sudden movement into the vehicle's path followed by an almost instantaneous collision.
11. **Political Subdivisions Tort Claims Act: Liability.** In determining whether the discretionary function exemption to the Political Subdivisions Tort Claims Act applies, the court must first consider whether the conduct is a matter of choice for the acting employee. If the court determines that the conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exemption was designed to shield.
12. **Public Officers and Employees: Immunity.** If a statute, regulation, or policy specifically prescribes a course of action which an employee must follow, then there is no discretionary immunity.
13. ____: ____. An employee's conduct must involve judgment or choice or there is no discretion for the discretionary function exemption to protect.
14. **Negligence: Damages: New Trial: Appeal and Error.** When a fact finder has used an incorrect standard of care in apportioning fault between a plaintiff and a defendant, the appropriate appellate remedy will generally be to remand for a new trial so the fact finder can employ the correct standard in its apportionment analysis.

Appeal from the District Court for Douglas County: J. RUSSELL DERR, Judge. Reversed and remanded for a new trial.

David M. Woodke and Aimee C. Bataillon, of Woodke & Gibbons, P.C., L.L.O., and Matthew G. Miller for appellant.

Robert J. Hamer, Deputy Omaha City Attorney, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Georgett Tadros was seriously injured when she was struck by a vehicle as she walked across West Center Road in Omaha, Nebraska. Tadros alleged that the City of Omaha (City) was negligent in programming the crosswalk signal at the intersection and that the driver who struck her was negligent in failing to yield the right-of-way to a pedestrian. The district court found that Tadros' contributory negligence precluded her from recovery, and it dismissed her petition. Tadros appealed, and the City has filed a cross-appeal.

SCOPE OF REVIEW

[1] In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong. *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 267 Neb. 958, 679 N.W.2d 198 (2004).

FACTS

On December 16, 1999, Tadros was crossing West Center Road at the intersection of 133d Street and was struck by a pickup truck driven by James Bowley, Jr. When Tadros started to cross the street, the white "walk" light on the crosswalk signal was illuminated. According to Tadros' petition, the signal changed to red as she stepped from the median in the middle of West Center Road. As she crossed the northernmost eastbound lane, an eastbound white car that had entered the intersection came to a sudden stop and allowed Tadros to pass. She proceeded across the northernmost eastbound lane of traffic, but when she reached the southernmost eastbound lane, she was struck by Bowley's pickup.

West Center Road runs east and west. At the intersection in question, for westbound traffic, there is a right-turn lane, two through-traffic lanes, and a left-turn lane. A 7-foot-9-inch-wide median separates the westbound left-turn lane from the two eastbound lanes. The total crossing distance across West Center Road from the north curb to the south curb is 81 feet 10 inches. The distance from the north curb to the middle of the southernmost

eastbound lane of West Center Road, where Tadros was struck, measures 78 feet.

At the intersection of 133d Street and West Center Road, there is an unmarked crosswalk with a signal that may be activated only by a pedestrian manually pressing the crosswalk button. At the time of this accident, the crosswalk signal was set as follows: 7 seconds for the white "walk" light, 11 seconds for the flashing "don't walk" light, and 4 seconds for the solid "don't walk" light. There was also a 1-second period when the traffic lights were red in all directions. The total allotted time for the crosswalk signal was 23 seconds.

Tadros filed a petition in Douglas County District Court alleging that Bowley and the City were negligent and seeking to recover damages for injuries she sustained. She alleged that the City had failed to program the crosswalk signal to provide a sufficient amount of time for a pedestrian to cross all lanes of West Center Road, failed to provide a pedestrian-activated crosswalk signal or detector on the median, and failed to program the signal in accordance with the appropriate design standards in the industry. She alleged that Bowley was negligent in failing to keep a reasonable and proper lookout, failing to keep his vehicle under reasonable and proper control, failing to yield the right-of-way to a pedestrian in a crosswalk, and operating his vehicle at a speed unreasonable under the circumstances then and there existing.

The City answered, claiming that it had discretionary function immunity pursuant to Neb. Rev. Stat. § 13-910(2) (Cum. Supp. 2002). It also claimed that Tadros was contributorily negligent in failing to keep an adequate lookout for oncoming traffic and in leaving the median, a place of safety, and walking into the path of oncoming traffic without looking.

Tadros' last memory before the incident was leaving a bank near the northeast corner of 133d Street and West Center Road, where she had transacted business. She testified that she had crossed West Center Road using the pedestrian crosswalk many times, that she knew the pedestrian signal was "very short," that she had previously experienced trouble crossing in the time allotted, and that "everybody tried to speed up at this intersection."

The district court found that Tadros was walking in a slight southeasterly direction from the north curb to the south curb and

was within the general area where crosswalk markings would be if they existed. It found that Tadros had suffered extremely serious injuries and that many of the injuries were permanent and would likely be the source of additional health complications in the future.

The court found that the City was not entitled to discretionary function immunity under § 13-910(2) because its setting of the pedestrian crossing light was dictated by the Manual on Uniform Traffic Control Devices (manual). Upon reading the appropriate sections of the manual in pari materia, the court concluded that the "pedestrian clearance interval" included the flashing "don't walk" signal of 11 seconds, the solid "don't walk" signal of 4 seconds, and the additional 1-second "all red" signal, for a total of 16 seconds.

The court then considered the negligence of the City in failing to time the pedestrian clearance interval according to the manual. It found that Tadros had presented sufficient evidence to establish liability on the part of the City. However, the court found that Tadros was contributorily negligent when she left a place of safety on the median; proceeded against a solid "don't walk" signal, which indicated she did not have the right-of-way; and was struck by oncoming traffic.

In comparing the negligence of the parties, the court concluded that Tadros was guilty of contributory negligence equal to or greater than that of the City and that Bowley's negligence was, at best, minimal. The court accorded the following percentages of negligence: 50 percent to Tadros, 40 percent to the City, and 10 percent to Bowley. Because the court found that Tadros' percentage of negligence was 50 percent, she was precluded from recovery pursuant to Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995).

ASSIGNMENTS OF ERROR

Tadros assigns the following errors: The district court erred (1) in finding that the pedestrian clearance interval consists of more than the flashing "don't walk" signal, when the manual and expert testimony indicated otherwise; (2) in failing to consider the statutory and common-law duties of Bowley and the substantial evidence that he breached such duties; (3) in finding that

Tadros was 50 percent negligent for leaving a place of safety and proceeding into oncoming traffic without looking; (4) in failing to consider Tadros' statutory duty to immediately proceed to the sidewalk once she had partially completed her crossing of West Center Road; and (5) in misapplying the law when determining the degree of Tadros' contributory negligence, if any.

The City's cross-appeal asserts that the district court erred in not finding that the setting of traffic signal timing is a discretionary function, which would give the City immunity from liability.

ANALYSIS

PEDESTRIAN CLEARANCE INTERVAL

Tadros claims the district court erred in its determination of what constitutes a pedestrian clearance interval. The amount of time allotted for a pedestrian to cross the intersection in question is an important element in assessing the City's negligence.

Neb. Rev. Stat. § 60-6,118 (Reissue 2004) states:

> Consistent with the provisions of the Nebraska Rules of the Road, the Department of Roads may adopt and promulgate rules and regulations adopting and implementing a manual providing a uniform system of traffic control devices on all highways within this state which, together with any supplements adopted by the department, shall be known as the Manual on Uniform Traffic Control Devices.

The parties do not dispute the fact that the manual is applicable to this case.

The manual states at paragraph 4D-7, "Pedestrian Intervals and Phases":

> Under normal conditions, the WALK interval should be at least 4 to 7 seconds in length so that pedestrians will have adequate opportunity to leave the curb before the clearance interval is shown. . . .
>
> A pedestrian clearance interval shall always be provided where pedestrian signal indications are used. It shall consist of a flashing DON[']T WALK indication. The duration should be sufficient to allow a pedestrian crossing in the crosswalk to leave the curb and travel to the center of the farthest traveled lane before opposing vehicles receive a

green indication (normal walking speed is assumed to be 4 feet per second).

The parties disagreed as to whether the pedestrian clearance interval for the crosswalk in question would include the flashing "don't walk" signal, the solid "don't walk" signal, and the 1-second period when the traffic signals were red in all directions.

The district court interpreted the manual to require that the pedestrian clearance interval include the flashing "don't walk" signal, the solid "don't walk" signal, and the additional 1-second "all red" period, for a total of 16 seconds. It concluded that a finding that the pedestrian clearance interval was limited to only the period when the flashing "don't walk" signal was activated would be inconsistent with an interpretation of paragraph 4D-7 in its entirety.

[2] The district court's interpretation of the manual presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004). Therefore, we review the terms of the manual independent of the determination made by the district court.

The plain language of the manual states that a pedestrian clearance interval consists of the flashing "don't walk" signal. We conclude that the district court's interpretation that the pedestrian clearance interval also included the solid "don't walk" signal and the 1-second "all red" period was incorrect. It is obvious that the purpose of the 4-second solid "don't walk" signal and the 1-second "all red" signal was to give pedestrians the necessary time to move from the middle of the "farthest traveled" traffic lane before oncoming traffic begins moving.

The intersection in question measured 78 feet from the north curb to the middle of the southernmost lane, which was the area where Tadros was struck. At a rate of 4 feet per second, a pedestrian would require 19.5 seconds to cross from the north curb to the middle of the southernmost lane during the flashing "don't walk" signal. The flashing "don't walk" signal at the intersection of 133d Street and West Center Road provided an interval of just 11 seconds. Assuming a normal walking speed of 4 feet per second, Tadros could have walked only 44 feet. This interval

could potentially strand pedestrians on the median with no way to reactivate the crosswalk signal. There was no pedestrian activation device on the median. A pedestrian would then have to either cross the eastbound lanes of traffic against the solid "don't walk" signal or wait for another pedestrian to activate the crosswalk signal.

Since the district court erred in its determination of the pedestrian clearance interval, the court also relied upon erroneous information in its apportionment of the City's negligence.

[3] In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong. *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 267 Neb. 958, 679 N.W.2d 198 (2004). Determining apportionment of negligence is solely a matter for the fact finder, and its action will not be disturbed on appeal if it is supported by credible evidence and bears a reasonable relationship to the respective elements of negligence proved at trial. *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004).

[4,5] In *Aguallo*, we stated that the common-law concept of contributory negligence has been abrogated by comparative negligence, which relieved the parties of an all-or-nothing situation. The apportionment of damages is determined by considering the relative fault of the parties.

> [An] important factor to be considered in apportioning fault is "the extent to which [each person's risk-creating] conduct failed to meet the applicable legal standard." Restatement (Third) of Torts: Apportionment of Liability § 8, comment *c.* at 87 (2000). That party X deviated substantially from its standard of care while party Y's deviation was only slight suggests that X should shoulder a higher burden for the damage done.

Aguallo, 267 Neb. at 808, 678 N.W.2d at 90.

In the case at bar, the district court failed to properly consider the extent to which the City's conduct failed to meet the applicable legal standard. The court's apportionment of negligence did not bear a reasonable relationship to the respective elements of negligence proved by Tadros at trial. Although the court found that the City was negligent in setting the pedestrian clearance

interval, it did not properly consider the effect of the City's failure to properly set the pedestrian clearance interval.

The City set an interval of only 11 seconds when it should have allowed 19.5 seconds. Eleven seconds would allow a pedestrian to walk 44 feet across the intersection instead of 78 feet, the distance from the north curb to the middle of the southernmost eastbound lane of West Center Road. This difference of 34 feet should have been considered by the district court in apportioning the City's negligence. The court did not properly consider the City's duty to ensure that the crosswalk signal provided sufficient time for a pedestrian to cross the intersection.

In comparing the relative fault of the parties, the proper amount of time for the pedestrian clearance interval was a significant factor that the district court did not consider in its assessment of the City's standard of care. The court's apportionment of the City's negligence was clearly wrong.

Bowley's Negligence

The district court found that Bowley's negligence was minimal in that "he possibly should have been more alert to the fact that he was approaching an intersection which contained an unmarked crosswalk and that the 'white vehicle' had quickly stopped in the next lane in front of him."

[6] The law imposes several duties upon drivers. Every driver is required to exercise due care to avoid colliding with a pedestrian upon any roadway. See Neb. Rev. Stat. § 60-6,109 (Reissue 2004). "Whenever any vehicle is stopped at a marked crosswalk or at any unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway, the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle." Neb. Rev. Stat. § 60-6,153(3) (Reissue 2004). Drivers are required to maintain a proper lookout for their own safety and the safety of others. See *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002).

Tadros was struck within a crosswalk area. When she entered the northernmost eastbound lane, the driver of a white car in that lane stopped for her. Bowley did not see Tadros. He proceeded through the intersection and did not stop until his vehicle struck Tadros. An engineer who analyzed automobile accidents testified

that Bowley should have been able to see Tadros from as far west as 134th Street.

[7,8] In *Styskal v. Brickey*, 158 Neb. 208, 217, 62 N.W.2d 854, 861 (1954), this court stated:

> "A 'go' signal at a street intersection confers no authority on the driver of an automobile who receives this signal to proceed across that intersection regardless of other persons or vehicles that may already be within it. It is not a command to go but a qualified permission to proceed lawfully and carefully in the direction indicated . . . ."
>
> . . . .
>
> A vehicle entering a street intersection with a traffic light in his favor is under obligation to use due care and to yield the right-of-way to vehicles in the intersection. His right-of-way is subject to the rights of those already in the intersection.

Tadros was already in the intersection when Bowley approached. She was seen by the driver of the white car, and she had the right-of-way to proceed. Witnesses testified that Tadros was walking at a "slow" or "normal" pace across the intersection. No one stated that she suddenly left the median.

At trial, Bowley testified that he was driving east in the south or curb lane of West Center Road. He recalled a white car in the northernmost eastbound lane but could not recall if it was ahead of him. In an earlier deposition, he stated that the white car was farther east than he was. On cross-examination, Bowley said he hit Tadros after he had passed through the intersection. He did not notice the white car slowing down.

Paul Gilinsky testified that he was traveling eastbound on West Center Road just before the accident. He was in the right-hand lane as he approached the intersection of 133d Street and West Center Road, and a red pickup truck was in front of him. Gilinsky said that he was traveling at about 45 miles per hour and that the pickup was traveling at about the same speed. He saw a woman standing on the northeast corner of the intersection of 133d Street and West Center Road as he drove through the intersection of 134th Street and West Center Road. He saw her on the westernmost portion of the median, saw her step off the median, and saw her walk across the street at a normal pace. He saw a

white car in the left-hand eastbound lane stop, and he saw the woman walk in front of that car. Gilinsky then saw the pickup hit the woman.

[9,10] In *Bashus v. Turner*, 218 Neb. 17, 20, 352 N.W.2d 161, 164 (1984), we stated that a place of safety is "any place established by the evidence that is occupied by the pedestrian just prior to sudden movement where he is then safe from injury, considering the facts and circumstances in each case then existing." We held that the determining element in a car-pedestrian accident is the pedestrian's sudden movement into the vehicle's path followed by an almost instantaneous collision. *Id.* The record does not support a finding that Tadros made any sudden movement into the path of Bowley's pickup. Tadros had time to walk in front of the white car and into the southernmost lane of eastbound traffic before she was hit by Bowley.

Bowley had a duty to maintain a proper lookout. See *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002). He did not see Tadros; however, the driver of the white car saw her and stopped as she crossed the intersection. Tadros was also seen by Gilinsky, who saw her step off the median and walk across the street at a normal pace. He saw the white car stop for her, and he saw Tadros walk in front of that car. He then saw Bowley hit Tadros.

Bowley breached his duty to maintain a proper lookout and his duty not to overtake and pass a vehicle that had stopped at the crosswalk to allow Tadros to cross the street. He had a duty to yield to Tadros, who was still in the intersection. The district court failed to consider the extent to which Bowley's conduct failed to meet his duty to Tadros. The district court's apportionment of negligence to Bowley did not bear a reasonable relationship to the respective elements of Bowley's negligence which were proved at trial. The court's apportionment of Bowley's negligence was clearly wrong.

Discretionary Function Exemption

In its cross-appeal, the City argues that the district court erred in not finding that setting the pedestrian clearance interval was a discretionary function involving inherent public policy issues, which would therefore exempt the City from liability. Section 13-910 provides, in pertinent part:

> The Political Subdivisions Tort Claims Act . . . shall not apply to:
>
> . . . .
>
> (2) Any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion is abused.

[11-13] A two-step analysis is used to determine whether the discretionary function exemption applies. *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004). The court must first consider whether the conduct is a matter of choice for the acting employee. *Id.* "This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice." *Id.* at 809, 678 N.W.2d at 90. If the court determines that the conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exemption was designed to shield. *Id.* If the statute, regulation, or policy specifically prescribes a course of action which an employee must follow, then there is no discretionary immunity. See *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992). The employee's conduct must involve judgment or choice or there is no discretion for the discretionary function exemption to protect. See *Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994).

In the case at bar, the district court concluded that the manual required the City to set the pedestrian clearance interval and that the City had no discretion in making that determination. We considered the issue of discretionary immunity in the installation of traffic control devices in *McCormick v. City of Norfolk*, 263 Neb. 693, 641 N.W.2d 638 (2002), and concluded that discretionary immunity protected the city's act or omission in not installing traffic control devices in response to changed traffic circumstances. In *Maresh*, we held that discretionary immunity did not protect the State from liability where the State did not require a contractor to use, place, or install traffic control devices or markings on a highway under construction as provided for in the manual.

Neb. Rev. Stat. § 60-6,121 (Reissue 2004) requires that all traffic control devices erected pursuant to the Nebraska Rules of the Road conform to the manual. Once the City elected to install the pedestrian crosswalk signal, it was required to conform to the manual in determining the pedestrian clearance interval. As previously stated, the placement of traffic control devices is a discretionary function. See *Maresh v. State, supra.* However, once such traffic control devices are in place, § 60-6,121 requires that "[a]ll such traffic control devices erected pursuant to the rules shall conform with the manual." Thus, the crosswalk signal was required to conform with the manual, and there was no element of choice for which discretionary immunity would apply.

The City did not state any reason for a deviation from the timing set forth in the manual. The district court correctly concluded that the setting of the pedestrian clearance interval was not the product of judgment or choice, because there was no discretion allowed in setting the interval.

> Where the challenged governmental activity involves safety considerations under an established policy rather than the balancing of competing public policy considerations, the rationale for the exception falls away and the United States will be held responsible for the negligence of its employees. . . .
>
> "For the government to show merely that some choice was involved in the decision-making process is insufficient to activate the discretionary function exception. The balancing of policy considerations is a necessary prerequisite."

(Citations omitted.) *Aslakson v. United States*, 790 F.2d 688, 693 (8th Cir. 1986).

The district court correctly concluded that any alleged discretion in setting the pedestrian clearance interval was not the kind of judgment that the discretionary function exemption was designed to shield. We find no merit to the City's cross-appeal because the City was not entitled to discretionary function immunity under § 13-910(2).

CONCLUSION

[14] The judgment of the district court finding that the City was not immune from liability was correct. However, the court's

apportionment of negligence did not bear a reasonable relationship to the respective elements of negligence proved at trial. The court's failure to consider the duties of the City and Bowley in determining their respective negligence invalidates the court's analysis of the comparative responsibility of the parties. In *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004), we stated that when a fact finder has used an incorrect standard of care in apportioning fault between a plaintiff and a defendant, the appropriate appellate remedy will generally be to remand for a new trial so the fact finder can employ the correct standard in its apportionment analysis. Pursuant to our decision in *Aguallo*, the judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STEPHAN, J., not participating.

STEVEN J. HAUSER, APPELLANT, V. NEBRASKA POLICE STANDARDS ADVISORY COUNCIL AND NEBRASKA COMMISSION ON LAW ENFORCEMENT AND CRIMINAL JUSTICE, APPELLEES.

694 N.W.2d 171

Filed March 25, 2005. No. S-03-1386.

1. **Administrative Law: Judgments: 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. ____: ____: ____. 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 not arbitrary, capricious, or unreasonable.
3. **Police Officers and Sheriffs.** A police officer is subject to rules that regulate his or her conduct on and off duty, whether in or out of uniform.
4. **Judgments: Appeal and Error.** Whether a decision conforms to the law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
5. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

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

Vincent Valentino, of Angle, Murphy, Valentino & Campbell, P.C., for appellant.

Terri M. Weeks, of Boucher Law Firm, Special Assistant Attorney General, for appellees.

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

WRIGHT, J.

NATURE OF CASE

The Nebraska Commission on Law Enforcement and Criminal Justice (Commission) approved the revocation of Steven J. Hauser's Nebraska law enforcement certificate. The Hall County District Court affirmed the Commission's decision, and Hauser 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 (APA) may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Lein v. Nesbitt, ante* p. 109, 690 N.W.2d 799 (2005).

[2] 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 not arbitrary, capricious, or unreasonable. *Id.*

BACKGROUND

Hauser received his certification as a law enforcement officer and became a Nebraska state trooper in 1978. In 1999, the executive director of the Commission received a petition signed by residents of North Platte, Nebraska, and the vicinity requesting revocation of Hauser's law enforcement certificate. The executive director requested an investigation pursuant to 79 Neb. Admin. Code, ch. 9, § 006.02 (1998), to determine whether the allegations against Hauser were within the purview of Neb. Rev. Stat. § 81-1403(5) (Reissue 1999) (now found at § 81-1403(6) (Cum. Supp. 2004)).

Following the investigation, the Nebraska Law Enforcement Training Center (Training Center), acting as the relator on behalf

of the State of Nebraska, filed an administrative complaint against Hauser with the Nebraska Police Standards Advisory Council (Council). The operative complaint alleged that he had abused his wife throughout 1998; provided false information to a law enforcement officer; and violated the duties and responsibilities set forth in his oath of office and various policies, codes, and canons of ethics of the Nebraska State Patrol (State Patrol). The complaint also alleged that Hauser's actions represented incompetence, neglect of duty, and/or physical, mental, or emotional incapacity which warranted revocation. Hauser's amended answer challenged the substance of the complaint and the procedure employed.

The matter came before the Council in August 2000, and at Hauser's request, the hearing was bifurcated. The first stage addressed claims relating to the Council's authority to hear the matter. The evidence presented established that the Council initially reviewed the rules in title 79, chapter 9, of the Nebraska Administrative Code; passed on the rules; and relayed them to the Commission, which then approved and formally promulgated the rules pursuant to the APA. There was no evidence adduced that the State Patrol's code of ethics or the State Patrol's disciplinary procedures and code of conduct had been promulgated under the APA or filed with the Nebraska Secretary of State. The Council determined that it had jurisdiction and proceeded to the merits of the allegations against Hauser.

After hearing evidence regarding the alleged misconduct, the Council found that Hauser had physically abused his wife several times in 1998 and had lied to an investigating officer regarding one of those incidents. It concluded that Hauser's actions amounted to a neglect of his duties and emotional incapacity. Finding that the State had proved the existence of one or more statutory grounds for revocation of Hauser's law enforcement certificate, the Council ordered such revocation.

The matter was then forwarded to the Commission. The Commission found that Hauser's behavior violated the State Patrol's code of ethics, the canons of police ethics, and those regulations governing general rules of conduct and demonstrated neglect of duty and emotional incapacity as set out in § 81-1403(5). It found that lying to an investigating officer also

violated the codes set forth above. Based upon such findings and conclusions of law, the Commission approved revocation of the Nebraska law enforcement officer certificate issued to Hauser.

Hauser appealed to the district court under the APA. The district court reversed the Commission's decision, concluding that it was made in excess of the Commission's statutory authority, that the Commission had no power to revoke Hauser's certificate, and that the Council had not passed any rules or regulations governing the revocation of law enforcement certificates.

The Council and the Commission appealed, and we reversed, finding that the district court erred in determining that the regulations promulgated concerning the revocation of certificates were invalid. See *Hauser v. Nebraska Police Stds. Adv. Council*, 264 Neb. 605, 650 N.W.2d 760 (2002). We noted that the Commission and the Council were not separate agencies; rather, the Council was a standing committee of the Commission. As such, the Commission was charged with the promulgation, adoption, and filing of rules and regulations with the Secretary of State. We concluded that the Commission had performed these functions with respect to the regulations concerning revocation of certificates and that such regulations were valid. We therefore remanded the cause to the district court for further proceedings.

On remand, the district court found that the Council and the Commission could consider the internal policies and oath of office of the State Patrol in determining whether there were statutory grounds for revoking Hauser's law enforcement certificate. It found by clear and convincing evidence that Hauser had violated § 81-1403(5) by neglecting his duties and conducting himself in such a manner as to show emotional incapacity to continue to be a certified law enforcement officer. It therefore affirmed the decisions of the Council and the Commission which revoked Hauser's law enforcement certificate. Hauser timely appealed.

ASSIGNMENTS OF ERROR

Hauser assigns the following errors to the decision of the district court: (1) the court's conclusion that it was proper for the Council and the Commission to rely on the State Patrol's codes of ethics and conduct and Hauser's oath of office in revoking his law enforcement certificate; (2) the court's finding that clear and

convincing evidence established the statutory grounds for revoking his law enforcement certificate; (3) the court's failure to find due process violations stemming from the participation of the Nebraska Attorney General in the revocation process; and (4) the court's application of 2000 Neb. Laws, L.B. 994, in reaching its decision.

ANALYSIS

Codes of Conduct and Ethics

Hauser argues that the district court erred in finding that the State Patrol's codes of conduct and ethics and his oath of office could be taken into consideration in determining whether he neglected his duties or lacked the emotional capacity to possess a law enforcement certificate. He claims that these policies should not have been considered because they were not adopted pursuant to the APA.

Hauser asserts that our decision in *McAllister v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 910, 573 N.W.2d 143 (1998), prevents the use of the State Patrol codes of conduct and ethics and the oath of office in evaluating his conduct because they have not been filed with the Secretary of State. *McAllister* involved an agency's disciplinary regulations that had not been filed with the Secretary of State pursuant to the APA. We held that agency rules and regulations that prescribe a penalty must be filed pursuant to the APA. The disciplinary regulations applied in *McAllister* contained a penalty provision, and therefore, we held they were invalid.

Hauser's argument ignores the fact that the district court did not use the State Patrol's internal policies or the oath of office to prescribe a penalty. Instead, the court based its decision to affirm the revocation of Hauser's certificate on the statutory grounds set forth in § 81-1403(5). The court merely used the codes to determine whether the grounds described in § 81-1403(5) had been violated. The only agency rules used to prescribe a penalty were the Commission's rules for revocation of law enforcement certificates, and evidence was presented which showed that these rules had been established pursuant to the APA.

The duties of the Council and the Commission are currently set out in Neb. Rev. Stat. § 81-1401 et seq. (Reissue 1999 &

Cum. Supp. 2004). At all times relevant to this case, § 81-1403 provided:

> Subject to review and approval by the commission, the council shall:
>
> . . . .
>
> (5) Revoke such certificates according to rules and regulations established by the council which shall include, but not be limited to, revocation for (a) incompetence, (b) neglect of duty, and (c) physical, mental, or emotional incapacity. Such rules and regulations shall include a procedure for hearing appeals of any person who feels that the revocation of his or her certificate was in error.

The district court found that the code of conduct, the code of ethics, and the oath of office were guidelines for evaluating and making determinations as to the duties and conduct expected of a State Patrol trooper and that they could be used in deciding whether a certificate should be revoked under § 81-1403(5).

Throughout 1998, Hauser engaged in numerous acts of domestic violence against his wife. On September 26, Hauser slapped his wife's face multiple times and grabbed her around the neck, causing her to fall to the floor. A call was made to the 911 emergency dispatch center because Hauser's wife was unresponsive. When law enforcement officers arrived following the call, Hauser denied having had any physical contact with his wife. This directly contradicted her testimony and the physical evidence. The court also found that Hauser had numerous opportunities during 1998 to extricate himself from this pattern of domestic violence.

The district court concluded that a certified law enforcement officer who violated the laws of the State of Nebraska by assaulting his wife and who then gave false information to police officers about that assault had violated § 81-1403(5) by neglecting his duties and conducting himself in a manner that demonstrated emotional incapacity to be a certified law enforcement officer.

In concluding that these codes and Hauser's oath of office were properly taken into consideration in determining whether Hauser neglected his duties, the district court relied upon *Scott v. State ex rel. Board of Nursing*, 196 Neb. 681, 244 N.W.2d 683

(1976), *overruled on other grounds, Langvardt v. Horton*, 254 Neb. 878, 581 N.W.2d 60 (1998).

The Board of Nursing of the State of Nebraska denied Hazel Scott's application for a professional nursing license. Neb. Rev. Stat. § 71-1,132.29 (Reissue 1971) provided in part that the board could deny a license upon proof that the applicant was guilty of "unprofessional conduct." Nebraska statutes did not define the term, but the board had adopted general standards as to what constituted unprofessional conduct.

We affirmed the denial of Scott's application and cited *Kansas State Board of Healing Arts v. Foote*, 200 Kan. 447, 436 P.2d 828 (1968). The Kansas Supreme Court had answered a similar contention by stating: " 'It would indeed be difficult, not to say impractical, in carrying out the purpose of the act, for the legislature to list each and every specific act or course of conduct which might constitute such unprofessional conduct of a disqualifying nature. . . .' " *Scott*, 196 Neb. at 690-91, 244 N.W.2d at 689.

In *In re Complaint Against Jones*, 255 Neb. 1, 581 N.W.2d 876 (1998), we examined the Nebraska Code of Judicial Conduct in regard to the conduct of a county judge. The penalty for violation of the code was set forth in Neb. Rev. Stat. § 24-722 (Reissue 1995), which provided: "A . . . judge of any court of this state may be reprimanded, disciplined . . . or removed from office for . . . (6) conduct prejudicial to the administration of justice that brings the judicial office into disrepute." The special master concluded that the judge's conduct had violated the code, and the Nebraska Commission on Judicial Qualifications recommended that the judge be removed from office.

The judge petitioned this court to modify or reject the commission's recommendation. Our inquiry was whether the charges were supported by clear and convincing evidence, which canons of the Code of Judicial Conduct had been violated, and which subsections of § 24-722 had been violated. We examined the actions of the judge in light of the Code of Judicial Conduct in order to determine whether such conduct violated § 24-722(6).

Both *Scott* and *In re Complaint Against Jones* support our conclusion that the Council, the Commission, and the district court did not err in relying upon the State Patrol's codes and oath of office to determine whether Hauser's conduct violated § 81-1403(5).

These codes were properly used as a guide to evaluate whether Hauser neglected his duties. Hauser's first assignment of error has no merit.

SUFFICIENCY OF EVIDENCE

Hauser claims the district court erred in finding clear and convincing evidence to establish statutory grounds for revoking his law enforcement certificate. All but one of the incidents involving Hauser and his wife occurred at a time when he was not acting in his capacity as a state trooper.

[3] A state trooper is not relieved of compliance with § 81-1403(5) simply because he or she is "off duty." A police officer on "off-duty" status is obligated to preserve the public peace and to protect the lives and property of the public in general. See *State v. Wilen*, 4 Neb. App. 132, 539 N.W.2d 650 (1995), citing 16A Eugene McQuillin et al., The Law of Municipal Corporations § 45.15 (3d ed. 1992). Police officers are considered to be under a duty to respond as police officers 24 hours a day. *State v. Wilen, supra*. It has been widely held, based both on common law and statute, that a police officer is not relieved of his or her obligation to preserve the peace while off duty. *Id.* A police officer is subject to rules that regulate his or her conduct on and off duty, whether in or out of uniform. *Id.* See, *In re Appeal of Bonnett*, 216 Neb. 587, 344 N.W.2d 657 (1984); *Richardson v. City of Omaha*, 214 Neb. 97, 333 N.W.2d 656 (1983). Hauser's conduct both on and off duty was properly considered in determining whether he had violated § 81-1403(5).

Hauser's former wife testified regarding numerous occasions when Hauser had physically and/or mentally abused her. After an argument on February 3, 1998, Hauser held her to the ground by sitting on top of her. When she refused to kiss him, he bit her cheek. Later that day, she went to the home of a police officer, who took photographs of her face and persuaded her to take legal action. The officer testified regarding the incident and to the authenticity of the photographs.

Following an argument, on June 10, 1998, Hauser restrained his spouse by sitting on her. He held her in this position for 35 to 40 minutes and then grabbed her face and mouth with such force

that an area from her chin to her nose was badly bruised. A coworker testified to seeing the bruising the next day at work.

On September 26, 1998, after an argument, Hauser slapped his wife's face repeatedly and grabbed her by the neck, which caused her to collapse. When Hauser's son arrived on the scene, Hauser stated that he thought he had killed her. A 911 call was made, but was later canceled. Two police officers arrived later in the evening, and Hauser told them that he and his wife had argued but that there was no physical contact.

At some point in October 1998, Hauser and his wife got into an argument while he was on duty in his patrol car. He became angry and grabbed one of her hands as if he was trying to break it. He also put his arm around her neck and squeezed it.

After an argument, on November 30, 1998, Hauser grabbed his wife and threw her off the bed. He then sat on top of her. After Hauser got up, she attempted to leave the room, at which time he grabbed her again and refused to let her go.

In December 1998, after another argument, Hauser refused to let his spouse leave the room. He spit in her face, pushed her up against a wall, and used his tongue to smear the spittle around her face. As she tried to leave the room, he slammed her into the doorframe. After she was allowed to leave, he caught up with her and grabbed her inappropriately.

Hauser argues that Neb. Rev. Stat. § 81-2005 (Reissue 1999) was the only statutory authority that set forth the duties of a state trooper. He claims his behavior did not constitute a neglect of any one of these duties or any duty promulgated under the APA. Hauser's reliance on § 81-2005 is misplaced. Section 81-2005 enumerates the powers but not necessarily all of the duties of a state trooper. As we have stated above, the State Patrol's internal policies and oath of office may be used to determine the duties of a trooper.

The State Patrol's code of ethics requires that a trooper "keep [his] private life unsullied as an example to all; maintain courageous calm in the face of danger, scorn or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. [A trooper is to be] [h]onest in thought and deed in both [his] personal and official life." The canons of police ethics, which are incorporated into the State Patrol's code of ethics, state that

> [t]he primary responsibility of the police service, and of the individual officer, is the protection of the people of the United States through the upholding of their laws . . . .
>
> . . . .
>
> . . . Laxity of conduct or manner in private life, expressing either disrespect for the law or seeking to gain special privilege, cannot but reflect upon the police officer and the police service. The community and the service require that the law enforcement officer lead the life of a decent and honorable person.

The State Patrol's code of conduct prescribes that

> [e]mployees shall conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorably on the Nebraska State Patrol. Conduct unbecoming shall include that which brings the State Patrol into disrepute or reflects discredit upon the employee as a member of the Nebraska State Patrol . . . .

The evidence of Hauser's abuse of his former spouse showed clearly and convincingly that he neglected his duties in violation of § 81-1403(5).

We do not reach the issue of whether Hauser's conduct established emotional incapacity. It is not necessary to prove both neglect of duty and emotional incapacity in order to revoke a law enforcement certificate. The evidence of Hauser's neglect of duty was enough to justify the revocation. One cannot continually engage in a pattern of assaultive behavior toward one's spouse and not be in violation of § 81-1403(5), which justifies the revocation of one's law enforcement certificate.

[4] A judgment or final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Lein v. Nesbitt, ante* p. 109, 690 N.W.2d 799 (2005). 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 not arbitrary, capricious, or unreasonable. *Id.* Whether a decision conforms to the law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.* The district court's decision

affirming the revocation of Hauser's law enforcement certificate conformed to the law, was supported by competent evidence, and was not arbitrary, capricious, or unreasonable.

Due Process and Retroactive Application

Hauser's final assignments of error concern the district court's failure to find a procedural due process violation stemming from the Attorney General's participation in the hearing process and the retroactive application of a change in the law.

Hauser claims that his due process rights were violated because the Attorney General acted as a hearing officer during the revocation proceedings. He argues that the Attorney General should have appointed a special assistant attorney general to represent Hauser and another special assistant to act as the hearing officer for the Council. He asserts that this approach would have allowed the Attorney General to fulfill his duty as a voting member of the Commission and preserve the impartiality of the revocation proceedings.

Hauser also claims that the rule requiring certification for employment with the State Patrol was improperly applied retroactively to him. He contends that prior to July 1, 2000, § 81-1401 et seq. (Reissue 1999) did not require a law enforcement certificate as a necessary prerequisite to performing law enforcement duties or maintaining a job as a law enforcement officer. Hauser claims that under the prior legislation, a law enforcement officer could have his certificate revoked but still hold and exercise the powers of his existing law enforcement position.

Pursuant to 2000 Neb. Laws, L.B. 994, § 2, which became effective July 13, 2000, "[a] law enforcement officer shall possess a valid law enforcement officer certificate or diploma, as established by the council, in order to be vested with the authority of this section . . . ." Hauser contends that the amendment was improperly applied because the complaint against him was first processed on September 8, 1999. He claims therefore that he has a constitutional right not to have his employment terminated by a statutory change which if applied retroactively would impair or interfere with his vested rights.

The issues of due process and the alleged improper application of L.B. 994 were not presented to the Council or the Commission. Hauser's petition for review by the district court alleged:

> [T]he actions of the Defendant Council and Defendant Commission and each of them violated and prejudiced the substantial rights of the Plaintiff Hauser because such agency decision is:
>
> (i) In violation of constitutional provisions;
>
> (ii) In excess of the statutory authority or jurisdiction of the agency;
>
> (iii) Made upon unlawful procedure;
>
> (iv) Affected by other error of law;
>
> (v) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review;
>
> (vi) Arbitrary or capricious; or
>
> (vii) In violation of Neb. Rev. Stat. §84-1413 (Reissue 1999).

[5] These general allegations did not establish that the issues in question were presented to and considered by the district court. Thus, the district court did not have the opportunity to analyze the issues or reach a decision regarding them. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Scurlocke v. Hansen*, 268 Neb. 548, 684 N.W.2d 565 (2004). Therefore, we decline to consider Hauser's final assignments of error.

CONCLUSION

For the reasons set forth in this opinion, the judgment of the district court is affirmed.

AFFIRMED.

DOUGLAS COUNTY, NEBRASKA, APPELLEE, V. JOSUE ANAYA AND MARY ANAYA, HUSBAND AND WIFE, AS PARENTS OF ROSA ARIEL ANAYA, A MINOR CHILD, APPELLANTS.

694 N.W.2d 601

Filed March 25, 2005. No. S-03-1446.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.

2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Civil Rights: Words and Phrases.** The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.
4. **Words and Phrases.** The exercise of religion involves not only belief and profession but the performance of, or abstention from, physical acts.
5. **Civil Rights: Statutes.** The right of free exercise of religion does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes conduct that his religion prescribes.
6. ____: ____. A law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.
7. ____: ____. A law is neutral and of general applicability if it does not aim to infringe upon or restrict practices because of their religious motivation and if it does not in a selective manner impose burdens only on conduct motivated by religious belief.
8. **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.
9. **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.

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

Amy L. Mattern, of Whitner Law Firm, P.C., L.L.O., for appellants.

Stuart J. Dornan, Douglas County Attorney, Brent Bloom, and Megan Hottman, Senior Certified Law Student, for appellee.

Amy A. Miller for amici curiae American Civil Liberties Union Foundation of Nebraska and Louise and Ray Spiering.

Patrick J. Phipps, of Metcalf, Thompson & Phipps, for amici curiae Children's Healthcare Is a Legal Duty et al.

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

WRIGHT, J.

NATURE OF CASE

The Douglas County District Court ordered Josue Anaya and Mary Anaya to submit their daughter to testing for metabolic diseases as required by Neb. Rev. Stat. § 71-519 (Cum. Supp. 2002).

The Anayas appeal, asserting that § 71-519 violates their rights guaranteed under the 1st and 14th Amendments to the U.S. Constitution and that the issue is moot.

SCOPE OF REVIEW

[1,2] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Id.*

FACTS

Rosa Ariel Anaya was born in the Anayas' home, without a physician present, on July 11, 2003. The birth was reported to the Department of Health and Human Services (DHHS) on July 17.

In August 2003, a DHHS employee received Rosa Anaya's birth certificate, checked DHHS' database, and determined that the testing for metabolic diseases required by § 71-519 had not been performed. A certified letter was sent to the Anayas explaining the statute's requirements. Enclosed with the letter was a brochure detailing the screening process, which included drawing a small amount of blood from the heel of the infant to be tested. The Anayas declined to submit Rosa Anaya for the screening, stating that it was in direct conflict with their sincerely held religious beliefs that life is taken from the body if blood is removed from it and that a person's lifespan may be shortened if blood is drawn.

Douglas County brought an action seeking to compel the Anayas to comply with § 71-519. At a hearing on September 26, 2003, Mary Anaya testified as to the Anayas' religious beliefs.

The Anayas subsequently filed a motion for judicial exemption from prosecution and dismissal of the petition. They alleged that it was impossible for them to comply with § 71-519 because 70 days had passed since the birth was registered and DHHS regulations required that the testing be completed within 48 hours of the registration of the birth if the birth was not attended by a physician. They also claimed the statute violated the 14th Amendment to the U.S. Constitution.

The district court found that the State has a compelling state interest in the screening of infants for metabolic diseases and that the Anayas' religious beliefs did not outweigh the State's compelling interest that "these children can grow and develop to be free of a metabolic disease particularly in light of the minimal invasion of the blood test administration which is merely a pinprick to the child's heel." The court rejected the Anayas' claim that the issue was moot due to Rosa Anaya's age. Although testing procedures are most effective when administered shortly after birth, the court found that it was not too late to administer the test even if Rosa Anaya was 6 months of age or older. The court ordered the Anayas to comply with § 71-519 by submitting Rosa Anaya for metabolic screening forthwith.

ASSIGNMENTS OF ERROR

The Anayas assert that the district court incorrectly held that the State has a compelling interest which outweighs their First Amendment right to free exercise of religion and their fundamental rights as parents. They also assign as error the court's determination that the issue was not moot.

ANALYSIS

CONSTITUTIONAL REVIEW

The Anayas argue that § 71-519 infringes upon their First Amendment right to freely exercise their religion and that the district court erred in concluding that the State had shown a compelling interest which justifies the infringement.

[3,4] "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872, 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). The " 'exercise of religion' " involves "not only belief and profession but the performance of (or abstention from) physical acts . . . ." *Smith*, 494 U.S. at 877.

The statute which the Anayas challenged provides:

> (1) All infants born in the State of Nebraska shall be screened for phenylketonuria, primary hypothyroidism, biotinidase deficiency, galactosemia, hemoglobinopathies, medium-chain acyl co-a dehydrogenase (MCAD) deficiency,

> and such other metabolic diseases as [DHHS] may from time to time specify. . . .
>
> (2) . . . If a birth is not attended by a physician and the infant does not have a physician, the person registering the birth shall cause such tests to be performed within the period and in the manner prescribed by [DHHS].

§ 71-519. When Rosa Anaya was born, regulations prescribed by DHHS provided that if a birth was not attended by a physician and "the tests have not been performed within 48 hours of birth as otherwise required by these regulations, the person registering the birth must cause newborn screening tests for metabolic diseases to be performed within 48 hours of registration of the birth." 181 Neb. Admin. Code, ch. 2, § 008 (2002).

The Anayas argue that because they have raised a free exercise of religion claim along with a parental substantive due process claim, they have a hybrid constitutional rights claim, which requires strict scrutiny review. Under a strict scrutiny review, the law must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). The Anayas claim *Smith* held that strict scrutiny is required in cases in which a free exercise claim has been raised along with a claim of violation of another constitutional right.

[5] In *Smith*, the claimants ingested peyote during a religious ceremony and were subsequently dismissed from their employment because Oregon law prohibited use of the drug. The question was whether the state's prohibition was permissible under the Free Exercise Clause. In upholding the Oregon law, the Court stated that it had never held that an individual's religious beliefs excused him from compliance with an otherwise valid law prohibiting conduct that a state is free to regulate. "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes . . . conduct that his religion prescribes . . . .' " *Smith*, 494 U.S. at 879, citing *United States v. Lee*, 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982) (Stevens, J., concurring in judgment).

We do not read *Smith* as supporting the Anayas' claim concerning strict scrutiny. Although *Smith* discussed prior decisions that involved not only the Free Exercise Clause but other constitutional provisions, the Court did not hold that a strict scrutiny review is required simply because more than one constitutional right might be implicated.

[6] In *Hialeah*, the Court again held that to be found constitutional, a neutral law of general applicability does not require demonstration of a compelling governmental interest. "In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Hialeah*, 508 U.S. at 531.

Federal courts have also discussed hybrid rights claims. In *Swanson By and Through Swanson v. Guthrie ISD I-L*, 135 F.3d 694 (10th Cir. 1998), the federal court addressed an argument that a school policy violated a home-schooled student's free exercise rights and the parents' right to direct her education. The court stated: "[W]e believe that simply raising such a claim is not a talisman that automatically leads to the application of the compelling-interest test." *Id.* at 699. "[I]t cannot be true that a plaintiff can simply invoke the parental rights doctrine, combine it with a claimed free-exercise right, and thereby force the government to demonstrate the presence of a compelling state interest." *Id.* at 700.

In *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999), the court stated, "[W]e recently held that, to assert a hybrid-rights claim, 'a free exercise plaintiff must make out a "colorable claim" that a companion right has been violated—that is, a "fair probability" or a "likelihood," but not a certitude, of success on the merits.' " The court further stated that "a plaintiff does not allege a hybrid-rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right or a claim of an alleged violation of a non-fundamental or non-existent right." *Id.* at 1208. See, also, *Boone v. Boozman*, 217 F. Supp. 2d 938 (E.D.

Ark. 2002) (court found that case did not present hybrid rights theory).

In rejecting the idea of strict scrutiny analysis for hybrid rights claims, the U.S. Court of Appeals for the Sixth Circuit has stated:

> Such an outcome is completely illogical; therefore, at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause.

Kissinger v. Board of Trustees, 5 F.3d 177, 180 (6th Cir. 1993).

We conclude that the Anayas' assertion of a hybrid rights claim does not implicate a strict scrutiny review of § 71-519. A party may not force the government to meet the strict scrutiny standard by merely asserting claims of violations of more than one constitutional right.

The second constitutional rights violation asserted by the Anayas seems to suggest that § 71-519 violates their rights as parents to make decisions concerning the upbringing of their children. They rely upon *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972).

In *Pierce*, the Court held that a compulsory education law deprived parents of the right to select a school for their children. It held that the Oregon compulsory education statute "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce*, 268 U.S. at 534-35. The Court concluded that the challenged law served no state interest and therefore had no reasonable relation to any state purpose.

In *Yoder*, the Court held that a state could not compel Amish parents to require their children to attend formal high school and that the compulsory education law violated the 1st and 14th Amendments. The Court noted that no harm to the physical or mental health of the child was inferred but that when the health and safety of a child was involved, different considerations applied.

> To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under

> *Prince* [*v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944),] if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.

Yoder, 406 U.S. at 233-34. The Court did not conclude that strict scrutiny was required.

It is true that "the custody, care and nurture of the child reside first in the parents." *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944). However, the Court has never held that parental rights to childrearing as guaranteed under the Due Process Clause of the 14th Amendment must be subjected to a strict scrutiny analysis. See *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). "[T]he Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those fundamental rights whose infringement merits heightened scrutiny." *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 533 (1st Cir. 1995). *Pierce* and *Yoder* do not support an inference that parental decisionmaking requires a strict scrutiny analysis.

The question is not whether the Anayas have set forth a hybrid rights claim but whether the law they have challenged is neutral and has general application.

This case is analogous to cases in which courts have upheld the state's right to require immunization of children. In *Boone v. Boozman*, 217 F. Supp. 2d 938 (E.D. Ark. 2002), the court upheld the constitutionality of an immunization statute, finding that the free exercise claim challenged a neutral law of general applicability. The law applied to all school children except those whose health would be endangered by immunization. Because the law was neutral, heightened scrutiny was not required even though compulsory immunization might burden a plaintiff's right to free exercise.

The court stated, "It is well established that the State may enact reasonable regulations to protect the public health and the public safety, and it cannot be questioned that compulsory immunization is a permissible exercise of the State's police power." *Id.* at 954. Society's interest in protecting against the spread of disease takes precedence over parental rights and the right to free exercise of religion. *Id.*

In *Prince*, 321 U.S. at 166-67, the Court held that

> neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. . . . [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and . . . this includes, to some extent, matters of conscience and religious conviction.

[7] A law is neutral and of general applicability "if it does not aim to 'infringe upon or restrict practices because of their religious motivation,' and if it does not 'in a selective manner impose burdens only on conduct motivated by religious belief[.]' " *San Jose Christian College v. Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004), quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). Section 71-519 is a neutral law of general applicability. It is generally applicable to all babies born in the state and does not discriminate as to which babies must be tested. Its purpose is not directed at religious practices or beliefs. Pursuant to *Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), and its progeny, a neutral law of general applicability need not be supported by a compelling governmental interest even though it may have an incidental effect of burdening religion.

Section 71-519 does not contain a system of particularized exemptions that allow some children to be excused from testing. See *Kissinger v. Board of Trustees*, 5 F.3d 177 (6th Cir. 1993). The statute does not unlawfully burden the Anayas' right to freely exercise their religion, nor does it unlawfully burden their parental rights. Section 71-519 cannot be construed as directly

regulating religious-based conduct. See *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991). There is no evidence that the State had an antireligious purpose in enforcing the law. See *id.*

Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Id.*

We conclude that the effect of § 71-519 upon the constitutional claims the Anayas have asserted is properly analyzed under a rational basis review. Evidence was presented concerning the effects of the diseases that are tested for under the statute. Early diagnosis allows for prevention of death and disability in children. The State has determined that it is appropriate to test for these diseases soon after a child is born in order to address treatment options. The health and safety of the child are of particular concern, as are the potential social burdens created by children who are not identified and treated.

The State has an interest in the health and welfare of all children born in Nebraska, and the purpose of § 71-519 is to protect such health and welfare. This is a rational basis for the law, and it is constitutional.

MOOTNESS

The Anayas argue that the case is moot because the testing was not performed within 48 hours of Rosa Anaya's birth or within 48 hours after the birth was registered. There is no merit to the Anayas' claim. One cannot refuse to comply with testing required within a particular timeframe and then claim that the case is moot because the time has passed.

Although the value of metabolic screening may decline as the child ages, the test results can prove helpful in preventing death or retardation later in development. The program manager for DHHS' newborn screening program testified that some of the conditions occur rapidly after birth and others occur later in childhood. Early diagnosis allows for prevention of death and disability in newborns and children. If a child is not born in a hospital

and the testing is conducted outside the 48-hour timeframe, some of the benefit of treatment is reduced, but further damage can be prevented. It is not possible to determine if a child has any of these conditions by the appearance of the child.

A medical doctor testified concerning the diseases identified in § 71-519. Phenylketonuria, referred to as "PKU," is an inherited metabolic condition due to a genetic absence of an enzyme. The condition creates an abnormal buildup of amino acid that interferes with the growth of nerve cells in the brain, which is critical in the very first weeks and months of an infant's life. Abnormal chemistry is present and can be diagnosed within hours of birth. Any damage occurs within the first few weeks of life, but clear evidence may not be seen until the second half of the first year. Treatment is a special diet that allows children to develop normally.

Hypothyroidism results in a loss of thyroid function and in newborns causes the brain not to develop, resulting in profound mental retardation and developmental delays. An infant with hypothyroidism would not grow well, and the condition would be obvious within a few weeks of birth.

Galactosemia is a condition due to a missing enzyme. Babies without the enzyme quickly become jaundiced and droopy, and they may have a bloodstream infection that kills them within days.

Biotinidase is an enzyme that helps to conserve a B vitamin. A person who lacks the enzyme can develop acidosis, blindness, mental retardation, seizures, and deafness. Treatment is inexpensive and inoffensive. Signs and symptoms of this disease do not manifest early or at a predictable time. A child who is deficient in biotinidase will probably become symptomatic during the first year, and a child who is partially deficient might become symptomatic during childhood or adolescence.

Hemoglobinopathies can result in diseases including thalassemia and sickle cell disease, which are readily diagnosable and at least partially correctable. Newborns with these diseases are susceptible to bloodstream infections during the first year of life. Symptoms include a low blood count and sometimes an enlarged spleen, which would generally be assessed by a physician.

MCAD, medium chain acyl-CoA dehydrogenase deficiency, is due to the absence of an enzyme that is responsible for burning

body fat. MCAD may appear in the first few days or weeks of life or during a childhood illness with fever and vomiting. It can be seen in school-age children. Remedial measures include educating the parents and the child's physician as to the condition and the risks and giving the child a dietary supplement. An episode of severe flu-like symptoms can result in brain damage.

[8,9] 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. *State on behalf of Pathammavong v. Pathammavong*, 268 Neb. 1, 679 N.W.2d 749 (2004). 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. *Krajicek v. Gale*, 267 Neb. 623, 677 N.W.2d 488 (2004).

The issue of whether metabolic screening can be required pursuant to state law is not moot. Were we to determine that the issue of testing is moot because testing has not been completed in the case at bar, we would create a loophole allowing parents to avoid compliance with § 71-519.

The testimony of expert witnesses demonstrated that there is value in testing a child even beyond the 48-hour period immediately after birth. Although some of the conditions would have already manifested themselves, others can develop later in life.

In our review of a question of law, this court has an obligation to resolve the question independently of the conclusion reached by the trial court. See *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004). The record demonstrates that even if metabolic screening is completed beyond the first 48 hours of life, it is still important for the health and welfare of the child. Steps can be taken to treat any condition detected. The district court was correct in finding that the issue is not moot.

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

AMERITAS INVESTMENT CORP., A NEBRASKA CORPORATION, AND AMERITAS LIFE INSURANCE CORP., A NEBRASKA CORPORATION, APPELLANTS, V. DIANA MCKINNEY, APPELLEE.

694 N.W.2d 191

Filed March 25, 2005. No. S-04-152.

1. **Jurisdiction: Proof.** The party seeking to establish the court's in personam jurisdiction carries the burden of proof, and the burden does not shift to the party challenging jurisdiction.
2. ____: ____. While the plaintiffs bear the ultimate burden of proof, personal jurisdiction need not be proved by a preponderance of the evidence until trial or until the court holds an evidentiary hearing.
3. **Motions to Dismiss: Jurisdiction.** To defeat a motion to dismiss for lack of personal jurisdiction, the nonmoving party need only make a prima facie showing of jurisdiction.
4. **Jurisdiction: Rules of the Supreme Court: Pleadings: Appeal and Error.** When reviewing an order dismissing a party from a case for lack of personal jurisdiction under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(2) (rev. 2002), an appellate court examines the question whether the nonmoving party has established a prima facie case of personal jurisdiction de novo.
5. **Jurisdiction: Judgments: Appeal and Error.** An appellate court reviews a lower court's determination regarding personal jurisdiction based on written submissions in the light most favorable to the nonmoving party.
6. **Pleadings: Affidavits: Appeal and Error.** If the lower court does not hold a hearing and instead relies on the pleadings and affidavits, then an appellate court must look at the facts in the light most favorable to the nonmoving party and resolve all factual conflicts in favor of that party.
7. **Constitutional Law: Jurisdiction: States.** Neb. Rev. Stat. § 25-536 (Reissue 1995) extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits.
8. **Constitutional Law: Due Process.** The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he or she has established no meaningful contacts, ties, or relations.
9. **Due Process: Jurisdiction.** By requiring that individuals have fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign, the Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.
10. **Due Process: Jurisdiction: States.** Generally, an analysis of personal jurisdiction under the Due Process Clause requires a court to determine whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.
11. **Due Process: Jurisdiction.** Where stipulated forum selection provisions have been obtained through freely negotiated agreements and are not unreasonable and unjust, their enforcement does not offend due process.

12. **Jurisdiction: States: Contracts: Waiver.** A valid and enforceable choice of forum clause in a contract is sufficient in itself to waive the requirement of minimum contacts and to submit a nonresident to the jurisdiction of the forum state.
13. **Jurisdiction: Contracts.** A minimum contacts analysis is not appropriate in determining the validity of forum selection clauses in commercial contracts.
14. **Due Process: Jurisdiction: Contracts.** Due process is satisfied when a defendant consents to personal jurisdiction by entering into a contract that contains a valid forum selection clause.
15. **Due Process: Jurisdiction: States: Contracts.** Where the exercise of personal jurisdiction is based upon a contractual choice of forum clause and is challenged on due process grounds, any forum selection clause that satisfies the Model Uniform Choice of Forum Act, Neb. Rev. Stat. § 25-413 et seq. (Reissue 1995), will also comport with due process, and permit a Nebraska court to exercise jurisdiction under the long-arm statute. If the forum selection clause is not valid under the Model Uniform Choice of Forum Act, however, the inquiry moves to whether the defendant has the necessary minimum contacts with Nebraska, other than the forum selection clause, to satisfy due process.
16. **Courts: Jurisdiction: Contracts.** Where a choice of forum clause is a necessary component of the court's exercise of personal jurisdiction, then the court would have no jurisdiction but for the fact that the parties have consented to its exercise by the choice of forum agreement, and the standards contained in the Model Uniform Choice of Forum Act, Neb. Rev. Stat. § 25-413 et seq. (Reissue 1995), apply.
17. **Jurisdiction: Contracts: Rules of the Supreme Court: Pleadings.** Neb. Rev. Stat. § 25-414 (Reissue 1995) raises a jurisdictional barrier to the enforcement of a contractual choice of forum clause that does not meet the Model Uniform Choice of Forum Act's requirements, making a motion to dismiss pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(2) (rev. 2002) proper.
18. **Jurisdiction: Statutes: Words and Phrases.** The language of Neb. Rev. Stat. § 25-414 (Reissue 1995) was intended to prevent a court from exercising jurisdiction where that exercise would result in injustice or in substantial inconvenience to the parties.
19. **Jurisdiction: States.** The doctrine of forum non conveniens (literally, "an unsuitable court") provides that a state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action, provided that a more appropriate forum is provided to the plaintiff.
20. **Jurisdiction: Words and Phrases.** The doctrine of forum non conveniens refers to the discretionary power of a court to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another forum.
21. **Courts: Jurisdiction.** A plaintiff's choice of a forum should not be disturbed except for weighty reasons, and only when trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to the plaintiff's convenience, or when the forum is inappropriate because of considerations affecting the court's own administrative and legal problems.
22. **Courts: Jurisdiction: States.** The trial court should consider practical factors that make trial of the case easy, expeditious, and inexpensive, such as the relative ease of access to sources of proof, the cost of obtaining attendance of witnesses, the ability to

secure attendance of witnesses through compulsory process, and the advantages of having trial in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

23. **Jurisdiction: Proof.** In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his or her home forum will normally outweigh the inconvenience the defendant may have shown.
24. **Jurisdiction.** Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.
25. **Appeal and Error.** An issue not presented to or decided by the trial court is not appropriate for consideration on appeal.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded for further proceedings.

David M. Williams for appellants.

Patrick G. Vipond and Stacy L. Morris, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

GERRARD, J.

Diana McKinney, a resident of Virginia, was sued in the district court for Lancaster County by a Nebraska financial services corporation for damages arising out of McKinney's agency relationship with the corporation. The action was dismissed after McKinney challenged the court's personal jurisdiction over her. The question presented in this appeal is whether the choice of forum clauses contained in McKinney's agency contracts provide a prima facie showing that a Nebraska court may exercise personal jurisdiction over McKinney. Because we conclude they do, we reverse the judgment of the district court and remand the cause for further proceedings.

BACKGROUND

The facts relevant to the jurisdictional issue presented in this appeal are largely undisputed. On November 1, 1998, McKinney entered into a "General Agent Contract" with Ameritas Life Insurance Corp. (ALIC), a Nebraska corporation. On December

1, McKinney entered into a "Securities Sales Agreement and Registered Representative Contract Commission Schedule" with Ameritas Investment Corp. (AIC), also a Nebraska corporation. (ALIC and AIC will be referred to collectively as "Ameritas.")

McKinney, a resident of Virginia, had been approached by Ameritas in Virginia about becoming an Ameritas agent. McKinney received and executed the contracts, for her part, in Virginia. The contracts were executed on behalf of Ameritas in Lincoln, Nebraska.

The ALIC contract required McKinney to indemnify ALIC for any disbursements made for claims against McKinney. Each contract also contained a nearly identical forum selection clause: "Any and all suits for the construction, interpretation, validity or enforcement of this Contract shall be instituted and maintained in any court of competent jurisdiction in Lancaster County, State of Nebraska." The contracts provided that they were to "be construed in accordance with the laws of the State of Nebraska."

By virtue of the contracts, McKinney became an independent agent licensed to sell Ameritas financial products. The contracts were to be performed only in the states where McKinney was licensed to sell Ameritas financial products: Virginia, California, Florida, and Maryland. McKinney is not licensed to sell Ameritas financial products in Nebraska, nor has she solicited a Nebraska resident in an attempt to sell Ameritas financial products. McKinney has never owned property in Nebraska, maintained an office in Nebraska, held a bank account in Nebraska, or been to Nebraska for any reason.

McKinney's immediate supervisor at ALIC was a vice president whose office is located in Nebraska. McKinney's supervisor visited her in Virginia on several occasions. The Ameritas policies sold by McKinney were processed in and issued from Nebraska, after McKinney sent the applications for those policies to Ameritas' Nebraska offices. If McKinney needed information on a policy, she would normally have obtained that information from Ameritas' Nebraska offices, and she was issued a personal identification number that allowed her to access policy information retained in Nebraska. All accounting functions pertaining to McKinney's commissions were handled in Lincoln, Nebraska, and McKinney was paid from Ameritas' Lincoln

offices. All the records pertaining to McKinney's business relationship with Ameritas are retained in Nebraska.

In 2002, Ursula White, a resident of Virginia lodged a complaint with Ameritas based on alleged conduct arising out of McKinney's sale of Ameritas financial products in Virginia. Ameritas employees in Nebraska settled the complaint. Ameritas then filed a complaint against McKinney in the district court, seeking $22,886.87 as indemnification for its settlement with White. McKinney filed a motion to dismiss pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(2) (rev. 2002), asserting that the court lacked personal jurisdiction over her pursuant to the Nebraska long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 1995), and the Model Uniform Choice of Forum Act (Choice of Forum Act), Neb. Rev. Stat. § 25-413 et seq. (Reissue 1995). The record, for purposes of this motion, consisted of the pleadings, contracts, and affidavits proffered by the parties.

The district court agreed with McKinney, concluding that the case should be dismissed because Nebraska was not a "reasonably convenient place" for trial of the action. See § 25-414. The court found that "[a]lthough the complaint in this case does not go into the details of the dispute, it is clear that the primary evidence will be the testimony of the disgruntled policy holder . . . ." The court found that White "cannot be compelled to attend a trial in Nebraska and it would be much more difficult for a judge or jury to evaluate the credibility of [White's] testimony without seeing her in person." Concluding that the action should be tried in Virginia, the court sustained McKinney's motion to dismiss. Ameritas appeals.

ASSIGNMENTS OF ERROR

Ameritas assigns, consolidated and restated, that the district court erred in (1) finding that § 25-414 was applicable and using the "reasonably convenient place for trial" standard, (2) not using the "gravely difficult and inconvenient" standard, and (3) not finding it had personal jurisdiction over McKinney.

STANDARD OF REVIEW

This court has not previously discussed the standard of review for a motion to dismiss for lack of personal jurisdiction filed

under rule 12(b)(2). Because the new civil rules for notice pleading are modeled after the Federal Rules of Civil Procedure, we look to the federal decisions for guidance. *Kellogg v. Nebraska Dept. of Corr. Servs., ante* p. 40, 690 N.W.2d 574 (2005).

[1-3] The party seeking to establish the court's in personam jurisdiction carries the burden of proof, and the burden does not shift to the party challenging jurisdiction. *Epps v. Stewart Information Services Corp.*, 327 F.3d 642 (8th Cir. 2003). But while the plaintiffs bear the ultimate burden of proof, personal jurisdiction need not be proved by a preponderance of the evidence until trial or until the court holds an evidentiary hearing. *Id.* See, also, *Northrup King v. Compania Productora Semillas*, 51 F.3d 1383 (8th Cir. 1995). To defeat a motion to dismiss for lack of personal jurisdiction, the nonmoving party need only make a prima facie showing of jurisdiction. *Epps v. Stewart Information Services Corp., supra.* See, also, *Northrup King v. Compania Productora Semillas, supra.*

[4-6] When reviewing an order dismissing a party from a case for lack of personal jurisdiction under rule 12(b)(2), an appellate court examines the question whether the nonmoving party has established a prima facie case of personal jurisdiction de novo. See *Stanton v. St. Jude Medical, Inc.*, 340 F.3d 690 (8th Cir. 2003). See, also, *Epps v. Stewart Information Services Corp., supra* (Fed. R. Civ. P. 12(b)(2) motions are reviewed de novo); *Northrup King v. Compania Productora Semillas, supra.* An appellate court reviews a lower court's determination regarding personal jurisdiction based on written submissions in the light most favorable to the nonmoving party. *Stanton v. St. Jude Medical, Inc., supra.* If the lower court does not hold a hearing and instead relies on the pleadings and affidavits, then an appellate court must look at the facts in the light most favorable to the nonmoving party and resolve all factual conflicts in favor of that party. *Epps v. Stewart Information Services Corp., supra.*

ANALYSIS

STATUTORY FRAMEWORK

[7] This appeal requires us to consider the relationship between the long-arm statute and the Choice of Forum Act. The long-arm statute, as relevant, provides that a Nebraska court may

exercise personal jurisdiction over a person who has "contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States." § 25-536(2). This section extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits. *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., ante* p. 222, 691 N.W.2d 147 (2005). Thus, the question presented by the long-arm statute is, generally, whether the exercise of personal jurisdiction would not offend federal principles of due process. See *id.*

[8,9] The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he or she has established no meaningful contacts, ties, or relations. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). By requiring that individuals have fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign, the Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit. *Id.*

[10,11] Generally, this analysis requires us to determine whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there. See, e.g., *Kugler Co. v. Growth Products Ltd.*, 265 Neb. 505, 658 N.W.2d 40 (2003). But that analysis applies "[w]here a forum seeks to assert specific jurisdiction over an out-of-state defendant *who has not consented to suit there* . . . ." (Emphasis supplied.) See *Burger King Corp. v. Rudzewicz*, 471 U.S. at 472. In *Burger King Corp. v. Rudzewicz*, 471 U.S. at 472 n.14, however, the U.S. Supreme Court noted that

> because the personal jurisdiction requirement is a waivable right, there are a "variety of legal arrangements" by which a litigant may give "express or implied consent to the personal jurisdiction of the court." . . . For example, particularly in the commercial context, parties frequently stipulate in advance to submit their controversies for resolution within a particular jurisdiction. . . . Where such forum-selection provisions

> have been obtained through "freely negotiated" agreements and are not "unreasonable and unjust," . . . their enforcement does not offend due process.

(Citations omitted.) Absent a showing that "trial in the contractual forum will be so gravely difficult and inconvenient that [the party challenging the clause] will . . . be deprived of his [or her] day in court[,] there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his [or her] bargain." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972).

[12-14] Based on *Burger King Corp. v. Rudzewicz*, the weight of authority holds that a valid and enforceable choice of forum clause in a contract is sufficient in itself to waive the requirement of minimum contacts and to submit the nonresident to the jurisdiction of the forum state. See, e.g., *St. Paul Fire and Marine v. Courtney Enterprises*, 270 F.3d 621 (8th Cir. 2001); *Menorah Ins. Co., Ltd. v. INX Reinsurance Corp.*, 72 F.3d 218 (1st Cir. 1995); *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994); *Heller Financial, Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286 (7th Cir. 1989); *Eli Lilly and Co. v. Home Ins. Co.*, 794 F.2d 710 (D.C. Cir. 1986); *Jacobsen Const. Co., Inc. v. Teton Builders*, 106 P.3d 719 (Utah 2005); *Kennecorp v. Country Club Hosp.*, 66 Ohio. St. 3d 173, 610 N.E.2d 987 (1993); *Vanier v. Ponsoldt*, 251 Kan. 88, 833 P.2d 949 (1992); *CV Holdings, LLC v. Bernard Technologies*, 14 A.D.3d 854, 788 N.Y.S.2d 445 (2005); *Desai Patel Sharma v. Don Bell Industries*, 729 So. 2d 453 (Fla. App. 1999); *Phoenix Leasing, Inc. v. Kosinski*, 47 Conn. App. 650, 707 A.2d 314 (1998); *Voicelink Data v. Datapulse*, 86 Wash. App. 613, 937 P.2d 1158 (1997); *Kohler Co. v. Wixen*, 204 Wis. 2d 327, 555 N.W.2d 640 (Wis. App. 1996). It can hardly be said that a defendant cannot reasonably anticipate being haled into court in a jurisdiction identified by a valid forum selection clause. Thus, a minimum contacts analysis is not appropriate in determining the validity of forum selection clauses in commercial contracts. *Kennecorp v. Country Club Hosp., supra.* Instead, due process is satisfied when a defendant consents to personal jurisdiction by entering into a contract that contains a valid forum selection clause. See *St. Paul Fire and Marine v. Courtney Enterprises, supra.*

Under Nebraska law, the enforceability of a forum selection clause is evaluated by the terms of the Choice of Forum Act.

> If the parties have agreed in writing that an action on a controversy may be brought in this state and the agreement provides the only basis for the exercise of jurisdiction, a court of this state will entertain the action if (a) the court has power under the law of this state to entertain the action; (b) this state is a reasonably convenient place for the trial of the action; (c) the agreement as to the place of the action was not obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; and (d) the defendant, if within the state, was served as required by law of this state in the case of persons within the state or, if without the state, was served either personally or by certified mail directed to his last-known address.

§ 25-414. This section applies "where the court would have no jurisdiction but for the fact that the parties have consented to its exercise by the choice-of-forum agreement." See Handbook of the National Conference of Commissioners on Uniform State Laws, Model Choice of Forum Act § 2, comment at 220 (1968).

[15] Consequently, where the exercise of personal jurisdiction is based upon a contractual choice of forum clause and is challenged on due process grounds, we must determine whether the choice of forum clause at issue satisfies the requirements of the Choice of Forum Act and the Due Process Clause. But as a practical matter, any forum selection clause which meets the Choice of Forum Act's requirement that Nebraska be a "reasonably convenient place for the trial of the action" will also satisfy the Due Process Clause requirement that trial of the action in Nebraska not be so gravely difficult and inconvenient that the party challenging the clause will be deprived of his or her day in court. See, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972). Therefore, any forum selection clause that satisfies the Choice of Forum Act will also comport with due process, and permit a Nebraska court to exercise jurisdiction under the long-arm statute. If the forum selection clause is not valid under the

Choice of Forum Act, however, the inquiry moves to whether the defendant has the necessary minimum contacts with Nebraska, other than the forum selection clause, to satisfy due process. See *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., ante* p. 222, 691 N.W.2d 147 (2005).

[16] Returning to Ameritas' arguments, we find that the foregoing analysis is dispositive of Ameritas' arguments in support of its first two assignments of error that the district court erred in applying the Choice of Forum Act's standards to the present case. Ameritas does not contend that absent the forum selection clauses, McKinney had the necessary minimum contacts with Nebraska to satisfy due process. Instead, Ameritas contends that in addition to the forum selection clauses, McKinney had other contacts with Nebraska that *taken together* would meet due process requirements. Thus, Ameritas claims that because the choice of forum clauses were not the "only" basis for the exercise of jurisdiction, the Choice of Forum Act should not have been applied. But where a choice of forum clause is a necessary component of the court's exercise of personal jurisdiction, it is clear that "the court would have no jurisdiction but for the fact that the parties have consented to its exercise by the choice-of-forum agreement." See Handbook of the National Conference of Commissioners on Uniform State Laws, *supra*, comment at 220. In short, since the court's exercise of jurisdiction in this case is dependent on the validity of the choice of forum clauses, the court did not err in applying the standards contained in the Choice of Forum Act.

[17] We note, although it is not contested by the parties, that McKinney's challenge to the forum selection clauses was properly raised as a rule 12(b)(2) motion. Some state and federal courts have treated challenges to forum selection clauses as raising complaints of improper venue, or failure to state a claim. See, generally, *Voicelink Data v. Datapulse*, 86 Wash. App. 613, 937 P.2d 1158 (1997) (collecting cases). But under Nebraska law, § 25-414 of the Choice of Forum Act, as analyzed above, raises a jurisdictional barrier to the enforcement of a contractual choice of forum clause that does not meet the Choice of Forum Act's requirements, making a rule 12(b)(2) motion proper.

EVALUATION UNDER CHOICE OF FORUM ACT

We now turn to the basis for the district court's dismissal of this action: its conclusion that Nebraska was not a "reasonably convenient place for the trial of the action" within the meaning of § 25-414. Although the Choice of Forum Act was adopted from the Model Choice of Forum Act, see Handbook of the National Conference of Commissioners on Uniform State Laws (1968), that model act was not widely adopted, and was withdrawn in 1975, see Handbook of the National Conference of Commissioners on Uniform State Laws 100 (1975). As a result, there is little case law discussing the requirements of the Choice of Forum Act.

[18] But it is established that the language of § 25-414 was intended to prevent a court from exercising jurisdiction where that exercise "would result in injustice or in substantial inconvenience to the parties." Handbook of the National Conference of Commissioners on Uniform State Laws, Model Choice of Forum Act, prefatory note at 219 (1968). This language, together with the underlying question whether the exercise of jurisdiction is "convenient" for the parties, has sensibly been held to support the use of considerations relevant to the forum non conveniens doctrine to aid in the construction of the statute. See *First Nat. Monetary Corp. v. Chesney*, 514 F. Supp. 649 (E.D. Mich. 1980).

[19,20] The doctrine of forum non conveniens (literally, "an unsuitable court") provides that a state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action, provided that a more appropriate forum is provided to the plaintiff. See, Restatement (Second) of Conflict of Laws § 84 (1971); Black's Law Dictionary 680-81 (8th ed. 2004). It refers to the discretionary power of a court to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another forum. *Qualley v. Chrysler Credit Corp.*, 191 Neb. 787, 217 N.W.2d 914 (1974).

[21-24] But the plaintiff's choice of a forum should not be disturbed except for "weighty reasons," see Restatement, *supra*, comment *c.* at 251, and only when trial in the chosen forum would establish " ' "oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience," ' " or when

the forum is inappropriate " ' "because of considerations affecting the court's own administrative and legal problems," ' " see *American Dredging Co. v. Miller*, 510 U.S. 443, 447-48, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994). The trial court should consider practical factors that make trial of the case easy, expeditious, and inexpensive, such as the relative ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the ability to secure attendance of witnesses through compulsory process. See *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992). It is also appropriate to consider the advantages of having trial in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself. See *American Dredging Co. v. Miller, supra.* But in any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his or her home forum will normally outweigh the inconvenience the defendant may have shown. *Koster v. Lumbermens Mutual Co.*, 330 U.S. 518, 67 S. Ct. 828, 91 L. Ed. 1067 (1947). Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947).

Thus, the question presented in this appeal, considering the applicable standard of review, is whether the facts taken in the light most favorable to Ameritas establish a prima facie showing that enforcement of the forum selection clause in this case would be "reasonably convenient," that is, would not result in serious and substantial inconvenience to McKinney, considering the factors set forth above. We find, on our de novo review of the record, that Ameritas made a prima facie showing of jurisdiction and that the district court erred in granting McKinney's rule 12(b)(2) motion. We note, particularly, that Ameritas' offices are located in Nebraska and that many of the business records that may be pertinent to the trial of this action are also located in Nebraska. Compare *Woodmen of the World Life Ins. Soc. v. Kight*, 246 Neb. 619, 522 N.W.2d 155 (1994). Furthermore, the contracts at issue specify that the laws of Nebraska are to govern construction of the contracts; presumably, a Nebraska court would be in a better position to apply Nebraska law should it be required. Compare *id.*

The district court's conclusion was based mainly on its reasoning that the primary evidence would be the testimony of the complainant, White, who could not be compelled to attend a trial in Nebraska. That may or may not prove to be the case; but at this juncture, on a rule 12(b)(2) motion, it is premature to conclude that the complainant's presumed unavailability in a Nebraska courtroom would produce "'"oppressiveness and vexation to [the] defendant . . . out of all proportion to plaintiff's convenience."'" See *American Dredging Co. v. Miller*, 510 U.S. at 447-48. Simply stated, the question is not whether Virginia would be a *better* place for this action to be tried. The question is whether or not Nebraska would be a "reasonably convenient" place for trial of the action or, in other words, whether Nebraska would be a place so substantially inconvenient that we should disregard Ameritas' choice of this forum and the parties' previous agreement that suits arising from these contracts would be tried in Nebraska. See *Epps v. Stewart Information Services Corp.*, 327 F.3d 642 (8th Cir. 2003). The evidence present in the record before us establishes a prima facie case that Nebraska is a reasonably convenient forum.

[25] With respect to the other requirements of the Choice of Forum Act, McKinney does not contend that Nebraska lacks subject matter jurisdiction over the act or that service of process was defective. See § 25-414. McKinney does argue in her appellate brief that the forum selection clauses should be found invalid as contained in contracts of adhesion. However, there is no suggestion in the record that this argument was presented to the trial court. An issue not presented to or decided by the trial court is not appropriate for consideration on appeal. *Kubik v. Kubik*, 268 Neb. 337, 683 N.W.2d 330 (2004). In any event, there is no evidence in the present record that would tend to show that McKinney's contracts with Ameritas were adhesion contracts.

We conclude that Ameritas' final assignment of error has merit. The district court erred in granting McKinney's rule 12(b)(2) motion to dismiss.

CONCLUSION

While the district court did not err in applying the requirements of the Choice of Forum Act to the forum selection clauses

at issue in the instant case, the court did err in concluding that the requirements of § 25-414 were not satisfied, considering the standards appropriate for ruling on a motion to dismiss pursuant to rule 12(b)(2). The judgment of the district court is therefore reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. WILLIAM C. PETERS, JR., RESPONDENT.

694 N.W.2d 203

Filed March 25, 2005. No. S-04-529.

SUPPLEMENTAL OPINION

Original action. Supplemental opinion: Former opinion modified.

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

PER CURIAM.

This case is before the court on the joint motion filed by William C. Peters, Jr., respondent, and the Office of the Counsel for Discipline of the Nebraska Supreme Court, relator, regarding our opinion reported at *State ex rel. Counsel for Dis. v. Peters, ante* p. 162, 690 N.W.2d 629 (2005). In response to this joint motion, we modify the opinion by withdrawing the section entitled "Conclusion," *id.* at 164, 690 N.W.2d at 631, and replacing it with the following:

CONCLUSION

> Based on the conditional admission of respondent, the recommendation of the Counsel for Discipline, and our independent review of the record, we find by clear and convincing evidence that respondent has violated DR 1-102(A)(1) and (5) and DR 6-101(A)(2) and that respondent should be and hereby is publicly reprimanded. We further order that

respondent be on probation for a period of 1 year, effective January 14, 2005, during which time respondent will not accept any chapter 13 bankruptcy engagements and will complete 15 hours of continuing legal education in the area of bankruptcy law, to be approved by the Counsel for Discipline. Respondent is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 10(P) (rev. 2003) and 23(B) (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.

JAMES R. SMITH, APPELLANT, V. COLORADO ORGAN RECOVERY SYSTEM, INC., ET AL., APPELLEES.

694 N.W.2d 610

Filed April 1, 2005. No. S-02-767.

1. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.
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. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
4. **Rules of Evidence.** In proceedings where the Nebraska rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility.
5. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
6. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
7. **Jury Instructions: Appeal and Error.** Whether a jury instruction given by a trial court is correct is a question of law.

8. **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.
9. **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.
10. **Moot Question.** As a general rule, a moot case is subject to summary dismissal.
11. **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.
12. **Negligence: Proximate Cause: Words and Phrases.** A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred.
13. **Negligence: Proximate Cause.** A cause of an injury may be a proximate cause, notwithstanding that it acted through successive instruments of a series of events, if the instruments or events were combined in one continuous chain through which the force of the cause operated to produce the disaster.
14. **Rules of Evidence: Expert Witnesses.** An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 1995) if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination.
15. **Expert Witnesses.** When an expert witness' opinion involves scientific or specialized knowledge, Nebraska courts will apply the principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).
16. **Trial: Courts: Expert Witnesses.** Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology can be applied to the facts in issue. In addition, the trial court must determine if the witness has applied the methodology in a reliable manner.
17. **Pleadings: Appeal and Error.** The overruling of a motion in limine is not reviewable on appeal.
18. **Pretrial Procedure: Evidence: Appeal and Error.** When a motion in limine to exclude evidence is overruled, the movant must object when the particular evidence which was sought to be excluded by the motion is offered during trial to preserve error for appeal.
19. **Motions for New Trial: Appeal and Error.** It is not an abuse of discretion to overrule a motion for new trial that is based on errors alleged to have occurred during trial, but to which no timely objection was made.
20. **Appeal and Error.** It is not the function of an appellate court to scour the record looking for unidentified evidentiary errors.
21. **Rules of the Supreme Court: Records: Appeal and Error.** Neb. Ct. R. of Prac. 9D(1)f and g (rev. 2001) clearly requires that factual recitations be annotated to the record, whether they appear in the statement of facts or argument section of a brief.

The failure to do so may result in an appellate court's overlooking a fact or otherwise treating the matter under review as if the represented fact does not exist.

22. **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 to show 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.
23. **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.

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

Edward F. Fogarty, of Fogarty, Lund & Gross, and Marc Humphrey, of Humphrey Law Firm, for appellant.

John A. Svoboda, of Gross & Welch, P.C., for appellee Nebraska Organ Retrieval System, Inc.

Michael F. Kinney and Martin V. Klein, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee Dr. Everett Spees.

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

GERRARD, J.

BACKGROUND

In 1994, James R. Smith, the plaintiff, was living in Omaha, Nebraska, and awaiting a liver transplant operation. A donor liver became available from a gunshot victim in Denver, Colorado. The donor liver was recovered from the donor at Denver General Hospital by Dr. Everett Spees, medical director for Colorado Organ Recovery System, Inc. (CORS).

When a liver is recovered, it is flushed twice while still in the donor's body, and then again after removal, before it is placed in a preservative solution for transport. There are two different solutions that may be used for flushing and preservation. "Euro-Collins" solution (EC) can be used, but the transplant should then occur within 6 hours. University of Wisconsin solution (UW) was invented after EC and allows for a longer period of preservation prior to transplant.

In this instance, concerned about a shortage of UW, Spees performed the initial flush of the donor liver with EC, and the second

flush was performed with UW. The liver was removed from the donor, flushed again with UW, and placed in UW for transport. These procedures were described in the donor information records that accompanied the liver for transport.

The liver was transported by CORS to a Denver airport and flown to Omaha. The liver was picked up from an Omaha airport by an employee of Nebraska Organ Retrieval System, Inc. (NORS). He transported the liver from the Omaha airport to the University of Nebraska Medical Center (UNMC), where it was transplanted into Smith. Neither the employee nor UNMC reviewed the donor information records prior to the transplant operation.

After a transplant was performed on Smith by Dr. Byers Shaw, the liver failed to function, and Smith was supported by extracorporeal porcine and cadaver livers until another donor liver became available. Smith received a second, functional liver approximately a week later, but allegedly suffered health problems as a result of the first transplant surgery.

Smith sued, inter alia, Spees, CORS, and NORS. Smith alleged that Spees and CORS had been negligent in flushing the liver with EC and in failing to specifically notify NORS that EC had been used. Smith alleged that NORS had been negligent in not reviewing the donor information records and notifying UNMC that EC had been used.

Prior to trial, the district court sustained NORS' motion for summary judgment. The court determined that there was no evidence establishing a duty on the part of NORS to review the donor information records.

The case proceeded to a jury trial on Smith's claims against Spees and CORS. The jury found that Spees and CORS had been negligent; however, the jury also found, pursuant to a special verdict form, that the use of EC was not a proximate cause of Smith's damages. The jury specifically found that the use of EC as an initial in situ flush solution was not a proximate cause of the failure of Smith's donor liver. Pursuant to the jury verdict, the district court entered a judgment for the defendants. Smith appeals.

ASSIGNMENTS OF ERROR

Smith assigns the following errors, as consolidated, reordered, and restated:

(1) The court erred in (a) overruling Smith's pretrial *Daubert* objections to the defendants' expert witnesses; (b) denying Smith's posttrial motion for sanctions and fees, based on the defendants' expert witnesses' use of "junk science," brief for appellant at 38; and (c) excluding testimony regarding proximate cause from Dr. John Dunn, one of Smith's expert witnesses.

(2) The court erred in excluding the following evidence: (a) a CORS staff conference record, made after Smith's transplant, directing employees to warn recipient transplant centers of changes in flush protocol; (b) evidence that CORS waived the $19,000 charge for the donor liver; (c) Shaw's statement to the donor team asking if UNMC was the donor team's "guinea pigs"; (d) a statement of a UNMC surgeon that an EC flush was "remarkably unexpected"; (e) testimony that the failure rate of UNMC liver transplant operations had been reduced to 2 percent at the time of Smith's operation; and (f) corroboration of a statement by Shaw that had he known of the EC flush, he would not have used the liver.

(3) The court erred in (a) refusing to give the jury a multiple-cause instruction relating to other possible causes for failure of the donor liver and (b) submitting a special interrogatory to the jury asking "if EC was a proximate cause" of the liver failure.

(4) The court erred in (a) determining that NORS had no duty to review the donor information records and (b) having concluded that NORS had no duty to review the donor information records, refusing to instruct the jury to that effect.

(5) The court erred in refusing to instruct the jury as a matter of law that (a) the standard of care required Spees and CORS to give actual notice to NORS of the use of EC and (b) proximate cause had been established.

STANDARD OF REVIEW

[1,2] In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (2001). 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. *Fales v. Norine*, 263 Neb. 932, 644 N.W.2d 513 (2002).

[3] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004).

[4-6] In proceedings where the Nebraska rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility. *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004). Generally, a trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Id.*

[7,8] Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004).

ANALYSIS

JURISDICTION

[9] We first note Spees' argument that this case should be dismissed for lack of appellate jurisdiction. 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. *Weeder v. Central Comm. College, ante* p. 114, 691 N.W.2d 508 (2005). Spees contends that CORS has been released from this case pursuant to a high-low settlement agreement and that since Spees' alleged negligence occurred within the scope of his employment, he was an agent of CORS, and the release of his principal also released him from liability. Thus, Spees argues that with respect to him, the case is moot and should be dismissed.

[10,11] As a general rule, a moot case is subject to summary dismissal. *Krajicek v. Gale*, 267 Neb. 623, 677 N.W.2d 488

(2004). However, dismissal of this entire appeal would be improper, as Smith also takes issue with the court's partial summary judgment in favor of NORS. Moreover, as will be made clear below, the issues presented in Smith's appeal are intertwined, and disposing of his arguments with respect to NORS requires us to first dispose of his arguments with respect to Spees and CORS—their alleged negligence is essential to analyzing the chain of causation in which NORS' negligence was, allegedly, a link. 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. *In re Estate of Jeffrey B., supra.* Since we must consider Smith's arguments with respect to Spees and CORS regardless of any settlement agreement, the issues presented by Smith's appeal are not moot.

PROXIMATE CAUSE

The primary issue in this appeal is causation. The jury specifically found that the negligence of Spees and CORS was not a proximate cause of the injuries and damages to Smith and that the use of EC as an initial in situ flush in this case was not a proximate cause of the failure of the donor liver.

[12,13] A proximate cause is a cause that produces a result in a natural and continuous sequence *and* without which the result would not have occurred. *Sweeney v. Kerstens & Lee, Inc.*, 268 Neb. 752, 688 N.W.2d 350 (2004). A cause of an injury may be a proximate cause, notwithstanding that it acted through successive instruments of a series of events, if the instruments or events were combined in one continuous chain through which the force of the cause operated to produce the disaster. *Id.*

Stated simply, Smith's theory of proximate cause in this case was that Spees' allegedly negligent use of EC as an initial in situ flush rendered the donor liver unsuitable for transplant, because the initial EC flush resulted in the liver's not being adequately preserved. Smith alleged that the use of EC caused the liver to fail and that CORS' and NORS' subsequent failure to notify the transplant team of the use of EC prevented the transplant team from making an informed decision to reject the tainted liver.

But it is important to note that although Smith alleged several parties were negligent, the natural and continuous sequence of

causation he set out to prove began with the use of EC as an initial in situ flush and that this event was found, by the jury, not to be a proximate cause of the failure of the donor liver. In other words, the jury found that something other than the use of EC caused the liver to fail. Implicit in this finding is that, according to the jury, the donor liver would have failed regardless of the use of EC.

Consequently, our analysis of Smith's assignments of error begins with those arguments which are directed at the jury's finding that the EC flush did not cause the donor liver to fail. In other words, we must first determine if any error on the part of the court undermines the jury's finding. Then, if the jury's special finding on causation was not the result of error, we must determine which of Smith's remaining assignments of error would remain prejudicial, when the effect of the jury's findings on causation is considered.

EXPERT TESTIMONY

Smith argues that the court erred in overruling his pretrial objections to the defendants' expert witnesses. This argument is pertinent because the jury's findings on proximate cause were based on the expert testimony presented by the defendants.

[14-16] An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 1995) if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination. *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004). When the opinion involves scientific or specialized knowledge, this court held in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), that we will apply the principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Under our recent *Daubert/Schafersman* jurisprudence, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. *Robb v. Robb, supra*. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology can be applied to the facts in issue. *Id.* In addition, the trial court must

determine if the witness has applied the methodology in a reliable manner. *Id.*

In this case, the defendants presented expert testimony from Drs. Steven Strasberg, James Southard, and Goran Klintmalm. Strasberg, a liver surgeon, was a professor of surgery and head of hepatobiliary-pancreatic surgery at Barnes-Jewish Hospital and Washington University. Strasberg had been researching preservation of the liver since 1985; of his approximately 150 peer-reviewed journal publications, 40 dealt with liver transplantation and 35 of those were specifically in the area of preservation injury. Strasberg had done approximately 500 donor liver retrieval operations and performed about 100 liver transplants.

Based on his review of the relevant medical literature, Strasberg testified to a reasonable degree of medical certainty that in his opinion, the use of EC in Smith's transplant did not increase the chance of that particular liver failure. Instead, Strasberg opined to a reasonable degree of medical certainty that Smith's donor liver failed because of three risk factors: (1) pre-preservation injury to the liver resulting from hypoxia, as well as cocaine and alcohol use by the donor; (2) prolonged preservation time; and (3) the length of time between removal of the liver from cold storage and restored circulation of blood.

Southard, who holds a doctorate degree, is the codeveloper and patent holder for UW. Southard was a professor and vice chairman of the department of surgery at the University of Wisconsin. Southard was the author of approximately 220 journal articles, of which 190 to 200 addressed organ preservation—specifically, the mechanisms by which cells and organs are injured by cold and how to develop new preservation methods and solutions. Southard had also authored approximately 30 book chapters on organ preservation. Southard opined, to a reasonable degree of scientific certainty, that the use of EC did not increase the risk of injury to the donor liver in Smith's case and did not cause or contribute to the failure of the donor liver.

Klintmalm was chairman of Baylor transplant sciences, director of the Dallas liver transplant program, and director of transplantation services at Baylor University Medical Center. Klintmalm had authored about 239 articles in peer-reviewed journals, 95 percent of which were focused on transplantation.

Klintmalm was the surgeon for about 40 percent of the 110 to 160 transplants performed annually by Baylor University. Klintmalm was also the author of a controlled study of human livers in which one group was flushed with EC and preserved in UW, and the other group was both flushed and preserved in UW. Klintmalm testified that the study concluded that "[a]ll livers, regardless of preservation or flush, worked equally well." Based on his experience, Klintmalm testified to a reasonable degree of medical certainty that the use of EC in Smith's case had "absolutely no impact on the outcome" and did not contribute to or increase the risk for failure of the liver.

Smith argues that the opinions of Strasberg, Southard, and Klintmalm should have been excluded on *Daubert/Schafersman* grounds. However, the record shows that Smith failed to preserve this argument for appeal. Smith filed a pretrial motion in limine to the defendants' expert witnesses' testimony, based on their deposition testimony, that was overruled by the district court. At trial, however, no foundational objection, based upon *Daubert/Schafersman* or otherwise, was made to the opinions of Strasberg, Southard, or Klintmalm. At the close of the evidence, Smith did make a motion to strike expert testimony, but even then, he sought to strike their testimony specifically with respect to duty and the standard of care, not causation. Finally, Smith's motion for new trial was based, in part, on the court's overruling of Smith's pretrial motion in limine.

[17-19] But the overruling of a motion in limine is not reviewable on appeal. *King v. Crowell Memorial Home*, 261 Neb. 177, 622 N.W.2d 588 (2001). When a motion in limine to exclude evidence is overruled, the movant must object when the particular evidence which was sought to be excluded by the motion is offered during trial to preserve error for appeal. *Olson v. Sherrerd*, 266 Neb. 207, 663 N.W.2d 617 (2003). By failing to object during trial to any of the expert opinion testimony now challenged on appeal, Smith waived his *Daubert/Schafersman* argument. Similarly, the court did not abuse its discretion in overruling Smith's motion for new trial; it is not an abuse of discretion to overrule a motion for new trial that is based on errors alleged to have occurred during trial, but to which no timely

objection was made. See *Mooney v. Gordon Memorial Hosp. Dist.*, 268 Neb. 273, 682 N.W.2d 253 (2004).

We also note that in any event, Smith's appellate argument appears to be directed at the credibility of the defense witnesses, and not to any specifically identified flaw in their reasoning or methodology. Simply stated, Smith's brief accuses all three defense experts of lying. While Smith's expert witnesses reached conclusions different from those of Strasberg, Southard, and Klintmalm, Smith's witnesses did not testify that the defense witnesses' methodology was scientifically invalid. In other words, even if preserved for appellate review, Smith's argument is less a *Daubert/Schafersman* claim than an unsubstantiated attack on the credibility of the defense witnesses.

Smith also claims that he should have been awarded sanctions and fees based on the defendants' use of "junk science" from their expert witnesses. Brief for appellant at 38. Obviously, given our disposition of Smith's argument with respect to that testimony, his claim for sanctions and fees is without merit.

Finally, Smith argues that the court abused its discretion in excluding the testimony of Dr. John Dunn with respect to causation. Dunn was a risk management expert and board certified in emergency medicine, but had "[v]ery little" experience in the field of organ transplants. In his deposition, Dunn specifically testified that he was *not* scientifically qualified to offer an expert opinion on the cause of Smith's donor liver failure. Dunn stated that he was not an expert on EC or UW and would not, if he were the judge, allow himself to testify as to whether the use of EC had a deleterious impact on Smith's donor liver. Given these admissions, the court did not abuse its discretion in concluding Dunn was not qualified to testify on causation.

In short, Smith waived any objection to the defendants' expert testimony, and the court did not abuse its discretion in excluding Dunn's expert testimony on the cause of the failure of Smith's donor liver. Smith's *Daubert/Schafersman* arguments do not undermine the jury's special finding on proximate cause.

Evidentiary Rulings

Smith complains of several rulings excluding evidence. It is not entirely clear how each of these rulings bears on the issue of causation, although Smith argues that the evidence he claims was

erroneously excluded would have helped build the "chain of causation" and the exclusion was prejudicial. As we conclude that the court did not err in excluding this evidence, we assume without deciding that Smith's alleged errors would have affected the jury's determination on causation.

Smith first complains of the exclusion of a record of a CORS staff conference, held after the recovery of Smith's donor liver, directing employees to notify transplant centers if different flush solutions were used. This evidence was excluded pursuant to Neb. Rev. Stat. § 27-407 (Reissue 1995), which provides in relevant part:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The court did not err in concluding that the evidence at issue was barred by § 27-407. The direction given to CORS employees is clearly a subsequent remedial measure, and Smith does not argue otherwise. Smith's offer of proof at trial did not establish that the evidence was proffered for any of the permissible purposes set forth in § 27-407. Instead, Smith's appellate brief simply contends that the evidence was *relevant*, which is unresponsive to the objection made and sustained by the court. We find no error in the court's evidentiary ruling.

Smith next asserts the court erred in excluding evidence that CORS offered not to charge NORS and UNMC for the donor liver, that Shaw accused the donor hospital of using UNMC as "guinea pigs," and of corroboration of a statement made by Shaw that had he known of the EC flush, he would not have transplanted Smith's donor liver. This evidence was excluded as hearsay, and Smith does not offer an appellate argument responsive to the court's ruling. Instead, Smith's brief simply argues that the evidence was relevant and that its exclusion was prejudicial. Because Smith does not contest the court's conclusion that the evidence was hearsay, and hearsay is inadmissible, see Neb. Rev.

Stat. § 27-802 (Reissue 1995), Smith has identified no error in the court's rulings.

[20,21] Smith also assigns that the court erred in "excluding UNMC assistant transplant surgeon Dr. [Rakesh] Sindhi's deposition testimony to the effect UW only was all he'd ever seen and this EC flush was remarkably unexpected." However, Smith's brief does not identify where, in the record, this evidence is to be found. It is not the function of an appellate court to scour the record looking for unidentified evidentiary errors. *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004). Neb. Ct. R. of Prac. 9D(1)f and g (rev. 2001) requires that factual recitations be annotated to the record, whether they appear in the statement of facts or argument section of a brief. The failure to do so may result in an appellate court's overlooking a fact or otherwise treating the matter under review as if the represented fact does not exist. *First Westside Bank v. For-Med, Inc.*, 247 Neb. 641, 529 N.W.2d 66 (1995). We have, however, thoroughly examined the record and are unable to discern to what Smith is referring. Consequently, we are unable to conclude that the court committed prejudicial error.

Finally, Smith claims the court erred in excluding testimony that by 1994, the failure rate for liver transplants at UNMC had been reduced to 2 percent. The evidence was excluded as being beyond the scope of pretrial disclosure. But, as with his other arguments, Smith merely contends that the exclusion of this evidence was prejudicial. He does not explain how the court's ruling was erroneous. Consequently, we find no error.

Multiple-Cause Instruction

Smith argues that the court erred in refusing to give his proposed jury instructions on multiple causes. Obviously, if the jury was not correctly instructed on causation, this would undermine its special finding on that issue. However, we conclude that the proffered instruction was not warranted by the evidence.

Smith's proposed instructions, summarized generally, would have instructed the jury that the defendants' negligence could still be a proximate cause of Smith's damages, even if other risk factors contributed to the failure of the liver. In essence, Smith was requesting a hybrid "substantial factor" type of instruction. Under

certain circumstances, when multiple causes act to produce a single injury or when the active negligence of a third person is also a substantial factor in bringing about the harm, the standard proximate cause instruction may be insufficient. See *Reimer v. Surgical Servs. of the Great Plains*, 258 Neb. 671, 605 N.W.2d 777 (2000). Under such circumstances, an instruction that a defendant's conduct is a cause of an event if it was a substantial factor in bringing it about is appropriate. *Id.* The " 'substantial-factor rule' " was developed primarily for cases in which application of the "but for" rule would allow each defendant to escape responsibility because the conduct of one or more others would have been sufficient to produce the same result. *Id.* at 677, 605 N.W.2d at 781.

[22] However, an instruction based on the "substantial-factor rule" was not warranted in this case. To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show 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. *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004).

In this case, Smith did not contend that in the absence of the initial EC flush, the donor liver would have failed. In fact, Smith contends the opposite. This is simply not a case in which liability could never be established under the standard proximate cause instruction; therefore, a "substantial factor" instruction was unwarranted. Compare *Reimer v. Surgical Servs. of the Great Plains, supra*. Nor did Smith contend that this was a case in which the jury would be unable to establish to what degree the plaintiff's damages were caused by the negligence of the defendants. Compare *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000).

Instead, Smith's theory of the case was that the use of EC caused Smith's donor liver to fail; in fact, Smith's proposed instruction would still have instructed the jury to that effect. But the jury was correctly instructed on proximate causation and that liability would attach if *either* Spees *or* CORS was *a* proximate cause of some damage to Smith. The jury was also properly instructed that

> [w]here the independent negligence [sic] acts or failures to act of more than one person combine to proximately cause the same single indivisible injury and damage, each such act or failure to act is a proximate cause, and each such person and/or corporation may be held responsible for the entire injury and damage. This is true although some may have been more negligent than others.

These instructions on proximate and concurring causation were a correct statement of the law and consistent with the evidence presented at trial. Smith's proposed instructions, including language taken from the "substantial-factor rule," were not warranted by the evidence.

Smith also assigned that the court erred in submitting a special interrogatory to the jury asking "if EC was a proximate cause" of Smith's donor liver failure. Smith did not argue in what way the court abused its discretion by submitting the special interrogatory to the jury or how Smith was prejudiced by the submission of the special interrogatory. Errors that are assigned but not argued are not typically addressed by this court, and we have no basis to do so here. See *Livingston v. Metropolitan Util. Dist.*, *ante* p. 301, 692 N.W.2d 475 (2005).

Effect of Special Finding on Proximate Cause

Smith presents several arguments with respect to the alleged negligence of NORS, and the court's summary judgment in NORS' favor. We conclude, however, that these arguments do not undermine the jury's special finding on causation, and we further conclude that the jury's conclusion that the use of EC was not a proximate cause of the failure of the donor liver is dispositive of Smith's claim against NORS.

As previously stated, a cause of an injury may be a proximate cause, notwithstanding that it acted through successive instruments of a series of events, if the instruments or events were combined in one continuous chain through which the force of the cause operated to produce the disaster. *Sweeney v. Kerstens & Lee, Inc.*, 268 Neb. 752, 688 N.W.2d 350 (2004). Smith contends that NORS had a duty to review the paperwork accompanying the donor liver and to inform the UNMC transplant team that EC had been used. Smith argues that because Shaw was reported to have said that he would not have used the liver had he known of

the EC flush, "but for" NORS' alleged negligence, Smith's failed transplant would not have occurred.

However, a proximate cause is a cause that produces a result in a natural and continuous sequence *and* without which the result would not have occurred. *Id.* Even if NORS was negligent, and even if Smith's injury would not have occurred "but for" NORS' negligence, this does not establish that NORS' alleged negligence caused Smith's injury in a natural and continuous sequence. At best, NORS would have been a link in the "chain of causation" between the use of EC and the failure of Smith's donor liver.

Smith contends that the absence of NORS at trial allowed the jury to conclude that "the chain of cause broke at its weakest link." Brief for appellant 29. But the jury found that chain of causation never to have been initiated. The jury's special finding was not simply that the use of EC was not a proximate cause of Smith's damages—rather, the jury specifically found that the use of EC *did not cause Smith's donor liver to fail.* In other words, the jury found that even had EC not been used, the result of Smith's transplant surgery would have been the same. Since the jury found that the liver failure was not caused by the use of EC, it would have been impossible for the same jury to find that the liver failure was caused by NORS' failure to warn UNMC of the same use of EC.

Consequently, any error in granting summary judgment for NORS was harmless, because any negligence on NORS' part was not a proximate cause of Smith's damages. Smith was not prejudiced by the "empty chair" at trial, as the jury's special finding on proximate cause was equally applicable to Spees, CORS, and NORS.

Similarly, Smith argues that the jury should have been instructed that Spees and CORS were negligent as a matter of law in failing to ensure that UNMC was notified of the use of EC. Smith's reasoning here is substantially the same as that reasoning he advanced with respect to NORS—he argues that since Shaw would not have used the donor liver had he known of the EC flush, the failure to notify UNMC establishes "but for" causation of Smith's damages. But, as above, if the EC flush did not cause Smith's donor liver to fail, then the failure to notify the

transplant team of the EC flush could not have been a cause of Smith's injuries.

In short, CORS, Spees, and NORS were not the legal cause of Smith's injuries. While it is true that several events preceded the unfortunate failure of Smith's donor liver, the jury determined that the conduct of CORS, Spees, and NORS did not act in a natural and continuous sequence to produce such injuries. That is because, according to the jury, the use of EC simply did not cause Smith's donor liver to fail.

[23] Therefore, we decline to consider Smith's remaining arguments, because even if the court had committed error with respect to NORS', CORS', or Spees' failure to inform UNMC of the use of EC, such error would not be prejudicial and would not affect our disposition of this appeal. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Livingston v. Metropolitan Util. Dist., ante* p. 301, 692 N.W.2d 475 (2005).

CONCLUSION

Smith has not shown that the jury's special finding on proximate cause—that the use of EC was not a proximate cause of the failure of Smith's donor liver—was the result of any error on the part of the court. Since the use of EC was not a proximate cause of Smith's donor liver failure, the actions of the defendants were not a proximate cause of Smith's injuries, and judgment was properly entered for the defendants. The judgment of the district court is affirmed.

AFFIRMED.

STEPHAN, J., not participating.

PIONEER CHEMICAL COMPANY, A NEBRASKA CORPORATION, APPELLANT, V. CITY OF NORTH PLATTE, A MUNICIPAL CORPORATION OF THE STATE OF NEBRASKA, AND UNION PACIFIC RAILROAD COMPANY, APPELLEES.

694 N.W.2d 208

Filed April 1, 2005. No. S-02-854.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges, on appeal thereto from the District Court for Lincoln County, DONALD E. ROWLANDS II, Judge. Judgment of Court of Appeals affirmed.

George G. Vinton for appellant.

Douglas L. Stack for appellee City of North Platte.

Stephen W. Kay, of Kay & Kay, for appellee Union Pacific Railroad Company.

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

PER CURIAM.

Having reviewed the briefs and record and having heard oral arguments, we conclude on further review that the decision of the Nebraska Court of Appeals in *Pioneer Chem. Co. v. City of North Platte*, 12 Neb. App. 720, 685 N.W.2d 505 (2004), is correct and, accordingly, affirm the decision of the Court of Appeals.

AFFIRMED.

VIRGIL D. ANDERSON, APPELLANT, V. WELLS FARGO FINANCIAL ACCEPTANCE PENNSYLVANIA, INC., DOING BUSINESS AS WELLS FARGO FINANCIAL ACCEPT, APPELLEE.

694 N.W.2d 625

Filed April 1, 2005. No. S-03-882.

1. **Motions to Dismiss: Jurisdiction: Rules of the Supreme Court: Pleadings: Appeal and Error.** The granting of a motion to dismiss for lack of subject matter jurisdiction under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) (rev. 2003) which is

limited to a facial attack on the pleadings is subject to the same de novo standard of review as a motion brought under rule 12(b)(6).

2. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
3. **Motions to Dismiss: Jurisdiction: Rules of the Supreme Court: Pleadings.** When a motion to dismiss is based on both Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) and (6) (rev. 2003) grounds, the court should consider the rule 12(b)(1) challenge first. If the court determines that it lacks subject matter jurisdiction, the court should dismiss on that basis and should not consider the rule 12(b)(6) grounds. In this context, the court should consider the rule 12(b)(6) grounds only after it has determined that it has subject matter jurisdiction.
4. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
5. **Pleadings: Proof.** Complaints should be liberally construed in the plaintiff's favor. A complaint should not be dismissed merely because it does not state with precision all elements that give rise to a legal basis for recovery. Complaints must nonetheless set forth sufficient information to suggest that there is some recognized theory upon which relief may be granted.

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

Michael D. McClellan and Michael D. Nelson, of Nelson McClellan, for appellant.

Scott A. Lautenbaugh, of Nolan, Olson, Hansen & Lautenbaugh, L.L.P., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

On April 15, 2003, Virgil D. Anderson, appellant, filed a declaratory judgment action in the district court for Douglas County against one defendant, Wells Fargo Financial Acceptance Pennsylvania, Inc., doing business as Wells Fargo Financial Accept (Wells Fargo), appellee. The complaint alleged that Wells Fargo breached a contract between the parties when it failed to have Anderson's name listed on the certificate of title to a motor vehicle that Anderson bought with another person, Pamela A.

McCoy. In general, Anderson alleged as follows: Anderson and McCoy were each listed as a "Buyer" on a "Retail Installment Contract and Security Agreement" entered into with a Nebraska automobile dealer, Lee Sapp Ford-Mercury (Lee Sapp); the contract was assigned by Lee Sapp to Wells Fargo; McCoy took possession of the vehicle; Anderson's name was not listed on the certificate of title; and upon McCoy's failure to make payments, Anderson had made $4,195.70 in payments at the time the complaint was filed. The complaint also alleged that Wells Fargo had declined to give Anderson adequate assurances that Anderson had an ownership interest in the vehicle. For relief, Anderson variously sought an order, inter alia, suspending his performance under the contract, canceling the contract, and awarding him a judgment in the total amount of payments he had already made under the contract.

On May 22, 2003, Wells Fargo filed a motion to dismiss based on Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) (rev. 2003) (lack of subject matter jurisdiction) and rule 12(b)(6) (failure to state claim upon which relief can be granted). On July 2, the district court granted Wells Fargo's motion to dismiss on both rule 12(b)(1) and (6) grounds and dismissed Anderson's action with prejudice. Anderson appealed.

During the pendency of this appeal, on the court's own motion, the parties were directed to further brief the case. In his supplemental brief, Anderson indicated that a separate action had been undertaken against McCoy, and at oral argument, Anderson conceded that he had possession of the vehicle and that his name had been placed on the certificate of title.

We conclude that the district court erred in concluding that it lacked subject matter jurisdiction but that it was correct in concluding that Anderson failed to state a claim upon which relief can be granted. We therefore affirm the granting of the motion to dismiss.

STATEMENT OF FACTS

On April 15, 2003, Anderson filed a complaint in district court seeking declaratory judgment against Wells Fargo. In the complaint, Anderson alleged, inter alia, the following: On August 8, 2002, Anderson entered into a contract with Lee Sapp, a Nebraska

automobile dealer which soon thereafter assigned the contract to Wells Fargo. Anderson and McCoy were each named as a "Buyer" of a motor vehicle on the contract form. McCoy took possession of the vehicle. Anderson was not given a copy of the certificate of title to the vehicle.

According to the complaint, McCoy ceased making payments on the vehicle. Thereafter, Anderson began making payments and had made payments totaling $4,195.70 at the time the complaint was filed. Anderson hired a private investigator to repossess the vehicle. The private investigator learned that Anderson's name was not on the certificate of title and indicated that Anderson had no ability to take possession of the vehicle.

On February 14, 2003, Anderson's attorney sent Wells Fargo a letter requesting adequate assurances that if Anderson paid off the remaining balance on the contract, Anderson would receive an ownership interest in the vehicle. Although Wells Fargo received the letter, Anderson received no response.

Anderson alleged in his complaint that Wells Fargo's failure to have Anderson's name placed on the title was a breach of the contract and various statutes. As relief, Anderson sought, inter alia, orders suspending his performance under the contract, canceling the contract, and awarding him a judgment in the total amount of payments he had already made under the contract.

On May 22, 2003, Wells Fargo filed a motion to dismiss the action for lack of subject matter jurisdiction pursuant to rule 12(b)(1) and for failure to state a claim upon which relief can be granted pursuant to rule 12(b)(6). Referring to the Uniform Declaratory Judgments Act, Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1995 & Cum. Supp. 2000), Wells Fargo asserted that the district court did not have subject matter jurisdiction because Anderson had an adequate remedy against McCoy and the court's judgment in this action would not terminate that controversy. Wells Fargo also asserted that it had no duty to Anderson and that therefore, Anderson's complaint failed to state a claim upon which relief could be granted.

On July 2, 2003, the district court filed its order sustaining Wells Fargo's motion to dismiss on both rule 12(b)(1) and (6) grounds and dismissing the action with prejudice, with costs taxed to Anderson. In its order, the court stated that

> contrary to the allegations contained in [Anderson's] complaint, [Wells Fargo] does not have a duty to require [Anderson's] co-purchaser to title the car in [Anderson's] name; further this Court lacks jurisdiction over the subject matter of this cause of action because any judgment rendered by this Court will not terminate the controversy between [Anderson] and . . . McCoy per Neb. Rev. Stat. § 25-21,150 and § 25-21,154.

Anderson appeals.

ASSIGNMENTS OF ERROR

Anderson asserts that the district court erred in (1) concluding that it did not have subject matter jurisdiction and (2) concluding that Anderson had failed to state a claim upon which relief could be granted. Anderson also asserts that it was improper for the district court to rule on the merits of his claim under rule 12(b)(6) when it also determined that it did not have subject matter jurisdiction under rule 12(b)(1).

STANDARDS OF REVIEW

[1] As discussed above, this action was filed on April 15, 2003, and thus, we apply the new rules for notice pleading. See Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2004). This court has not previously discussed the standard of review for a motion to dismiss filed under rule 12(b)(1). Because the new rules are modeled after the Federal Rules of Civil Procedure, we look to the federal decisions for guidance. See, similarly, *Kellogg v. Nebraska Dept. of Corr. Servs., ante* p. 40, 690 N.W.2d 574 (2005). We do hereby determine, as do the federal appellate courts, that the granting of a motion to dismiss for lack of subject matter jurisdiction under rule 12(b)(1) which is limited to a facial attack on the pleadings is subject to the same de novo standard of review as a motion brought under rule 12(b)(6). See *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695 (8th Cir. 2003).

[2] A district court's grant of a motion to dismiss for failure to state a claim under rule 12(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Weeder v. Central Comm. College, ante* p. 114, 691 N.W.2d 508 (2005).

ANALYSIS

It Is Improper to Consider Motion Based on Rule 12(b)(6) Grounds Where Court Concludes It Lacks Subject Matter Jurisdiction Under Rule 12(b)(1).

We note first that the district court granted Wells Fargo's motion to dismiss both for lack of subject matter jurisdiction under rule 12(b)(1) and for failure to state a claim for relief under rule 12(b)(6). Anderson observes that the district court's order was inconsistent and asserts that the court should not have considered the rule 12(b)(6) grounds when it determined that it lacked subject matter jurisdiction under rule 12(b)(1). We agree with Anderson's analysis and conclude that when a motion to dismiss raises both rule 12(b)(1) and (6) grounds, the court should consider the rule 12(b)(1) grounds first and should then consider the rule 12(b)(6) grounds only if it determines that it has subject matter jurisdiction.

In articulating the proper procedure to be followed relative to a motion asserting both rule 12(b)(1) and (6) grounds, we look to the federal decisions for guidance. *Kellogg v. Nebraska Dept. of Corr. Servs., supra.* Federal courts generally state, and we agree, that when a motion to dismiss is based on both rule 12(b)(1) and (6) grounds, the court should consider the rule 12(b)(1) challenge first. It has been observed that "[w]hen a court is confronted with motions to dismiss under both Rules 12(b)(1) and 12(b)(6), it ordinarily ought to decide the former before broaching the latter. . . . After all, if the court lacks subject matter jurisdiction, assessment of the merits becomes a matter of purely academic interest." *Deniz v. Municipality of Guaynabo*, 285 F.3d 142, 149-50 (1st Cir. 2002). Elsewhere, it has been stated: "When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits." *Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001). The Court of Appeals for the Fifth Circuit has said:

> A dismissal under both rule 12(b)(1) and 12(b)(6) has a "fatal inconsistency" and cannot stand. . . . "Federal jurisdiction is not so ambidextrous as to permit a district court to dismiss a suit for want of jurisdiction with one hand and to decide the merits with the other. A federal district court concluding lack

> of jurisdiction should apply its brakes, cease and desist the proceedings, and shun advisory opinions. To do otherwise would be in defiance of its jurisdictional fealty."

Ehm v. National R.R. Passenger Corp., 732 F.2d 1250, 1257 (5th Cir. 1984). More importantly, it has been stated: "If the allegations [of a complaint] do not survive the jurisdictional attack, then there is no jurisdiction even to consider the other claims, much less to entertain a Rule 12(b)(6) motion to dismiss those claims." *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 512 (5th Cir. 1980).

[3] We similarly conclude that when a motion to dismiss is based on both rule 12(b)(1) and (6) grounds, the court should consider the rule 12(b)(1) challenge first. If the court determines that it lacks subject matter jurisdiction, the court should dismiss on that basis and should not consider the rule 12(b)(6) grounds. In the context under discussion, the court should consider the rule 12(b)(6) grounds only after it has determined that it has subject matter jurisdiction.

In the present case, the district court in its order considered the rule 12(b)(6) grounds first and ultimately dismissed on both rule 12(b)(1) and (6) grounds. In reviewing the ruling, we will follow the proper order and will consider the rule 12(b)(1) grounds first.

District Court Possessed Subject Matter Jurisdiction: Dismissal Under Rule 12(b)(1) Was Error.

We first consider whether the district court erred when it concluded that it lacked subject matter jurisdiction and granted the motion to dismiss on rule 12(b)(1) grounds. We conclude that although the court possessed the discretion to refuse to enter a judgment or decree, it did not lack the power to hear the case, and that the court erred as a matter of law when it stated it lacked subject matter jurisdiction.

Anderson titled his complaint a "Declaratory Judgment" action. Section 25-21,150 of the Uniform Declaratory Judgments Act states:

> Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have

> determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Section 25-21,154 states: "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."

In its motion to dismiss, Wells Fargo asserted that the district court lacked subject matter jurisdiction because a ruling in this declaratory judgment action would not terminate the controversy between Anderson and McCoy. In its order granting the motion to dismiss, the court agreed with Wells Fargo and concluded with respect to rule 12(b)(1) that it lacked "jurisdiction over the subject matter . . . because any judgment rendered by this Court will not terminate the controversy between [Anderson] and . . . McCoy per Neb. Rev. Stat. § 25-21,150 and § 25-21,154." Although the court did not give further explanation, it is apparent that the court relied on § 25-21,154 in concluding that it lacked subject matter jurisdiction. Such reliance for the proposition that the court lacked subject matter jurisdiction was error as a matter of law.

[4] Subject matter jurisdiction deals with the court's ability to hear a case. We recently stated: "Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved." *State v. Thomas*, 268 Neb. 570, 584, 685 N.W.2d 69, 82 (2004). Accepting Anderson's allegations in the complaint, as we must, the district court had the power to hear and determine the general class or category of cases to which Anderson's case belonged. Section 25-21,150 gave the district court subject matter jurisdiction over the general class of issues raised in Anderson's complaint, and the district court was possessed of subject matter jurisdiction.

For the sake of completeness, we note that we recently observed that we "have long stated that [§ 25-21,154] indicates discretionary rather than mandatory power [and that] whether to entertain an action for declaratory judgment is within the discretion of the trial court." *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 268 Neb. 439, 449, 684 N.W.2d 14, 23 (2004). However,

in the instant case, the district court did not dismiss as a matter of discretion but instead declared that it did not have jurisdiction.

Contrary to the district court's ruling, it did not lack subject matter jurisdiction over Anderson's declaratory judgment action, and we conclude that the district court erred in granting the motion to dismiss on rule 12(b)(1) grounds.

Complaint Failed to State Claim Upon Which Relief Can Be Granted: Dismissal Under Rule 12(b)(6) Was Proper.

As noted above, the district court properly should have considered the motion to dismiss on rule 12(b)(1) grounds first, and had it lacked subject matter jurisdiction, the court should not have considered the rule 12(b)(6) grounds. However, because we have concluded that the district court had subject matter jurisdiction and erred in granting the motion to dismiss on rule 12(b)(1) grounds, we will review the district court's further decision to grant the motion to dismiss on 12(b)(6) grounds. We conclude that because no relief could have been granted based on the allegations in the complaint, the district court was correct in concluding that Anderson failed to state a claim upon which relief could be granted.

[5] We recently stated that complaints should be liberally construed in the plaintiff's favor, and a complaint should not be dismissed merely because it does not state with precision all elements that give rise to a legal basis for recovery. *Spear T Ranch v. Knaub, ante* p. 177, 691 N.W.2d 116 (2005). However, federal courts have observed, and we agree, that complaints must nonetheless set forth sufficient information to suggest that there is some recognized theory upon which relief may be granted. *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077 (D.C. Cir. 1984).

The crux of Anderson's complaint is contained in paragraph 9 wherein he alleges, inter alia, that Wells Fargo's "failure to have [Anderson's] name placed on the title is a breach of the Installment Contract." The "Installment Contract" was attached to the complaint, and we recognize that Anderson is listed as a "Buyer" on the contract. The contract does not contain a provision explicitly requiring the seller to put the buyers' names on the certificate of title, nor is this potential act assigned to the

assignee, Wells Fargo. Anderson has not alleged any recognized theory which would require Wells Fargo to take the actions Anderson seeks, nor have we been directed on appeal to authority upon which relief can be granted. Anderson therefore failed to state a complaint against Wells Fargo upon which relief could be granted, and we conclude that the district court did not err in granting the motion to dismiss on rule 12(b)(6) grounds.

CONCLUSION

We conclude that the district court erred in determining that it lacked subject matter jurisdiction. However, the court did not err in determining that Anderson failed to state a claim upon which relief could be granted. We therefore conclude that the court was correct in granting the motion to dismiss on rule 12(b)(6) grounds. We affirm the order granting Wells Fargo's motion to dismiss with prejudice.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JOSEPH H. MCDONALD, APPELLANT.

694 N.W.2d 204

Filed April 1, 2005. No. S-04-516.

1. **DNA Testing: Appeal and Error.** A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
2. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

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

Stefanie A. Martinez for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

McCORMACK, J.

NATURE OF CASE

In 1975, Joseph H. McDonald was convicted of first degree murder and sentenced to life imprisonment. The present appeal arises from the district court's denial of McDonald's motion for DNA testing pursuant to the DNA Testing Act (the Act), Neb. Rev. Stat. § 29-4116 et seq. (Cum. Supp. 2004). Under the Act, a court shall order testing upon a determination that, among other things, such testing was not effectively available at the time of trial. See § 29-4120(5). Because McDonald has failed to satisfy this requirement, we affirm.

BACKGROUND

The following facts are taken from our opinion in *State v. McDonald*, 195 Neb. 625, 626-29, 240 N.W.2d 8, 9-11 (1976):

> At approximately 3 a.m., on the morning of July 4, 1974, a police officer observed an automobile on fire in a trailer court at 19th and Read Streets in Omaha, Nebraska, and immediately placed a fire alarm. The Omaha fire department arrived some 5 minutes after the alarm was received, broke out all the windows of the car, and extinguished the flames. Following routine procedure, they opened the hood and the trunk of the burned car. The body of Lyle Ford was found in the trunk. There was a wound behind the left ear and streaks of blood on the neck and face.
>
> Two officers of the Omaha police department began an immediate investigation by canvassing the area for witnesses. Several people residing in the trailer court provided information. Three witnesses had seen and heard two boys arguing with a man in the immediate area of the burned car sometime before the fire. One witness said the boys appeared to be trying to get money from the man. One witness said that one of the boys had on a light T-shirt. Another said that one of the boys had on a gold T-shirt and had long blonde hair, and the other boy was of "slighter" stature, possibly younger, and wore dark clothing. Another witness also said one boy had long blonde hair and was wearing a gold T-shirt. The manager of the trailer court advised one of the officers that a younger brother of an occupant of one of the trailers had been involved in another fire recently. The officers then went

to the trailer occupied by the defendant's brother, Tim McDonald, and talked with him. Tim said that Joe McDonald, the defendant, had been at the trailer at about 10:30 p.m. At that time, he had on a gold T-shirt and he had long blonde hair. The police officers also learned from witnesses that the defendant had been with a boy named Robert Johnson earlier in the evening, and that Johnson was of slighter stature and lived in the trailer court. This led the officers to the Johnson trailer. The officers knocked on the door and were admitted by Robert Johnson's mother. The officers asked if the defendant and Robert Johnson were there. She stated that they were in the living room sleeping. She let the officers in and they observed the defendant sleeping on the floor and Johnson sleeping on a couch. The officers awoke the boys and told them they wanted to talk to them. The boys got up and dressed. The defendant, who had long blonde hair, put on a yellow T-shirt and a pair of trousers. The officers noticed what appeared to be blood on the T-shirt and trousers. Johnson's physical appearance and clothing also matched the descriptions given to the officers. The officers then arrested both boys at approximately 6 a.m. and took them to the police station.

The medical evidence was that the victim was still alive at the time of the fire, and that he died from asphyxiation. The doctor also testified that it was possible that the victim could have died from the head wound but the fire intervened and killed him before that happened.

The evidence was conflicting as to the cause of the fire. The prosecution presented evidence tending to show that the fire had been set. The defense introduced evidence tending to show that the fire was accidental and caused by dropping a match or cigarette on the carpet, or by a short in the cigarette lighter.

At the time of the crime, the defendant, Joseph McDonald, was 16 years old, and Robert Johnson was 15 years old. Both of them testified at trial, Johnson as a prosecution witness, and the defendant on his own behalf.

In general outline, the testimony of the two boys substantially agreed. On July 3, 1974, the two boys were part

of a group of girls and boys who spent the evening drinking beer and riding around the city. They returned to the trailer park sometime after midnight. At approximately 1:45 a.m., the girls left in the car in which the group had been riding. At that time the boys were at least partially intoxicated.

The boys saw the victim, Lyle Ford, in his car in the trailer park even before the girls left. He appeared to be drunk and was having trouble lighting a cigarette. After the defendant had an additional beer, he and Johnson had a brief argument with the victim and attempted to get some money from him on the pretext that he had backed into the car of the defendant's brother, but they were unsuccessful.

From this point on the testimony of the two boys, McDonald and Johnson, is in substantial agreement as to what they did together but is sharply divergent and conflicting as to which one suggested or performed certain acts. The boys went to the Johnson trailer, got a shotgun, broke it down, took the shotgun barrel, and went back to the victim's car. The victim was standing behind his car and the trunk was open.

Johnson testified that the defendant hit the victim on the head with the gun barrel, the victim fell into the trunk, and Johnson helped put the rest of the victim's body into the trunk. He testified that the defendant suggested robbing the victim, and that the defendant took the victim's wallet before they closed the trunk lid. He also testified that the defendant deliberately set the car on fire afterward. The defendant testified that Johnson hit the victim and the defendant helped put the victim's body into the trunk. The defendant testified that he did not know Johnson was going to rob the victim until afterward when Johnson gave him $20 from the victim's billfold, and then threw the billfold away. The defendant also testified that Johnson got into the car afterward and used the cigarette lighter to light a cigarette. The defendant did not see Johnson set the car on fire, but testified that he, the defendant, did not set it on fire.

When the boys left the victim's car, they returned to the Johnson trailer, put the shotgun back together, and left it there. They then went to another trailer to get a crowbar

with which to open the trunk, but the woman would not let them in. As they were returning to the Johnson trailer, they could see the victim's car burning. They went into the Johnson trailer, watched the activity around the fire for awhile, and then went to sleep. The shotgun, the victim's wallet, and money taken from defendant's person were all received in evidence.

The jury found the defendant guilty and he was sentenced to life imprisonment.

On November 7, 2003, McDonald filed a motion under the Act seeking DNA testing of exhibits 32 (McDonald's yellow T-shirt) and 33 (his pants) that were received into evidence at his trial. He asserted that DNA testing would reveal that the purported bloodstains on his clothes were actually "red rouge," a metal-polishing substance he used at his place of employment. McDonald also filed a motion for appointment of counsel under the Act.

A hearing was held on the matter on April 2, 2004. No one testified, and only one exhibit was received into evidence: an affidavit from a law clerk in the Douglas County Attorney's office. The law clerk averred that he called the Omaha Police Department's property and records divisions about the shirt and pants and was told that they had been destroyed on an unknown date. Based upon the law clerk's affidavit, the district court overruled McDonald's motions for DNA testing and appointment of counsel. McDonald appeals.

ASSIGNMENTS OF ERROR

In his assignments of error, McDonald claims that (1) the district court erred in overruling his motion for DNA testing and appointment of counsel, (2) exhibits 32 and 33 were destroyed without a court order, (3) his due process rights were violated by the destruction of exhibits 32 and 33, and (4) his due process rights were violated by the suppression of exculpatory evidence by the prosecution.

STANDARD OF REVIEW

[1] A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003).

ANALYSIS

The initial step toward obtaining relief under the Act is for a person in custody to file a motion requesting forensic DNA testing of biological material. See § 29-4120. Forensic DNA testing is available for any biological material that is related to the investigation or prosecution that resulted in the judgment; is in the actual or constructive possession of the state, or others likely to safeguard the integrity of the biological material; and either was not previously subjected to DNA testing or can be retested with more accurate current techniques. See § 29-4120(1). Once these thresholds are met, the court shall order testing upon a determination that such testing was not effectively available at the time of trial, that the biological material has been retained under circumstances likely to safeguard its integrity, and that the testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced. See, § 29-4120(5); *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004).

We affirm the district court's judgment because McDonald apparently agrees that testing was available at the time of trial to determine whether any stains were blood or a polishing substance. See brief for appellant at 6-7 ("[a]lthough DNA testing was not developed at the time of the trial, testing to determine whether or not the red substance was in fact blood was readily available and considered a common, standard practice"). As mentioned, under § 29-4120(5), the court shall order testing upon a determination that such testing was not effectively available at the time of trial. Because such testing *was* available at the time of his trial, McDonald is not entitled to DNA testing 30 years later.

[2] McDonald also argues on appeal that (1) his due process rights were violated under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), when the State failed to inform him of any test results on the shirt and pants and (2) his due process rights were violated under *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984), and *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988), when the State destroyed his shirt and pants. Assuming without deciding that such issues are properly raised in this type of proceeding, the record does not indicate that either

theory was presented to the district court. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *State v. Wester, ante* p. 295, 691 N.W.2d 536 (2005).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
BRIAN A. VERLING, APPELLANT.

694 N.W.2d 632

Filed April 1, 2005. No. S-04-562.

1. **Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to inferences drawn from those facts by the trial judge.
2. **Constitutional Law: Investigative Stops: Motor Vehicles: Animals.** A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.
3. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
4. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** A law enforcement officer is entitled to conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. Such an investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. The officer may also run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are outstanding warrants for any of its occupants. The officer may engage in similar routine questioning of passengers in the vehicle to verify information provided by the driver.
5. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** In order to expand the scope of a traffic stop and continue to detain the person for additional investigation, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the interference.
6. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or hunch, but less than the level of suspicion required for probable cause.

7. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** Whether a police officer has a reasonable suspicion based on sufficient articulable facts requires taking into account the totality of the circumstances.
8. **Investigative Stops: Probable Cause.** A finding of reasonable suspicion must be determined on a case-by-case basis.
9. **Investigative Stops: Motor Vehicles: Probable Cause.** When a determination is made to detain a person during a traffic stop, even where each factor considered independently is consistent with innocent activities, those same factors may amount to reasonable suspicion when considered collectively.
10. **Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress, determinations of reasonable suspicion are made de novo, but findings of historical fact to support reasonable suspicion are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial court.
11. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** Although of limited usefulness, nervousness exhibited by a motorist during a traffic stop may be considered along with other factors in determining whether the officer has reasonable suspicion to expand the scope of the detention.
12. **Investigative Stops: Probable Cause.** After determining that there is reasonable suspicion to support a continued detention, a court must then consider whether the detention was reasonable in the context of an investigative stop.
13. **Constitutional Law: Investigative Stops: Probable Cause.** In determining whether an investigative stop supported by reasonable suspicion is otherwise reasonable under the Fourth Amendment, a court considers both the length of the continued detention and the investigative methods employed therein.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Jeff T. Courtney, of Pfeffer & Courtney, for appellant.

Jon Bruning, Attorney General, and Matthew M. Enenbach for appellee.

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

STEPHAN, J.

Brian A. Verling appeals his conviction in the district court for Douglas County on one count of unlawful possession with intent to deliver a controlled substance. The principal issue on appeal is whether Verling's Fourth Amendment rights were violated when law enforcement officers, alerted by a drug detection dog, searched the rented vehicle he had been operating after issuing a warning citation for speeding. We conclude that Verling's constitutional rights were not violated and affirm his conviction.

FACTS

On February 6, 2003, Stephen W. Worley, a "K-9 unit" police officer, stopped a sport utility vehicle eastbound on Interstate 80 near 72d Street in Omaha, Nebraska, after he observed it passing other vehicles and radar indicated the vehicle was speeding. When he approached the vehicle, he observed the driver and a front seat passenger who he subsequently identified as Verling and Matt Klinicki, respectively. Hearing extremely loud music when Verling rolled down his window, Worley found it odd that Klinicki appeared to be sleeping. He also noticed a "very strong orange or citrus odor" emanating from the vehicle. Worley testified that such odor is commonly used as a method of concealing the scent of illegal drugs.

Worley noticed that Verling's hands were shaking as he produced his driver's license and registration documents. Worley took note of the fact that the vehicle had been rented, knowing from experience that persons who transport unlawful drugs commonly use rental vehicles in order to avoid seizure of their personal vehicles. Although the vehicle had been rented in Arizona, Verling had an Illinois driver's license. This information piqued Worley's suspicion because he knew that unlawful drugs were commonly transported from Arizona to points east, including major cities such as Chicago, Illinois.

At Worley's request, Verling accompanied him to Worley's police cruiser where Worley ran a data check on Verling's license. The data check revealed that Verling had no criminal record and that the vehicle was not stolen.

Worley initiated a conversation with Verling while they were seated in the police cruiser. Verling stated that he and Klinicki had flown from Illinois to Phoenix, Arizona, to visit Verling's girl friend, staying at a hotel while in Phoenix, and that they were driving back to Illinois because he disliked air travel. Worley ascertained that the vehicle had been rented on February 3, 2003, and was due to be returned on February 5. During their conversation, Worley noted that Verling was attempting to "steer the conversation" and that he appeared "increasingly nervous" when Worley inquired about the origin and destination of his journey. Verling asked questions about Worley's drug detection dog and whether Worley knew about a "certain strip club" in Iowa. Worley testified

that he was surprised by Verling's question about the strip club and that based upon his experience, individuals engaged in criminal activity commonly attempt to steer conversations with law enforcement officers away from their activities to some other subject.

While Verling remained seated in the police cruiser, Worley returned to the vehicle where he checked its identification number and briefly conversed with Klinicki, who had remained seated in the vehicle. Klinicki told Worley that they had stayed at Verling's girl friend's house while they were in Arizona. He also stated that they were driving back rather than flying because Klinicki was "dead set" against flying. When questioned by Worley, Klinicki stated that he did not know if Verling was afraid of flying. Worley returned to his cruiser and spoke again with Verling, who denied knowledge of whether Klinicki had a fear of air travel. Worley took note of the conflicting information received from Verling and Klinicki regarding where they had stayed in Phoenix and why they were driving back to Illinois. Worley and Verling then exited the cruiser, and Worley issued Verling a warning citation for speeding. As Verling began to walk away, Worley asked him if there was anything illegal in the vehicle and received a negative response. Worley then asked if he could search the vehicle, and Verling responded affirmatively. Worley approached the vehicle and asked Klinicki to step out so that he could perform the search, informing Klinicki that Verling had given consent. Klinicki responded that he felt they really needed to get going and then looked at Verling. At that point, Verling stated that he thought they should get going as well.

While Worley was in his cruiser with Verling, Officer Travis Oetter arrived at the scene as backup. As Worley was talking to Klinicki about getting out of the vehicle so he could perform the search, Oetter shined his flashlight into the back cargo area of the vehicle. Worley then heard Oetter say, "I can see it in there." The trial court allowed this statement over Verling's hearsay objection. Based on their prior experience working together, Worley understood that Oetter was referring to illegal drugs.

At this point, Worley retrieved his drug detection dog from his cruiser. The dog was trained to alert to the odor of controlled substances, including marijuana, cocaine, methamphetamine, and heroin, and was certified to perform this function. After circling

the vehicle on Worley's command, the dog alerted at the rear of the vehicle. Worley then opened the rear cargo area of the vehicle and found two large, black duffelbags. Green plastic wrap was visible through the top mesh of one of the bags. Worley opened the bags and found five large bundles of marijuana, which he seized.

Verling was arrested at the scene and subsequently charged with unlawful possession with intent to deliver a controlled substance, a Class III felony. He filed a motion to suppress all evidence obtained as a result of the search of his vehicle on grounds that it was conducted without consent or probable cause. After a hearing at which the above facts were adduced, the district court denied the motion. Following a stipulated bench trial at which Verling preserved the issues raised in his motion to suppress, the district court found him guilty of the charged offense and sentenced him to probation for a term of 4 years. Verling perfected this timely appeal, which we removed to our docket pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Verling assigns that the trial court erred in overruling his motion to suppress because (1) there was no concern for officer safety during the traffic stop, (2) there was no need to discover and preserve evidence as the officer issued a warning citation that would not be prosecuted, (3) the search was performed without the necessary probable cause, and (4) the court relied on inadmissible hearsay admitted into evidence over objection.

STANDARD OF REVIEW

[1] When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to inferences drawn from those facts by the trial judge. *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000).

ANALYSIS

During the pendency of this appeal, the U.S. Supreme Court decided *Illinois v. Caballes*, 543 U.S. 405, 125 S. Ct. 834, 160 L.

Ed. 2d 842 (2005), a case involving facts similar in many respects to those presented by this appeal. In *Caballes*, an Illinois state trooper stopped the defendant for speeding. When the trooper radioed the dispatcher to report the stop, a second trooper overheard the transmission and proceeded to the scene with a narcotics detection dog. While the arresting officer was in the process of writing a warning ticket, the second trooper walked his dog around the vehicle. The trooper had no basis for doing so other than the dispatch report that he overheard. The dog alerted at the trunk, and a subsequent search resulted in the seizure of marijuana found inside the trunk. The entire incident lasted less than 10 minutes. The defendant was arrested and convicted of a narcotics offense, but the conviction was reversed by the Illinois Supreme Court, which found error in the denial of the defendant's motion to suppress the evidence seized from the vehicle. *People v. Caballes*, 207 Ill. 2d 504, 802 N.E.2d 202, 280 Ill. Dec. 277 (2003). Relying on its prior decision in *People v. Cox*, 202 Ill. 2d 462, 782 N.E.2d 275, 270 Ill. Dec. 81 (2002), the Illinois Supreme Court held that the police "impermissibly broadened the scope of the traffic stop . . . into a drug investigation because there were no specific and articulable facts to support the use of a canine sniff." *People v. Caballes*, 207 Ill. 2d at 509, 802 N.E.2d at 204, 280 Ill. Dec. at 279.

[2] The U.S. Supreme Court granted certiorari on the question of " '[w]hether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.' " *Illinois v. Caballes*, 125 S. Ct. at 837. In answering this question in the negative, the Court first noted that the duration of the stop in *Caballes* was "entirely justified by the traffic offense and the ordinary inquiries incident to such a stop." 125 S. Ct. at 837. It then reasoned that because a dog sniff reveals only the presence of contraband, and no person has a legitimate expectation of privacy in possessing contraband, no intrusion on the driver's privacy expectations occurred. Thus, the Court concluded that "[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." 125 S. Ct. at 838. The Court distinguished *People v. Cox, supra*, in which a canine

sniff was held impermissible because it occurred "during an unreasonably prolonged traffic stop." *Illinois v. Caballes*, 125 S. Ct. at 837. The Court in *Caballes* noted its assumption that "a similar result would be warranted in this case if the dog sniff had been conducted while respondent was being unlawfully detained." 125 S. Ct. at 837.

[3] As in *Illinois v. Caballes*, the initial stop in this case was lawful because Verling was speeding. A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003). Moreover, when the dog alerted, the police had probable cause to search the vehicle, especially in light of the other circumstances known to Worley. See, *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983); *U.S. v. Bloomfield*, 40 F.3d 910 (8th Cir. 1994); *State v. Staten*, 233 Neb. 800, 448 N.W.2d 152 (1989). The critical inquiry, therefore, is whether Verling was being lawfully detained at the time of the canine sniff which triggered the events leading to his arrest and conviction.

[4,5] A law enforcement officer is entitled to conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. See, *State v. Lee, supra*; *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). Such an investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. *Id.* The officer may also run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are outstanding warrants for any of its occupants. See, *State v. Lee, supra*; *State v. Anderson, supra*; *State v. Gutierrez*, 9 Neb. App. 325, 611 N.W.2d 853 (2000). The officer may engage in similar routine questioning of passengers in the vehicle to verify information provided by the driver. *U.S. v. Johnson*, 58 F.3d 356 (8th Cir. 1995). See, also, *State v. Gutierrez, supra*. However, in order to expand the scope of a traffic stop and continue to detain the person for additional investigation, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the interference. *State v. Lee, supra*; *State v. Anderson, supra*. See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Here, the original purpose of

the traffic stop was completed when Worley issued the warning citation to Verling. See, *State v. Lee, supra*; *State v. Anderson, supra.* Continuing the detention beyond that point was lawful only if Worley had developed a reasonable, articulable suspicion that Verling was involved in illegal activity beyond that which justified the initial stop. See *id.*

[6-10] Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or hunch, but less than the level of suspicion required for probable cause. *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003); *State v. Anderson, supra.* Whether a police officer has a reasonable suspicion based on sufficient articulable facts requires taking into account the totality of the circumstances. *Id.* A finding of reasonable suspicion must be determined on a case-by-case basis. *State v. Lee, supra*; *State v. Mahlin*, 236 Neb. 818, 464 N.W.2d 312 (1991). Even where each factor considered independently is consistent with innocent activities, those same factors may amount to reasonable suspicion when considered collectively. *United States v. Sokolow*, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989); *State v. Lee, supra.* Determinations of reasonable suspicion are made de novo, but findings of historical fact to support reasonable suspicion are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial court. *State v. Lee, supra*; *State v. Kelley*, 265 Neb. 563, 658 N.W.2d 279 (2003).

The information which Worley developed during the traffic stop supported a reasonable suspicion that Verling was transporting illegal drugs. When he initially approached the stopped vehicle, Worley detected a strong citrus odor from within the vehicle, which he knew to be a method used by persons transporting illegal drugs to mask the scent of their cargo. See *U.S. v. Pollington*, 98 F.3d 341 (8th Cir. 1996), and *U.S. v. Bloomfield*, 40 F.3d 910 (8th Cir. 1994) (recognizing distinctive masking odor as factor giving rise to reasonable suspicion of drug transportation). Verling had an Illinois driver's license, but the vehicle had been rented in Arizona. Worley knew from his law enforcement experience that illegal drugs are regularly transported from southwestern states to cities such as Chicago and that rented vehicles are commonly used for this purpose. Thus, when

Verling and Klinicki gave conflicting accounts as to why they were returning to Chicago over land instead of by air, and where they had stayed while in Arizona, it was reasonable for Worley to suspect that they were transporting illegal drugs. See *U.S. v. Johnson*, 58 F.3d 356 (8th Cir. 1995) (determining inconsistent explanations of reason for trip given by driver and passenger justified expansion of inquiry during traffic stop).

[11] Other facts learned during the traffic stop contributed to this suspicion, although to a lesser extent. At the time of the original stop, Worley noticed that Klinicki was feigning sleep despite loud music playing in the vehicle. Worley also noted that Verling seemed increasingly nervous when questioned about the origin and destination of his travel and that he attempted to steer the conversation away from his own activities, a ploy which Worley had previously encountered in dealing with persons involved in criminal activity. Although of limited usefulness, nervousness exhibited by a motorist during a traffic stop may be considered along with other factors in determining whether the officer has reasonable suspicion to expand the scope of the detention. *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000).

Considering the totality of these circumstances, we conclude that Worley had a reasonable, articulable suspicion that Verling was transporting illegal drugs at the time Worley issued the warning citation for speeding. Accordingly, we need not address Verling's contention that the district court erroneously permitted Worley to testify concerning the statement made by Oetter, the backup officer, after the citation was issued but prior to the canine sniff.

[12,13] After determining that there is reasonable suspicion to support a continued detention, a court must then consider whether the detention was reasonable in the context of an investigative stop. *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003). We consider both the length of the continued detention and the investigative methods employed therein. See, *U.S. v. Bloomfield, supra*; *State v. Lee, supra*. Here, the canine sniff was initiated 10 to 15 minutes after the initial stop and approximately 1 minute after issuance of the warning citation. The duration of the extended detention was clearly reasonable, and the use of the drug detection dog during the lawful detention did not violate any

constitutionally protected right. See *Illinois v. Caballes*, 543 U.S. 405, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005).

We are not persuaded by Verling's argument that *Knowles v. Iowa*, 525 U.S. 113, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998), requires a different result. In *Knowles*, the U.S. Supreme Court held that issuance of a traffic citation could not serve as the basis for a warrantless search of the vehicle under the search incident to arrest exception because no arrest had occurred. The State does not contend that there was a search incident to arrest in this case, but, rather, that probable cause was established by a canine sniff conducted during a lawfully extended detention following the issuance of a traffic citation. *Knowles* is therefore inapplicable.

CONCLUSION

In summary, we conclude that the canine sniff which provided probable cause for the vehicle search occurred during a detention which extended beyond the issuance of the traffic citation but was nevertheless lawful because of Worley's reasonable, articulable suspicion that Verling was transporting illegal drugs. Accordingly, the district court did not err in denying Verling's motion to suppress evidence obtained during the search or in receiving such evidence at trial. Finding no error, we affirm.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, v. VICTOR F. TERRY, RESPONDENT.

694 N.W.2d 209

Filed April 1, 2005. No. S-04-750.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

This matter is before the court on the voluntary surrender of license of respondent, Victor F. Terry, filed in case No. S-04-750.

Respondent was admitted to the practice of law in the State of Nebraska on September 24, 1996. At all times relevant hereto, respondent was engaged in the private practice of law in Omaha, Nebraska.

On March 31, 2004, in case No. S-04-312, this court entered an order temporarily suspending respondent from the practice of law. On June 28, formal charges were filed in this case, S-04-750, by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent. Certain facts giving rise to the temporary suspension in case No. S-04-312 serve as a basis for the formal charges. The formal charges set forth five counts that included charges that respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) and (4) through (6), and Canon 9, DR 9-102(A)(1) and (2) and DR 9-102(B)(3) and (4), as well as his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997). Respondent's alleged misconduct included failing to maintain his business and personal accounts separate from his attorney trust account; failing to promptly pay funds to clients that such clients were entitled to receive; engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and failing to respond to written communications from relator.

On August 13, 2004, respondent filed an answer disputing certain of the allegations contained in the formal charges and raising issues of fact. On November 16, respondent filed an amended answer, which again disputed certain of the allegations in the formal charges and raised issues of fact.

A referee was appointed, and an evidentiary hearing was held on the formal charges. On January 5, 2005, the referee filed his report. In his report, the referee found that respondent engaged in conduct violating DR 1-102(A)(1) and (4) through (6); DR 9-102(A)(1) and (2); DR 9-102(B)(3) and (4); and his oath of office as an attorney. The referee recommended that as a result of respondent's conduct, respondent should be disbarred from the practice of law. On January 18, respondent filed an exception to the referee's recommended sanction.

FACTS

On February 22, 2005, respondent filed with this court a voluntary surrender of license, voluntarily surrendering his license

to practice law in the State of Nebraska. In his voluntary surrender of license, respondent in effect stated that he knowingly did not challenge or contest the truth of the allegations in the formal charges that he violated DR 1-102(A)(1) and (4) through (6); DR 9-102(A)(1) and (2); DR 9-102(B)(3) and (4); and his oath of office as an attorney. In addition to surrendering his license, respondent in effect voluntarily consented to the entry of an order of disbarment and waived all proceedings against him in connection with the entry of an order of disbarment.

On February 22, 2005, relator filed a motion for judgment and, pursuant to Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001), sought an order awarding it costs and expenses, in the amount of $794.31, incurred in the prosecution of this case.

ANALYSIS

Neb. Ct. R. of Discipline 15 (rev. 2001) provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to rule 15, we find that respondent has voluntarily surrendered his license to practice law, admitted in writing that he knowingly does not challenge or contest the truth of the formal charges, and waived all proceedings against him in connection therewith. In particular, we find that respondent has not challenged or contested the truth of the allegations that he engaged in conduct that violated DR 1-102(A)(1) and (4) through (6); DR 9-102(A)(1) and (2); DR 9-102(B)(3) and (4); and his oath of office as an attorney and that respondent has consented to the entry of an order of disbarment.

We further find that relator's motion seeking judgment and an award of costs and expenses should be, and hereby is, granted.

CONCLUSION

Upon due consideration of the pleadings in this matter, the court finds that respondent knowingly does not now challenge or contest the truth of the allegations that he engaged in conduct that violated DR 1-102(A)(1) and (4) through (6); DR 9-102(A)(1) and (2); DR 9-102(B)(3) and (4); and his oath of office as an attorney and that his waiver was knowingly made. The court accepts respondent's surrender of his license to practice law, finds that respondent should be disbarred, and hereby enters judgment and orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with Neb. Ct. R. of Discipline 16 (rev. 2004), and upon failure to do so, he shall be subject to punishment for contempt of this court.

Respondent is directed to pay relator's costs and expenses in the amount of $794.31 in accordance with §§ 7-114 and 7-115 and Neb. Ct. R. of Discipline 10(P) (rev. 2003) and 23(B) within 60 days from the date of this opinion.

JUDGMENT OF DISBARMENT.

PHOUMY KAM, APPELLEE,
V. IBP, INC., APPELLANT.

694 N.W.2d 658

Filed April 8, 2005. No. S-03-481.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and INBODY, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals affirmed.

Riko E. Bishop and Joseph F. Bachmann, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., and Bruce M. Smith for appellant.

Rod Rehm, of Rehm, Bennett & Moore, P.C., L.L.O., for appellee.

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

PER CURIAM.

Having reviewed the briefs and record and having heard oral arguments, we conclude on further review that the decision of the Nebraska Court of Appeals in *Kam v. IBP, inc.*, 12 Neb. App. 855, 686 N.W.2d 631 (2004), is correct and accordingly affirm the decision of the Court of Appeals.

AFFIRMED.

DEWAYNE HANCHERA, APPELLANT, V. BOARD OF ADJUSTMENT, RED WILLOW COUNTY, NEBRASKA, APPELLEE.

694 N.W.2d 641

Filed April 8, 2005. No. S-03-1175.

1. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; 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. **Zoning: Evidence: Appeal and Error.** A district court may disturb a decision of a board of adjustment if the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong. In deciding whether a board's decision is supported by the evidence, the district court shall consider any additional evidence it receives.
3. **Zoning: Courts: Appeal and Error.** In appeals involving a decision of a board of adjustment, an appellate court reviews the decision of the district court, and irrespective of whether the district court took additional evidence, the appellate court is to decide if, in reviewing a decision of a board of adjustment, the district court abused its discretion or made an error of law.
4. **Appeal and Error.** Where competent evidence supports a district court's factual findings, an appellate court will not substitute its factual findings for those of the district court.
5. **Jurisdiction: Pleadings.** The failure to verify a petition is not a defect that defeats the jurisdiction of a court.
6. **Zoning: Ordinances: Licenses and Permits.** A new zoning ordinance will not have retroactive effect where a landowner, in good faith reliance on existing zoning, has substantially changed position either by causing substantial construction to be made or by incurring substantial expenses related to construction, or both.
7. **Ordinances: Proof: Time.** The burden is upon the landowner asserting a right of nonconforming use to prove that his use existed prior to the effective date of the ordinance.
8. **Ordinances: Words and Phrases.** "Good faith," as used in nonconforming-use cases, means without knowledge of the pendency of a restrictive ordinance.

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

Steven M. Virgil and Amy Svoboda for appellant.

David A. Jarecke, of Crosby Guenzel, L.L.P., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

DeWayne Hanchera filed a complaint with the Red Willow County Board of Commissioners (Board of Commissioners) concerning Furnas County Farms' undertaking of the erection and operation of confined animal feeding facilities at two locations—commonly known as the Kircher and Geihsler properties. The Board of Commissioners referred the matter to the Red Willow County zoning administrator (Zoning Administrator). On October 31, 2001, the Zoning Administrator filed a memorandum with the Board of Commissioners containing her findings. She found that on the two listed properties,

> both properties had structure prior to October 16, 2001. Concrete was delivered to one property on October 13, 2001 and the other on October 15, 2001. Because of this factor, which I might add has been found to legally be considered substantial construction, both properties fall outside of the Zoning Regulations enacted on October 16, 2001.

Hanchera appealed the decision of the Zoning Administrator to the Red Willow County Board of Adjustment (Board of Adjustment). On February 19, 2002, the Board of Adjustment affirmed the decision of the Zoning Administrator. Hanchera then appealed the Board of Adjustment's decision to the Red Willow County District Court pursuant to Neb. Rev. Stat. § 23-168.04 (Reissue 1997). On September 15, 2003, the district court found that the evidence established that substantial construction to the facilities had begun prior to October 16, 2001. The court found that "the February 19, 2002 determination by the Board of Adjustment of Red Willow County that substantial construction had commenced prior to October 16, 2001 is supported by competent evidence." The court further found that the

decision of the Board of Adjustment was not illegal, arbitrary, or capricious, and the court "wholly and in total affirm[ed] the decision" of the Board of Adjustment.

BACKGROUND

In 2001, Red Willow County was in the process of developing a comprehensive zoning plan and accompanying regulations, which would restrict the construction of confined animal feeding operations. Furnas County Farms was attempting to build a confined animal feeding operation in Red Willow County. Furnas County Farms was aware of the county's development of the comprehensive zoning plan and regulations through public advertisement and participation in public hearings and meetings relating to the regulations.

On September 24, 2001, the Red Willow County Planning Commission held a public meeting at which it reviewed final changes made to the Red Willow County zoning regulations. A motion was made to accept the comprehensive plan and zoning regulations as amended and to recommend their acceptance to the Board of Commissioners.

On September 25, 2001, the Board of Commissioners held a public hearing to consider the adoption of the comprehensive plan and zoning regulations. At that hearing, the Board of Commissioners was advised by a consultant hired by Red Willow County that the comprehensive plan and zoning regulations needed to be published and set forth in a final document incorporating the most recent changes. The consultant recommended that in order to provide sufficient time for publication and time to establish a zoning administrator's office, the effective date of the adoption of the comprehensive plan and zoning regulations should be postponed until October 16. A motion was made to include language in the comprehensive plan and zoning regulations identifying October 16 as the effective date for both regulations. This motion was seconded and passed.

Also on September 25, 2001, the Board of Commissioners passed resolutions Nos. 753 and 754. Resolution No. 753 provides in relevant part that a public hearing was held on September 25 regarding the comprehensive plan and that the comprehensive plan was thereby adopted by Red Willow County. Resolution No. 753 further provides that the resolution will take effect and be in

force from and after the publication of the resolution in book form and by reference in the official Red Willow County newspaper. Resolution No. 754 provides in relevant part that a public hearing was held on September 25 regarding the zoning regulations and that the zoning regulations were thereby adopted by Red Willow County. Resolution No. 754 further provides that the resolution will take effect and be in force from and after the publication of the resolution in book form and by reference in the official Red Willow County newspaper.

Publication for both resolutions took place on October 9, 2001. The front page of the zoning regulations reflects that the zoning regulations were adopted on September 25 and became effective on October 16. The zoning regulations themselves, however, make no reference to an effective date of October 16. Rather, article 14, § 1404, of the zoning regulations provides that the zoning regulations "shall take effect and be in force from and after its passage and publication according to law."

The record reflects that with respect to the Kircher property, Furnas County Farms expended $660 between August 1 and 6, 2001, for easements and a Department of Environmental Quality application fee, $10,844.66 on October 13 for concrete, and $23 on October 15 for an electrical inspection application. The record also reflects that with respect to the Geihsler property, $660 was expended on August 1 for easements and a Department of Environmental Quality application fee, $4,000 was expended on October 5 for a downpayment for the purchase price of the land, $115.25 was expended on October 15 for an electrical inspection application, and $653.10 was expended on October 15 for concrete. In addition, Furnas County Farms made two downpayments to Sand Livestock Systems, Inc., in the amount of $93,553 each on September 30. The purpose of these downpayments is not apparent from the record. The record also reflects that Furnas County Farms did not enter into purchase agreements to purchase the Kircher and Geihsler properties until October 4 and did not become record owners of those properties until December.

ASSIGNMENTS OF ERROR

Hanchera assigns, restated, that (1) the district court erred as a matter of law in finding that the zoning regulations were effective

as of October 16, 2001, and not September 25, 2001, and (2) the record before the district court did not contain evidence showing that a nonconforming use existed prior to the effective date of the zoning regulations becoming effective.

STANDARD OF REVIEW

[1] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; 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. *County of Sarpy v. City of Gretna*, 267 Neb. 943, 678 N.W.2d 740 (2004); *Adam v. City of Hastings*, 267 Neb. 641, 676 N.W.2d 710 (2004).

[2] A district court may disturb the decision of a board of adjustment if the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong. In deciding whether a board's decision is supported by the evidence, the district court shall consider any additional evidence it receives. *Bowman v. City of York*, 240 Neb. 201, 482 N.W.2d 537 (1992).

[3,4] In appeals involving a decision of a board of adjustment, an appellate court reviews the decision of the district court, and irrespective of whether the district court took additional evidence, the appellate court is to decide if, in reviewing a decision of a board of adjustment, the district court abused its discretion or made an error of law. *Id.* Where competent evidence supports the district court's factual findings, the appellate court will not substitute its factual findings for those of the district court. *Id.*

ANALYSIS

STANDING

The Board of Adjustment argues that Hanchera does not have standing to bring the present action because his second amended petition, the operative petition, was not duly verified as required by § 23-168.04. Therefore, before embarking on our analysis of Hanchera's appeal, we must determine whether Hanchera's failure to verify his second amended petition deprives this court of jurisdiction. We conclude that it does not.

[5] Section 23-168.04 provides in relevant part that "[a]ny person or persons, jointly or severally, aggrieved by any decision of

the board of adjustment . . . may present to the district court for the county a petition, duly verified, setting forth that such decision is illegal, in whole or in part, and specifying the grounds of the illegality." We have previously held that verification " 'is a purely procedural direction which is formal but does not go to the essence of the law with regard to requirements for jurisdiction of courts.' " *In re Interest of L.D. et al.*, 224 Neb. 249, 259, 398 N.W.2d 91, 98 (1986). The failure to verify a petition is not a defect that defeats the jurisdiction of a court. *Hiatt v. Menendez*, 157 Neb. 914, 62 N.W.2d 123 (1954). Thus, we conclude that Hanchera's failure to verify his second amended petition does not deprive this court of jurisdiction.

Whether Furnas County Farms Acquired a Vested Interest in a Nonconforming Use

Hanchera contends in his second assignment of error that the record does not support a finding that Furnas County Farms established a nonconforming use in the properties prior to the effective date of the Red Willow County zoning regulations. We agree.

[6,7] A new zoning ordinance will not have retroactive effect where a landowner, in good faith reliance on existing zoning, has substantially changed position either by causing substantial construction to be made or by incurring substantial expenses related to construction, or both. *Whitehead Oil Co. v. City of Lincoln*, 234 Neb. 527, 451 N.W.2d 702 (1990). See *Thayer v. Town of Tilton*, 861 A.2d 800 (N.H. 2004). The burden is upon the landowner asserting a right of nonconforming use to prove that his use existed prior to the effective date of the ordinance. *City of Syracuse v. Farmers Elevator, Inc.*, 182 Neb 783, 157 N.W.2d 394 (1968); 1 Kenneth H. Young, Anderson's American Law of Zoning § 6.10 (4th ed. 1996).

[8] While we have not previously had occasion to determine when good faith is lacking in a landowner's attempt at establishing a vested interest in a nonconforming use, other courts have done so. " 'Good faith,' as it is used in the nonconforming-use cases . . . means without knowledge of the pendency of a restrictive ordinance." 1 Young, *supra*, § 6.34 at 595. In *Town of Hillsborough v. Smith*, 276 N.C. 48, 56, 170 S.E.2d 904, 910 (1969), the North Carolina Supreme Court stated:

> "[G]ood faith" . . . is not present when the landowner, with knowledge that the adoption of a zoning ordinance is imminent and that, if adopted, it will forbid his proposed construction and use of the land, hastens, in a race with the town commissioners, to make expenditures or incur obligations before the town can take its contemplated action so as to avoid what would otherwise be the effect of the ordinance upon him.

A number of courts have refused to find the existence of a nonconforming use where construction was commenced without good faith, in the sense that it was commenced with knowledge of the pendency of an ordinance which prohibited such construction. For example, in *Biggs v. Town of Sandwich*, 124 N.H. 421, 470 A.2d 928 (1984), the court held that good faith was lacking where the landowners were apprised of the proposed zoning changes prior to the initial construction.

In *City of Tucson v. Arizona Mortuary*, 34 Ariz. 495, 272 P. 923 (1928), the court rejected the contention that a vested right had been obtained where, prior to the completion of any material amount of construction, the landowner had been advised that a restrictive ordinance was pending. The court reasoned that the landowner "may not now be heard to set up any loss to it which arose from its actions *after* it had knowledge that the ordinance was being considered." (Emphasis in original.) *Id.* at 511, 272 P. at 929.

In *Tim Thompson, Inc. v. Village of Hinsdale*, 247 Ill. App. 3d 863, 617 N.E.2d 1227, 187 Ill. Dec. 506 (1993), the court refused to find that a vested interest in the continuation of a prior zoning classification had been established where there was constructive notice of the proposed comprehensive zoning code and the majority of construction expenditures followed further notice and the enactment of the zoning code. See, also, *1350 Lake Shore Associates v. Mazur-Berg*, 339 Ill. App. 3d 618, 791 N.E.2d 60, 274 Ill. Dec. 264 (2003) (holding that property owner could not be said to have relied in good faith on probability that zoning certificate or building permit would be issued pursuant to current zoning once property owner was aware that amendatory zoning ordinance was to be introduced).

CONCLUSION

The record in the instant case reveals that Furnas County Farms was aware that Red Willow County was in the process of developing regulations which would hinder, if not prohibit, its confined animal feeding operations. Furnas County Farms was also aware that such regulations had been adopted by the Board of Commissioners on September 25, 2001, but were not considered effective until October 16. It is obvious from the actions and statements of Furnas County Farms and its representatives that its construction activities, all of which took place after the passage of the zoning regulations on September 25, were an attempt to circumvent the applicability of the regulations. Under these facts, we cannot say that Furnas County Farms' actions were in good faith. We therefore find that Furnas County Farms did not obtain vested interests in either the Kircher or Geihsler properties and that the properties are subject to the Red Willow County zoning regulations. Accordingly, we reverse the decision of the district court and remand the cause with directions to the district court to remand the cause to the Board of Adjustment to reverse its decision.

Because we find that Furnas County Farms did not obtain a vested interest in the properties because it lacked good faith, we need not decide Hanchera's remaining assignment of error, specifically, whether the district court erred in finding the effective date of the zoning regulations was October 16, 2001. See *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003) (stating that appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it).

REVERSED AND REMANDED WITH DIRECTIONS.

HENDRY, C.J., participating on briefs.

ALLIED MUTUAL INSURANCE COMPANY, APPELLANT AND CROSS-APPELLEE, V. CITY OF LINCOLN, APPELLEE AND CROSS-APPELLANT, AND GENESIS INSURANCE COMPANY, APPELLEE AND CROSS-APPELLEE.

694 N.W.2d 832

Filed April 8, 2005. No. S-03-1414.

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. **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. **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. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
6. **Summary Judgment: Motions for New Trial: Time: Appeal and Error.** A motion purportedly seeking a new trial is not a proper motion to file after a motion for summary judgment is sustained and does not toll the time for filing a notice of appeal.
7. **Pleadings: Judgments.** A postjudgment motion must be reviewed based on the relief sought by the motion, not based upon the title of the motion. When the statutory basis for a motion challenging a judgment on the merits is unclear, the motion may be treated as a motion to alter or amend the judgment.
8. ____: ____. A motion for reconsideration is treated as a motion to alter or amend the judgment pursuant to Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002).
9. **Pleadings: Judgments: Time: Appeal and Error.** In cases involving a motion to alter or amend the judgment, a critical factor is whether the motion was filed within 10 days of the final order, because a timely motion under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002) tolls the time for filing a notice of appeal.

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

Thomas B. Wood, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellant.

Dana W. Roper, Lincoln City Attorney, and Ernest R. Peo for appellee City of Lincoln.

Robert T. Grimit and Andrew K. Smith, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee Genesis Insurance Company.

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

MCCORMACK, J.

NATURE OF CASE

Allied Mutual Insurance Company (Allied), an insurer for the City of Lincoln, filed a declaratory judgment action to construe and determine the validity of insurance contracts written by Allied and Genesis Insurance Company (Genesis) as insurers for the city. The city filed a cross-petition in the action and sought declaratory judgment that the Allied policy and the public entity policy issued by Genesis extended coverage for the city's liability. The claims against the city were based upon an automobile accident that occurred in March 1998, wherein Sarah Cockson was injured and Laura Cockson was killed when the car in which they were passengers collided with another automobile driven by Jeffrey Ireland. At the time of the accident, the automobile operated by Ireland was being pursued by an officer with the Lincoln Police Department. All parties moved for summary judgment. The district court entered summary judgment in favor of Genesis and denied summary judgment for Allied and the city. Allied appeals, and the city cross-appeals.

BACKGROUND

In 1999, Sarah Cockson, in her individual capacity, and Robert Cockson, as personal representative of the estate of Laura Cockson, filed a claim against the city under Neb. Rev. Stat. § 13-911 (Reissue 1997) of the Political Subdivisions Tort Claims Act, alleging that the accident was proximately caused by the actions of the police officer during the vehicular pursuit.

In 2000, a settlement agreement was reached between the city and the Cocksons. The city then demanded that Allied and Genesis indemnify it pursuant to the insurance policies issued by each insurer to the city. Allied had issued the city a business automobile policy for September 1, 1997, through September 1, 1998, and Genesis had issued the city a public entity policy for

that same time period. Genesis denied that its policy provided coverage for the city's liability. Genesis claimed that its policy provided automobile hazard coverage only for those losses emanating out of the StarTran public transportation system. Allied did not concede that its policy provided coverage, but loaned the city $306,682 to use as a partial payment to satisfy the settlement. The receipt for Allied's loan provides that the city will repay amounts loaned by Allied in the event that a court finds that the Allied policy did not provide coverage for the injuries sustained by the Cocksons as a result of the accident.

Allied's policy provides, in relevant part:

> SECTION II - LIABILITY COVERAGE
>
> A. COVERAGE
>
> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".
>
> . . . .
>
> B. EXCLUSIONS
>
> This insurance does not apply to any of the following:
>
> 1. EXPECTED OR INTENDED INJURY
>
> "Bodily injury" or "property damage" expected or intended from the standpoint of the "insured".

Endorsement No. 11 of the Genesis policy contains the following limitation: "Coverage provided by this policy within the automobile hazard, including no-fault (personal injury protection), uninsured motorists and underinsured motorists coverages, is limited to only those autos owned, operated, used, maintained or repaired, including loading or unloading, by StarTran."

All parties filed motions for summary judgment. On May 30, 2002, the district court sustained Genesis' motion, but denied Allied's motion. The district court did not address the city's motion at that time. In its order, the district court found that under endorsement No. 11 of the Genesis policy, the policy clearly provides coverage for automobile hazards, but the coverage is limited to those automobiles owned, operated, used, maintained, or repaired by StarTran. Since the claim against the city arose out of the use of a motor vehicle by the Lincoln Police

Department, the exclusionary provision of the policy applied, and the court granted Genesis' motion for summary judgment. With regard to Allied's motion for summary judgment, the court stated that Allied contends that the coverage does not apply because the Cocksons' injuries did not arise out of the operation, ownership, and maintenance of an insured vehicle (the police car) because the collision was between the Cocksons' vehicle and another vehicle. Allied further claimed that the officer's continuance of the pursuit was an intentional act. The court found that the officer did act intentionally in continuing the chase and engaging his vehicle's lights and siren, but whether his actions amounted to expected or intended bodily injury or property damage from the standpoint of the insured, as required by Allied's policy exclusion, remained a genuine issue of material fact. The court, therefore, denied Allied's motion for summary judgment. The district court's order did not expressly direct the entry of final judgment as to any of the parties and did not expressly determine that there was no just reason for delay of an appeal.

Allied and the city filed notices of appeal on June 28 and July 1, 2002, respectively. Thereafter, on October 24, the city filed with the Nebraska Court of Appeals a motion to dismiss Allied's appeal for lack of jurisdiction. The city alleged that the district court's May 30 order was not a final judgment because it did not adjudicate the rights and liabilities of all the parties and the order did not direct the entry of final judgment pursuant to Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2000). Citing *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (2000), the Court of Appeals sustained the city's motion to dismiss. See *Allied Mut. Ins. Co. v. City of Lincoln*, 11 Neb. App. xxviii (No. A-02-747, Jan. 2, 2003). In *Scottsdale Ins. Co.*, we addressed whether a city's insurers were required to indemnify the city for a judgment entered against it in a motorist's personal injury action for injuries the motorist sustained when the car in which she was riding was struck by a car that was being pursued by a city police officer. We held that an order granting one insurer's motion for summary judgment and denying another insurer's motion for summary judgment in the declaratory judgment action was not a final, appealable order, requiring dismissal of the city's appeal and one insurer's cross-appeal where the order did not adjudicate rights

and liabilities of the parties to the action and the order made no express determinations. An exception to this rule exists, however, when multiple parties are involved in a claim. In such cases, a court may direct the entry of final judgment as to one or more but fewer than all of the claims or parties upon an express determination that there is no just reason for delay and upon an express direction for the entry of summary judgment. See § 25-1315. In its May 30 order, the district court did not expressly direct the entry of final judgment, nor did the court make a determination that there was no just reason for delay.

On March 25, 2003, following the dismissal of Allied's appeal by the Court of Appeals, Genesis filed a motion with the district court requesting that the court find the judgment entered on May 30, 2002, to be final pursuant to § 25-1315(1). The district court sustained Genesis' motion and, on August 14, 2003, entered an order directing that the May 30, 2002, judgment be entered as a final judgment as to Allied and as to the city's claims against Genesis. The district court also denied the city's motion for summary judgment in a separate order entered on that date. On August 25, 2003, Allied filed a motion for a new trial. Allied's motion was denied by the district court on November 13, and Allied filed its notice of appeal within 30 days of the district court's order. The city cross-appeals.

ASSIGNMENTS OF ERROR

Allied assigns seven errors, all of which can be consolidated into the following two restated errors: The district court erred by (1) determining that endorsement No. 11 of the Genesis insurance policy was an exclusion of coverage entitling Genesis to summary judgment and (2) failing to grant summary judgment in favor of Allied and finding that the motor vehicle pursuit by the Lincoln Police Department was not an intentional act and that the injuries were not intended or expected. The city, as cross-appellant, assigns two errors: The district court erred in (1) not determining that the police officer's action in apprehending Ireland, rather than the vehicular pursuit, constituted the efficient proximate cause of the injuries suffered by the Cocksons and (2) determining that endorsement No. 11 of the Genesis policy limited coverage for automobile hazards to StarTran vehicles.

STANDARD 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. *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003).

[2] 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. *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004).

[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. *Chief Indus. v. Great Northern Ins. Co.*, 268 Neb. 450, 683 N.W.2d 374 (2004); *Hall v. Auto-Owners Ins. Co.*, 265 Neb. 716, 658 N.W.2d 711 (2003).

ANALYSIS

JURISDICTION

[4,5] 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. *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (2000). 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. *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004). Whether we have jurisdiction over the present appeal depends upon whether the district court's May 30, 2002, order or August 14, 2003, order is the final order.

Confusion arises over whether the May 30, 2002, order was the final order, because the district court, in its August 14, 2003, order, directed that its May 30 order "is and should be entered as a final judgment as to the claims of [Allied] and the City of Lincoln against Genesis." Genesis contends that the district court's August 14 order merely recognized that a final order had been entered on May 30, 2002, and that no reason existed for further delay of an appeal on that order. Under Genesis' logic, the

May 30 order was the final order; consequently, Allied's current appeal is untimely because it failed to commence an appeal within 30 days of the entry of that order. See Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004). We disagree with Genesis and find instead that the district court's August 14, 2003, order was the final, appealable order.

In *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 602 N.W.2d 465 (1999), we addressed a situation similar to the one presented in the instant case. In *Moore*, we had to determine whether an August 1998 order was the final order despite that order's declaration that a July 1998 order was the final order. We found that despite the fact that the district court had utilized its August order to label its July order as the final order, the July order was not final. At the time the July order was entered, it was not a final, appealable order. The August order, on the other hand, was the final order—it had the effect of dismissing the action. With regard to the August order's reference to the July order, we read the reference as incorporating the reasoning of the earlier order into the final order entered in August 1998.

In the present case, the May 30, 2002, order did not make the express findings required by § 25-1315. As a result, that order is not a final, appealable order, as was determined by the Court of Appeals. As we did in *State ex rel. Stenberg v. Moore, supra*, we find that the August 14, 2003, order was the final order, even though it purported to designate the May 30, 2002, order as the final order. It was the August 14, 2003, order that made the express determinations required by § 25-1315 that judgment in favor of Genesis was final and that no just reason for delay existed. Thus it was that order which had the effect of making the final determination of Genesis' rights and obligations in this action. As to the district court's reference to the May 30, 2002, order, we conclude, as we did in *State ex rel. Stenberg v. Moore, supra*, that the August 14, 2003, order merely incorporated the reasoning of the previous order.

[6,7] Because the August 14, 2003, order was the final order, Allied had 30 days to appeal that order, unless a proper motion was filed which tolled the appeal time. See § 25-1912(1). Following the district court's August 14 order, Allied filed a document entitled "Motion for New Trial" which purportedly sought

a new trial. As our recent jurisprudence makes clear, a motion purportedly seeking a new trial is not a proper motion to file after a motion for summary judgment is sustained and does not toll the time for filing a notice of appeal. See *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004). However, a postjudgment motion must be reviewed based on the relief sought by the motion, not based upon the title of the motion. When the statutory basis for a motion challenging a judgment on the merits is unclear, the motion may be treated as a motion to alter or amend the judgment. *Id.*

[8,9] Allied's motion asked the district court to grant a new trial based upon an irregularity in the proceedings of the court, an insufficiency of evidence, and an error of law. This motion is similar to a motion for reconsideration, which is treated as a motion to alter or amend the judgment pursuant to Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002). *Woodhouse Ford v. Laflan, supra.* In cases involving a motion to alter or amend the judgment, a critical factor is whether the motion was filed within 10 days of the final order, because a timely motion under § 25-1329 tolls the time for filing a notice of appeal. *Woodhouse Ford v. Laflan, supra.* Allied's motion was timely filed; therefore, we have jurisdiction over this appeal.

Summary Judgment in Favor of Genesis

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. *Woodhouse Ford v. Laflan, supra.*

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 trial court. *Chief Indus. v. Great Northern Ins. Co.*, 268 Neb. 450, 683 N.W.2d 374 (2004); *Hall v. Auto-Owners Ins. Co.*, 265 Neb. 716, 658 N.W.2d 711 (2003).

Under the public entity insurance policy provided by Genesis, Genesis agreed to indemnify the city for losses the city was obligated to pay as a result of bodily injury, personal injury, advertising injury, or property damage covered by the policy. The

coverage afforded by the Genesis policy was limited by endorsement No. 11, which states that "[c]overage provided by this policy within the automobile hazard, including no-fault (personal injury protection), uninsured motorists and underinsured motorists coverages, is limited to only those autos owned, operated, used, maintained or repaired, including loading or unloading, by StarTran." Automobile hazard is defined in section IV of the Genesis policy as "liability arising out of the ownership, use (including maintenance or repair), loading or unloading of any auto."

We conclude that the city's liability arose out of the use of the city's police vehicle. Because it is clear from endorsement No. 11 that the Genesis insurance policy does not afford coverage for liability arising out of the use of city police vehicles, we conclude that the district court properly granted Genesis' motion for summary judgment.

Allied's Motion for Summary Judgment

Allied also contends on appeal as its second assignment of error that the district court erred in denying its motion for summary judgment. In its August 14, 2003, order, the district court made an express finding that judgment was final as to the claims of Allied and the city against Genesis. The court did not make an express determination that judgment was final as to any claims against Allied. Consequently, there is no final order under § 25-1315, and as a result, we do not have jurisdiction to address the denial of Allied's motion for summary judgment.

CONCLUSION

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

Affirmed.

Hendry, C.J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JOHN I. SUTTON, RESPONDENT.

694 N.W.2d 647

Filed April 8, 2005. No. S-04-649.

1. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
2. ____. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
3. ____. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires consideration of any aggravating or mitigating factors.
4. ____. An attorney's failure to respond to inquiries and requests for information from the Counsel for Discipline is viewed as an important matter and as a threat to the credibility of attorney disciplinary proceedings.
5. ____. Responding to disciplinary complaints in an untimely manner and ignoring requests for information from the Counsel for Discipline of the Nebraska Supreme Court indicate a disrespect for our disciplinary jurisdiction and a lack of concern for the protection of the public, the profession, and the administration of justice.

Original action. Judgment of suspension.

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

No appearance for respondent.

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

PER CURIAM.

INTRODUCTION

On May 27, 2004, formal charges were filed by the State of Nebraska on behalf of the Counsel for Discipline of the Nebraska Supreme Court, as relator, against the respondent, John I. Sutton, who was admitted to the practice of law in the State of Nebraska on September 12, 1979, and who is currently suspended from the practice of law. See *State ex rel. Counsel for Dis. v. Sutton*, 268 Neb. 485, 684 N.W.2d 23 (2004) (*Sutton I*). After Sutton failed to file an answer to the formal charges in the present case, we

sustained the relator's motion for judgment on the pleadings and must now determine the appropriate sanction.

STATEMENT OF FACTS

The formal charges state that Sutton practiced law in Omaha, Nebraska. In July 2002, Ross Stroud retained Sutton to represent him in a dissolution of marriage case and protection order violation case. On February 13, 2004, Stroud filed a grievance against Sutton with the Counsel for Discipline, alleging that Sutton neglected his cases. On February 17, the Counsel for Discipline mailed a notice of the grievance to Sutton by certified mail and instructed him to respond in writing within 15 working days. Sutton failed to file a written response within the time permitted. Although a second letter was sent in April 2004, again directing Sutton to file a response to Stroud's grievance, Sutton has yet to file a response.

Formal charges were filed against Sutton on May 27, 2004, alleging that his conduct violated his oath of office as an attorney and Canon 1, DR 1-102(A)(1) and (5), and Canon 6, DR 6-101(A)(3), of the Code of Professional Responsibility. Sutton was personally served with the charges on June 7, and the sheriff's return of service was filed on June 10. Sutton failed to file an answer or otherwise plead in this matter.

Accordingly, the Counsel for Discipline filed a motion for judgment on the pleadings on July 9, 2004. We granted the motion on September 15, and thus, the sole issue before us is the appropriate sanction.

ANALYSIS

Neb. Ct. R. of Discipline 9(E) (rev. 2001) states, in relevant part:

> Upon receipt of notice of a Grievance from the Counsel for Discipline, the member against whom the Grievance is directed shall prepare and submit to the Counsel for Discipline, in writing, within fifteen working days of receipt of such notice, an appropriate response to the Grievance, or a response stating that the member refuses to answer substantively and explicitly asserting constitutional or other grounds therefor.

Further, Neb. Ct. R. of Discipline 3(B) (rev. 2001) provides:

> Acts or omissions by a member, individually or in concert with any other person or persons, which violate the Code of Professional Responsibility as adopted by the Court, the oath, or the provisions of these rules, shall be grounds for discipline whether the act or omission occurred in the course of an attorney-client relationship or otherwise.

[1,2] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Widtfeldt, ante* p. 289, 691 N.W.2d 531 (2005). Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case. *State ex rel. Counsel for Dis. v. Wintroub*, 267 Neb. 872, 678 N.W.2d 103 (2004).

[3] The determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors. *State ex rel. Special Counsel for Dis. v. Fellman*, 267 Neb. 838, 678 N.W.2d 491 (2004). We are, unfortunately, presented with a very sparse record in the present case. Because Sutton neither responded to the Counsel for Discipline regarding Stroud's grievance nor filed a pleading in this matter, we have no basis for considering any factors that mitigate in favor of Sutton. By the same token, we do not have a record that informs us of the nature and extent of Sutton's neglect toward Stroud as we consider the imposition of a sanction.

We do know that Sutton was suspended from the practice of law on July 30, 2004, for a period of 1 year, followed by probation for a period of 2 years during which Sutton was to be supervised by another attorney and continue treatment as directed by his physicians, psychiatrists, and substance abuse counselor. See *Sutton I*. The suspension resulted from behavior that occurred between March and November 2002 when Sutton (1) neglected legal matters for a client, (2) failed to deposit client funds into his attorney trust account, (3) failed to return unearned funds to the

client, and (4) practiced law while his license was temporarily suspended for nonpayment of bar association dues. See *id.* The referee determined that during this period of time in 2002, Sutton abused prescription medications and was suffering from depression and certain other medical conditions. We also note that Sutton has received a prior private reprimand for conduct similar to that which occurred in each of these cases.

[4,5] We consider an attorney's failure to respond to inquiries and requests for information from the Counsel for Discipline as an important matter and as a threat to the credibility of attorney disciplinary proceedings. See *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000). Responding to disciplinary complaints in an untimely manner and repeatedly ignoring requests for information from the Counsel for Discipline of the Nebraska Supreme Court indicate a disrespect for our disciplinary jurisdiction and a lack of concern for the protection of the public, the profession, and the administration of justice. See *id.*

Ordinarily, cumulative acts of attorney misconduct and repeated disregard of requests for information from the Counsel for Discipline will appropriately lead to disbarment—and, in fact, may ultimately end in disbarment for Sutton. However, given the lack of information that we have regarding (1) the nature and extent of the present misconduct and (2) Sutton's present or future fitness to practice law, in light of Sutton's previously asserted mental and physical health problems that existed during the present allegation of neglect, we are not firmly convinced that disbarment at this time is necessary in order to protect the public or maintain the reputation of the bar as a whole. Instead, we believe that an indefinite suspension is more appropriate at this juncture and will serve as adequate protection for the public. Should Sutton apply for reinstatement in the future, he will need to fully answer for the current charges of neglect and failing to respond to the Counsel for Discipline, and demonstrate a present and future fitness to practice law subject to the conditions set forth in *Sutton I.*

CONCLUSION

We previously granted the relator's motion for judgment on the pleadings, finding by clear and convincing evidence that Sutton

violated DR 1-102(A)(1) and (5), DR 6-101(A)(3), and his oath of office as an attorney. It is the judgment of this court that Sutton should be and is hereby suspended from the practice of law indefinitely, effective immediately. Should Sutton apply for reinstatement, he will be required to fully answer for the current charges of neglect and failing to respond to the Counsel for Discipline, and demonstrate a present and future fitness to practice law subject to the terms and conditions outlined above. Sutton shall comply with Neb. Ct. R. of Discipline 16 (rev. 2004), and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, Sutton is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 10(P) (rev. 2003) and 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION.

McCORMACK, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
VYTAS A. JONUSAS, APPELLANT.

694 N.W.2d 651

Filed April 8, 2005. No. S-04-762.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
3. **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 made by the court below.
4. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Lawrence G. Whelan for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

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

WRIGHT, J.

NATURE OF CASE

Vytas A. Jonusas was charged with theft by deception, in violation of Neb. Rev. Stat. § 28-512 (Reissue 1995). The Douglas County District Court convicted Jonusas of theft by unlawful taking or disposition pursuant to Neb. Rev. Stat. § 28-511(1) (Reissue 1995), and he appealed.

SCOPE OF REVIEW

[1] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *State v. Pathod, ante* p. 155, 690 N.W.2d 784 (2005).

[2] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Delgado, ante* p. 141, 690 N.W.2d 787 (2005).

FACTS

In early 1999, Michael Young and his wife became interested in purchasing a bar and grill in Elkhorn, Nebraska. Jonusas, who worked for Pinnacle Business Brokerage (Pinnacle), acted as the broker for the deal between the Youngs and the owner of the bar and grill. After certain negotiations, the Youngs wrote a check to Pinnacle for $5,000 as a downpayment. It was Michael Young's understanding that the money was to be held in escrow.

On June 1, 1999, the parties signed a purchase agreement stating that the purchase price was to be $70,000. The Youngs wrote Pinnacle a check for an additional $45,000 and agreed to sign a note on the remaining $20,000. The Youngs' payment of $50,000 was to be held in escrow by Pinnacle because the agreement was contingent upon the Youngs obtaining a liquor license. It was

agreed that the $50,000 would be returned in the event that their application was not approved.

The Youngs' liquor license application was prepared by an employee of Pinnacle's, who contacted Michael Young and asked him various questions, including whether he or his wife had any felony convictions. Michael Young responded that they did not. Jonusas accompanied the Youngs to Lincoln when they filed their application, and on the return trip, Michael Young mentioned that his wife could not drive. It then came to light that the Youngs had previous convictions for driving while under the influence. Jonusas told the Youngs they needed to report this information on their liquor license application. The Youngs sent in an amendment to their application, but the application was denied. They appealed this decision and were again denied. The Youngs never received a liquor license.

In October 1999, Michael Young requested the return of the $50,000. Jonusas ignored this request. Michael Young contacted Jonusas again in December and demanded the return of the money. Jonusas stated that he could not return it without a release from the seller or a court order. Following a court order directing the return of the money, Jonusas agreed to its return. In July 2000, Michael Young again spoke with Jonusas about the return of the money. During this conversation, Jonusas revealed that he had invested the money and lost it all. At the time of trial, the $50,000 had not been returned to the Youngs.

Jonusas was charged by information with theft by deception pursuant to § 28-512. He pleaded not guilty, and a bench trial was held.

A detective from the Omaha Police Department, who had been assigned to investigate the matter, testified that Jonusas claimed that the Youngs had lied to him and that he believed they had forfeited the $50,000 by trying to "cheat him." Jonusas admitted that he kept the money and never put it into an escrow account.

During the State's closing argument, the question arose whether it would be proper for the district court to find Jonusas guilty of theft by unlawful taking or disposition rather than theft by deception. In his closing argument, Jonusas' counsel argued that such a finding would be improper.

The district court found Jonusas guilty, stating:

> [T]he Court just found you guilty . . . under [§] 28-511, Subsection 1, which is theft by unlawful conduct. Basically, what that statutes [sic] says is, if you take property of someone with the intent to withhold it then you're guilty of this, and what I found was . . . that you were to keep $50,000 in an escrow for this bar. That you did not follow the escrow agreement, but rather you put it at risk investing it. And as a result, by putting it at risk and also not returning that property to the lawful owner, you are guilty of theft by unlawful conduct.

While the court referred to § 28-511(1) as describing "theft by unlawful conduct," the statute actually refers to theft by unlawful taking or disposition.

At sentencing, the district court stated that Jonusas had been found guilty of "theft by deception." Jonusas' counsel did not object to the court's statement, and Jonusas was sentenced to 60 months' probation. At the conclusion of the probation, Jonusas was to serve 180 days in prison, unless the prison term was waived by the court. He was also ordered to pay restitution.

ASSIGNMENTS OF ERROR

Jonusas argues that the district court erred in (1) failing to clearly state the crime of which he was convicted, (2) violating his constitutional right to a fair trial, (3) finding sufficient evidence to support a conviction of theft by deception, (4) finding sufficient evidence to support a conviction of theft by unlawful taking or disposition, and (5) overruling his motion for directed verdict.

ANALYSIS

CONSOLIDATION OF THEFT OFFENSES

Jonusas claims the district court erred in failing to clearly set forth the crime of which he was convicted. It is undisputed that Jonusas was charged with theft by deception, but at the conclusion of the trial, the court found Jonusas guilty of violating § 28-511(1), theft by unlawful taking or disposition.

[3] The issue presented is whether a defendant may be charged with theft by one manner and subsequently convicted of theft by another manner. This is a question of law, which we analyze independently of the determination made by the trial court. When

dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

Neb. Rev. Stat. § 28-510 (Reissue 1995) provides:

> Conduct denominated theft in [§§] 28-509 to 28-518 constitutes a single offense embracing the separated offenses heretofore known as larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like. An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under [§§] 28-509 to 28-518, notwithstanding the specification of a different manner in the indictment or information, subject only to the power of the court to [e]nsure fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

Section 28-510 mirrors A.L.I., Model Penal Code and Commentaries § 223.1(1) (1980). The purpose of Model Penal Code § 223.1 is described in comment 1 at 133:

> The purpose of consolidation, therefore, is not to avoid the need to confront substantive difficulties in the definition of theft offenses. The appropriate objective is to avoid procedural problems. . . . The real problem arises from a defendant's claim that he did not misappropriate the property by the means alleged but in fact misappropriated the property by some other means and from the combination of such a claim with the procedural rule that a defendant who is charged with one offense cannot be convicted by proving another.

Section 28-510 has created a single offense of "theft" which may be committed by the violation of any one of the following sections. See, also, Model Penal Code and Commentaries, *supra*, comment 2(c). Neb. Rev. Stat. § 28-509 (Reissue 1995) defines the terms used in conjunction with the offense of theft. Neb. Rev. Stat. §§ 28-511 to 28-517 (Reissue 1995 & Cum. Supp. 2004) each set forth a different manner by which theft may be committed. Neb. Rev. Stat. § 28-518 (Reissue 1995) describes the grading of theft crimes. The consolidation statute, § 28-510, provides that the offense of theft may be supported by evidence that it was

committed via any manner described in §§ 28-509 to 28-517 regardless of the manner by which the information alleges the theft occurred. The defendant is thus foreclosed from defending on the basis that his conduct supported one type of theft but that he was charged with another. See Model Penal Code and Commentaries, *supra*.

Jonusas asserts that his being charged with theft by deception and being convicted of theft by unlawful taking or disposition was a violation of his due process rights. He claims he was not given notice that he was being tried for theft by unlawful taking or disposition when he was charged with theft by deception. We conclude that this argument is without merit.

A plain reading of § 28-510 reveals that the State may charge a defendant with theft by deception but obtain a conviction of theft by unlawful taking or disposition. The phrase "any manner that would be theft under [§§] 28-509 to 28-518" includes a conviction of theft by unlawful taking or disposition. See § 28-510.

In effect, § 28-510 has subsumed various forms of unlawful acquisitive behavior into a single offense of theft which may be committed by taking part in any one of several activities described in §§ 28-509 to 28-517. The unifying concept in all these crimes is that each involves the involuntary transfer of property. In each case, the actor appropriates the property of the victim without his or her consent or with a consent that was obtained by fraud or coercion. See Model Penal Code and Commentaries, *supra*, comment 2.

Prejudice by Lack of Fair Notice or by Surprise

In his assignments of error, Jonusas asserts he was prejudiced by lack of fair notice or by surprise. At Jonusas' trial, the first mention of the crime of theft by unlawful taking or disposition occurred during the State's closing argument. Jonusas' counsel was questioned by the district court regarding the possibility of a conviction of theft by unlawful taking or disposition. During this questioning, defense counsel could have requested the appropriate relief based on the circumstances presented if he believed that Jonusas was prejudiced by this possibility. The court has power to ensure a fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise. See § 28-510.

We conclude that Jonusas has not shown that he was prejudiced or surprised by the court's inquiry regarding a conviction of theft by unlawful taking or disposition. We also conclude that § 28-510 placed Jonusas on notice that he could be convicted of theft in any manner described under §§ 28-509 to 28-517 and that he could have formulated his defense strategy accordingly.

The Supreme Court of New Jersey considered similar issues when it addressed the consolidation of theft offenses in *State v. Talley*, 94 N.J. 385, 466 A.2d 78 (1983). The defendant was indicted for armed robbery and was convicted of theft by deception. Prior to the enactment of New Jersey's consolidation statute, a defendant charged with one theft offense could not be convicted of another. The New Jersey Legislature consolidated all theft offenses under N.J. Stat. Ann. § 2C:20-2(a) (West 1995), which provided: " 'A charge of theft may be supported by evidence that it was committed in any manner that would be theft under this chapter, notwithstanding the specification of a different manner in the indictment . . . .' " (Emphasis omitted.) 94 N.J. at 390, 466 A.2d at 80. The court noted that what unified the theft offenses was the involuntary transfer of property without consent. It concluded that if the defendant was faced with the possibility of a conviction for theft other than as charged, the defendant could not successfully attack the statute because the law prescribed certain protections that remedied any notice problems. The trial court had the power to provide a continuance or other appropriate relief to ensure a fair trial.

The evidence relating to the manner by which Jonusas acquired the Youngs' money established an activity that § 28-511(1) defines as theft. Section 28-510 gives adequate notice to one accused of theft that he may be charged with one manner of theft and convicted of theft by a different manner. There was no evidence indicating that Jonusas was prejudiced by lack of fair notice or by surprise. Every criminal defendant, regardless of education or experience, is presumed to know the law. See *State v. Veiman*, 249 Neb. 875, 546 N.W.2d 785 (1996).

SUFFICIENCY OF EVIDENCE REGARDING THEFT BY DECEPTION

Jonusas argues that the district court erred in finding sufficient evidence to support a conviction for theft by deception. Jonusas

was not convicted of theft by deception but was convicted of theft by unlawful taking or disposition pursuant to § 28-511(1). Therefore, we do not consider the sufficiency of the evidence to support a conviction of theft by deception.

SUFFICIENCY OF EVIDENCE REGARDING THEFT BY UNLAWFUL TAKING OR DISPOSITION

Jonusas claims the district court erred in finding sufficient evidence to support a conviction for theft by unlawful taking or disposition. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Delgado, ante* p. 141, 690 N.W.2d 787 (2005).

Section 28-511(1) states: "A person is guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof." The purchase agreement provided that if the Youngs failed to obtain a liquor license, the money placed in escrow was to be returned to them. Jonusas admitted that he never placed the money in escrow and, instead, lost it through an investment.

Jonusas argues that he was lawfully in possession of the Youngs' money and that he did not intend to deprive them of it. He contends that he believed the Youngs had breached the purchase agreement and, as such, forfeited their rights to the deposit. This claim has no merit. Nowhere in the agreement did it state that Jonusas was entitled to the money in the event that the Youngs breached the agreement. In no event did the money ever belong to Jonusas, and his alleged reason for taking the money does not exonerate him.

The properly admitted evidence, viewed and construed most favorably to the State, was sufficient to support Jonusas' conviction. Jonusas was to place the Youngs' money in escrow. Jonusas was not entitled to take control of the money for personal investment. His failure to place the money in escrow and his subsequent loss of the funds clearly established his intent to deprive the Youngs of their property.

MOTION FOR DIRECTED VERDICT

Jonusas alleges that the district court erred in overruling his motion for directed verdict. After the State had presented its evidence and following the presentation of all the evidence, Jonusas moved to dismiss all counts against him. He argued in both instances that the State had failed to present a prima facie case.

[4] There is no indication that Jonusas ever moved for a directed verdict; however, a motion to dismiss for failure to prove a prima facie case should be treated as a motion for a directed verdict. See *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 513 N.W.2d 495 (1994). A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law. *Scurlocke v. Hansen*, 268 Neb. 548, 684 N.W.2d 565 (2004).

The evidence was clearly sufficient to support Jonusas' conviction pursuant to § 28-511(1). Therefore, the district court did not err in overruling his motion to dismiss.

SENTENCE

The district court sentenced Jonusas for the offense of theft by deception after it had convicted him of theft by unlawful taking or disposition. Neither party has raised this issue on appeal, and we decline to find plain error. Section 28-518 prescribes that in either case, Jonusas was to be sentenced for a Class III felony because the amount taken was over $1,500.

CONCLUSION

Jonusas' assignments of error are without merit, and the judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF HEATHER R. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. CHAD K. AND MICHELLE K., APPELLANTS.

694 N.W.2d 659

Filed April 8, 2005. No. S-04-767.

1. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Parental Rights: Due Process.** Parents are entitled to due process in adjudication proceedings.
3. **Constitutional Law: Due Process.** Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker.
4. **Parental Rights.** The purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child. The parents' rights are determined at the dispositional phase, not at the adjudication phase.
5. **Effectiveness of Counsel: Conflict of Interest: Proof.** A party asserting a conflict of interest based on joint representation must demonstrate that his or her lawyer actively represented conflicting interests and that the actual conflict of interest adversely affected the lawyer's performance.
6. **Juvenile Courts: Jurisdiction: Proof.** At the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002), the State must prove the allegations of the petition by a preponderance of the evidence.

Appeal from the County Court for Cass County: JOHN F. STEINHEIDER, Judge. Affirmed.

Matthew K. Kosmicki for appellants.

Steven D. Sunde, Deputy Cass County Attorney, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Chad K. and Michelle K. appeal the June 22, 2004, order of the county court for Cass County, sitting as a juvenile court, adjudicating Heather R., Chad "C.J." K. (C.J.), and Andrea K. to be juveniles as described in Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002). Chad and Michelle assert that they were denied effective assistance of counsel, that their due process rights were violated because their joint representation by court-appointed counsel posed a conflict of interest, and that there was insufficient evidence to support the court's order. We determine that an ineffective assistance of counsel claim was not available in these juvenile adjudication proceedings in which counsel was appointed pursuant to statute and that appointment was not required under the federal Constitution. Further, because Chad and Michelle were afforded due process and the evidence is sufficient to support the court's order, we affirm the order of adjudication.

STATEMENT OF FACTS

On May 13, 2004, Heather reported to a counselor at her middle school that on May 11 her stepfather, Chad, had hit her with a belt, leaving visible marks on her buttocks. Heather told the counselor that the reason Chad hit her was because she had let a dog out and that when she told Chad she did not know how long the dog had been out, he told her he should hit her for that too. Heather also told the counselor that Chad had hit her on the shoulder on March 25.

The counselor reported the incident to the Department of Health and Human Services. Investigator David Heidbrink of the Nebraska State Patrol, investigated the incident. On May 14, Heather's injuries were examined by a pediatrician, Dr. Laura Wilwerding. After Dr. Wilwerding's examination of Heather and Heidbrink's investigation, Heather and her brother, C.J., and their sister, Andrea, were taken into emergency protective custody for the Department of Health and Human Services to arrange temporary foster care placement.

On May 18, 2004, the State filed a petition for adjudication in the juvenile court. The State alleged that Heather, born November 11, 1991; C.J., born December 20, 1994; and Andrea, born

February 1, 1998, came within the meaning of § 43-247(3)(a) because they lacked proper parental care by reason of the fault or habits of their parents; their parents neglected or refused to provide proper or necessary care for their health, morals, or well-being; or they were in a situation dangerous to life or limb or injurious to their health or morals.

The allegations in the petition were extensive and included allegations as to each child and each parent, not repeated here. The specifics of the May 11, 2004, incident were alleged in the petition, including further details in which C.J. stated that Heather was screaming and crying after the "latest beating." Other incidents were alleged, including one episode in which Chad is alleged to have hit Heather across the face or head with his hand and cracked her on the head with his knuckles. The allegations included a report by Dr. Wilwerding who observed "linear type bruises on Heather's buttocks consistent with being beaten with a belt."

A hearing on the petition was held June 22, 2004. At the hearing, the children were represented by a guardian ad litem and Chad and Michelle were jointly represented by court-appointed counsel.

Heather testified at the hearing that on May 11, 2004, Chad hit her on the buttocks six times with his belt because she had let the dog out. She felt pain after he hit her, and the pain did not stop until the following weekend. Heather testified that C.J. had observed the incident and that she had observed Chad hitting C.J. with a belt several times in the recent past. She recalled witnessing an incident in February in which C.J. had broken a blade off a fan and Chad had hit C.J. with the blade, causing C.J. to have bruises on his upper thighs and back. Heather testified that Michelle saw Chad hitting C.J. and did nothing to stop it and that Michelle had been present at other times when Heather had been hit and had done nothing to stop it. Heather testified that Michelle had also hit both her and C.J. with a belt on more than one occasion. Heather testified regarding other incidents in which Chad had been angry with her and had pulled her hair and hit her on the head. Heather also described a common punishment used by Chad known as "riding the Harley" in which she or C.J. would be required to remain in a squatting position with their arms raised forward for an extended period of time. She testified that once

they had been required to hold the position for 3 hours. Heather stated that she had witnessed Chad hitting Andrea with a belt in the past when Andrea was "[a]bout five."

Heidbrink testified at the hearing regarding his investigation in which he was assisted by a Department of Health and Human Services caseworker. Heidbrink and the caseworker interviewed Heather and elicited the same information Heather had reported to her counselor. Heidbrink observed bruises on Heather's buttocks that she said were caused by her being hit by Chad on May 11, 2004. Photographs in evidence show the bruises.

Heidbrink interviewed Chad and Michelle individually on May 14, 2004. Both admitted to having hit the children with a belt. Chad admitted to having hit C.J. with a fan blade, and he admitted to hitting Heather on May 11 but said that he had not intended to bruise her. Michelle stated that she had not witnessed the incident on May 11 and that she may have been sleeping upstairs at the time.

Dr. Wilwerding testified regarding her examination of Heather's injuries on May 14, 2004. Dr. Wilwerding observed multiple bruises on Heather's buttocks, and Heather told her the bruises were caused when her stepfather hit her six times with a belt. Heather told her she was hit about once a month. Dr. Wilwerding testified that her examination indicated that the bruising had occurred on approximately May 11; that the injuries were consistent with having been struck by a belt; and that in her medical opinion, the cause of the injuries was "[p]hysical beating." She also testified that a significant impact and a large amount of force were required for bruising to occur on the buttocks.

Chad and Michelle called witnesses on their behalf. A former babysitter for the children testified that she had known the family since 2000 and that she had not observed Chad and Michelle being angry with or yelling at the children, nor had she observed the children being fearful of them. Chad's father testified that he had not observed Chad or Michelle being violent toward their children and that he had observed them using only verbal discipline with the children.

Although Chad did not testify at the hearing, Michelle testified on her own behalf. She did not deny that she and Chad had hit the children on the buttocks, but she testified that they were

never hit elsewhere on their bodies. Michelle testified that there had been an ongoing problem with Heather's letting the dog out and forgetting that the dog was still out. Michelle recounted other discipline problems they had had with Heather. Michelle testified that she and Chad first dealt with discipline problems by talking to the children and that they used other forms of discipline, such as grounding the children, before they would resort to physical discipline. Michelle testified that she had never disagreed with Chad's physical discipline but that she was not aware that the children had ever sustained bruises as a result. Michelle admitted that she had observed Chad hit C.J. with a fan blade, but she said the discipline was not "hard" and was only on the buttocks. Michelle disputed some of Heather's testimony regarding other incidents in which Heather had been physically disciplined.

Following the hearing, the court on June 22, 2004, found that the State had proved its allegations by a preponderance of the evidence, and the court therefore entered an order adjudicating the children to be within the meaning of § 43-247(3)(a). The court took jurisdiction over the children and ordered that out-of-home placement be continued, that a case plan and court report be prepared, and that a disposition hearing be scheduled. Chad and Michelle appeal the June 22 order of adjudication.

ASSIGNMENTS OF ERROR

Chad and Michelle assert that (1) they received ineffective assistance of counsel or that their due process rights were violated because counsel failed to retain a pediatrician to give a second medical opinion, (2) their due process rights were violated because their court-appointed counsel had a conflict of interest as a result of representing them jointly, and (3) the evidence was insufficient to support the court's decision.

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Brian B. et al.*, 268 Neb. 870, 689 N.W.2d 184 (2004).

ANALYSIS

No Ineffective Assistance of Counsel Claim in This Juvenile Adjudication Where Counsel Was Appointed Pursuant to Statute and Appointment Not Required Under Federal Constitution.

Chad and Michelle argue that because counsel failed to obtain and present testimony consisting of a second medical opinion regarding Heather's injuries, they were provided ineffective assistance of counsel, or, in the alternative, their due process rights were violated. Following our review of the record, we conclude that ineffective assistance of counsel is not an available claim in this juvenile adjudication proceeding in which counsel was appointed pursuant to statute and where counsel was not required under the federal Constitution.

We recently stated in a case involving termination of parental rights that "juvenile proceedings are civil rather than criminal in nature" and that "an individual has no constitutional right to effective assistance of counsel in a civil proceeding." *In re Interest of Joshua R. et al.*, 265 Neb. 374, 381, 657 N.W.2d 209, 214 (2003). See, also, *In re Interest of Azia B.*, 10 Neb. App. 124, 626 N.W.2d 602 (2001). In *In re Interest of Joshua R. et al.*, our rationale stemmed from the fact that the right to counsel and the corresponding right to effective counsel derived from the Sixth Amendment are limited to "criminal prosecutions." We further observed that "a statutory right to the appointment of counsel does not give rise to an ineffective assistance of counsel claim in a civil postconviction case," 265 Neb. at 382, 657 N.W.2d at 215, and we reasoned that a similar result was indicated in juvenile proceedings. Our rationale for this reasoning was the fact that appointment of counsel in a civil case where such appointment is not required by the federal Constitution need not be accompanied by a corresponding entitlement to effective counsel. See *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) (stating that because there is no constitutional right to counsel in postconviction proceedings, there is no claim of ineffective assistance of counsel). Although the instant case involves an adjudication, we note that the U.S. Supreme Court has held that while the federal Constitution does not require that counsel be appointed for parents in every parental rights termination

proceeding, due process might require appointment of counsel in certain parental rights termination proceedings. *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). In *Lassiter*, the Court held that the determination of whether due process requires appointed counsel should be made in the first instance by the trial court, subject to appellate review, and that such determination should be based on a balancing of the parent's interests, the state's interests, and the risk that a parent will be erroneously deprived of his or her child because the parent is not represented by counsel. We have previously applied *Lassiter* and concluded that due process did not require that a parent be represented by counsel at a temporary detention hearing. *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991).

Leaving aside the fact that this juvenile case involves an adjudication rather than a parental rights termination, as in *Lassiter*, we note that in this case, counsel was appointed for Chad and Michelle based on statute and not on the basis of constitutional imperative, and we do not believe that appointment of counsel was required under the federal Constitution. See, Neb. Rev. Stat. § 43-279.01(1)(b) (Reissue 2004); *In re Interest of N.M. and J.M.*, 240 Neb. 690, 697, 484 N.W.2d 77, 82 (1992). We therefore analyze Chad and Michelle's claims regarding performance of counsel under principles applicable to the statutory right to counsel rather than under a federal constitutional right to counsel. See *In re Welfare of G.L.H.*, 614 N.W.2d 718 (Minn. 2000) (noting distinction between constitutional right to counsel and statutory right to counsel in juvenile proceedings).

[2,3] Although we did not find entitlement to an ineffective assistance of counsel claim in *In re Interest of Joshua R. et al.*, 265 Neb. 374, 657 N.W.2d 209 (2003), we nevertheless noted that due process is required in cases involving termination of parental rights. *Id.* We have also acknowledged that parents are entitled to due process in adjudication proceedings. *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004). In that case, we stated that in the context of both adjudication and termination hearings,

> " '[p]rocedural due process includes notice to the person whose right is affected by the proceeding; reasonable

> opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker.' "

267 Neb. at 247-48, 674 N.W.2d at 457 (quoting *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 158, 655 N.W.2d 672, 681 (2003)). The fundamental fairness concept of the Due Process Clause of the 14th Amendment informs our assessment of the protections which are appropriate in juvenile matters. See *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

As is evident from the claims on appeal in this case, as a practical matter, due process claims challenging the adequacy of representation by counsel in juvenile cases commonly encompass assertions that in a criminal case might be characterized as "ineffective assistance of counsel" claims. Although the record does not require appointment of counsel on federal constitutional grounds, Chad and Michelle were entitled to due process, and we therefore review the following assignments of error in light of due process requirements.

Absence of Second Medical Opinion Did Not Violate Due Process.

[4] Because the due process to which a party is entitled is derived from the context in which the claim arises, we note that the present case involves adjudication rather than termination proceedings. We have noted, "The purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child. The parents' rights are determined at the dispositional phase, not at the adjudication phase." *In re Interest of Brian B. et al.*, 268 Neb. 870, 878, 689 N.W.2d 184, 191 (2004). We therefore review the due process afforded to Chad and Michelle in light of the understanding that the purpose of these adjudication proceedings was to protect the interests of the children rather than to ultimately determine Chad and Michelle's parental rights.

Following our review of the adjudication proceedings herein, we conclude that Chad and Michelle were not denied due process. They were given proper notice and a hearing and were represented

by counsel. With respect to their specific argument regarding a second medical opinion, we determine from our review of the proceedings that Chad and Michelle were given a reasonable opportunity to refute and defend against the medical testimony and to confront and cross-examine Dr. Wilwerding, the State's witness, and that in fact, they did present evidence with respect to the issues in the case. Furthermore, we note that there is nothing in the record before us that would suggest that a second medical opinion could be obtained that would likely refute the testimony of Dr. Wilwerding, engender doubt in the accuracy of the photographs depicting Heather's injuries, or otherwise affect the outcome of these proceedings. We therefore reject Chad and Michelle's claim that their due process rights were violated because of counsel's purported failure to obtain and present a second opinion.

Joint Representation Did Not Violate Due Process.

Chad and Michelle further assert that their due process rights were violated because they were represented by the same court-appointed counsel and that such counsel had a conflict of interest arising from such joint representation. We conclude that the joint representation in these proceedings did not violate the due process rights of either Chad or Michelle.

[5] We note that in the context of criminal cases, we have stated that a party asserting a conflict of interest based on joint representation of codefendants "must demonstrate that his or her lawyer actively represented conflicting interests and that the actual conflict of interest adversely affected the lawyer's performance." *State v. Marchese*, 245 Neb. 975, 978, 515 N.W.2d 670, 673 (1994). We use this standard as guidance in our determination of whether counsel's joint representation in this case violated either Chad's or Michelle's due process rights.

Chad and Michelle focus their arguments on the purported detriment the joint representation had on Michelle's interests. They assert that Michelle was not as culpable as Chad under the allegations of the petition because she did not participate in and was not aware of the incident on May 11, 2004. They argue that separate representation would have better served Michelle's interests by highlighting how her behavior differed from that of Chad and that joint representation forced counsel to focus on Chad's interests and lose sight of Michelle's "defense."

We note, however, that the allegations in the petition encompassed more than the May 11, 2004, incident and were not limited to Chad's behavior. In addition to the allegations made against Chad individually, the State alleged that "[b]oth parents admitted to using a belt as a form of punishment on their children." The State also alleged that "Heather told Dr. Wilwerding that her Mom is aware of the way her stepfather is disciplining her and her siblings. She stated that she would not go talk to her Mom about it because she would just go tell Dad and he will get even more mad." The allegations in the petition implicated the behavior of both Chad and Michelle, and their behavior allegedly bore similarities.

Our review of these adjudication proceedings shows that Michelle's individual interests were adequately represented by counsel. Counsel called Michelle to testify in her own behalf and asked questions which allowed Michelle to present her perspective on the issues in this case. Michelle testified that she was not present and was not aware of the May 11 incident until after Heather reported it. Michelle also disputed aspects of Heather's testimony and detailed her version of how discipline was handled within the family. Michelle admitted that she hit the children with a belt and did not intervene when Chad did so. Because Michelle was able and did present her version of events at the hearing, we reject the argument that counsel focused on Chad to Michelle's detriment.

Chad and Michelle have not demonstrated that an actual conflict of interest existed or that any such conflict adversely affected their joint counsel's performance on behalf of either parent. Joint representation did not deprive either party of a reasonable opportunity to refute and defend against the charges and accusations, to confront and cross-examine adverse witnesses, or to present evidence on the charges and accusations. We therefore conclude that joint representation did not violate Chad's and Michelle's due process rights.

Order of Adjudication Was Supported by Sufficient Evidence.

Finally, Chad and Michelle assert that the evidence was not sufficient to support the court's adjudication order. We conclude

that there was sufficient evidence to support the court's order of adjudication.

In its petition, the State alleged in general that Heather, C.J., and Andrea are children

> who lack proper parental care by reason of the fault or habits of their parent(s), guardian(s), or custodian(s); whose parent(s), guardian(s), or custodian(s) neglect or refuse to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juveniles; or who are in a situation or engage in an occupation dangerous to life or limb or injurious to the health or morals of such juveniles.

Each of these general allegations is one of the factors described in § 43-247(3)(a).

The petition was very detailed in its allegations. The State made specific allegations regarding the May 11, 2004, incident wherein Chad hit Heather with the belt, the incident in which Chad hit C.J. with the fan blade, both Chad's and Michelle's past use of a belt to punish the children, and Michelle's awareness of and failure to stop Chad's use of physical discipline.

[6] At the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence. *In re Interest of Jac'Quez N.*, 266 Neb. 782, 669 N.W.2d 429 (2003); *In re Interest of T.M.B. et al.*, 241 Neb. 828, 491 N.W.2d 58 (1992). See § 43-279.01(3). At the adjudication hearing, the State presented evidence to support the allegations in the petition. As we discussed above in the "Statement of Facts," the State presented testimony by Heather, Heidbrink, and Dr. Wilwerding, and photographs showing Heather's injuries were admitted in evidence. Chad and Michelle presented opposing testimony.

Although Michelle disputed some of Heather's testimony regarding certain incidents, the county court apparently accepted Heather's testimony, and we give weight to the fact that the court observed the witnesses and accepted Heather's version of the facts over Michelle's version. When the evidence is in conflict in a juvenile case, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one

version of the facts over the other. *In re Interest of Jac'Quez N., supra*; *In re Interest of Joshua R. et al.*, 265 Neb. 374, 657 N.W.2d 209 (2003).

Having reviewed the evidence presented at the hearing, we conclude that the State provided sufficient evidence to prove the allegations of the petition by a preponderance of the evidence. We therefore reject Chad and Michelle's final assignment of error.

CONCLUSION

In this case, appointment of counsel was not required on federal constitutional grounds and no ineffective assistance of counsel claim is available with respect to these juvenile adjudication proceedings in which counsel was appointed pursuant to statute. However, Chad and Michelle were entitled to due process in these juvenile adjudication proceedings. We conclude that Chad and Michelle were accorded fundamental fairness and that their due process rights were not violated in these proceedings. We further conclude that there was sufficient evidence to support the adjudication of all three children. We therefore affirm the adjudication order of the county court.

AFFIRMED.

DOUGLAS COUNTY SCHOOL DISTRICT 0001, ALSO KNOWN AS OMAHA PUBLIC SCHOOLS, ET AL., APPELLEES, V. MICHAEL O. JOHANNS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NEBRASKA, ET AL., APPELLEES, AND LANCASTER COUNTY SCHOOL DISTRICT 0001, ALSO KNOWN AS LINCOLN PUBLIC SCHOOLS, ET AL., APPELLANTS.

694 N.W.2d 668

Filed April 15, 2005. No. S-04-874.

1. **Interventions.** Whether a party has the right to intervene in a proceeding is a question of law.
2. **Parties: Jurisdiction: Waiver.** The presence of necessary parties to a suit is a jurisdictional matter and cannot be waived by the parties; it is the duty of the plaintiff to join all persons who have or claim any interest which could be affected by the judgment.
3. **Judgments: Jurisdiction.** A jurisdictional question which does not involve a factual dispute is a matter 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. **Public Officers and Employees: Pleadings.** When public officers are engaged in litigation to protect public rights, and their pleadings and procedure maintain the public interest, no private person is entitled to intervene.
6. **Parties: Presumptions.** Under the parens patriae doctrine, when a state is a party to a suit involving a matter of sovereign interest, it is presumed to represent the interests of all its citizens.
7. **Parties: Presumptions: Proof.** To overcome the presumption that the government is adequately representing all of its citizens, the applicant must show that its interest is different from the state's interest and that the state will fail to represent the applicant's interest.
8. **Parties: Interventions.** State representation is adequate if (1) no collusion is shown between the representative and an opposing party, (2) the represented interest is not adverse to the proposed intervenor, and (3) the representative has been diligently prosecuting the litigation.
9. **Interventions: Statutes.** The intervention statutes are to be liberally construed.
10. **Interventions.** The interest required as a prerequisite to intervention under Neb. Rev. Stat. § 25-328 (Cum. Supp. 2004) is a direct and legal interest—an interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action.
11. ____. An indirect, remote, or conjectural interest in the result of a suit is not enough to establish intervention as a matter of right.
12. **Interventions: Pleadings.** A person seeking to intervene must allege facts showing that he or she possesses the requisite legal interest in the subject matter of the action.

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

James B. Gessford, Gregory H. Perry, and Joshua J. Schauer, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellants Lancaster County School District 0001 et al.

David M. Pedersen, Jill Robb Ackerman, Elizabeth Eynon-Kokrda, and Kenneth W. Hartman, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, L.L.P., for appellees Douglas County School District 0001 et al.

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

CONNOLLY, J.

Lancaster County School District 0001, also known as Lincoln Public Schools, and other parties (collectively LPS) appeal a

district court's order that denied it the right to intervene. In the underlying action, Douglas County School District 0001, also known as Omaha Public Schools, and other parties (collectively OPS) challenged the constitutionality of the state school funding statutes. In arguing it has a right to intervene, LPS contends that it has a direct legal interest in the action because if the school funding system is enjoined, it may lose funding. We determine that (1) the parens patriae doctrine prevents LPS' intervening as defendants because its interest is adequately represented by the State and (2) LPS cannot intervene as plaintiffs because its interest is speculative. Because we determine that LPS is not entitled to intervene as a matter of right, we affirm.

BACKGROUND

OPS filed this action against Michael O. Johanns, in his official capacity as Governor, and other public officers (collectively the State). It seeks a declaratory judgment that the Nebraska statutory school funding system is unconstitutional under special legislation and the equal protection and due process clauses of the Nebraska Constitution. The lengthy operative complaint sought to enjoin the State from further implementing the funding system and an award of attorney fees.

The allegations in the complaint focused on the school funding system's failure to provide the resources necessary to adequately educate students in ethnically and economically diverse settings of Douglas County School District 0001. The school district alleged that it is the largest in Nebraska, that its student body is economically diverse, and that it has the largest racially and ethnically diverse student body in Nebraska. The allegations included statistics that set out the number of students in programs such as students who qualify for free lunches, the percentage of students for whom English is their second language, and the number of students in special education. The school district alleged that federal mandates required it to meet standards to educate these students, and it provided detailed allegations of those standards. The complaint alleged that the school district's students failed in meeting academic standards and that it could not properly educate the students without additional funding. The complaint sets out the details of the funding system. It alleged that the

State was on notice of the school district's student body characteristics, that the school funding system failed to provide the students with the opportunity to obtain the free education guaranteed to them under the Nebraska Constitution, and that the funding system denied them an equal opportunity to meet legally set academic standards.

OPS' complaint further alleged that the school funding system was unconstitutional on its face and as applied. It asked the court to declare the funding system void and to enjoin the State from further executing or implementing the system.

LPS moved to intervene as both defendants and plaintiffs. Lancaster County School District 0001 alleged that it is the second largest school district in Nebraska, that its students share many of the characteristics of Douglas County School District 0001, and that it is required to comply with the same academic standards. In the complaint, the school district alleged nothing about the specific number of economically, racially, or ethnically diverse students it serves, or how it could or could not meet the students' needs. LPS alleged that it sought to intervene as defendants so it could resist the claim that the funding system was unconstitutional. It also sought to intervene as plaintiffs, stating:

> [LPS] allege[s] in support thereof that in the event relief is afforded [to OPS, it is] joining [OPS] in claiming what is sought by the Complaint, or by uniting with the [State] in resisting the claim of [OPS], or by demanding anything adversely to both [OPS and the State].
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> . . . .
>
> [I]n the event Nebraska's school funding system or the state aid formula is held to be unconstitutional or otherwise unlawful . . . the causation of such must be determined, and that to the extent Nebraska's school funding system or the state aid formula is determined to be the cause, that [LPS joins OPS] in claiming what is sought by the Complaint . . . .

LPS further alleges that it "will be subject to harm from any loss of funding and such loss of funding will cause the funding system or the state aid formula to be unconstitutional or otherwise unlawful as to [LPS]."

The State did not object to the motion to intervene. OPS moved to dismiss or strike the complaint in intervention. The district court found that (1) LPS failed to allege facts showing that it had a direct and immediate interest in the action; (2) if the funding system were declared unconstitutional, LPS could participate in the legislative process when the Legislature acted to restructure the system; and (3) even if LPS had a direct interest, because the State, as defendants, consisted of public officers engaged in litigation to protect public rights, no private person was entitled to intervene. The court overruled the motion to intervene and dismissed the intervention complaint. LPS appeals.

ASSIGNMENTS OF ERROR

LPS assigns, rephrased, that the district court erred by denying its motion to intervene, dismissing its complaint, and failing to find that it was a necessary party.

STANDARD OF REVIEW

[1-3] Whether a party has the right to intervene in a proceeding is a question of law. *In re Change of Name of Davenport*, 263 Neb. 614, 641 N.W.2d 379 (2002). The presence of necessary parties to a suit is a jurisdictional matter and cannot be waived by the parties; it is the duty of the plaintiff to join all persons who have or claim any interest which could be affected by the judgment. *Spear T Ranch v. Knaub, ante* p. 177, 691 N.W.2d 116 (2005). A jurisdictional question which does not involve a factual dispute is a matter of law. *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004).

[4] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Dworak v. Farmers Ins. Exch., ante* p. 386, 693 N.W.2d 522 (2005).

ANALYSIS

LPS contends that it has a direct legal interest in the action and therefore a right to intervene. OPS argues, however, that the State is adequately defending the constitutionality of the school funding system and that LPS has failed to plead a direct legal interest in the matter.

Intervention in Nebraska is controlled by statute, which provides:

> 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 complaint, 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.

Neb. Rev. Stat. § 25-328 (Cum. Supp. 2004).

LPS Has Failed to Show Right to Intervene as Defendants

In its chameleon-like pleading, LPS alleges that it has a direct legal interest in defending the constitutionality of the school funding statutes and that if the funding statutes are unconstitutional, it seeks the same relief that OPS might receive. In seeking to intervene as defendants, it argues that the OPS action could enjoin school funding and harm LPS. OPS, however, argues that the State is adequately representing any LPS interest regarding the statutes' constitutionality.

[5,6] We have long held that "'"[w]hen public officers are engaged in litigation to protect public rights, and their pleadings and procedure maintain the public interest, no private person is entitled to intervene."'" *Best & Co., Inc. v. City of Omaha*, 149 Neb. 868, 877, 33 N.W.2d 150, 156 (1948). Accord *Smithberger v. Banning*, 130 Neb. 354, 265 N.W. 10 (1936). We have applied the same principle as other jurisdictions which routinely hold that under the parens patriae doctrine, when a state is a party to a suit involving a matter of sovereign interest, it is presumed to represent the interests of all its citizens. See, e.g., *Maine v. Director, U.S. Fish and Wildlife Service*, 262 F.3d 13 (1st Cir. 2001); *United States v. Hooker Chemicals & Plastics*, 749 F.2d 968 (2d Cir. 1984); *Commonwealth of Pa. v. Rizzo*, 530 F.2d 501 (3d Cir. 1976); *New Mexico Right to Choose/NARAL v. Johnson*, 126

N.M. 788, 975 P.2d 841 (1998). See, also, *Wade v. Goldschmidt*, 673 F.2d 182 (7th Cir. 1982) (discussing presumption in dicta). The concept of parens patriae refers to when "a governmental entity presents itself as a trustee, guardian, or representative of all citizens." 6 James Wm. Moore, Moore's Federal Practice § 24.03[4][a] at 24-49 (3d ed. 2004). Discussing the parens patriae doctrine, the U.S. Supreme Court has explained:

> The "*parens patriae*" doctrine . . . is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, "must be deemed to represent all its citizens." . . . The principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

New Jersey v. New York, 345 U.S. 369, 372-73, 73 S. Ct. 689, 97 L. Ed. 1081 (1953), quoting *Kentucky v. Indiana*, 281 U.S. 163, 50 S. Ct. 275, 74 L. Ed. 784 (1930).

[7,8] To overcome the presumption that the government is adequately representing all of its citizens, the applicant must show that its interest is different from the state's interest and that the state will fail to represent the applicant's interest. See, e.g., *Hooker Chemicals & Plastics, supra*. In addition, a difference in tactics does not create inadequate representation. *Director, U.S. Fish and Wildlife Service, supra*; *Chiglo v. City of Preston*, 104 F.3d 185 (8th Cir. 1997); *New Mexico Right to Choose/NARAL, supra*. Courts generally hold that state representation is adequate if (1) no collusion is shown between the representative and an opposing party, (2) the represented interest is not adverse to the proposed intervenor, and (3) the representative has been diligently prosecuting the litigation. See, e.g., *Delaware Valley Citizens' Council v. Com. of Pa.*, 674 F.2d 970 (3d Cir. 1982); *Wade, supra*. The presumption applies equally to individual citizens and political subdivisions. *Hooker Chemicals & Plastics, supra*.

In applying the parens patriae doctrine, courts have held that in cases where a party sought to intervene as defendants to defend the constitutionality of a statute, the state adequately represented the applicant's interests and denied intervention as a matter of

right. *Horton v. Meskill*, 187 Conn. 187, 445 A.2d 579 (1982). See, *New Mexico Right to Choose/NARAL, supra*; *Ass'n of Rural and Small Schools v. Casey*, 531 Pa. 439, 613 A.2d 1198 (1992).

LPS argues that we overruled the parens patriae doctrine in *Ruzicka v. Ruzicka*, 262 Neb. 824, 635 N.W.2d 528 (2001). We disagree. In *Ruzicka*, we stated in dicta that under § 25-328, a party who is adequately represented by another party may intervene. But *Ruzicka* did not involve a governmental party and thus did not involve the parens patriae doctrine. *Ruzicka* did not overrule our previous cases applying the doctrine.

Here, LPS seeks first to intervene as defendants to defend the constitutionality of the school funding system. So, LPS' position is identical to that of the State, and we presume under the parens patriae doctrine that the State adequately represents that interest. LPS has not alleged that the State has failed to perform its duties in defending the litigation, nor has it alleged any malfeasance or collusion. Therefore, LPS has failed to allege facts showing that it may intervene as defendants. The district court correctly denied intervention.

LPS Has Failed to Show Right to Intervene as Plaintiffs

If it cannot intervene as defendants, LPS argues that it should be allowed to intervene as plaintiffs if the school funding system is declared unconstitutional. It argues that it will lose funding if the statutes are unconstitutional and that it has a direct interest in the action. OPS, however, argues that LPS did not properly plead a direct legal interest and that any interest LPS has is speculative.

[9-12] The intervention statutes are to be liberally construed. *In re Change of Name of Davenport*, 263 Neb. 614, 641 N.W.2d 379 (2002). But the interest required as a prerequisite to intervention under § 25-328 is a direct and legal interest—an interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action. *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002); *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. *In re Change of Name of Davenport, supra*. Therefore, a person seeking to intervene must

allege facts showing that he or she possesses the requisite legal interest in the subject matter of the action. *Id.*; *Ruzicka, supra.* We have defined an "interest in the matter in litigation" as "the subject matter of the action, 'the thing in controversy.' " *Kirchner v. Gast*, 169 Neb. 404, 411, 413, 100 N.W.2d 65, 72, 73 (1959).

The Maryland Court of Appeals considered a similar case in which a school district sought to intervene as a plaintiff. See *Montgomery County v. Bradford*, 345 Md. 175, 691 A.2d 1281 (1997). In *Bradford*, the plaintiff sought a declaratory judgment that students in Baltimore were deprived of their right to at least a minimum quality of education required in the state constitution. Montgomery County sought to intervene, contending in a detailed petition that if the funding statutes were found unconstitutional, it would result in a diminution of resources to other districts in the state, including Montgomery County. Montgomery County argued that it had a strong interest in the lawsuit and that it had a fundamental interest to participate in defining the constitutional parameters of an adequate education in Maryland that would not harm Montgomery County. The plaintiffs opposed intervention, arguing that Montgomery County did not have a direct legal interest in the litigation. The trial court denied intervention, finding that whether the Montgomery County students were receiving an appropriate education was not an issue in the suit and that any future loss of funds was speculative.

Montgomery County appealed, presenting the same primary arguments as LPS: (1) that it had an interest in preserving state funding and (2) that should the funding scheme be found unconstitutional, it had an interest in the remedies that the court might fashion. The Maryland Court of Appeals affirmed. The court determined that Montgomery County's concerns were speculative because they were premised on future events that might not occur and that any decreased funding would not automatically follow. The court stated:

> [T]he County's concerns are indirect, remote, and speculative; they do not focus directly on the "transaction" involved in these cases, viz., whether the plaintiffs' actions, directed, as they are, *solely* to the constitutional adequacy of the education provided to children in the Baltimore City public schools, implicates Montgomery County's legal interest in

> any way which would give it a right to intervene in these cases under [the state intervention rule]. Were it otherwise, according to the plaintiffs, and that was all that was needed to establish a right to intervene, then any applicants' generalized interest in participating in the formulation of a constitutional standard, to which the person may be subjected, could intervene as a party from which an interpretation of a constitutional provision might emerge.

Id. at 199, 691 A.2d at 1293.

Likewise, the Connecticut Supreme Court denied intervention as a matter of right in a similar case. *Horton v. Meskill*, 187 Conn. 187, 445 A.2d 579 (1982). Discussing whether the intervenors had a direct interest when the action concerned students in a different district, the court noted that a person or political subdivision does not have a sufficient interest to create a right to intervene merely because an impending judgment might have some effect on the intervenor. *Id.*

Here, without providing individualized details, LPS pled only the following allegations of a direct legal interest:

> [I]n the event Nebraska's school funding system or the state aid formula is held to be unconstitutional or otherwise unlawful . . . the causation of such must be determined, and that to the extent Nebraska's school funding system or the state aid formula is determined to be the cause, that Intervenors . . . join [OPS] in claiming what is sought by the Complaint . . . .
>
> [LPS] will be subject to harm from any loss of funding and such loss of funding will cause the funding system or the state aid formula to be unconstitutional or otherwise unlawful as to [LPS].

Like *Montgomery County v. Bradford*, 345 Md. 175, 691 A.2d 1281 (1997), and *Horton, supra*, we hold that this speculative allegation is insufficient to state a direct legal right that would allow intervention. LPS has not alleged details to show how it would lose funding, or how much. Further, whether any funding would be lost is speculative because it is dependent on a ruling finding the funding scheme unconstitutional.

Moreover, actions by the State that would act to decrease funding—actions such as legislative redrafting or budgeting—would

fall outside of the trial court's control. For example, as the trial court has already noted, if it enjoined operation of the school funding statutes, it could not dictate to the state Legislature how and in what amount it should fund the schools. Instead, the court could find only that the current system was unconstitutional. The Legislature would then be required to resolve the issue through different budgeting, redrafting of statutes, and tax increases or by applying other unknown solutions. LPS would be free to participate in that process, which is outside of judicial control. Accordingly, we determine that the interest LPS alleges is indirect, remote, and conjectural and thus is not enough to establish intervention as a matter of right.

LPS as Necessary Party

LPS contends that it is a necessary party to the action. Neb. Rev. Stat. § 25-323 (Cum. Supp. 2004) provides in part:

> The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in.

We have determined that LPS does not have a direct legal interest. The court can determine the action without LPS' presence. Accordingly, we determine that LPS is not a necessary party to the suit.

CONCLUSION

We determine that LPS was not entitled to intervene as a matter of right and that the parens patriae doctrine applies. We further determine that LPS is not a necessary party to the action. Accordingly, we affirm.

Affirmed.

AMANDA MADLOCK, APPELLANT, V. SQUARE D COMPANY, APPELLEE.

695 N.W.2d 412

Filed April 22, 2005. No. S-04-758.

1. **Workers' Compensation: Appeal and Error.** With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
2. **Workers' Compensation.** When a worker sustains a scheduled member injury and a whole body injury in the same accident, the Nebraska Workers' Compensation Act does not prohibit the court from considering the impact of both injuries in assessing the loss of earning capacity. In making such an assessment, the court must determine whether the scheduled member injury adversely affects the worker such that loss of earning capacity cannot be fairly and accurately assessed without considering the impact of the scheduled member injury upon the worker's employability. If the loss of earning capacity cannot be fairly and accurately assessed without such consideration, then the court is permitted to do so.
3. ____. When a whole body injury is the result of a scheduled member injury, the member injury should be considered in the assessment of whole body impairment. Under such circumstances, the trial court should not enter a separate award for the member injury in addition to the award for loss of earning capacity. To allow both awards creates an impermissible double recovery.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Timothy S. Dowd, of Dowd, Dowd & Howard, for appellant.

Brenda S. Spilker and Tracy L. Stoehr, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

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

WRIGHT, J.

NATURE OF CASE

Amanda Madlock appeals from the judgment of a Workers' Compensation Court review panel that reversed, in part, an award entered by the trial court. The review panel found that because Madlock's foot injury (a scheduled member injury) was taken into consideration in determining her loss of earning capacity, the trial court's award of separate benefits for the member injury constituted an impermissible double recovery of benefits.

SCOPE OF REVIEW

[1] With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Hobza v. Seedorff Masonry, Inc.*, 259 Neb. 671, 611 N.W.2d 828 (2000).

FACTS

On September 7, 1999, while employed by the Square D Company (Square D), Madlock was carrying a 60- to 70-pound box of circuit breakers, when the handles on the box broke and the box landed on her right foot. The parties stipulated that Madlock's injury resulted from an accident arising out of and in the course of her employment; that she suffered an injury to her right foot resulting in a permanent partial impairment of 22 percent; that she was earning an average weekly wage of $694.08 at the time of the accident; and that all benefits owed to her as a result of the foot injury, including disability and medical benefits, had been paid by Square D. The parties disagreed concerning whether back problems Madlock experienced were causally related to the accident. Madlock claimed that her gait was altered because of the foot injury, resulting in a low-back condition.

Dr. John McClellan of the Nebraska Spine Center opined that Madlock had persistent lumbar back pain caused by the residual effects of the injury to her right foot. Dr. Denise Vosik stated that the residual effects of the foot injury resulted in an injury to the body as a whole and that the chronic and recurrent sacroiliac dysfunction experienced by Madlock was caused, or at least significantly aggravated, by the work accident.

Square D offered the report of Dr. Christopher Anderson, which report stated that it was "medically possible that [Madlock's] right foot injury may have caused some secondary gait deviations, which altered the . . . biomechanics through her back, yet not to a severe degree that would cause multilevel lumbar degenerative disc disease and annular tears." Anderson opined that those conditions were "more than likely" preexistent to the foot injury, noting that Madlock was hospitalized in April 1986 for similar low-back pain.

In determining Madlock's loss of earning capacity, the trial court considered the impact of the member injury and concluded that a fair and accurate assessment of Madlock's loss of earning

capacity could not be made absent the inclusion of the limitations flowing from the member injury. The trial court noted: "The impact and adverse effect of the scheduled injury upon the plaintiff's whole body injury is evident as one considers the fact that even the medical experts could not segregate the two."

The trial court found that the medical evidence documented the existence of an altered gait due to the right foot injury, that Madlock had met and carried her burden of proof on the issue of causation, and that Madlock had suffered a 10-percent loss of earning capacity. The trial court awarded her $46.26 per week for each week from and after the date of the accident for the statutorily mandated period of entitlement less those weeks during which she received or was entitled to temporary total and temporary partial disability benefits.

The trial court next addressed whether a separate award or recovery for the member injury was permitted and whether Square D was entitled to a credit or offset against the loss of earning capacity award for the moneys already paid for the member injury. The trial court reasoned that

> [w]hile it would be unjust to permit a claimant a "double recovery," there are always exceptions that must be accommodated. Such is the circumstance presented in this case. The plaintiff has two distinct injuries (foot and low back). While one resulted from the other, they are, nonetheless, distinct to the extent that they present an impairment to plaintiff not only in combination but individually.

The trial court found that the member injury continued to operate as an independent source of restriction and limitation, noting that " '[w]hile sitting to do her work, [Madlock] noticed that the swelling would become worse and as a result,' " she would have to elevate her leg. The trial court stated:

> The apparent tendency of the plaintiff's foot to swell and become painful and thus interfere with ambulation clearly is a condition unrelated to the subsequent back injury and exists solely because of the member injury itself. To totally blend or integrate that member loss into the body as a whole injury is to ignore the reality of plaintiff's full loss.
>
> . . . The court is sufficiently satisfied that plaintiff's foot impairment is significant enough to not only add to plaintiff's

overall loss of earning capacity but to create impairment for plaintiff independently and in addition to that loss.

The award entered by the trial court included $462.72 per week for 24 1/7 weeks for temporary total disability due to the member injury; $4,248.65 for varying periods of temporary partial disability; $462.72 for 47.3 weeks for a 22-percent permanent impairment to Madlock's right foot; $462.72 per week for 8 weeks for temporary total disability due to the low-back injury; and $46.27 per week for a 10-percent loss of earning capacity for a period of 238 5/7 weeks.

Square D sought review by a three-judge panel, asserting that the trial court erred in awarding benefits for a 22-percent permanent partial impairment of the right foot in addition to awarding benefits for a 10-percent loss of earning capacity, because the impact of the member injury was already considered in calculating the loss of earning capacity award.

The review panel affirmed the trial court's order except that it reversed the finding that Madlock was entitled to benefits for a member injury in addition to benefits for a loss of earning capacity when the member impairment was considered in assessing the loss of earning capacity. The review panel concluded that Madlock had sustained a member injury which ultimately led to a back injury and that the back injury was an extraordinary or unusual result which entitled her to an award for loss of earning capacity. The review panel determined that the trial court had properly considered the impact of the member injury in awarding loss of earning capacity, but that it was error to award weekly benefits for a 22-percent member impairment. It concluded that this award resulted in a double recovery for the member injury, in that Madlock would receive both scheduled member benefits and an increase in loss of earning capacity. The review panel reversed that portion of the award providing Madlock with benefits for a member injury in addition to a loss of earning capacity. Madlock appeals.

ASSIGNMENT OF ERROR

Madlock asserts that the three-judge review panel erred in reversing that portion of the trial court's award of benefits for a 22-percent permanent partial impairment of the right foot.

ANALYSIS

The issue is whether a worker may recover benefits for both a scheduled member injury and a whole body injury resulting in loss of earning capacity when the member injury was taken into consideration in determining the loss of earning capacity. The issue presents a question of law rather than one of fact. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Hobza v. Seedorff Masonry, Inc.*, 259 Neb. 671, 611 N.W.2d 828 (2000).

In this case, the review panel stated:

> We believe [the trial court's] award of scheduled member benefits after specifically including the limitations imposed upon the plaintiff by her member injury in assessing loss of earning capacity to be in error. . . . In this instance, the plaintiff sustained a member injury which ultimately lead [sic] to a back injury, an extraordinary or unusual result, entitling her to an award for loss of earning capacity. We believe that [the trial court] properly considered the impact of the member injury in making his award of loss of earning capacity, but find that it was error for him to award in addition the weekly indemnity benefits for a 22 percent member impairment. Such result leads to a double recovery of benefits for the member injury. Not only does the plaintiff receive an increase in loss of earning capacity but then also receives the scheduled member benefits as well.

The panel reversed that portion of the award which provided Madlock $462.72 per week for 47.3 weeks for a 22-percent permanent impairment to her right foot.

Neb. Rev. Stat. § 48-121 (Reissue 2004) provides for compensation for three categories of job-related disabilities: (1) total disability, (2) partial disability, and (3) "schedule" injuries to specific parts of the body. See *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003), citing *Jeffers v. Pappas Trucking, Inc.*, 198 Neb. 379, 253 N.W.2d 30 (1977). In *Zavala*, we discussed whether a scheduled member injury should be considered in addition to a whole body injury in calculating loss of earning capacity when both injuries resulted from the same accident. We noted that § 48-121 does not specify how compensation is to be

established when a worker suffers both a scheduled member injury and a whole body injury as a result of a single accident.

[2] We stated:

> [W]hen a worker sustains a scheduled member injury and a whole body injury in the same accident, the [Nebraska Workers' Compensation] Act does not prohibit the court from considering the impact of both injuries in assessing the loss of earning capacity. In making such an assessment, the court must determine whether the scheduled member injury adversely affects the worker such that loss of earning capacity cannot be fairly and accurately assessed without considering the impact of the scheduled member injury upon the worker's employability. If the loss of earning capacity cannot be fairly and accurately assessed without such consideration, then the court is permitted to do so.

Zavala, 265 Neb. at 199, 655 N.W.2d at 702.

In *Jeffers*, 198 Neb. at 384, 253 N.W.2d at 33, we noted the three categories of job-related disabilities identified in § 48-121 and stated: "[L]osses in bodily function, so far as subdivisions (1) and (2) are concerned, are important only insofar as they relate to earning capacity and employability." For claims which fall under subdivision (3), loss of earning capacity is not material. *Jeffers, supra*. The Legislature intended to establish the amount of benefits for loss of specific members under subdivision (3) without regard to the extent of any subsequent disability. *Id.* However, the Legislature has never indicated whether a worker may receive compensation for both a scheduled member injury and a whole body injury when the member injury was considered in assessing the whole body injury and subsequent loss of earning capacity.

It is not disputed that Madlock's back injury was an unusual or extraordinary condition that developed following the scheduled member injury. However, Square D claims that Madlock should be entitled to compensation for lost earning capacity based on the whole body injury only and not given an additional award based on permanent partial impairment of the right foot.

The issue presented in the case at bar has been considered in other jurisdictions. Obviously, the result in each case depended upon the workers' compensation law involved and the particular facts and circumstances of the case. In *Providence Washington*

Ins. Co. v. Grant, 693 P.2d 872 (Alaska 1985), the employee fell from a ladder, injuring his back, knee, ankle, and ribs. Following an award of $74.79 per week, the employee petitioned for a redetermination, arguing that he was entitled to separate awards for his back, knee, and foot injuries. The workers' compensation board agreed. On appeal to the Alaska Supreme Court, the employer argued that the approach taken by the board constituted a double recovery because the employee was awarded compensation for the scheduled disabilities of his knee and foot separately and his loss of earning capacity resulting from the scheduled injuries was incorporated into the award for his back injury. The employer argued that the employee should not receive both awards under such circumstances.

The court stated:

> We recognize that this approach could result in a double recovery if the loss of earning capacity resulting from the scheduled injuries were used to determine the employee's compensation for an unscheduled disability. To avoid this, when awarding the claimant for an unscheduled injury, the board must attempt to separate the loss of earning capacity resulting from scheduled disabilities from the loss of earning capacity resulting from the unscheduled injury.

Id. at 876.

The court determined that the board could compensate for the back injury based upon the total loss of earning capacity only if the loss of earning capacity resulting from the foot and knee injuries could not be severed from the loss of earning capacity resulting from the back injury. In such a situation, the employee would be entitled to an award based on his total loss of earning capacity resulting from the fall plus an award for his scheduled injuries.

In *Farrens Tree Surgeons v. Winkles*, 334 So. 2d 569, 572 (Fla. 1976), the court noted the rule of law enunciated by the then Florida Industrial Relations Commission in *Grao v. Fountainebleau Hotel*, I.R.C. Order 2-2543 (Mar. 11, 1974), *cert. denied* 300 So. 2d 900 (Fla. 1974):

> " 'When there are *two distinct injuries*, one to a scheduled member and one to the body as a whole, even if both are incurred during the same accident, they may both be compensated for separately as long as the injury to the body

> as a whole is not *the result of the injury to the scheduled member*. . . . [I]n determining the loss of wage earning capacity, *all* injuries, including scheduled injuries, must be considered. . . .' "

(Emphasis in original.)

The Judge of Industrial Claims was directed to determine three amounts: the "scheduled recovery," the separate anatomical injury to the body as a whole, and loss of wage earning capacity. The award was to be the greater of the total of the scheduled injury plus the anatomical whole body injury not resulting from the scheduled injury, or the loss of wage earning capacity taking into consideration all of the injuries. *Farrens Tree Surgeons, supra.*

In *Miller v. Lauridsen Foods, Inc.*, 525 N.W.2d 417, 420 (Iowa 1994), the court held: "If an employee suffers both an injury to a scheduled member and also to part of the body not included in the schedule, then the resulting injury is compensated on the basis of an unscheduled injury." See, also, *Honeywell v. Allen Drilling Co.*, 506 N.W.2d 434 (Iowa 1993); *Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12 (Iowa 1993).

The court in *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 336 (Tenn. 1996), stated: "It is the rule in Tennessee that where an injury is to more than one member, one of which is scheduled and the other of which is not scheduled, benefits are allowable on the basis of percentage of the body as a whole." See, also, *Continental Ins. Companies v. Pruitt*, 541 S.W.2d 594 (Tenn. 1976).

In the case at bar, the whole body injury cannot be separated from the scheduled member injury. Both arose from the same accident. If Madlock had not injured her foot, she would not have sustained a back injury that was compensable under Nebraska's workers' compensation statutes. Under these circumstances, the trial court was required to, and did, consider the scheduled member injury in awarding benefits because Madlock's loss of earning capacity could not be fairly and accurately assessed without such consideration.

Madlock's scheduled member injury was an essential factor in determination of the award for loss of earning capacity. By also awarding separate benefits for the member injury, the trial court allowed Madlock a greater recovery than that to which she was entitled. Thus, the review panel correctly determined that the trial

court had erred in awarding Madlock additional benefits for the scheduled member injury.

[3] We therefore hold that when a whole body injury is the result of a scheduled member injury, the member injury should be considered in the assessment of whole body impairment. Under such circumstances, the trial court should not enter a separate award for the member injury in addition to the award for loss of earning capacity. To allow both awards creates an impermissible double recovery.

CONCLUSION

The judgment of the review panel is affirmed.

AFFIRMED.

McCORMACK, J., not participating.

RANDY DAVIS, APPELLANT, v. GOODYEAR TIRE & RUBBER COMPANY AND LIBERTY MUTUAL INSURANCE CORP., APPELLEES.

696 N.W.2d 142

Filed April 22, 2005. No. S-04-861.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. **Workers' Compensation.** A determination as to whether an injured worker has had a loss of earning power is a question of fact to be determined by the Workers' Compensation Court.
3. **Workers' Compensation: Appeal and Error.** Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
4. **Workers' Compensation.** Pursuant to Neb. Rev. Stat. § 48-121(2) (Reissue 2004), benefits are measured not by loss of bodily function, but by reduction in or loss of earning power or employability.
5. **Workers' Compensation: Words and Phrases.** Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Reissue 2004), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted.

6. **Workers' Compensation.** The mere fact that after an injury, the employee receives, or is offered, his or her former wages, or a larger sum, does not necessarily preclude recovery of compensation under the workers' compensation statutes.
7. ____. The fact that an employee is still employed and still paid the same or better does not, of itself, mean he or she has not experienced some loss of earning capacity.
8. ____. If an employee, after a work-related injury, receives wages equal to or greater than the wages received before the injury, the wages may be considered in the determination whether an employee has sustained a loss of earning capacity.
9. ____. If, after injury, an employee receives the same or higher wages than before injury, it is indicative, although not conclusive, of the fact that his or her earning power has not been impaired.
10. **Workers' Compensation: Appeal and Error.** Neb. Rev. Stat. § 48-185 (Reissue 2004) precludes an appellate court's substitution of its view of the facts for that of the Workers' Compensation Court if the record contains sufficient evidence to substantiate the factual conclusions reached by the Workers' Compensation Court.
11. **Workers' Compensation.** An employee's actual wages, after injury, are pertinent to a determination of the degree to which the employee's earning power has been impaired.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Dallas D. Jones and Tracy L. Stoehr, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

Anne E. Winner, of Keating, O'Gara, Davis & Nedved, P.C., L.L.O., for appellees.

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

GERRARD, J.

NATURE OF CASE

The plaintiff, Randy Davis, was injured as a result of an accident arising out of and in the course of his employment with Goodyear Tire & Rubber Company (Goodyear). Davis was able to continue working at Goodyear, but with physical restrictions, and he filed a petition for workers' compensation benefits. At trial, the parties stipulated to the compensability of the injury and submitted the amount of Davis' damages to the single judge. The court-appointed vocational rehabilitation specialist had opined that Davis had suffered a 25- to 30-percent loss of earning power if he was able to continue working at Goodyear, but a 60- to 70-percent loss of earning power if Davis lost his job. Based on

this opinion, the single judge concluded that Davis had suffered a 27.5-percent loss of earning power and awarded benefits accordingly. The issue presented is whether the single judge erred in basing his determination of Davis' loss of earning power on Davis' continued employment with Goodyear.

BACKGROUND

On October 31, 2000, Davis was employed by Goodyear as a shop mechanic and suffered an injury to his lower back while trying to lift one end of a heavy machine. This was apparently an aggravation of a preexisting low-back condition, and the parties stipulated that this event was compensable. Davis subsequently suffered a scheduled member injury in an unrelated incident that is not relevant to this appeal.

The October 31, 2000, accident and injury were found by the single judge to result in a 10-percent permanent impairment to the body as a whole. The single judge found that Davis had suffered permanent physical restrictions: never lifting greater than 50 pounds; not lifting more than 20 pounds repetitively; and avoiding prolonged bending, stooping, squatting, or kneeling. The single judge noted Davis' testimony that he was abiding by these restrictions. The judge also noted the testimony of the engineering manager for the Lincoln, Nebraska, plant where Davis was employed that Davis' performance had been effective and that there was no reason to believe Davis would be laid off.

Davis was found to have reached maximum medical improvement on September 22, 2001. Steven Kuhn, the court-appointed vocational rehabilitation specialist, evaluated Davis' loss of earning power, concluding as follows:

> Davis's ability to perform work for Goodyear Tire and Rubber has been impacted by his work related injury and the subsequent physical restrictions and limitations. Prior to his injury . . . Davis was able to preform [sic] the full range of job duties associated with various Maintenance Mechanic positions. He is now limited in the type of the positions he preforms [sic] and to the number of hours he works.
>
> While maintaining his employment at Goodyear Tire and Rubber . . . Davis has a loss of access to employment of 60 percent and a minimal loss of wage earning ability. However

> if he were to leave Goodyear Tire and Rubber for any reason and attempt to obtain employment in the general labor market his loss of access to employment would be 35 to 40 percent. His loss of access to employment will decreased [sic] the type of positions he is able to preform [sic] limiting him to lower skilled positions that typically pay less.
>
> It is the opinion of this Rehabilitation Consultant based upon my education, training and work experience within a reasonable degree of vocational certainty that . . . Davis does have a loss of earning capacity due to his work related injury of October 31, 2000.
>
> If . . . Davis is able to maintain his position with Goodyear Tire and Rubber his loss of earning capacity would be 25 to 30 percent.
>
> If . . . Davis was unable to maintain his position at Goodyear Tire and Rubber [and] were to acquire other alternative employment based upon transferable skills his loss of earning capacity would be 60 to 70 percent.
>
> If . . . Davis were able to take advantage of vocational services to increase his skills his loss of earning capacity would be 40 to 50 percent.

The single judge concluded that Davis' loss of earning power was 27.5 percent. The single judge first found that the later opinion of a 40- to 50-percent loss of earning power was speculative at best, and the single judge rejected that opinion, because Davis was not entitled to vocational rehabilitation at the time of the award. The single judge also rejected Kuhn's opinion regarding Davis' loss of earning power should he be unable to retain his employment at Goodyear. The single judge noted the "uncontradicted testimony in this case" that based upon Davis' seniority, it was not probable that he would lose his job. The single judge stated that "[t]he focus is not solely on plaintiff's present job at Goodyear, but his present job is part of the entire set of jobs available to him in the Lincoln, Nebraska job market." The single judge concluded that

> the pertinent analysis in cases of this type, is whether plaintiff is in possession of real, long term bona fide employment, which constitutes part of the entire marketplace of jobs (in

> this case, the Lincoln, Nebraska area) which plaintiff could perform given his particular physical restrictions, acquired skill, and present training. With respect to whether a particular job at hand should be excluded from the relevant job market, the question is, whether the particular job which plaintiff has is of the type which constitutes "make work," "artificial," or an "odd-lot" type of employment. If so, the job should be excluded from the marketplace of jobs to be used in the analysis. Clearly, in this case, there is no evidence of such, and the job which plaintiff is actually performing as modified, must be considered as a part of the analysis leading to a determination of plaintiff's loss of earning power. In that regard, I find that . . . Kuhn's opinion that plaintiff has suffered a loss of earning power of between 25 and 30 percent is not the result of a specific focus or overemphasis placed upon any one job and is a valid analysis containing no speculative criteria.
>
> Based upon the testimony, exhibits, and reports identified above, it is this Courts [sic] own independent finding that within the range provided by . . . Kuhn, plaintiff has suffered a 27.5 percent loss of earning power as a result of the accident and injury of October 31, 2000.

Based on that finding, the single judge awarded Davis the sum of $159.03 per week for 296 1/7 weeks of permanent partial disability measured as a 27.5-percent loss of earning power resulting from the October 31, 2000, accident. Davis appealed, but the review panel of the Workers' Compensation Court affirmed the award entered by the single judge. Davis timely appeals to this court.

ASSIGNMENTS OF ERROR

Davis assigns that the single judge erred in finding that Davis sustained only a 27.5-percent loss of earning power resulting from the accident and injury of October 31, 2000, and (2) finding that " 'Kuhn's opinion that plaintiff has suffered a loss of earning power of between 25 and 30 percent is not the result of a specific focus or overemphasis placed upon any one job and is a valid analysis containing no speculative criteria.' "

STANDARD OF REVIEW

[1-3] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Zoucha v. Touch of Class Lounge, ante* p. 89, 690 N.W.2d 610 (2005). A determination as to whether an injured worker has had a loss of earning power is a question of fact to be determined by the Workers' Compensation Court. *Swoboda v. Volkman Plumbing, ante* p. 20, 690 N.W.2d 166 (2004). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Estate of Coe v. Willmes Trucking*, 268 Neb. 880, 689 N.W.2d 318 (2004).

ANALYSIS

[4,5] Before addressing Davis' specific arguments, we review the basic principles underlying our analysis of the issues presented. Davis was awarded permanent partial disability benefits pursuant to Neb. Rev. Stat. § 48-121(2) (Reissue 2004), under which benefits are measured not by loss of bodily function, but by reduction in or loss of earning power or employability. See *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002). Earning power, as used in § 48-121(2), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted. *Swoboda v. Volkman Plumbing, supra.*

[6,7] Thus, the mere fact that after an injury, the employee receives, or is offered, his or her former wages, or a larger sum, does not necessarily preclude recovery of compensation under the workers' compensation statutes. *Schmid v. Nebraska Intergov. Risk Mgt. Assn.*, 239 Neb. 412, 476 N.W.2d 243 (1991). The fact that an employee is still employed and still paid

the same or better does not, of itself, mean he or she has not experienced some loss of earning capacity. *Underwood v. Eilers Machine & Welding*, 6 Neb. App. 631, 575 N.W.2d 878 (1998).

[8,9] Instead, if an employee, after a work-related injury, receives wages equal to or greater than the wages received before the injury, the wages may be considered in the determination whether an employee has sustained a loss of earning capacity. *Schmid v. Nebraska Intergov. Risk Mgt. Assn., supra*; *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990). If, after injury, an employee receives the same or higher wages than before injury, it is indicative, although not conclusive, of the fact that his or her earning power has not been impaired. *Akins v. Happy Hour, Inc.*, 209 Neb. 236, 306 N.W.2d 914 (1981); *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 288 N.W.2d 482 (1980); *Underwood v. Eilers Machine & Welding, supra.*

With those principles in mind, we turn to the specific arguments made in Davis' appeal. Davis' primary argument is that the single judge's determination was erroneous because it was a function of overemphasis on Davis' employment with Goodyear.

But the single judge, before making a determination of Davis' loss of earning power, set forth a complete and well-reasoned explanation of the legal principles recited above. This single judge explained that while Davis' earning power was to be determined by reference to the general labor market, "it must include the actual job taken and considered as a part of the job mix available in the relevant labor market - the general job market in which the injured worker lives and works." In other words, the single judge clearly applied the correct legal standards to his determination on this issue. Read in this context, the single judge's "independent finding that . . . plaintiff has suffered a 27.5 percent loss of earning power" was the single judge's factual finding of Davis' employability in the general Lincoln, Nebraska, labor market.

[10] Consequently, Davis' argument that the single judge overemphasized Davis' employment with Goodyear is, effectively, an argument that the single judge weighed Kuhn's opinion incorrectly in making a factual finding of Davis' loss of earning power. But our standard of review for factual findings of the Workers' Compensation Court is very deferential. Section 48-185 precludes an appellate court's substitution of its view of the facts for that of

the Workers' Compensation Court if the record contains sufficient evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. *Harmon v. Irby Constr. Co.*, 258 Neb. 420, 604 N.W.2d 813 (1999). The single judge's factual finding is supported by Kuhn's opinion and the evidence presented at trial regarding Davis' ability to continue working at Goodyear. The single judge's finding is supported by sufficient evidence and is not clearly wrong.

[11] Davis also argues that Kuhn's opinion, itself, placed too much emphasis on Davis' employment with Goodyear. But the law is clear that if, after injury, an employee receives the same or higher wages than before injury, it is indicative, although not conclusive, of the fact that his or her earning power has not been impaired. *Akins v. Happy Hour, Inc., supra*; *Sidel v. Travelers Ins. Co., supra*. Stated more generally, an employee's actual wages, after injury, are pertinent to a determination of the degree to which the employee's earning power has been impaired. While the relevant inquiry includes the employee's ability to obtain employment generally, see *Swoboda v. Volkman Plumbing, ante* p. 20, 690 N.W.2d 166 (2004), in conducting that inquiry, neither the single judge nor the vocational rehabilitation specialist should be expected to disregard the job that the employee actually has.

Davis contends that Kuhn's opinion was speculative and unreliable in that the figures relied upon by the single judge were contingent upon Davis' retaining his job with Goodyear. But, under the circumstances, any opinion regarding Davis' loss of earning power would be contingent upon Davis either retaining or losing his employment with Goodyear. A certain degree of contemplation regarding future events is inherent in any determination of an employee's employability; it is the province of the trier of fact to evaluate the evidence and make a reasonably certain finding of the employee's loss of earning power. Here, the single judge relied upon competent evidence supporting his conclusions that Davis was unlikely to lose his job at Goodyear and that when that job was considered as part of the overall labor market, Davis had suffered a 27.5-percent loss of earning power. See *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002) (affirming loss of earning capacity determination for temporary

partial disability benefits based on rehabilitation specialist's conclusion that employee would keep employment, but be unable to work overtime).

Finally, Davis argues that the "beneficent purposes" of the Nebraska Workers' Compensation Act required the Workers' Compensation Court to award Davis the higher estimation of his loss of earning capacity. Brief for appellant at 22. We have consistently held that the Nebraska Workers' Compensation Act should be broadly construed to accomplish the beneficent purposes of the act. *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001).

But that is a principle of statutory interpretation, requiring us to give statutory language a liberal construction to carry out the spirit of the act. See *id.* This is not a case of statutory interpretation; rather, it is a case of a disputed factual finding. Davis contends that where there is a risk that the Workers' Compensation Court's factual findings may prove incorrect, the beneficent purposes of the act require that risk to be placed on the employer. Davis is effectively arguing that where the evidence could support alternative factual findings, the Workers' Compensation Court should be required to make the finding most favorable to the employee. That is not the law. See *Smith v. Ruan Transport, Inc.*, 190 Neb. 509, 209 N.W.2d 146 (1973).

CONCLUSION

We find no merit to Davis' assignments of error. The judgment of the Workers' Compensation Court is supported by competent evidence and is affirmed.

AFFIRMED.

HENDRY, C.J., not participating.

GERHOLD CONCRETE COMPANY, INC., A DIVISION OF LYMAN-RICHEY CORPORATION, APPELLEE AND CROSS-APPELLANT, V. ST. PAUL FIRE AND MARINE INSURANCE COMPANY, APPELLANT AND CROSS-APPELLEE, AND FIRST DAKOTA ENTERPRISES, INC., APPELLEE AND CROSS-APPELLEE.

695 N.W.2d 665

Filed April 28, 2005. No. S-03-1064.

1. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.
2. **Contracts.** Whether a contract exists is a question of fact.
3. **Prejudgment Interest: Appeal and Error.** Whether prejudgment interest should be awarded is reviewed de novo on appeal.
4. **Mechanics' Liens: Bonds: Contractors and Subcontractors.** Neb. Rev. Stat. § 52-118 (Reissue 1998) provides protection to materialmen and laborers in the construction or repair of public construction projects when the provisions of the general mechanic's lien laws do not apply.
5. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
6. **Contracts: Parties: Intent.** To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract.
7. ____: ____: ____. The question whether the parties intended to contract is a factual one, not a legal one, and, except in the clearest cases, the question is for the finder of fact to resolve.
8. **Contracts.** An "agreement to agree" is not enforceable in Nebraska.
9. **Contracts: Parties.** A contract is not subject to the objection that it is indefinite if the parties can tell when it has been performed, and it is enough if, when that time arrives, there is in existence some standard by which performance can be tested.
10. ____: ____. A binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality or express utterance from the parties themselves as to all the details of the proposed agreement; it may be implied from the parties' conduct and the surrounding circumstances.
11. **Prejudgment Interest: Claims.** A plaintiff can recover prejudgment interest only when the claim is liquidated, that is, when no reasonable controversy exists to either the plaintiff's right to recover or the amount.
12. **Claims.** A two-prong inquiry is required to determine whether a claim is liquidated. A dispute must not exist either to the amount due or to the plaintiff's right to recover.

13. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
14. **Rules of Evidence: Appeal and Error.** Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. §§ 27-401 and 27-403 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion.

Appeal from the District Court for Madison County: PATRICK G. ROGERS, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Mark D. Fitzgerald, of Fitzgerald, Vetter & Temple, for appellant.

William T. Oakes, Michael J. Leahy, and Andrew C. McElmeel, of Stinson, Morrison & Hecker, L.L.P., for appellee Gerhold Concrete Company, Inc.

Mark D. Fitzgerald, of Fitzgerald, Vetter & Temple, for appellee First Dakota Enterprises, Inc.

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

CONNOLLY, J.

St. Paul Fire and Marine Insurance Company (St. Paul) provided a payment bond for First Dakota Enterprises, Inc. (First Dakota), a general contractor for a public construction project. Gerhold Concrete Company, Inc. (Gerhold), supplied concrete to CMS, Inc., First Dakota's subcontractor. CMS failed to pay Gerhold for the concrete, and Gerhold sued First Dakota on a contract theory and St. Paul on the performance bond.

The district court dismissed First Dakota from the suit but determined that a jury could find that Gerhold could recover against St. Paul on the bond. A jury returned a verdict for Gerhold. St. Paul appeals the district court's denial of its motion for a directed verdict. St. Paul claims that Neb. Rev. Stat. § 52-118.01 (Reissue 1998) required Gerhold to give 4 months' written notice to First Dakota before it could proceed against the bond, that Gerhold failed to give notice, and thus, Gerhold's claim must fail.

Under § 52-118.01, for Gerhold to recover on the performance bond, it must give written notice to the contractor within 4 months from the date of the last materials supplied, unless it had a contractual relationship, express or implied, with the contractor. Gerhold acknowledges that it did not give written notice to First Dakota. This appeal requires us to determine whether there was a contractual relationship, express or implied, that excused Gerhold from providing written notice to First Dakota.

Resolving every controverted fact in Gerhold's favor and giving it the benefit of every reasonable inference, we determine that the jury could find that First Dakota told Gerhold that it would pay for concrete supplied to CMS. Thus, the jury could conclude that a contract, and hence, a contractual relationship, existed, and the district court properly overruled the motion for a directed verdict. Likewise, we determine that the court erred when it granted First Dakota's motion to dismiss because there was evidence from which a jury could determine that a contract was formed. Accordingly, we affirm in part, and in part reverse and remand for a new trial against First Dakota.

BACKGROUND

This appeal arises from a public construction project to build a veterans home in Norfolk, Nebraska. First Dakota obtained discounted prices from Gerhold when it bid on the project. According to Gerhold, it offered those prices only if it were the sole concrete supplier for the project. First Dakota was awarded the project as general contractor. Some time later, Steve Johnson, who was Gerhold's plant manager, spoke with Wayne July, the project manager for First Dakota. According to Johnson, July confirmed that First Dakota would use Gerhold as its concrete supplier. July admitted that he committed to using Gerhold "to a certain extent," but did not commit to having Gerhold as the exclusive supplier.

First Dakota subcontracted the concrete work to CMS and specified that CMS should use Gerhold as the supplier. Gerhold agreed to bill CMS for the concrete. Through May, June, and part of July 1999, First Dakota paid CMS, but CMS failed to pay Gerhold.

According to Johnson, he met with July and informed him that CMS failed to pay the invoices for May through July 1999,

which amounted to about $100,000, and that Gerhold would stop supplying concrete if it did not receive payment. The record contains the following colloquy between Gerhold's attorney and Johnson:

> Q. What was . . . July's response to learning that First Dakota might lose its concrete supplier?
>
> A. . . . July was, of course, concerned. And he told me, he says, you don't want to do that. . . .
>
> I said, what about the CMS account, that past-due account? And Wayne July said, you keep that concrete coming, and First Dakota, don't worry about it, First Dakota will take care of it.
>
> . . . .
>
> Q. What did you say when . . . July said that First Dakota would take care of the unpaid invoices, just keep the concrete coming?
>
> A. I agreed we would keep the concrete coming.

Johnson later stated again that July agreed to take care of unpaid invoices if Gerhold continued to supply concrete. July denied that Gerhold ever notified him that it would stop supplying concrete if it were not paid or that he agreed to pay for unpaid invoices. He stated that had Gerhold quit delivering concrete, he would have obtained a new supplier. First Dakota paid all further invoices directly to Gerhold but did not pay for the previous, unpaid invoices for May through July.

Gerhold filed suit against First Dakota for breach of contract and against St. Paul on the bond seeking payment for the unpaid May through July 1999 invoices. After Johnson's testimony, St. Paul and First Dakota moved for a directed verdict. They argued that First Dakota did not enter into a contract for payment and that there was no contractual relationship, express or implied, for Gerhold to recover payment for past invoices. The court granted First Dakota's motion for directed verdict, stating that the evidence failed to show the formation of a contract for payment of the unpaid invoices; specifically, the court determined that Gerhold failed to show the terms of any oral contract to pay. The court then reviewed § 52-118.01, and it concluded there was evidence that a general contractual relationship existed between Gerhold and First Dakota based on the agreement that Gerhold

would provide concrete at specified prices and that First Dakota would exclusively use Gerhold's concrete. Because of that contractual relationship, the court determined a jury could find that § 52-118.01 relieved Gerhold from the notice requirement and denied St. Paul's motion for a directed verdict.

The jury returned a verdict for $91,582.28, and the district court denied Gerhold's request for prejudgment interest, finding that the amount of recovery was in controversy. Gerhold had initially sought $111,137.34, but later stipulated that the amount should be reduced by $16,473.06. St. Paul appeals, and Gerhold cross-appeals. We granted St. Paul's petition to bypass.

ASSIGNMENTS OF ERROR

St. Paul assigns that the district court erred by (1) failing to grant its motion for a directed verdict and to dismiss the action against it, (2) failing to allow evidence that Gerhold previously acknowledged receipt of a payment that was greater than it would admit at trial, and (3) refusing to permit cross-examination of a witness about a prior inconsistent statement in answers to interrogatories.

On cross-appeal, Gerhold assigns, rephrased, that the district court erred by (1) sustaining the motion for directed verdict for First Dakota and (2) denying an award of prejudgment interest.

STANDARD OF REVIEW

[1] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law. *Livingston v. Metropolitan Util. Dist., ante* p. 301, 692 N.W.2d 475 (2005).

[2] Whether a contract exists is a question of fact. See *Viking Broadcasting Corp. v. Snell Publishing Co.*, 243 Neb. 92, 497 N.W.2d 383 (1993).

[3] Whether prejudgment interest should be awarded is reviewed de novo on appeal. See *Blue Valley Co-op v. National Farmers Org.*, 257 Neb. 751, 600 N.W.2d 786 (1999).

ANALYSIS

St. Paul argues that Gerhold cannot recover on the bond because it failed to give notice as required by § 52-118.01. Gerhold argues,

however, that it had a direct or implied contractual relationship with First Dakota that would relieve it from the notice requirements and allow it to recover under the bond.

[4] Neb. Rev. Stat. § 52-118 (Reissue 1998) requires a bond for certain public building projects. It provides protection to materialmen and laborers in the construction or repair of public construction projects when the provisions of the general mechanic's lien laws do not apply. See *Dukane Corp. v. Sides Constr. Co.*, 208 Neb. 227, 302 N.W.2d 721 (1981).

Section 52-118.01 provided in part:

> Every person who has furnished labor or material in the prosecution of the work provided for in the contract set out in subsection (1) of section 52-118, in respect of which a bond is furnished under such section, and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or her or material was furnished or supplied by him or her for which such claim is made shall have the right to sue on such bond for the amount or the balance thereof unpaid at the time of the institution of such suit and to prosecute the action to final execution and judgment for the sum or sums justly due him or her. *Any person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing such bond shall have a right of action upon the bond upon giving written notice to the contractor* within four months from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed.

(Emphasis supplied.) Section 52-118.01 relieves suppliers from giving notice if they have a contractual relationship, express or implied, with the contractor. Here, the issue is whether Gerhold had a contractual relationship with First Dakota that would exempt it from giving notice under § 52-118.01. Gerhold argues that any contractual relationship is sufficient, even if it is not related to payment or would not provide notice to the contractor

of unpaid subcontractor bills. St. Paul, however, argues that the contractual relationship must be a specific contract to pay for supplies and that there was no such contract between Gerhold and First Dakota.

Courts that have considered the kind of contractual relationship that would obviate the notice requirement normally do so in the context of the federal Miller Act. The purpose and language of § 52-118.01 are the same as in the Miller Act. The notice language of the Miller Act mirrors § 52-118.01. See 40 U.S.C.A. § 3133(b) (West 2005) (formerly 40 U.S.C.A. § 270b (2000)). Thus, we find the federal cases relevant.

Some appellate courts addressing the issue have held that a contractual relationship between a supplier and a general contractor for something other than payment for materials is not sufficient to obviate the Miller Act's notice requirements. *United States v. Hesselden Construction Co.*, 404 F.2d 774 (10th Cir. 1968); *United States v. Van de Riet*, 316 F.2d 912 (4th Cir. 1963); *United States v. Praught*, 270 F.2d 235 (1st Cir. 1959). As a result, courts have held that the contractual relationship that precludes the notice requirement must relate to a direct promise or contract to pay for materials. For example, some courts have held that a contract under which a contractor agreed to issue checks payable jointly to both the subcontractor and supplier failed to establish a direct contractual relationship, express or implied, that would obviate the statutory notice requirements. See, *United States v. Hesselden Construction Co., supra*; *Dial Block Co. v. Mastro Masonry*, 374 N.J. Super. 13, 23, 863 A.2d 373, 379 (2004) (comparing state statute with language referring only to " 'direct contract' " to broader language of Miller Act). In contrast, when a general contractor orally agreed to pay not only for future supplies but for previous, unpaid shipments, the supplier was exempt from notice requirements under the Miller Act. *American Cas. Co. of Reading, Pa. v. Southern Mat. Co.*, 261 F.2d 197 (4th Cir. 1958).

The Georgia Court of Appeals has formulated a slightly different approach. Interpreting a statute with language identical to § 52-118.01, the court determined that it would look to the course of contractual dealings between the contractor and supplier to determine whether there was an express or implied contractual

relationship. *Huddleston Concrete Co. v. Safeco Ins. Co. &c.*, 186 Ga. App. 531, 368 S.E.2d 117 (1988). The court recognized that in the course of dealing between the contractor and the supplier, circumstances could arise when the contractor would have actual or constructive notice of a claim despite the absence of a direct contract or promise of payment. The court held that when a contractor orally promised to pay a supplier for unpaid shipments out of retainage when the project was complete, a contractual relationship existed, express or implied, that obviated the statute's notice requirement. *Id.*

[5] We determine that under either formulation of the rule, Gerhold presented evidence of a contractual relationship that would exempt it from the notice requirement of § 52-118.01. In reviewing a trial court's ruling on a motion for directed verdict, we treat the motion as an admission of the truth of all competent evidence submitted on behalf of Gerhold. Gerhold is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. See *Livingston v. Metropolitan Util. Dist., ante* p. 301, 692 N.W.2d 475 (2005).

Here, resolving every controverted fact in Gerhold's favor and giving Gerhold the benefit of every reasonable inference, Gerhold presented evidence that First Dakota orally agreed to "take care of" the unpaid invoices if Gerhold continued to supply concrete. First Dakota, however, denied that it agreed to pay the past invoices. Although the record presents conflicting evidence that First Dakota agreed to pay for the May through July 1999 invoices, a jury could reasonably find that First Dakota had actual notice of the unpaid invoices and orally contracted to pay them. Because Gerhold presented evidence that would allow a jury to find an express or implied contractual relationship between Gerhold and First Dakota, the district court did not err when it overruled St. Paul's motion. Accordingly, we affirm the court's overruling the motion for a directed verdict.

CROSS-APPEAL

Dismissal of Contract Against First Dakota

On cross-appeal, Gerhold argues that the district court erred when it dismissed Gerhold's contract claim against First Dakota.

First Dakota contends that a contract was not formed as a matter of law and that all that was formed was an "agreement to agree." Reply brief for appellee First Dakota at 19.

[6,7] To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). The question whether the parties intended to contract is a factual one, not a legal one, and, except in the clearest cases, the question is for the finder of fact to resolve. *Viking Broadcasting Corp. v. Snell Publishing Co.*, 243 Neb. 92, 497 N.W.2d 383 (1993).

[8-10] First Dakota correctly argues that an "agreement to agree" is not enforceable in Nebraska. See *Nebraska Nutrients v. Shepherd, supra*. But a contract is not indefinite if the parties can tell when it has been performed, and it is enough if, when that time arrives, there is in existence some standard by which performance can be tested. *Id.* A binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality or express utterance from the parties themselves as to all the details of the proposed agreement; it may be implied from the parties' conduct and the surrounding circumstances. *Id.*

Here, Gerhold presented evidence that a representative of First Dakota, in direct response to an inquiry about the May through July 1999 invoices, said "you keep that concrete coming, and First Dakota, don't worry about it, First Dakota will take care of it." In addition, evidence showed that Gerhold then agreed to continue providing concrete. Unlike circumstances when the parties agreed to finalize contract terms in the future, here, Gerhold presented evidence that would allow a jury to determine that a specific oral contract had been formed under which First Dakota agreed to pay for the May through July invoices in exchange for Gerhold's continuing to provide concrete. Whether a contract was formed is a question of fact that should have been submitted to the jury. Accordingly, we agree that the court erred when it dismissed the contract claim against First Dakota and reverse, and remand for a new trial against First Dakota.

PREJUDGMENT INTEREST

Gerhold next argues that the district court erred by refusing to award prejudgment interest. St. Paul argues, however, that the claim was not liquidated.

[11,12] A plaintiff can recover prejudgment interest only when the claim is liquidated, that is, when no reasonable controversy exists to either the plaintiff's right to recover or the amount. *Davis v. Davis*, 265 Neb. 790, 660 N.W.2d 162 (2003). Thus, a two-prong inquiry is required. A dispute must not exist either to the amount due or to the plaintiff's right to recover. See *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993).

Here, a reasonable controversy existed both to Gerhold's right to recover and to the amount due. A reasonable controversy existed under § 52-118.01 whether there was a contractual relationship. Further, the amount in controversy changed during the proceedings. Gerhold initially sought $111,137.34, but later stipulated that the amount should be reduced by $16,473.06. Because the issue presented a reasonable controversy about whether Gerhold could recover and the amount of the recovery, the claim was not liquidated. Accordingly, we affirm the district court's order denying prejudgment interest.

REMAINING ASSIGNMENTS OF ERROR

In its brief, St. Paul states:

> In the event this matter is reversed and a new trial occurs, it will be necessary for the appellate court to review some of the trial court's evidentiary rulings which would have been prejudicial to the appellant and First Dakota had the jury been called upon to make a decision respecting the appellee's alleged contract claim.

Brief for appellant at 25. Accordingly, we address the remaining assignments of error.

EXCLUSION OF LIEN WAIVER

St. Paul contends that the court erred by excluding evidence of a lien waiver between Gerhold and CMS. Before trial, Gerhold moved in limine to exclude evidence concerning how it credited payments from CMS that were made in July and September 1999. According to Gerhold, under an agreement with CMS, it credited

payments to an open account, with the oldest invoices paid first. Gerhold anticipated that St. Paul and First Dakota would argue that the payments came from funds paid to CMS by First Dakota or that Gerhold should have applied the payments to the May through July invoices for the project instead of older invoices on the open account.

The record indicates that the court excluded the evidence before trial under Neb. Rev. Stat. §§ 27-401 and 27-403 (Reissue 1995). At trial, St. Paul and First Dakota offered an exhibit showing a partial lien release between Gerhold and CMS for $70,000. After an offer of proof at trial, the court sustained Gerhold's objection and did not receive the exhibit into evidence. The court did allow evidence of other documents showing the charges that Gerhold sought to recover.

[13,14] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Kvamme v. State Farm Mut. Auto. Ins. Co.*, 267 Neb. 703, 677 N.W.2d 122 (2004). Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under §§ 27-401 and 27-403, the trial court's decision will not be reversed absent an abuse of discretion. *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000).

Here, Gerhold argued in its motion in limine that the evidence was irrelevant or unduly prejudicial because it did not relate to the May through July 1999 invoices. The court then excluded the evidence. We have reviewed this assignment of error and determine that the court did not abuse its discretion.

Evidence Concerning Inconsistent Statements in Pleadings

St. Paul argues that the court erred by not allowing an inquiry about inconsistent statements in Gerhold's pleadings or answers to interrogatories. At trial, a witness stated that he was not aware of a joint check issued to Gerhold and CMS. St. Paul and First Dakota then sought to inquire about a pleading which alleged that a joint check had been issued. They stated that they desired to impeach witnesses regarding "claims made in the petition that

they are no longer claiming." Gerhold objected and stated it would drop those claims, and First Dakota and St. Paul then argued that the matter affected credibility. The court sustained the objection based on relevancy.

The record shows that the inquiry related to claims that Gerhold was no longer pursuing and that the evidence could be confusing to a jury. We have reviewed this assignment of error and determine that the court did not abuse its discretion.

CONCLUSION

We determine that resolving every controverted fact in Gerhold's favor and giving it the benefit of every reasonable inference, the evidence showed that under the contractual relationship between First Dakota and Gerhold, First Dakota contracted to pay for the May though July 1999 invoices or that First Dakota had actual knowledge of the claim that would excuse Gerhold from the notice requirements of § 52-118.01. We also determine that the court erred when it dismissed the claim against First Dakota. Gerhold was not entitled to prejudgment interest, and we determine that the remaining assignments of error are without merit. Accordingly, we affirm in part, and in part reverse and remand for a new trial against First Dakota.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. SUSANA MURO, ALSO KNOWN AS SUSANA MURO ANDRADE, APPELLANT.

695 N.W.2d 425

Filed April 28, 2005. No. S-03-1399.

1. **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.
2. **Criminal Law: Judgments: Appeal and Error.** In a bench trial of a criminal case, the trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous.
3. **Proximate Cause.** The determination of causation, including proximate causation, is ordinarily a question of fact.

4. **Proximate Cause: Words and Phrases.** Criminal conduct is a cause of an event if the event in question would not have occurred but for that conduct; conversely, conduct is not a cause of an event if that event would have occurred without such conduct.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges, on appeal thereto from the District Court for Dawson County, JAMES E. DOYLE IV, Judge. Judgment of Court of Appeals affirmed in part, and in part sentence vacated and cause remanded with directions.

Derek L. Mitchell for appellant.

Jon Bruning, Attorney General, and James H. Spears for appellee.

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

STEPHAN, J.

Susana Muro was convicted by the district court for Dawson County of child abuse resulting in the death of a child and sentenced to 20 years' imprisonment. The Nebraska Court of Appeals affirmed her conviction, finding there was sufficient evidence that she knowingly failed to secure necessary medical care for her daughter, Vivianna Muro, after becoming aware that the child had sustained a serious injury, and that such failure was a proximate cause of the child's death. *State v. Muro*, 13 Neb. App. 38, 688 N.W.2d 148 (2004). On further review, we conclude that while the evidence in the record is sufficient to support the finding that Muro knowingly and intentionally caused or permitted Vivianna to be deprived of medical care, it is insufficient as a matter of law to establish that such deprivation caused the child's death.

I. BACKGROUND

1. FACTS

The facts are set forth in detail in the published opinion of the Court of Appeals. *State v. Muro, supra.* We summarize here the sequence of events which preceded the death of Vivianna on October 28, 2002. Additional facts and opinion evidence will be discussed in our analysis of the causation issue.

On October 27, 2002, Muro resided in Lexington, Nebraska, with her husband, Jose Muro (Jose), and their children, a 4-year-old son and 8-month-old Vivianna. At approximately 3:20 p.m. on that day, Muro left the children at home in the care of Jose while she ran errands. Vivianna appeared normal at that time. When Muro returned home sometime after 6 p.m., Jose was holding Vivianna but the child was not crying as she usually did when held by Jose. Muro inquired about Vivianna, and Jose replied that she was asleep. He placed her in her crib while Muro fed their son and performed various chores.

Between 7 and 7:30 p.m., Muro took Vivianna from her crib and noticed that something was wrong. Vivianna was unresponsive and appeared "dazed," and her eyes were "half open, half closed." Muro observed that Vivianna was "limp, kind of like a rag doll." Over the next several hours, both Muro and Jose called the Tri-County Hospital in Lexington for advice without identifying themselves or disclosing that Vivianna was limp and unresponsive. A nurse testified that she advised the unidentified callers to bring the baby to the emergency room if they had any concern or uncertainty regarding her condition. Muro then called her mother-in-law, who resided in another state, and asked for advice about a " 'friend's' " baby who appeared " 'dazed' " and " 'loose,' " specifically denying that she was referring to Vivianna. Muro's mother-in-law told her to tell her friend to take the baby to the hospital as soon as possible. Muro and Jose then took Vivianna to Tri-County Hospital.

When she arrived at the hospital at approximately 11 p.m., Vivianna was not breathing, her pupils were fixed and dilated, and she was limp and cold. Although medical personnel performing resuscitation were able to establish a heartbeat, they were never able to stabilize Vivianna or establish spontaneous respiration. A physician diagnosed various injuries, including a hematoma on the left side of her head. The physician concluded that the severity of the child's condition necessitated transfer to Good Samaritan Hospital in Kearney, Nebraska, and made the necessary arrangements. An ambulance crew accompanied by Dr. Stephen Parys, a pediatrician, arrived in Lexington and transported Vivianna to Good Samaritan Hospital. During the transfer process, Parys noted various injuries, including the hematoma,

bruising, and an old rib fracture depicted on x ray. He suspected that the injuries were traumatic in origin. Parys continued assisted breathing measures during the transfer, but the child remained unresponsive and unconscious.

Upon arrival at Good Samaritan Hospital at approximately 1:30 a.m., a CT scan was performed which revealed a slightly displaced skull fracture in the left parietal area with an overlying hematoma, as well as other signs of brain injury. After consulting a neurosurgeon who concluded that surgical intervention was not feasible, Parys and other physicians conducted tests from which they concluded that brain death had occurred. Parys explained Vivianna's condition to Muro and Jose, and they made the decision to discontinue life support. Death occurred at 6:28 a.m. on October 28, 2002.

An autopsy was performed by Dr. Blaine Roffman the next day. He made certain findings indicative of trauma, including torn skin over the right lateral thorax and the left anterior thorax, broken and hemorrhaged fingernails, recent bruising of the right side of the neck and the midline of the forehead, bruising to "the left of the oral cavity on the cheek," and a fracture of the left parietal skull. At trial, Roffman ultimately opined that the cause of death was "a fracture of the left parietal skull, which resulted in cerebral edema [swelling], which resulted in brain death."

There is no contention or evidence that Muro inflicted or witnessed the infliction of the fatal injuries. There is evidence that the injuries occurred during the period when Muro was away from the family home on October 27, 2002.

2. Procedural History

(a) District Court

On November 19, 2002, Muro was charged by information with felony child abuse resulting in death under Neb. Rev. Stat. § 28-707 (Cum. Supp. 2004). Muro stood mute at her arraignment, and a plea of not guilty was entered for her. Following a bench trial at which Muro testified on her own behalf, the district court entered an order finding Muro guilty of the charged crime. The court found that Muro knowingly and intentionally failed to provide necessary care, that Vivianna's condition worsened as a result, and that the worsening of her condition ultimately led to

her death. The court specifically found that Muro's deprivation of care for Vivianna contributed in a natural and continuous sequence to Vivianna's death. At a subsequent sentencing hearing, the district court imposed the minimum sentence for a Class IB felony of imprisonment for 20 years. See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2002).

(b) Court of Appeals

Muro perfected a timely appeal in which she asserted that the evidence was insufficient to sustain her conviction and that her sentence was excessive. *State v. Muro*, 13 Neb. App. 38, 688 N.W.2d 148 (2004). The Court of Appeals affirmed the conviction and sentence. After summarizing the evidence viewed in a light most favorable to the State, the majority of the panel determined that "[t]he evidence was sufficient to support the trial court's conclusion that Muro acted knowingly and intentionally, that her actions knowingly and intentionally deprived Vivianna of necessary medical care, and that such denial of medical care was a proximate cause of Vivianna's death." *Id.* at 55, 688 N.W.2d at 161. The majority further found no error in the sentence imposed by the district court. The dissenting judge concluded that the medical evidence was insufficient as a matter of law to prove beyond a reasonable doubt that Muro's delay in seeking treatment caused Vivianna's death. We granted Muro's petition for further review.

II. ASSIGNMENTS OF ERROR

In her petition for further review, Muro assigns, restated, that the Court of Appeals erred in (1) ruling that the State provided sufficient evidence that any act or omission done by her was the proximate cause or resulted in the death of Vivianna, (2) finding that any act of omission by Muro was done knowingly and intentionally, and (3) finding that the trial court did not abuse its discretion in imposing a prison sentence of 20 years in lieu of probation.

III. STANDARD OF REVIEW

[1] 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. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004); *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004).

[2,3] In a bench trial of a criminal case, the trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous. *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997). The determination of causation, including proximate causation, is ordinarily a question of fact. *State v. Sommers*, 201 Neb. 809, 272 N.W.2d 367 (1978). See *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 667 N.W.2d 244 (2003).

IV. ANALYSIS

Muro was charged with Class IB felony child abuse under § 28-707, which provides in relevant part:

> (1) A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be:
>
> . . . .
>
> (c) Deprived of necessary food, clothing, shelter, or care;
>
> . . . .
>
> (3) Child abuse is a Class I misdemeanor if the offense is committed negligently.
>
> (4) Child abuse is a Class IIIA felony if the offense is committed knowingly and intentionally and does not result in serious bodily injury as defined in section 28-109.
>
> (5) Child abuse is a Class III felony if the offense is committed knowingly and intentionally and results in serious bodily injury as defined in such section.
>
> (6) Child abuse is a Class IB felony if the offense is committed knowingly and intentionally and results in the death of such child.

Under this statute, the proscribed conduct for felony child abuse and misdemeanor child abuse is exactly the same; it is the actor's state of mind which differentiates the offenses. *State v. Parks*, 253 Neb. 939, 573 N.W.2d 453 (1998). Similarly, the three gradations of felony child abuse set forth in § 28-707 are all based upon the same proscribed conduct; the differentiating factor is the degree of harm caused by such conduct.

It is undisputed that Muro did not seek medical care for Vivianna for a period of approximately 4 hours after she first noticed the child's unresponsiveness and other abnormal symptoms. Muro argues in this appeal that the State failed to prove both that the deprivation of care was knowing and intentional on her part and that it resulted in the death of Vivianna.

1. State of Mind

Muro argues that because she did not realize or comprehend the extent of Vivianna's injuries, she could not have knowingly and intentionally deprived Vivianna of necessary medical care. The Court of Appeals examined the evidence pertaining to the events which transpired during the 4-hour period before Vivianna was taken to the hospital and concluded that such evidence, viewed in a light favorable to the State, was sufficient to support an inference that Muro knowingly and intentionally failed to provide necessary medical care for Vivianna after the seriousness of the child's condition became readily apparent to her. See *State v. Muro*, 13 Neb. App. 38, 688 N.W.2d 148 (2004). We agree with the disposition of this issue by the Court of Appeals and the reasoning upon which it is based.

2. Causation

It is clear from the record that Vivianna sustained a serious traumatic head injury inflicted by someone other than Muro. The issue, as accurately stated by the Court of Appeals, is

> whether, viewing the evidence in a light most favorable to the prosecution, the court was clearly erroneous in finding that Muro's failure to seek medical treatment for Vivianna was a proximate cause of her death. In other words, does the evidence support a finding that Vivianna's death would not have occurred had Muro not failed to seek medical treatment for Vivianna?

Id. at 50, 688 N.W.2d at 158.

(a) Principles of Law

[4] In criminal cases where a defendant's conduct is alleged to have resulted in death, we have defined proximate cause as " 'a moving or effective cause or fault which, in the natural and continuous sequence, unbroken by an efficient intervening cause,

produces the death and without which the death would not have occurred.' " *State v. William*, 231 Neb. 84, 88, 435 N.W.2d 174, 177 (1989), quoting *State v. Sommers*, 201 Neb. 809, 272 N.W.2d 367 (1978). " 'Conduct is a cause of an event if the event in question would not have occurred but for that conduct; conversely, conduct is not a cause of an event if that event would have occurred without such conduct.' " *Id.*, quoting *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986).

Applying these principles, we held in *State v. William, supra*, a motor vehicle homicide case, that a motorcyclist's unlawful acts in attempting to avoid apprehension were a proximate cause of his passenger's death from injuries sustained when the motorcycle collided with another vehicle during a police pursuit. In *State v. Sommers, supra*, another motor vehicle homicide case, the issue was whether a motorist's intoxication was a proximate cause of a death which resulted from a collision on an icy bridge. Based on evidence demonstrating that the intoxication caused the defendant to be physically impaired and that other nonimpaired drivers were able to avoid collisions at the scene, we concluded the evidence was sufficient to permit a finding that the defendant's intoxication was a proximate cause of the decedent's death. In *State v. Dixon, supra*, we held that a victim's fatal heart attack, proximately caused by a defendant's felonious conduct in burglarizing the victim's home, established the causal connection necessary to sustain a felony murder conviction. In reaching this conclusion, we relied in part upon a physician's testimony that the " 'shock value and the emotional trauma inflicted upon [the victim] at the time of the break-in caused the arrhythmia, which caused her death.' " *Id.* at 793, 387 N.W.2d at 686.

However, in *State v. Doyle*, 205 Neb. 234, 287 N.W.2d 59 (1980), an appeal from a manslaughter conviction, we held that the evidence was insufficient to establish that the defendant's conduct was a proximate cause of the death. A dead human infant was found on premises occupied by the defendant, but there was no evidence of internal or external trauma and a pathologist was unable to state the cause of death. Witnesses testified that the defendant appeared to be pregnant before the body was found and that she appeared not to be pregnant thereafter. In determining that this evidence was insufficient to support the manslaughter

conviction, we reasoned that there was "no evidence offered by the State that had the defendant done something, which she did not do, the infant would have lived; nor that had she not done anything, which she did do, the infant would have lived." *Id.* at 239, 287 N.W.2d at 63.

(b) Medical Testimony

In this case, the State attempted to prove through the testimony of two physicians that Muro's conduct was a proximate cause of the death. Parys, the pediatrician who treated Vivianna during and after her transport to Good Samaritan Hospital, testified at trial that there was very little chance of saving her life while she was in his care. Parys did state, with reasonable medical certainty, that "[i]f treatment was sought earlier, then there would've been a chance of survival." On cross-examination, he testified that he could not give a percentage of what the chance for survival would have been. He stated that if treatment had been sought immediately, survival was possible, but he could not say it was probable. He opined that Vivianna "might have survived" if treatment was sought earlier. He further testified that a person's condition progressively worsens after the type of skull injury suffered by Vivianna.

Dr. Randell Alexander, a pediatrician and an expert on child abuse, testified that a brain could swell to the degree seen in Vivianna within an hour, or it could also take several hours. He testified that in most cases with this type of injury, a child will die within 1 to 2 hours even with medical care. He opined, based upon the fact that Vivianna was still alive 4 hours after the trauma was inflicted, that "this is an injury that might have been survivable." He further testified that because of the delay in seeking treatment, Vivianna's survival was hopeless, but that there may have been a small amount of hope if prompt treatment had been sought. He testified that there was an opportunity to save Vivianna if treatment had been sought earlier and that if 100 children survived this type of injury for 4 hours, "a substantial fraction" could be saved with early treatment.

On cross-examination, Alexander admitted the possibility that doctors may not have been able to save Vivianna even if Muro had sought immediate treatment. He could not say that she

would have survived if treatment had been sought 3 hours earlier. Alexander testified there was a reasonable likelihood that Vivianna could have survived with early treatment, but declined to say whether survival was possible or probable. He testified that her chance of survival with early treatment was more than 5 percent but less than 95 percent. On redirect, he stated that the long delay in seeking treatment and the fact that most children would have died within 2 hours of the injury suggested that Vivianna's injury was not "invariably fatal." Thus, he opined that the delay in treatment "may have" contributed to her death.

(c) Resolution by Court of Appeals

Based upon the foregoing evidence and legal principles, a majority of the Court of Appeals panel concluded that it was "sufficient that the evidence establish that the injury could have been survived but for a defendant's actions." *State v. Muro*, 13 Neb. App. 38, 54, 688 N.W.2d 148, 161 (2004). The majority thus determined that evidence of an unquantified chance of survival with prompt treatment was sufficient to establish that Muro's conduct was a proximate cause of Vivianna's death. The dissenting judge reasoned that because there was no evidence that survival would have been probable with prompt medical care, it cannot be said that Muro's failure to seek prompt care was a proximate cause of Vivianna's death. The dissenting judge considered the "core question" to be "whether, with the requisite degree of probability, earlier treatment would have made a difference—meaning whether it was probable that Vivianna would have lived, because the proof must show that the delay caused her death." *Id.* at 60, 688 N.W.2d at 164 (Sievers, Judge, dissenting). Based in part upon our decision in *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999), the dissenting judge reasoned that in order to establish the element of proximate cause, the State had the burden to prove that survival in the absence of the unlawful conduct would have been probable, i.e., more likely than not, noting that

> a criminal conviction which requires proof of guilt beyond a reasonable doubt should not be based upon medical evidence of proximate cause which would, as a matter of law, clearly fall short of the proof needed to support a workers'

compensation claim, a personal injury claim, or a medical malpractice claim.

State v. Muro, 13 Neb. App. at 62, 688 N.W.2d at 165-66 (Sievers, Judge, dissenting).

(d) Disposition on Further Review

Our case law, as summarized above, establishes that criminal conduct is a proximate cause of an event if the event in question would not have occurred but for that conduct; conversely, conduct is not a proximate cause of an event if that event would have occurred without such conduct. *State v. William*, 231 Neb. 84, 435 N.W.2d 174 (1989); *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986). The burden in a criminal proceeding is on the State to produce proof beyond a reasonable doubt of every element of a charged offense. *State v. Sims*, 258 Neb. 357, 603 N.W.2d 431 (1999). Thus, to establish that Muro's unlawful conduct was a proximate cause of Vivianna's death, the State was required to prove beyond a reasonable doubt that but for Muro's delay in seeking medical treatment, Vivianna would have survived her preexisting traumatic head injury. We agree with the dissenting judge that the State did not meet this burden. The State proved only the *possibility* of survival with earlier treatment. Such proof is insufficient to satisfy even the lesser civil burden of proof by a preponderance of the evidence. See *Doe v. Zedek, supra*.

Viewing the evidence in this case in the light most favorable to the prosecution, a finder of fact could not reasonably conclude beyond a reasonable doubt that but for Muro's unlawful conduct, Vivianna would have survived. Accordingly, the evidence is legally insufficient to establish that Vivianna's death resulted from the conduct in question.

The State's failure to prove that Muro's unlawful conduct caused the death, however, does not relieve her of criminal responsibility. As noted above, § 28-707 includes multiple gradations of felony child abuse, depending upon the result of the abusive conduct. We agree with the trial court and the Court of Appeals that the State proved beyond a reasonable doubt that Muro knowingly and intentionally deprived Vivianna of necessary care. That finding is sufficient to sustain a conviction for Class IIIA felony child abuse under § 28-707(4) without any

proof of resulting harm to the child. Accordingly, Muro's sentence must be vacated and the cause remanded for imposition of an appropriate sentence for the Class IIIA felony.

V. CONCLUSION

For the reasons discussed, we affirm the judgment of the Court of Appeals which affirmed Muro's conviction of felony child abuse. However, based upon our determination that the Court of Appeals erred in finding that the evidence was sufficient to establish that the child abuse resulted in death, and therefore constituted a Class IB felony under § 28-707, we vacate the sentence and remand the cause to the Court of Appeals. We direct that court to remand the cause to the district court with directions to impose an appropriate sentence for Class IIIA felony child abuse. See, § 28-707(4); *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002).

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

MAX GABEL AND ROSALIE GABEL, APPELLANTS, v. POLK COUNTY, NEBRASKA, BOARD OF COMMISSIONERS ET AL., APPELLEES.

695 N.W.2d 433

Filed April 28, 2005. No. S-04-488.

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. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues.
3. **Political Subdivisions: Appeal and Error.** An appeal from a board of supervisors denying a conditional use permit is to be taken in accordance with Neb. Rev. Stat. §§ 23-168.01 to 23-168.04 (Reissue 1997) and not by a petition in error.

Appeal from the District Court for Polk County: MICHAEL OWENS, Judge. Appeal dismissed.

Bruce E. Stephens, of Stephens & Sutter, for appellants.

Ronald E. Colling, Polk County Attorney, for appellee Polk County, Nebraska, Board of Commissioners.

Kent E. Rauert, of Svehla, Barrows, Thomas & Rauert, P.C., for appellees Pat Gabel and Brian Gabel.

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

CONNOLLY, J.

Max Gabel and Rosalie Gabel filed a petition in error challenging a conditional use permit granted to Pat Gabel and Brian Gabel by the Polk County Board of Commissioners. The petition in error named the board of commissioners, the Polk County Planning Commission, and Pat and Brian as defendants (collectively the appellees). Under *Mogensen v. Board of Supervisors*, 268 Neb. 26, 679 N.W.2d 413 (2004), the proper procedure to challenge the board of commissioners' decision was to appeal to the Polk County Board of Adjustment rather than by filing a petition in error in district court. Thus, the district court lacked jurisdiction. Consequently, we also lack jurisdiction and therefore dismiss Max and Rosalie's appeal.

BACKGROUND

In September 2001, the Polk County Board of Commissioners voted to approve a conditional use permit that allowed Pat and Brian to operate an intensive livestock confinement facility. Max and Rosalie did not appeal the decision to the Polk County Board of Adjustment. Instead, they filed a petition in error challenging the conditional use permit.

The appellees then entered special appearances, arguing that the court lacked jurisdiction because they had not been properly served. The court agreed and sustained the special appearances.

Max and Rosalie then appealed. In a memorandum opinion filed on January 14, 2005, this court noted that an order sustaining a special appearance is not a final, appealable order unless the plaintiff elects to stand on it and bring about a dismissal. See *Busboom v. Gregory*, 179 Neb. 254, 137 N.W.2d 825 (1965). Because Max and Rosalie had not stood on the order sustaining the special appearances, we dismissed their appeal for lack of jurisdiction.

After we dismissed Max and Rosalie's appeal, they stood on the order sustaining the special appearances and brought about a dismissal of the case. They appeal from that order of dismissal.

ASSIGNMENTS OF ERROR

Max and Rosalie assign, restated and consolidated, that the district court erred in sustaining the appellees' special appearances and dismissing the case.

STANDARD 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. *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003).

ANALYSIS

[2] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues. *Mogensen v. Board of Supervisors, supra.*

[3] In *Mogensen*, the Antelope County Board of Supervisors denied appellant a conditional use permit. After the denial, he filed a petition in error in district court challenging the decision. On appeal, we first noted that under Neb. Rev. Stat. §§ 23-168.01 to 23-168.04 (Reissue 1997), when a county board of supervisors or board of commissioners makes a zoning decision, a party adversely affected by the decision may appeal to the county board of adjustment. We went on to hold that this procedure outlined in §§ 23-168.01 to 23-168.04 forecloses the ability to appeal the zoning decision by petition in error. Thus, the district court had no jurisdiction to entertain the petition in error.

This case is identical in all relevant respects to *Mogensen v. Board of Supervisors*, 268 Neb. 26, 679 N.W.2d 413 (2004). The Polk County Board of Commissioners made a zoning decision adverse to Max and Rosalie. Under §§ 23-168.01 to 23-168.04 and our decision in *Mogensen*, their remedy was to appeal the board of commissioners' decision to the Polk County Board of Adjustment, rather than to file a petition in error in district court. As a result, the district court lacked jurisdiction over the error proceedings.

Because the district court lacked jurisdiction, we also lack jurisdiction. See *Mogensen v. Board of Supervisors, supra.* Accordingly, we dismiss Max and Rosalie's appeal.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLANT, v. MELVIN J. RICE, APPELLEE.

695 N.W.2d 418

Filed April 28, 2005. No. S-04-547.

1. **Sentences: Appeal and Error.** Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
3. **Sentences: Appeal and Error.** When the State challenges a sentence as excessively lenient, the appellate court should consider (1) the nature and circumstances of the offense; (2) the history and characteristics of the defendant; (3) the need for the sentence imposed (a) to afford adequate deterrence to criminal conduct, (b) to protect the public from further crimes of the defendant, (c) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, and (d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (4) any other matters appearing in the record which the appellate court deems pertinent.
4. **Sentences.** A sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. But there also must be some reasonable factual basis for imposing a particular sentence.

Petition for further review from the Nebraska Court of Appeals, INBODY, Chief Judge, and SIEVERS and CARLSON, Judges, on appeal thereto from the District Court for Dakota County, MAURICE REDMOND, Judge. Sentence vacated, and cause remanded with directions.

Jon Bruning, Attorney General, and Kevin J. Slimp, and Edward H. Matney, Dakota County Attorney, and Amber L. Hegarty for appellant.

Scott M. Dugan, Dakota County Public Defender, for appellee.

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

STEPHAN, J.

Melvin J. Rice entered a guilty plea to a reduced charge of driving during revocation, a Class IV felony. After receiving a

standard presentence investigation report and referring Rice to the Department of Correctional Services Diagnostic and Evaluation Center for additional evaluation, the district court for Dakota County sentenced Rice to probation for a term of 36 months under specified terms and conditions. The State of Nebraska, through the Dakota County Attorney, appealed the sentence as excessively lenient, and the Nebraska Court of Appeals affirmed. *State v. Rice*, No. A-04-547, 2004 WL 2937184 (Neb. App. Dec. 21, 2004) (not designated for permanent publication). We granted the State's petition for further review and now conclude that the sentence was excessively lenient. We therefore vacate Rice's sentence and remand the cause with directions for resentencing by a different judge.

BACKGROUND

The following summary of the pertinent facts is taken nearly verbatim from the unpublished opinion of the Court of Appeals. At approximately 10:30 a.m. on August 11, 2003, Rice was stopped by a deputy sheriff of Dakota County, after a citizen complaint of Rice's erratic driving. Rice was found to have an open container of whiskey in the vehicle, was too drunk to perform the usual field sobriety tests, and could hardly stand. Rice's blood alcohol level was .307. The deputy checked Rice's driver's history and found that his driving privileges were revoked for 15 years after a conviction on February 19, 2002, for third-offense driving under the influence. Through a plea agreement, the original charge from the August 11, 2003, arrest, a Class III felony, was amended to driving during revocation, a Class IV felony, to which Rice pled guilty.

Previous Convictions.

Rice's record shows the following pertinent convictions:

July 1972—convicted of drunk driving in California (placed on probation for 3 years);

July 1977—convicted of driving under the influence in Nevada;

September 1977—convicted of drunk driving in California;

May 1984—convicted of driving under the influence in Thurston County, Nebraska (sentenced to 7 days in jail with a license revocation for 6 months);

July 1984—convicted twice of driving under the influence in Dakota County, Nebraska (fined and placed on probation, from which he was ultimately unsuccessfully released);

November 1984—convicted in Dakota County of driving under the influence, third offense, as well as driving under suspension;

April 1990—convicted of driving during suspension, second offense, in Dakota County;

May 1990—convicted of driving under the influence, third offense, in Dakota County, but charges for driving under suspension and driving left of center were dismissed (sentenced to 3 months in jail, $500 fine, and 15-year loss of driving privileges);

April 1992—convicted of driving under suspension, third offense, in Dakota County (sentenced to a 90-day jail sentence, $250 fine, and 2-year license suspension);

May 1996—convicted in Douglas County, Nebraska, of driving under the influence, second offense, as well as driving under suspension (sentenced to 90 days in jail, $500 fine, and 1-year license suspension for driving under the influence, plus 24 months of intensive supervision probation for driving under suspension—from which probation he was unsatisfactorily released in November 1997);

November 1997—convicted in Dakota County of driving under suspension after driving under the influence, third offense, but a driving under the influence charge was dismissed (sentenced to 9 months in county jail);

November 1998 and *January 2002*—convicted of public intoxication in Sioux City, Iowa; and

February 2002—charged in Dakota County with driving during revocation, driving under the influence, third offense, and having an open container, leading to convictions for driving under the influence, third offense, and driving during revocation (sentenced to 90 days in jail, $600 fine, and 15-year license suspension, and 11 months in jail and $1,000 fine, respectively).

Presentence Investigation.

The Nebraska Probation System presentence report for the present offense reveals that Rice was married from 1955 to 1967 and that no children resulted from the marriage. He had an 11-year relationship from 1967 to 1978, during which one child was

born. He has been in his present relationship since 1980. Two children have been born of this relationship, a daughter in 1985 and a son in 1987. Rice claims a close relationship with his children. Rice worked as a pipewelder, retiring in 2000. He was 67 years old at the time of sentencing. He suffered his first heart attack in 1999, a second in 2001, and a third in June 2003. He began drinking alcoholic beverages when he was 14 years of age and his drinking has steadily increased over time. At the age of 48, he entered inpatient treatment at a veterans' hospital for 45 days, and he states that he successfully completed the program and remained sober for approximately 2½ years. When he relapsed at the age of 51, he began drinking every day, and he continued until, at 61 years of age, he reentered inpatient treatment at another veterans' hospital. He claims to have successfully completed this program, but he relapsed again at the age of 63. He remained sober for 3 years until his relapse in December 2001, and he became sober again while in jail for his February 15, 2002, offense. He began drinking again in June 2003, continuing to the time of his arrest for the present offense.

The probation officer's summary concludes that Rice has an extreme alcohol addiction and displays "disrespect for a Court order, which distinctively [sic] ordered for [sic] him not to drive for fifteen years." The probation officer stated that she believed that if Rice were placed on probation, the risk is substantial that Rice will engage in additional criminal conduct. She recommended commitment to a correctional facility, stating that a lesser sentence "will depreciate the seriousness of [Rice's] crime or promote disrespect for the law." Finally, the probation officer said that Rice does not fall within the target population for the intensive supervision probation program based upon the "current offense, criminal history and [Rice's] criminogenic needs."

Department of Correctional Services Evaluation.

The court-ordered evaluation by the Department of Correctional Services revealed that Rice functions somewhere in the high average range of intelligence. In terms of treatment and programming recommendations, the evaluation determined that Rice could use "some substance abuse treatment relapse prevention programming and possible follow-up to that." Rice did not have any adjustment problems while in the evaluation

process. The evaluation notes that Rice has "a fairly extensive history of Driving Under Suspension and Driving While Intoxicated" but that "[h]e does not appear to be a violent individual and does have a history of health problems in particular with his heart." The evaluation concluded that Rice did not like the prison environment and would not like to return. The final recommendations from the evaluation were as follows:

> [Rice] would benefit from some substance abuse relapse prevention treatment and aftercare and could receive this if he was sentenced to a period of probation and required to attend these classes. If [Rice] were sentenced to prison, some form of substance abuse treatment would be available to him. [Rice] would also be able to obtain counseling for what appears to be some depression if he were sentenced to probationary status.

At the sentencing hearing, the State argued that given his record, Rice was a "severe risk to the public," and that "a period of incarceration is necessary and a lesser sentence would depreciate the seriousness of the offense." Defense counsel argued that because Rice would be entitled to a credit for 247 days served while awaiting sentencing, any sentence of incarceration would necessarily be for a brief period which would not allow for effective treatment. The district court prefaced its pronouncement of sentence by stating to Rice that "the Court is going to take a chance on you. It believes that the time that you spent at the [Diagnostic and Evaluation Center] should have got [sic] your attention and wake [sic] you up a little bit." Under the terms of his probation, Rice was ordered to serve 180 days in the Dakota County jail, which could be waived by the court upon application by Rice's probation officer if Rice satisfactorily completed his probation; to pay a $1,000 fine; to have his driver's license revoked for a period of 15 years; to abstain from all drug and alcohol use and submit to random testing for the same; to perform 200 hours of community service; to complete a drug and alcohol evaluation; and to attend drug and alcohol treatment and counseling at his cost and complete any recommended aftercare. Rice was referred to an appropriate mental health center for evaluation and was ordered not to ride in the front seat of any vehicle while on probation.

ASSIGNMENT OF ERROR

In its petition for further review, the State contends that the Court of Appeals erred in concluding that the district court did not abuse its discretion in imposing a sentence that was excessively lenient.

STANDARD OF REVIEW

[1,2] Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion. *State v. Fields*, 268 Neb. 850, 688 N.W.2d 878 (2004); *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id.*

ANALYSIS

Rice was convicted of driving during revocation, a Class IV felony, punishable by up to 5 years' imprisonment, a $10,000 fine, or both. Neb. Rev. Stat. §§ 60-6,196(6) (Cum. Supp. 2002) and 28-105 (Cum. Supp. 2004). Rice's guilty plea resulted from an agreement which reduced the charge from second-offense driving during revocation, a Class III felony punishable by up to 25 years' imprisonment, a $25,000 fine, or both. See *id.*

[3,4] When the State challenges a sentence as excessively lenient, the appellate court should consider:

> (1) The nature and circumstances of the offense;
>
> (2) The history and characteristics of the defendant;
>
> (3) The need for the sentence imposed:
>
> (a) To afford adequate deterrence to criminal conduct;
>
> (b) To protect the public from further crimes of the defendant;
>
> (c) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; and
>
> (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and

> (4) Any other matters appearing in the record which the appellate court deems pertinent.

Neb. Rev. Stat. § 29-2322 (Reissue 1995). Accord *State v. Fields, supra.* A sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *State v. Fields, supra*; *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999). But there also must be some reasonable factual basis for imposing a particular sentence. *State v. Fields, supra*; *State v. Hamik, supra.*

Rice's offense involved operation of a motor vehicle on the highways or streets of the State of Nebraska while his operator's license had been revoked as part of his sentence for driving under revocation and third-offense driving under the influence. Despite his counsel's argument that this offense is not one of the more serious crimes in the "hierarchy of [f]elonious conduct," brief for appellee at 10, the circumstances of the current offense leave no doubt as to its very serious nature. Rice was operating a motor vehicle without a license but with a blood alcohol content almost four times the legal limit and with an open container of whiskey in his vehicle. This conduct posed an obvious and real threat to public safety, which we take into consideration in determining whether a sentence of probation was excessively lenient.

As noted, Rice has a history of alcohol-related motor vehicle offenses spanning more than 30 years, including at least two prior convictions for operating a motor vehicle during periods when his license was suspended or revoked. Prior to the offense involved in this case, he was incarcerated on at least 13 separate occasions and placed on probation 3 times, 2 of which resulted in unsatisfactory release. The presentence investigation report accurately characterized Rice as having an extreme alcohol addiction coupled with a lack of respect for court orders revoking his privilege to operate a motor vehicle.

Although we take note of Rice's age and medical history as mitigating factors, it is difficult to discern a need or justification for leniency in this case. Given Rice's record of recidivism with respect to alcohol-related offenses and the egregious circumstances

of the current offense, a sentence of probation does not adequately reflect the seriousness of the offense, promote respect for the law, or provide just punishment. We agree with the Court of Appeals that a primary objective of sentencing in this case must be to protect the public from the very real risk posed by Rice's operation of a motor vehicle while intoxicated. However, in light of the record, we cannot agree with the court's reasoning that the probationary program outlined by the district court offers the "best chance of protecting the public." *State v. Rice*, No. A-04-547, 2004 WL 2937184 at *6 (Neb. App. Dec. 21, 2004) (not designated for permanent publication). Probation has not deterred Rice's conduct in the past, and we find nothing in the record to suggest that it would be more likely to succeed now. Rice has obtained treatment before, but he has continued to relapse into alcohol abuse. His driver's license has been revoked, but he continues to drink and drive. While we agree, and indeed hope, that Rice may benefit from additional substance abuse treatment, the evaluation performed by the Department of Correctional Services indicates that some form of such treatment would be available to him if he were incarcerated in the custody of the department.

In short, we find nothing in this record which would justify taking a chance that probation will end a 30-year pattern of alcohol abuse and disregard for its legal consequences. Here, protection of the public requires certainty, not chance, and the only certainty we can perceive is that Rice cannot drink and drive while incarcerated.

CONCLUSION

For the reasons discussed, we conclude that the district court abused its discretion by imposing an excessively lenient sentence of probation, and the Court of Appeals erred in affirming the sentence. In this circumstance, Neb. Rev. Stat. § 29-2323 (Reissue 1995) permits an appellate court to set aside the sentence and either (1) remand the cause for imposition of a greater sentence, (2) remand the cause for further sentencing proceedings, or (3) impose a greater sentence. We elect the first option and, therefore, vacate the sentence and remand the cause to the Court of Appeals, directing that court to remand the cause to the district court with instructions to impose a greater sentence. The resentencing should be conducted by one of the current sitting district

judges in the Sixth Judicial District or the retired district judge who has been appointed by this court to serve as an active district judge in that district until further order of the court. See *State v. Fields*, 268 Neb. 850, 688 N.W.2d 878 (2004).

SENTENCE VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

CITIZENS OPPOSING INDUSTRIAL LIVESTOCK AND VILLAGE BOARD OF REYNOLDS, APPELLANTS, V. JEFFERSON COUNTY BOARD OF ADJUSTMENT, APPELLEE.

695 N.W.2d 435

Filed April 28, 2005. No. S-04-669.

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. **Political Subdivisions: Jurisdiction: Pleadings.** Verification of a petition under Neb. Rev. Stat. § 23-168.04 (Reissue 1997) is a purely procedural direction which is formal but does not go to the essence of the law with regard to requirements for jurisdiction of the courts.

Appeal from the District Court for Jefferson County: PAUL W. KORSLUND, Judge. Reversed and remanded for further proceedings.

Steven M. Virgil, Patricia Knapp, and, on brief, Andrew W. Simpson for appellants.

Daniel L. Werner for appellee.

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

CONNOLLY, J.

Citizens Opposing Industrial Livestock (COIL) and the village board of Reynolds (village) appeal the district court's order dismissing their action against the Jefferson County Board of Adjustment. The district court determined that it lacked subject matter jurisdiction because COIL and the village did not file a

verified petition as required by Neb. Rev. Stat. § 23-168.04 (Reissue 1997). We determine that although the petition was not verified, the failure to verify does not deprive the court of jurisdiction. Accordingly, we reverse, and remand for further proceedings.

BACKGROUND

In February 2004, the Jefferson County Board of Commissioners approved a special use permit to allow the operation of a finishing site for swine. In March, the board of adjustment affirmed the board of commissioners' decision.

COIL and the village filed a petition in the district court challenging the ruling by the board of adjustment. The petition was signed by COIL and the village's attorney, but did not include a verification affidavit. The board of adjustment moved to dismiss, contending that the district court lacked jurisdiction because the petition was not verified as required by § 23-168.04.

The district court determined that the petition was not duly verified and that the failure to file a verified petition was jurisdictional. So the court dismissed the petition, and COIL and the village appeal.

ASSIGNMENTS OF ERROR

COIL and the village assign that the district court erred by determining that the petition was not verified and dismissing the action.

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. *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004).

ANALYSIS

COIL and the village argue that an attorney's signature is sufficient to verify a petition. They further argue that if an attorney's signature is insufficient, the failure to verify a petition is not jurisdictional.

Section § 23-168.04 provides:

> Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment . . . may present to

> the district court for the county a petition, duly verified, setting forth that such decision is illegal, in whole or in part, and specifying the grounds of the illegality. The petition must be presented to the court within fifteen days after the filing of the decision in the office of the board of adjustment. . . . Within ten days after the return day of the summons, the county board shall file an answer to the petition which shall admit or deny the substantial averments of the petition and matters in dispute as disclosed by the petition. The answer shall be verified in like manner as required for the petition.

Section 23-168.04 does not define how a petition should be verified. Nebraska's civil procedure, however, previously required verification of pleadings. Under Neb. Rev. Stat. § 25-824 (1943), every pleading of fact was required to be verified by the affidavit of the party or the party's agent or attorney. *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986). In 1969, the Legislature eliminated the requirement of verified pleadings in civil cases. § 25-824 (Cum. Supp. 1969); *In re Interest of L.D. et al., supra.*

Even before the verification requirement was eliminated, we held that usually, verification of a pleading constitutes no part of a pleading and ordinarily is not necessary to vest jurisdiction in a court. *In re Interest of L.D. et al., supra*, citing *Johnson v. Jones*, 2 Neb. 126 (1873); *Northup v. Bathrick*, 80 Neb. 36, 113 N.W. 808 (1907) (syllabus of court, "verification of a pleading is not jurisdictional"); *Dorrington v. Meyer*, 8 Neb. 211 (1879). But § 23-168.04 still contains a verification requirement.

[2] We recently discussed the verification requirement of § 23-168.04 in *Hanchera v. Board of Adjustment, ante* p. 623, 694 N.W.2d 641 (2005). In *Hanchera*, the operative petition was not verified as required by § 23-168.04, and the Red Willow County Board of Adjustment argued that the failure to verify deprived the district court of jurisdiction. Relying on *In re Interest of L.D. et al., supra*, we determined that verification "'"is a purely procedural direction which is formal but does not go to the essence of the law with regard to requirements for jurisdiction of the courts."'" *Hanchera v. Board of Adjustment, ante* at 628, 694 N.W.2d at 646.

The lack of verification was not jurisdictional, and the district court should have allowed leave to amend. Accordingly, the court erred when it dismissed for lack of subject matter jurisdiction, and we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLANT, V.
ADRIAN C. WASHINGTON, APPELLEE.

695 N.W.2d 438

Filed April 28, 2005. No. S-04-868.

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.** Neb. Rev. Stat. § 29-1207 (Reissue 1995) requires discharge of a defendant whose case has not been tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial.
4. ____. Final disposition under Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995) occurs on the date the motion is "granted or denied."

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Exceptions sustained.

Stuart J. Dornan, Douglas County Attorney, Rob D. MacTaggart, and Casey J. Symonds, Senior Certified Law Student, for appellant.

Thomas C. Riley, Douglas County Public Defender, and Matthew J. Miller for appellee.

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

MCCORMACK, J.

BACKGROUND

Adrian C. Washington was charged with second degree assault by information filed December 4, 2003. The next day, Washington

waived his right to physically appear for his arraignment and also filed a motion for discovery. That motion was not disposed of until May 27, 2004, when the district court ordered mutual and reciprocal discovery.

On June 9, 2004, Washington filed a motion to discharge, claiming his right to a speedy trial had been violated. At a hearing on his motion to discharge, Washington argued that the time period during which his motion for discovery was pending should not be excluded for speedy trial calculation purposes. He claimed that the discovery motion did not cause any delay in the case's progression toward a trial because he and the State had exchanged discovery while his motion was pending. The district court sustained Washington's motion to discharge and dismissed the information.

Pursuant to Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2004), the State filed an application for leave to docket an appeal.

ASSIGNMENTS OF ERROR

The State claims that the district court erred in concluding that Washington's statutory right to a speedy trial had been violated and in granting his motion to discharge.

STANDARD 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. Petty, ante* p. 205, 691 N.W.2d 101 (2005).

[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. *Id.*

ANALYSIS

[3] Neb. Rev. Stat. § 29-1207 (Reissue 1995) requires discharge of a defendant whose case has not been tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial. *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004). An information was filed against Washington on December 4, 2003. Therefore, absent any excluded time periods, he should have been

brought to trial by June 4, 2004, 5 days before he filed his motion to discharge.

In computing the 6-month period for statutory speedy trial purposes, § 29-1207(4)(a) excludes 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." The issue in this case is whether the time period during which Washington's motion for discovery was pending should be excluded under § 29-1207(4)(a).

That issue is far from unsettled. Several cases of this court plainly indicate that a motion for discovery filed by a defendant is a pretrial motion and that the time period during which it is pending should be excluded for speedy trial calculation purposes. See, *State v. Steele*, 261 Neb. 541, 624 N.W.2d 1 (2001); *State v. Ward*, 257 Neb. 377, 597 N.W.2d 614 (1999), *disapproved on other grounds, State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004); *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983). See, also, *State v. Castillo*, 11 Neb. App. 622, 657 N.W.2d 650 (2003).

Washington argues that the time period for *his* motion for discovery should not be excluded because it caused no delay in the progression of his case to trial. He also argues that to the extent the motion's disposition by the district court was delayed, such delay was unreasonable. We recently rejected similar arguments:

> "[T]he plain terms of § 29-1207(4)(a) exclude all time between the time of the filing of the defendant's pretrial motions and their final disposition, regardless of the promptness or reasonableness of the delay." . . . Thus, we have recognized that under § 29-1207(4)(a), the period of delay is defined by the statute itself as the period between the filing and final disposition of the pretrial motion. We have also stated that "where the excludable period properly falls under § 29-1207(4)(a) rather than the catchall provision of § 29-1207(4)(f), no showing of reasonableness or good cause is necessary to exclude the delay," and that "conspicuously absent from § 29-1207(4)(a) is any limitation, restriction, or qualification of the time which may be charged to the defendant as a result of the defendant's motions."

(Citation omitted.) *State v. Covey*, 267 Neb. 210, 216-17, 673 N.W.2d 208, 213 (2004).

[4] Final disposition under § 29-1207(4)(a) occurs on the date the motion is " 'granted or denied.' " *State v. Covey*, 267 Neb. at 217, 673 N.W.2d at 213. Washington's December 5, 2003, motion for discovery was not disposed of until May 27, 2004, when the district court ordered mutual and reciprocal discovery. For the reasons set forth above, that time period should be excluded for speedy trial calculation purposes. Excluding that time period, Washington's motion to discharge was filed long before the 6-month period expired. Thus, the district court erred in sustaining Washington's motion to discharge and in dismissing the information. We sustain the State's exceptions. Because jeopardy did not attach, the cause is remanded to the district court for further proceedings pursuant to Neb. Rev. Stat. § 29-2316 (Cum. Supp. 2004).

EXCEPTIONS SUSTAINED.

GREGORY F. JOHNSON, APPELLANT, V. UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION NOW KNOWN AS ST. PAUL FIRE AND MARINE INSURANCE COMPANY, AND EMPLOYERS MUTUAL CASUALTY COMPANY, A CORPORATION, APPELLEES.

696 N.W.2d 431

Filed May 6, 2005. No. S-03-748.

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. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing 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 the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Jurisdiction: States.** When there are no factual disputes regarding state contacts, conflict-of-law issues present questions of law.

5. ____: ____. The first step in a conflict-of-law analysis is to determine whether there is an actual conflict between the legal rules of different states.
6. ____: ____. An actual conflict exists when a legal issue is resolved differently under the law of two states.
7. **Insurance: Contracts: Motor Vehicles: Torts: Liability.** Because actions for uninsured and underinsured coverage can involve both tort and contract liability, a court must classify the nature of the specific conflict issue as sounding in tort or in contract.
8. **Insurance: Contracts.** An insurance policy is a contract between the insurer and the insured, whose respective rights and obligations must be determined by application of contract principles.
9. ____: ____. The right of an insured to recover benefits from his or her insurer requires a court to review the scope of the insurance contract as well as any statutes governing the contract provisions.
10. **Torts: Motor Vehicles: States: Damages.** A conflict regarding a motor vehicle accident victim's right to bring a tort action against a tort-feasor for damages arising out of an accident in the foreign state is governed by the Restatement (Second) of Conflict of Laws § 146 (1971).
11. **Insurance: Motor Vehicles: Contracts.** The enforceability of the insurers' setoff provisions in their underinsured motorist coverages presents an issue of coverage, which is governed by the provisions for contract of the Restatement (Second) of Conflict of Laws (1971).
12. **Insurance: Torts: Case Disapproved.** To the extent that *Crossley v. Pacific Employers Ins. Co.*, 198 Neb. 26, 251 N.W.2d 383 (1977), can be interpreted as authorizing the application of the Restatement (Second) of Conflict of Laws § 146 (1971) to resolve a conflict limited to the issue of insurance coverage, not implicating threshold tort liability, it is disapproved.
13. **Contracts.** For the resolution of contract conflicts, the Nebraska Supreme Court has adopted the Restatement (Second) of Conflict of Laws § 188 (1971).
14. **Jurisdiction: States: Contracts.** Usually, when determining whether another state has a more significant interest in having its law applied to a specific contract issue, the most compelling factor under general conflict-of-laws principles is the protection of the parties' justified expectations.
15. **Contracts: Appeal and Error.** The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Daniel H. Friedman and Herbert J. Friedman, of Friedman Law Offices, for appellant.

Cathy S. Trent and Stephen L. Ahl, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee United States Fidelity and Guaranty Company.

Randall L. Goyette and Molly M. Egley Brummond, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee Employers Mutual Casualty Company.

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

HENDRY, C.J.

NATURE OF CASE

This is an action arising out of a motor vehicle accident that occurred in Colorado in which appellant Gregory F. Johnson was injured. After recovering from the tort-feasor's insurers, Johnson sought additional benefits from his own insurer and the insurer of the car he was driving when injured. The district court for Lancaster County granted the insurers' motions for summary judgment, determining that in accordance with Colorado law, Johnson was not entitled to any additional benefits.

BACKGROUND

At the time of the accident, Johnson was a partner in a Kearney, Nebraska, automobile dealership known as Action Auto Exchange. Action Auto Exchange was insured by Employers Mutual Casualty Company (EMC). EMC's policy provided, inter alia, underinsured motorist (UIM) coverage in the amount of $100,000 and medical payments coverage.

In December 1993, another Kearney automobile dealer, Leon Brown, asked Johnson to ride with him to Denver in order to drive back any vehicle Brown might purchase at an automobile auction. Brown paid Action Auto Exchange for Johnson's services. Brown's dealership was insured under a policy issued by United States Fidelity and Guaranty Company (USF&G), which also provided, inter alia, UIM coverage in the amount of $100,000 and medical payments coverage.

On December 15, 1993, while driving a pickup Brown purchased in Colorado, Johnson was struck from behind by an automobile driven by Melissa Schultz. The impact caused the pickup to roll over. Johnson was seriously injured and sued Schultz and her insurers, Shelter Insurance Company and Allstate Insurance Company. These policies provided, respectively, $50,000 and $100,000 of automobile liability coverage. Both of Schultz'

insurers tendered their policy limits to settle Johnson's claims, which offers Johnson accepted in November 2000.

Johnson then made demand against USF&G and EMC for unpaid medical expenses and UIM benefits. Both of these policies contained out-of-state coverage extensions, requiring the insurers to "[p]rovide the minimum amounts and types of other coverages, such as no-fault, required of out-of-state vehicles by the jurisdiction where the covered 'auto' is being used." Both policies also contained setoff provisions, purporting to reduce the insurer's UIM liability by any moneys recovered from a legally responsible party. In conformance with Colorado law and the out-of-state coverage provisions, USF&G paid Johnson the maximum required personal injury protection (PIP) benefits of $100,000. EMC denied coverage for the balance of Johnson's claimed medical expenses. Both USF&G and EMC denied Johnson's claim to UIM benefits.

On November 13, 2000, Johnson brought suit against USF&G and EMC in the district court for Lancaster County, alleging he was totally and permanently disabled, had incurred medical expenses in excess of $151,000 to date, and would require future surgery and medical treatment. Johnson set out three causes of action. In his first cause of action, Johnson alleged that USF&G and EMC each owed him $100,000, their respective policy limits for UIM coverage. In his second cause of action, Johnson asserted that EMC owed him $51,000, which he claimed was the balance of his medical expenses not covered by the $100,000 PIP benefit previously paid by USF&G. In his third cause of action, Johnson alleged that USF&G and EMC's denials of benefits were made in bad faith.

USF&G and EMC moved for summary judgment. Following an evidentiary hearing, the district court found there were no genuine issues of material fact and that USF&G and EMC were entitled to judgments against Johnson. In granting summary judgment, the district court concluded that (1) under *Crossley v. Pacific Employers Ins. Co.*, 198 Neb. 26, 251 N.W.2d 383 (1977), Colorado law applied to Johnson's UIM claim, and that as a result, Johnson was not entitled to UIM benefits from either USF&G or EMC; (2) under Colorado law, Johnson was not entitled to PIP benefits from EMC; (3) pursuant to a contract

exclusion, Johnson was not entitled to medical payments benefits from EMC; and (4) USF&G and EMC had not acted in bad faith. Johnson appeals.

ASSIGNMENTS OF ERROR

Johnson assigns, restated and renumbered, that the district court erred in (1) applying Colorado law and (2) granting summary judgment on the issues of (a) UIM benefits, (b) PIP benefits, and (c) medical payments benefits.

STANDARD 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. *Cave v. Resier*, 268 Neb. 539, 684 N.W.2d 580 (2004).

[2,3] Summary judgment is proper when the pleadings and evidence admitted at the hearing 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. *Auto-Owners Ins. Co. v. Home Pride Cos.*, 268 Neb. 528, 684 N.W.2d 571 (2004). 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. *Id.*

ANALYSIS

CONFLICT OF LAW REGARDING UIM BENEFITS: APPLICATION OF TORT OR CONTRACT PRINCIPLES

Although recognizing that Johnson's claims against USF&G and EMC "arguably arise out of insurance contracts," the district court determined that under *Crossley, supra*, "the Nebraska Supreme Court has nevertheless held that Section 146 of the Restatement governs choice of law questions in actions for uninsured or UIM benefits." The Restatement (Second) of Conflict of Laws § 146 at 430 (1971) provides:

> In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under

> the [general choice-of-law] principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Applying § 146, the court concluded that Colorado law governed Johnson's claim for UIM benefits.

Johnson argues that *Crossley v. Pacific Employers Ins. Co.*, 198 Neb. 26, 251 N.W.2d 383 (1977), is not controlling under these facts. Johnson contends that because insurance contracts are involved in this action, the conflict sounds in contract and should be resolved by applying the Restatement, *supra*, § 188(1) at 575 ("rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties"). We agree with Johnson.

[4] When there are no factual disputes regarding state contacts, conflict-of-law issues present questions of law. See, *Malena v. Marriott International*, 264 Neb. 759, 651 N.W.2d 850 (2002); *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 625 N.W.2d 197 (2001); *Hughes Wood Products, Inc. v. Wagner*, 18 S.W.3d 202 (Tex. 2000) (stating that while which state's law governs issue is question of law, determining state contacts involves factual inquiry).

[5,6] The first step in a conflict-of-law analysis is to determine whether there is an actual conflict between the legal rules of different states. See *Malena*, 264 Neb. at 762-63, 651 N.W.2d at 854 (" '[b]efore entangling itself in messy issues of conflict of laws a court ought to satisfy itself that there actually is a difference between the relevant laws of the different states' "), quoting *Barron v. Ford Motor Co. of Canada Ltd.*, 965 F.2d 195 (7th Cir. 1992). An actual conflict exists when a legal issue is resolved differently under the law of two states. See, *Nodak Mut. Ins. v. American Family Mut.*, 604 N.W.2d 91 (Minn. 2000); *Seizer v. Sessions*, 132 Wash. 2d 642, 940 P.2d 261 (1997).

The district court properly concluded that under Colorado law at the time of the accident, an insurer was liable for UIM benefits only when there was a "gap" between the moneys recovered from the person or organization legally liable and the limit of the insurer's UIM coverage. See Colo. Rev. Stat. Ann. § 10-4-609(5) (West 1990) (governing insurer's maximum UIM liability).

Because it was undisputed that Johnson had recovered $150,000 in liability benefits from Schultz' insurers and that the USF&G and EMC policies provided only $100,000 in UIM coverage, the court determined: "Whereas there is no 'gap' in this case . . . Johnson is precluded as a matter of Colorado law from recovering UIM benefits from either defendant."

In contrast, under Nebraska law since 1991, an insured is entitled to recover UIM benefits when there was a "gap" between the insured's *damages* and the moneys recovered from the person or organization legally liable, up to the limits of the UIM coverage provided. See 1990 Neb. Laws, L.B. 1136, § 124 (operative July 1, 1991), codified as Neb. Rev. Stat. § 44-6409 (Reissue 2004) (transferred from Neb. Rev. Stat. § 60-578 (Reissue 1993)). Thus, there is an actual conflict of law regarding the enforceability of the setoff provisions in these contracts. Having determined that an actual conflict exists, we next determine whether the choice-of-law rules for tort or contract govern the resolution of this conflict.

[7] Actions for uninsured (UM) and UIM coverage can involve both tort and contract liability. See *Lee v. Saliga*, 179 W. Va. 762, 373 S.E.2d 345 (1988). Thus, in such actions, a court's second step is to classify the nature of the specific conflict issue: Does the conflict sound in tort or in contract? See, *Ohayon v. Safeco Ins. Co. of Ill.*, 91 Ohio St. 3d 474, 476, 747 N.E.2d 206, 208 (2001) ("[w]e must *classify* the [plaintiffs'] cause of action before we answer the choice-of-law question raised in their complaint because different choice-of-law rules apply depending on whether the cause of action sounds in *contract* or in *tort*"); *Buchanan v. Doe*, 246 Va. 67, 71, 431 S.E.2d 289, 291 (1993) ("forum state applies its own law to ascertain whether the issue is one of tort or contract"). See, also, Eugene F. Scoles et al., Conflict of Laws §§ 3.3 to 3.5 (4th ed. 2004) (discussing, generally, importance of initial subject matter characterization in conflict analysis).

[8] "[I]t is well-settled Nebraska law that an insurance policy is a contract between the insurer and the insured, whose respective rights and obligations must be determined by application of contract principles." *Volquardson v. Hartford Ins. Co.*, 264 Neb. 337, 344, 647 N.W.2d 599, 606 (2002). See, also, *Schrader v. Farmers Mut. Ins. Co.*, 259 Neb. 87, 608 N.W.2d 194 (2000)

(holding that Neb. Rev. Stat. § 44-6413(1)(e) (Reissue 2004), barring actions for UM or UIM coverage when insured's underlying claim against tort-feasor expires, is inapplicable when insured timely files action against tort-feasor; in that circumstance, applicable statute of limitations on claim against insurer for UM or UIM benefits is statute governing actions on written contracts).

[9] The right of an insured to recover benefits from his or her insurer requires a court to review the scope of the insurance contract as well as any statutes governing the contract provisions. See, e.g., *Hood v. AAA Motor Club Ins. Assn.*, 259 Neb. 63, 607 N.W.2d 814 (2000) (stating that provision drawn by insurer to comply with statutory requirements of UM or UIM coverage must be construed in light of purpose and policy of statute). Thus, we determine Johnson's action sounds in contract, not tort, "even though it is tortious conduct that triggers applicable contractual provisions." See *Ohayon*, 91 Ohio St. 3d at 480, 747 N.E.2d at 211. Accord, *Miller v. State Farm Mut. Auto. Ins. Co.*, 87 F.3d 822 (6th Cir. 1996) (rejecting executrix's argument that tort conflict-of-law provisions determined which state's law governed issue of whether insurer was required to provide per-person or per-accident UIM coverage and affirming district court's application of contract provisions); *Walker v. State Farm Mut. Auto. Ins. Co.*, 973 F.2d 634 (8th Cir. 1992) (applying conflict-of-law provisions for contract to determine which state's law governed insureds' right to stack UIM coverages); *Vaughan v. Nationwide Mut. Ins. Co.*, 702 A.2d 198 (D.C. App. 1997) (applying conflict-of-law provisions for contract to determine which state's law governed insurer's right to reduce UM coverage by money recovered from state disability plan); *Ryals v. State Farm Mut. Auto. Ins. Co.*, 134 Idaho 302, 1 P.3d 803 (2000) (applying conflict-of-law provisions for contract to determine which state's law governed interpretation of UM coverage provisions); *Lee v. Saliga*, 179 W. Va. 762, 766, 373 S.E.2d 345, 349 (1988) (noting that UM cases involve both contract and tort law, but that where question "involves an aspect of policy *coverage*, rather than *liability*, it is treated as a contract question for purposes of conflicts analysis").

The district court's determination that *Crossley v. Pacific Employers Ins. Co.*, 198 Neb. 26, 251 N.W.2d 383 (1977), controlled in this factual circumstance was error. In *Crossley*, the

Nebraska plaintiff suffered minor injuries in an automobile accident while in Colorado riding as a passenger in a vehicle driven by a Nebraska resident. A Colorado driver was "at fault" for the accident, but the plaintiff's medical costs and wage losses fell below the minimum liability threshold for asserting a tort claim against a Colorado driver insured under the Colorado Auto Accident Reparations Act. After the Colorado driver's insurer refused to pay personal injury damages to the plaintiff, he filed suit against his own insurer for UM benefits in the district court for Douglas County. The plaintiff's policy provided $10,000 in UM coverage for all sums to which the insured was " 'legally entitled to recover as damages from the owner or operator' " of a UM vehicle. 198 Neb. at 28, 251 N.W.2d at 385. The district court found that the Colorado vehicle was a UM vehicle as a matter of law, and the jury returned a verdict for the plaintiff.

On appeal, the plaintiff argued that he was entitled to recover if the Colorado driver would be liable under the tort law of Nebraska, but that in the alternative, if this court determined that Colorado law controlled, he should be allowed to recover UM benefits from his own insurer. In response, this court determined that under the Restatement (Second) of Conflict of Laws § 146 (1971), the law of the state where the accident occurred controls the right to recover and the amount of the recovery. *Crossley, supra.*

[10] We reaffirm the holding in *Crossley* that under the Restatement, *supra*, § 146, Colorado's no-fault law governed the threshold issue of the tort-feasor's liability. As this court noted, "in virtually all instances where the conduct and the injury occur in the same state, that state has the dominant interest in regulating that conduct and in determining whether it is tortious in character, and whether the interest affected is entitled to legal protection." *Crossley*, 198 Neb. at 30, 251 N.W.2d at 386, citing Restatement, *supra*, § 146, comment *d*. See, also, *Malena v. Marriott International*, 264 Neb. 759, 651 N.W.2d 850 (2002) (recognizing foreign state's dominant interests in limiting less serious tort claims in order to protect claimants with more serious damages and to maintain low insurance premiums for its residents, when conduct and injury occurred in foreign state).

But this court's reliance on § 146 in *Crossley, supra*, should not be read as a determination that Colorado law governed the interpretation of a Nebraska contract. Rather, we stated:

> [T]he plaintiff could only recover under his own uninsured motorist coverage any sums which the operator of the Colorado automobile would be legally responsible to pay to the plaintiff as damages, and that issue is determined under Colorado law. Uninsured motorist coverage is dependent upon legal liability on the part of the uninsured motorist to the insured for the personal injuries sustained. *The claimant must establish the liability of the uninsured motorist to him before he can recover*. . . . Whether the Colorado driver is regarded as an insured motorist or an uninsured motorist, there is simply no dispute that she is not legally liable to the plaintiff for his bodily injuries suffered in this accident.

(Emphasis supplied.) *Crossley v. Pacific Employers Ins. Co.*, 198 Neb. 26, 30, 251 N.W.2d 383, 386 (1977). Thus, our reliance on § 146 was simply a rejection of the plaintiff's contention that he was entitled to have the issue of the tort-feasor's underlying liability resolved under Nebraska's tort rules. Instead, we interpreted the insurance policy to require the insured to prove he or she could establish the tort-feasor's threshold liability under the law of the state where the accident occurred. See Eugene F. Scoles et al., Conflict of Laws § 17.56 (4th ed. 2004) (citing cases showing split of authority whether insureds must prove they are legally entitled to recover under law of state where policy was issued or state in which accident occurred, for purposes of UM or UIM coverage).

This application of *Crossley* is supported by cases from other jurisdictions cited in that opinion. See, *Bachman v. American Mutual Insurance Co. of Boston*, 338 F. Supp. 1372 (D. Kan. 1972) (concluding in action against decedent's insurer that plaintiff had failed to sustain his burden of showing uninsured motorist was liable for injuries to plaintiff's son); *Noland v. Farmers Insurance Exchange*, 413 S.W.2d 530, 533 (Mo. App. 1967) (holding that where Missouri insured was injured in Missouri when car in which she was riding was struck by separate uninsured vehicle driven by her husband and where Missouri law precluded wife from suing husband, insured was not entitled to UM

benefits because coverage was provided only when UM motorist was legally responsible for damages, noting that action against insurer "was upon contract (not tort), and that the terms of the contract govern").

This application of *Crossley, supra*, is also consistent with the language this court adopted in *Lane v. State Farm Mut. Auto. Ins. Co.*, 209 Neb. 396, 405, 308 N.W.2d 503, 509 (1981):

> "We construe the words 'legally entitled to recover as damages' to mean simply that the insured must be able to establish fault on the part of the uninsured motorist which gives rise to the damages and to prove the extent of those damages. This would mean that in a direct action against the insurer *the insured has the burden of proving that the other motorist was uninsured, that the other motorist is legally liable for damage to the insured, and the amount of this liability. . . .*"

(Emphasis supplied.) Quoting *Winner v. Ratzlaff*, 211 Kan. 59, 505 P.2d 606 (1973).

We acknowledge that the *Crossley* analysis has led to some confusion as to whether this court applied tort or contract conflict-of-law provisions to determine which state's law controls the interpretation of an insurance contract. See *Lane, supra* (concluding that *Crossley, supra*, was inapplicable to issue of whether Nebraska insured was required to obtain judgment against Nebraska tort-feasor before proceeding against UM insurer because *Crossley* was decided under Colorado law and not Nebraska's UM statute). We take this opportunity, however, to clarify *Crossley*. In doing so, we decline to interpret *Crossley* as adopting the Restatement (Second) of Conflict of Laws § 146 (1971) to determine the governing state law for the interpretation or enforcement of a contract issued by a Nebraska insurer to a Nebraska insured when the issue does not involve the tort-feasor's threshold liability. Such interpretation would run counter to generally recognized conflict-of-law principles and perpetuate unnecessary confusion in our conflict-of-law jurisprudence.

The Ohio Supreme Court resolved an issue similar to the case now before this court and, in doing so, addressed similar confusion in Ohio's case law. *Ohayon v. Safeco Ins. Co. of Ill.*, 91 Ohio St. 3d 474, 747 N.E.2d 206 (2001). In *Ohayon*, the son of an Ohio

insured was struck by a car in Pennsylvania and settled with the tort-feasor for the limits of the tort-feasor's liability coverage. In an action brought in Ohio, the Ohio insureds argued that Pennsylvania's law controlled the issue of whether the insureds could stack their UIM coverage amounts for separate vehicles and whether their UIM insurer could limit its liability by the moneys recovered from the person or organization legally responsible. Pennsylvania law permitted stacking and prohibited the setoff provisions, but the insureds' policy, issued in Ohio, contained provisions barring stacking and permitting setoffs, consistent with Ohio's statutes. The trial court determined that the action was based on tort law and applied the Restatement's tort conflict-of-law provisions to determine that Pennsylvania law governed the coverage issue. See *Ohayon, supra.* The Ohio Ninth District Court of Appeals reversed, and the Ohio Supreme Court affirmed the Court of Appeals' decision.

The Ohio Supreme Court reasoned that a tort conflict-of-law analysis was appropriate where the issue was the measure of damages recoverable from the tort-feasor, but that "[t]he resolution of . . . stacking and setoff issues is a coverage issue, separate and independent from the measure of damages assessed to the tortfeasor." *Id.* at 482, 747 N.E.2d at 213. Similar to the confusion arguably created by this court's decision in *Crossley v. Pacific Employers Ins. Co.*, 198 Neb. 26, 251 N.W.2d 383 (1977), the Ohio Supreme Court had previously applied a tort conflict-of-law analysis in *Kurent v. Farmers Ins.*, 62 Ohio St. 3d 242, 581 N.E.2d 533 (1991), to determine whether the insured was legally entitled to recover from the tort-feasor pursuant to the foreign state's no-fault law. In *Ohayon, supra*, the court clarified that *Kurent* was not applicable to issues of coverage.

We agree with the reasoning in *Ohayon, supra*, and conclude that in applying *Crossley, supra*, the district court "confused the issue of a tort-feasor's liability to a plaintiff with the issue of an insurer's liability on its contract." See *Miller v. State Farm Mut. Auto. Ins. Co.*, 87 F.3d 822, 826 & n.1 (6th Cir. 1996) (discussing Ohio Supreme Court's decision in *Kurent, supra*, and concluding that in another case, Ohio's Seventh District Court of Appeals had misapplied *Kurent* by concluding it controlled in any claim against insurer for recovery of damages caused by third party).

[11,12] The issue in *Crossley, supra*—whether, in the first instance, the insured was legally entitled to recover from the tort-feasor—is simply not before this court in Johnson's case. USF&G and EMC do not contend that the Colorado Auto Accident Reparations Act prevented Johnson from maintaining a tort action against Schulz, that it limited his recovery, or that Johnson failed to satisfy the minimum liability threshold for pursuing a tort action. See Colo. Rev. Stat. Ann. § 10-4-714 (West 1990). Compare *Malena v. Marriott International*, 264 Neb. 759, 651 N.W.2d 850 (2002) (reversing application of Nebraska law and determining that defendant was entitled to jury instruction based on California law that precluded plaintiff's recovery for parasitic damages for fear of developing illness in certain circumstances). The fact that Schulz' insurers paid the limits of their liability obligations demonstrates that Schulz' underlying tort liability was not at issue. Rather, the issue is the enforceability of the insurers' setoff provisions in their UIM coverages. We conclude that the record in this case limits the conflicts issue to coverage, which is governed by the Restatement's conflict-of-law provisions for contract. To the extent that *Crossley* can be interpreted as authorizing the application of the Restatement (Second) of Conflict of Laws § 146 (1971) to resolve a conflict limited to the issue of insurance coverage, not implicating threshold tort liability, it is hereby disapproved.

APPLICATION OF RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 PRINCIPLES TO JOHNSON'S CASE

Johnson asserts that under the Restatement, *supra*, Nebraska has the most significant relationship to the insurance contracts in dispute and that Nebraska law should apply. USF&G and EMC argue that regardless of whether the conflict provisions for tort or contract are applied, Colorado has the most significant interest in applying its law to an accident which occurred in Colorado.

[13] For the resolution of contract conflicts, this court has adopted the Restatement, *supra*, § 188. *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 625 N.W.2d 197 (2001), citing *Powell v. American Charter Fed. Sav. & Loan Assn.*, 245 Neb. 551, 514 N.W.2d 326 (1994). Section 188 at 575 provides:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state

> which, with respect to that issue, has the most significant relationship to the transaction and the parties under the [general choice-of-law] principles stated in § 6.
>
> (2) In the absence of an effective choice of law by the parties . . . the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
>
> (b) the place of negotiation of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and
>
> (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

In this case, it is undisputed that the insurance contracts in question were issued in Nebraska. The insured risks, the coverage limits, and the premium costs were all negotiated in Nebraska. The insured risk was principally located in this state. Johnson is a resident of this state, and USF&G and EMC were licensed to conduct insurance business in this state. Thus, the general contacts under § 188 unquestionably point to Nebraska contract law as controlling. In *Mertz*, we stated that "[w]hile § 188 sets out the general contacts to consider in contract cases involving conflict of law disputes, §§ 189 through 197 deal with conflict of laws disputes with regard to specific types of contracts." 261 Neb. at 709, 625 N.W.2d at 202. The Restatement, *supra*, § 193 at 610, addresses the issue of covered risks in an insurance policy:

> The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the [general choice-of-law] principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

Comment *a.* clarifies that the law selected by application of § 193 "determines such questions as . . . what risks are covered by the

policy." *Id.* at 610. Comment *b.* provides that the principal location of the insured risk is the state "where it will be during at least the major portion of the insurance period." *Id.* at 611. Thus, regardless of whether the issue is analyzed under § 188 or § 193, Nebraska's law should govern what UM or UIM risks were covered by Johnson's insurance contracts unless Colorado has a more significant relationship to the parties and the transaction under the general choice-of-law principles stated in § 6 of the Restatement. See *Mertz, supra* (discussing presumption created by application of sections dealing with specific types of contracts).

The Restatement (Second) of Conflict of Laws § 6(2) at 10 (1971) provides that when there is no statutory provision directing a court's choice-of-law decision, the relevant factors include:

> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.

[14] Usually, when dealing with contract claims, the most compelling factor under § 6 is the protection of the parties' justified expectations. See, Restatement, *supra*, § 188, comment *b.*; Restatement, *supra*, § 193, comment *c.* at 612 ("location of the insured risk . . . has an intimate bearing upon the risk's nature and extent and is a factor upon which the terms and conditions of the policy will frequently depend"). Compare *Malena v. Marriott International*, 264 Neb. 759, 651 N.W.2d 850 (2002) (setting out most relevant principles under § 6 for tort claims). However, in a circumstance not implicating either a tort-feasor's threshold liability or the amount a tort victim can recover, and focusing only upon coverage based upon a contract entered into in Nebraska, this state would also have the most significant interest in applying its law when such law specifically prohibits the enforcement of a contract provision. See Restatement, *supra*, § 205, comment *c.* at 662 (explaining that even if application of rule defeats

expectations of parties to contract, state with "a local law rule which requires that the contract give rise to certain rights and duties or which provides that the parties may not limit the extent of their obligations by a certain provision" is likely to represent strongly felt policy under the principles stated in § 6). Compare *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 710, 625 N.W.2d 197, 204 (2001) ("Iowa's interest in protecting the expectations of the parties is outweighed by Nebraska's strong public policy considerations").

In 1990, the Nebraska Legislature amended its statutory formula for determining an insurer's maximum liability for UIM coverage to permit benefits to an insured when the tort-feasor is underinsured relative to the insured's actual damages. See 1990 Neb. Laws, L.B. 1136, § 124. The insurance contracts in this case were negotiated and issued after that amendment was enacted. Nebraska therefore has a significant interest not only in ensuring that its residents with UIM coverage are compensated for their injuries to the extent required by the governing statutes, but also in ensuring that policies issued in this state conform to those statutes.

We reject USF&G and EMC's arguments that the application of contract conflict-of-law principles leads to the determination that Colorado law would apply. We conclude that Colorado would not have a more significant relationship to this issue under the interests stated in the Restatement, *supra*, § 6, because the determination of a Nebraska resident's right to recover UIM benefits from a Nebraska insurer does not, under the record before us, impact Colorado residents or insurers, or the application of its no-fault rules, as they then existed. Finally, the application of Nebraska's laws to resolve the enforceability of contract coverage provisions between Nebraska insurers and insureds enhances the predictability of the parties' contractual rights and obligations by removing the constant variable of different states in which insureds travel. See *Vaughan v. Nationwide Mut. Ins. Co.*, 702 A.2d 198 (D.C. App. 1997).

PIP Benefits

In contrast to the setoff provisions for UIM coverage, we determine that there is no conflict of law presented by the PIP

issue. The out-of-state coverage provisions of both the USF&G and EMC policies specified that the insurer would provide any coverage "*required of out-of-state vehicles by the jurisdiction where the covered 'auto' is being used.*" (Emphasis supplied.) UIM coverage was required by both Nebraska and Colorado, and the coverage was provided in both policies. PIP coverage, however, was required only by Colorado law and was provided only as a result of the out-of-state coverage provisions. Thus, there is no conflict between Nebraska and Colorado laws regarding this coverage, and the coverage provided was entirely dependent upon the requirements of Colorado law. As such, the issue is simply an application of Colorado law as provided by the insurance contracts.

In applying Colorado law to Johnson's claim for PIP coverage, the district court determined that Johnson was not entitled to PIP benefits from EMC under the Colorado Auto Accident Reparations Act, see Colo. Rev. Stat. Ann. § 10-4-701 et seq. (West 1990 & Supp. 1999), as construed in *State Farm Mut. Auto. Ins. Co. v. Ketcham*, 849 P.2d 871 (Colo. App. 1994). Although the Colorado Legislature repealed the no-fault act, effective July 2001, see § 10-4-701 (West Supp. 1999), it was in effect at the time of this accident.

In 1993, the Colorado Auto Accident Reparations Act required every *owner* of a motor vehicle operated on the public highways of Colorado to have a complying policy in effect, which included mandatory PIP coverage. See §§ 10-4-705 to 10-4-707. As noted, the PIP coverage requirements extended to out-of-state policies while the covered vehicle was in Colorado. See § 10-4-711(4).

In *Ketchum*, the plaintiff was a California resident who was injured in Colorado while operating a Colorado resident's vehicle while his own vehicle remained in California. He sought PIP benefits from his insurer, which were denied. The Colorado Court of Appeals held that under § 10-4-711, an insurer was "not required to provide no-fault benefits under § 10-4-706 and § 10-4-707 to a nonresident whose insured vehicle is not located in Colorado at the time of the accident." *Ketchum*, 849 P.2d at 873.

We agree with the district court's application of *Ketchum*. Pursuant to *Ketchum*, only Brown, the owner of the automobile at the time of the accident, was required to have PIP coverage.

Brown's insurance provider, USF&G, in fact paid Johnson PIP benefits in accordance with its out-of-state policy provisions and Colorado law. As such, we find no merit to Johnson's argument that EMC was also required to provide him with PIP benefits.

Medical Payments Benefits

Finally, the court determined that Johnson was not entitled to medical payments benefits under his EMC policy because an exclusion precluded that coverage for an insured's bodily injury sustained " 'while working in a business of selling, servicing[,] repairing or parking 'autos' unless that business is yours.' " The court determined the language was unambiguous and found that Johnson was clearly working for Brown's business at the time of the accident.

In their briefs, the parties do not contend this issue would have been resolved differently depending upon whether Colorado or Nebraska law was applied or that an actual conflict exists. Rather, their arguments center upon the proper interpretation of the contract and whether that interpretation requires payment to Johnson under EMC's medical payments provisions. We therefore analyze the issue based upon the arguments in the parties' respective briefs.

[15] The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *H & R Block Tax Servs. v. Circle A Enters., ante* p. 411, 693 N.W.2d 548 (2005).

Johnson argues that although he would not have gone to Denver but for Brown's request, once in Denver, Johnson was doing work for his own partnership business as well. While that may be the case, Johnson's evidence does not challenge the undisputed record establishing that at the time of the accident, Johnson was driving a vehicle owned by Brown from Colorado to Nebraska, the very service he had agreed to provide to Brown for a fee. Viewing the evidence in a light most favorable to Johnson and giving him the benefit of all reasonable inferences, we conclude that the district court did not err in determining as a matter of law that at the time of the accident, Johnson was in Brown's employ. The policy issued by EMC specifically

excluded coverage for medical payments under these facts. This assignment of error is without merit.

CONCLUSION

For the reasons stated above, we affirm the district court's order granting summary judgment to USF&G and EMC on the issues of medical payments and PIP benefits. We reverse, however, that portion of the court's order granting summary judgment on the issue of UIM benefits and remand the cause to the district court for further action consistent with this opinion.

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

STATE OF NEBRASKA, APPELLEE, V. KIMBERLY SUE FAUST, APPELLANT.

696 N.W.2d 420

Filed May 6, 2005. No. S-04-298.

1. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Witnesses: Appeal and Error.** Witness credibility is not to be reassessed on appellate review.
4. **Constitutional Law: Identification Procedures: Due Process.** An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law.
5. ____: ____: ____. The initial inquiry is whether an identification procedure was unduly suggestive. A determination of impermissible suggestiveness is based on the totality of the circumstances.
6. **Trial: Identification Procedures: Evidence.** Even if there have been impermissible pretrial suggestions as to an accused's identity, in-court identification may be received when it is independent of and untainted by the impermissible identification procedures.
7. **Identification Procedures.** Reliability is the linchpin in determining the admissibility of identification testimony. The factors to be considered include (1) the opportunity of the witness to view the alleged criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of his or her prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation. Against these factors is to be weighed the corrupting influence of the suggestive identification itself.

8. **Trial: Prosecuting Attorneys.** Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case.
9. **Trial: Prosecuting Attorneys: Juries.** The conduct of a prosecutor which does not mislead and unduly influence the jury and thereby prejudice the rights of the defendant does not constitute misconduct.
10. **Motions for New Trial: Proof.** In order for a new trial to be granted, it must be shown that a substantial right of the defendant was adversely affected and that the defendant was prejudiced thereby.
11. **Criminal Law: Motions for New Trial: Evidence: Proof.** A criminal defendant who seeks a new trial on the basis of newly discovered evidence must show that if the evidence had been admitted at the former trial, it would probably have produced a substantially different result.

Appeal from the District Court for Otoe County: RANDALL L. REHMEIER, Judge. Affirmed.

James R. Mowbray and Jeffrey A. Pickens, of Nebraska Commission on Public Advocacy, and Timothy W. Nelsen, Otoe County Public Defender, for appellant.

Jon Bruning, Attorney General, and Jeffery J. Lux for appellee.

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

GERRARD, J.

NATURE OF CASE

On April 25, 2000, Shannon Bluhm and Robert Parminter were killed on an Otoe County road. The appellant, Kimberly Sue Faust, was charged in the deaths and convicted of two counts of first degree murder and two counts of use of a weapon to commit a felony. On appeal, we reversed those convictions because the jury had been "exposed to a significant amount of improper and prejudicial testimony." *State v. Faust*, 265 Neb. 845, 849, 660 N.W.2d 844, 855 (2003). Faust was retried and convicted of one count of first degree murder, one count of second degree murder, and two counts of use of a firearm to commit a felony. Faust's motion for new trial was denied, and she appeals.

TRIAL EVIDENCE

The bodies of Bluhm and Parminter were found by the side of a road near Parminter's house, near Bluhm's burning car. Parminter was killed attempting to rescue Bluhm from the

burning automobile. Parminter died of at least two gunshot wounds to the head; Bluhm had stab wounds to the chest and gunshot wounds to the back of the head and to the back.

According to the State's evidence, Bluhm had been intimately involved with Faust's husband, Bruce Faust (Bruce). The parties agree that on April 25, 2000, Faust placed her bicycle into her Jeep Cherokee and drove to a county road near a paved highway, where she parked the Jeep, and from where she rode the bicycle into Eagle, Nebraska. Faust then testified that she arrived in Eagle at about 9:15 or 9:20 p.m. Faust came across Bluhm in Eagle and accepted Bluhm's offer of a ride back to Faust's Jeep. From there, the parties' accounts differ.

Faust testified at trial on January 7, 2004. According to Faust, when they arrived at the Jeep, Bruce was there and got into Bluhm's car on the driver's side. Faust claimed that Bruce was yelling at her, so she ran from the car to her Jeep and drove off. Faust said that she stopped and turned on the Jeep's dome light to look for her mobile telephone and that she saw that her pant leg was soaked in blood, although Faust herself was not bleeding. She testified that she reached under her seat looking for her telephone, but found a revolver that she had borrowed from her father and not yet returned. Faust testified that she accidentally fired the revolver inside the Jeep.

Faust said that she drove back toward Bluhm's car, which was then on fire, and saw someone lying on the road and another person standing nearby. According to Faust, she got out of her car and knelt next to the person in the road, who was Bluhm. Faust said that Bruce then grabbed her hair and began firing a gun. Faust claimed that Bruce tried to shoot her in the head, but that this time, the gun did not fire. Faust said that Bruce then threatened Faust and threw the gun to the ground. Faust testified that she picked up the gun, got in her Jeep, and drove home, where she burned her bloody clothing.

On cross-examination, the State questioned Faust about whether she was outside Bluhm's salon in Eagle at 8:45 p.m.

> Q. And the next time that you was [sic] in Eagle, Nebraska, then, was, according to your statement, was at about approximately 9:20 p.m. when you're pushing your bike?

A. Correct.

Q. Did you ever drive your Jeep Cherokee back to Eagle, Nebraska, between 7 p.m. and 9:30 p.m.?

A. Not that I recall.

Q. Okay. Well, wouldn't you know if you did or didn't?

A. I don't believe I did.

Q. Were you sitting outside of Shannon Bluhm's shop in your Jeep Cherokee at about 8:45 p.m.?

A. No.

Q. You're absolutely sure of that?

A. Yes.

The State later asked Faust:

Q. And you're absolutely sure that you were not sitting in your Jeep Cherokee at about 8:45 p.m., looking at Shannon's shop?

A. No, I wasn't.

Q. And I'm talking about the night of April 25 of 2000, when all this happened, you weren't there?

A. No, I wasn't.

The reason for this line of questioning was that on January 1, 2004—a week before Faust's trial testimony—an investigator with the Nebraska State Patrol became aware of and interviewed Belva Anderson, who had been a customer at Bluhm's salon on April 25, 2000. Anderson was called by the State as a rebuttal witness and testified that she had left Bluhm's salon on April 25 at 8:45 p.m. Anderson testified that as she went out the front door, she saw a Jeep that was parked "so close to the door that [she] had a hard time getting out." Anderson testified that there was one person in the Jeep and positively identified Faust as the person behind the steering wheel of the Jeep. Anderson was cross-examined with respect to the length of the sidewalk and the number of parking spaces near the salon, but the credibility of her in-court identification was not directly challenged by cross-examination at trial.

MOTION FOR NEW TRIAL

As previously noted, Faust was convicted pursuant to jury verdict, and Faust filed a motion for new trial. At the hearing on the motion for new trial, Faust called Anderson as a witness. Faust first examined Anderson with respect to the layout of the salon,

sidewalk, and parking lot as she recalled it on April 25, 2000. Anderson then said that she had thought that the person she had seen in the Jeep on April 25 had short, blonde hair and blue eyes, but that at trial, Faust had longer, brown hair and brown eyes.

Anderson was then examined with respect to a picture of Faust that Anderson had seen in the Hastings, Nebraska, newspaper prior to Anderson's trial testimony. Anderson said that she had seen the photograph prior to being contacted by law enforcement and that in the photograph, Faust had more closely resembled her appearance at trial as opposed to her appearance in April 2000. In other words, Anderson testified that she knew, prior to her in-court identification of Faust, that Faust had longer, brownish-colored hair. Anderson testified that she had been able to identify Faust at trial "[b]ecause [Anderson] trimmed [Faust's] hair and bleached, it in [Anderson's] mind." Anderson said that she had not been "bother[ed]" by the eye color problem because she had not been "100 percent sure . . . that [Faust's] eyes [had been] blue." Anderson insisted that she was "100 percent sure when [she] testified that that was [Faust]."

Anderson testified that when she was interviewed by law enforcement prior to trial, she had been shown a photograph of Faust's Jeep and had told law enforcement that she recalled the Jeep she saw outside Bluhm's salon as being darker in appearance, but that "it was dusk, you know." Faust then continued her attacks on inconsistencies between Anderson's recollection and the actual physical surroundings of the salon. Anderson still maintained, when asked if she was certain that the person she identified in court was the person she saw on April 25, 2000, "I swear to God. I'm sure."

Anderson then testified about meeting with a defense investigator on February 7, 2004, after she had testified at trial. Anderson admitted that at the time of the interview, she had expressed uncertainty about her prior in-court identification. Anderson said that she had "agonized over this" and "second-guessed" herself. Anderson said, however, that she had become certain again after law enforcement, on February 11, had shown Anderson a photograph of Faust on the night Faust had been arrested. Anderson said that seeing Faust in court, she again had "no doubts."

Faust then examined the criminal investigator from the Nebraska State Patrol who had located and made the initial contact with Anderson. The investigator testified that he had located Anderson after examining Bluhm's appointment book from April 25, 2000, and had interviewed Anderson on January 1 and 2, 2004. The investigator testified that he had not shown Anderson a photograph of Faust prior to Anderson's trial testimony. The investigator testified that he had shown Anderson a photograph of Faust's Jeep on the day of Anderson's trial testimony, as described by Anderson. The investigator said that Anderson had advised him that "she recalled the Jeep being a darker color, and then she also stated that it was dusk, so she was unsure of the color, but she was sure of the make."

The investigator then testified that he asked Anderson to make an identification of Faust on the morning of Anderson's trial testimony. Anderson was asked to take a seat in the courtroom gallery, to see if she could identify Faust as being in the courtroom. The investigator testified that Faust was not in the courtroom at that time. He then left the courtroom. Anderson then emerged from the courtroom and advised the investigator that she was able to recognize Faust. The investigator returned to the courtroom and saw Faust, separated from the gallery by the courtroom bar. Faust was the only woman seated at counsel table. The investigator testified that Faust was wearing civilian clothing and that he had not advised Anderson what entrance into the courtroom Faust would use. The investigator also said that on February 11, 2004, after trial, he had shown Anderson three booking photographs of Faust.

Anderson was then recalled to the stand. Anderson testified that prior to her trial testimony, she had been seated in the courtroom gallery and had seen Faust when she walked in. Faust had come into the courtroom through a different entrance from the public entrance, escorted by a man. Anderson said that Faust had been seated at counsel table with three men.

The district court overruled Faust's motion for new trial. Faust has perfected this timely appeal.

ASSIGNMENT OF ERROR

Faust assigns that the district court erred in overruling her motion for new trial. In her brief, Faust argues that the motion for

new trial should have been granted because of (1) witness misconduct on the part of Anderson, (2) prosecutorial misconduct in using a suggestive identification technique and failing to inform Faust of that technique, and (3) newly discovered evidence, i.e., evidence of Anderson's and the prosecution's misconduct.

STANDARD OF REVIEW

[1,2] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003). See *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *State v. King, ante* p. 326, 693 N.W.2d 250 (2005).

ANALYSIS

Neb. Rev. Stat. § 29-2101 (Cum. Supp. 2004) provides, in relevant part:

> A new trial, after a verdict of conviction, may be granted, on the application of the defendant, for any of the following grounds affecting materially his or her substantial rights: . . . (2) misconduct of the jury, of the prosecuting attorney, or of the witnesses for the state . . . (5) newly discovered evidence material for the defendant which he or she could not with reasonable diligence have discovered and produced at the trial[.]

Faust's first two arguments are based on alleged witness and prosecutorial misconduct; her third argument is based on alleged newly discovered evidence. We address each argument in turn.

WITNESS MISCONDUCT

Faust's first argument is that Anderson committed witness misconduct when she made her in-court identification of Faust. The sole authority cited by Faust in support of this argument is *State v. Tainter*, 218 Neb. 855, 359 N.W.2d 795 (1984), in which the defendant introduced collateral evidence to attack the credibility of the police officer who had administered the defendant's breath alcohol test. The officer denied having, on another

occasion, removed evidence from the police evidence room for other than law enforcement purposes, but the defendant adduced evidence that the officer had previously been suspended for such conduct. We stated:

> The defendant seems to have a theory that an incorrect or false statement by a witness for the State about his own past misconduct on the job somehow invalidated the results of the breath test.
>
> The fact that a witness may have lied about a past act does not invalidate the rest of his testimony. It only means the jury must weigh these statements against the rest of the evidence in reaching a verdict. . . . This court will not reexamine or pass on the trier of fact's determination of credibility. . . .
>
> . . . .
>
> The misconduct of the State's witness here was insufficient to materially affect the defendant's substantive rights. As pointed out in the early case of *Argabright v. State*, 62 Neb. 402, 87 N.W. 146 (1901), which dealt with misconduct of an attorney at trial, to warrant reversal the misconduct must be of such a nature as to unduly influence the decision of the jury. Here, there was no undue influence.

(Citations omitted.) *State v. Tainter*, 218 Neb. at 859-60, 359 N.W.2d at 798.

[3] Clearly, the issue presented in *Tainter* has no bearing in the instant case. Faust's entire argument with respect to "witness misconduct" is that Anderson committed misconduct when she purportedly made an unreliable identification of Faust at trial, because, according to Faust, Anderson's in-court identification was tainted by her observation in the courtroom prior to testifying and her viewing of Faust's photograph in the newspaper prior to trial. But the record does not suggest, nor does Faust argue, that Anderson's trial testimony was deliberately false. In other words, Faust argues that Anderson committed misconduct because her testimony was not credible. But witness credibility is not to be reassessed on appellate review, *State v. McPherson*, 266 Neb. 734, 668 N.W.2d 504 (2003), and reframing the issue as "witness misconduct" does not change this well-established principle. Faust's appellate argument does not support a finding

of witness misconduct. The district court did not abuse its discretion in rejecting this basis for Faust's motion for new trial.

PROSECUTORIAL MISCONDUCT

Next, Faust argues that there was prosecutorial misconduct in using a suggestive identification technique—specifically, Anderson's observation in the courtroom prior to testifying—and failing to inform Faust of the use of that technique. Faust contends that Anderson's in-court identification of Faust was irreparably tainted by the allegedly suggestive identification made in the courtroom prior to her testimony, based upon the constitutional standards for suggestive identifications that have been articulated by this court and the U.S. Supreme Court. Consequently, in order to evaluate Faust's claim of prosecutorial misconduct, the first step is to consider, pursuant to those standards, whether the in-court identification was actually rendered unreliable by the allegedly suggestive identification technique used by the State.

[4-6] An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law. *State v. Carter*, 241 Neb. 645, 489 N.W.2d 846 (1992). The initial inquiry is whether an identification procedure was suggestive. *Id.* A determination of impermissible suggestiveness is based on the totality of the circumstances. *Id.* Furthermore, even if there have been impermissible pretrial suggestions as to an accused's identity, in-court identification may be received when it is independent of and untainted by the impermissible identification procedures. *Id.*

[7] Reliability is the linchpin in determining the admissibility of identification testimony. *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). The factors to be considered include (1) the opportunity of the witness to view the alleged criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of his or her prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation. *Id.*, citing *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). Against these factors is to be weighed the corrupting influence of the suggestive identification itself. *Manson v. Brathwaite, supra.*

Admittedly, application of the factors enumerated in *Manson v. Brathwaite, supra*, is not particularly supportive of Anderson's in-court identification. According to Anderson's testimony regarding the events of April 25, 2000, she observed the person she identified as Faust for approximately 5 to 10 seconds. The record does not establish the degree of attention that Anderson gave to her observation of Faust, although it was clearly not the attention that might be expected from a trained observer, or someone who knew that her observations might be subject to later scrutiny. Compare *id.* Anderson provided no prior description of the person she observed that can be evaluated for accuracy. Anderson's in-court identification was made more than 3½ years after her observations outside Bluhm's salon.

However, Anderson did testify that she noticed the person particularly because of the unusual way in which the person's vehicle was parked and that she was positive of the time that the incident occurred. Anderson was candid about the details of the incident that she could remember and those she could not, and overall, her trial testimony demonstrated a high level of certainty in her observations and identification. Compare *id.* Anderson's testimony, as she explained it at trial and at the motion for new trial, was based on the observations she made on April 25, 2000. See, *State v. Sanders*, 235 Neb. 183, 455 N.W.2d 108 (1990); *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988).

More importantly, as previously noted, these factors are to be weighed against the corrupting influence—if any—of the allegedly suggestive identification. See *Manson v. Brathwaite, supra*. In this case, the pretestimonial identification at issue was not so suggestive as to undermine the reliability of Anderson's in-court identification. As stated by the U.S. Court of Appeals for the Eighth Circuit, "[t]o inquire of a witness in a nonleading fashion, shortly before she takes the stand, whether she can identify a person, which is the same question she will be asked while testifying, is not a procedure that we believe to be impermissibly suggestive." *United States v. Wade*, 740 F.2d 625, 628 (8th Cir. 1984). "[W]here the witness confronts the defendant, prior to testifying, in substantially the same circumstances in which he would have encountered him from the witness stand, his in-court identification cannot be said to have been infected

by the pre-testimonial identification." *United States v. Williams*, 596 F.2d 44, 49 (2d Cir. 1979). See, also, *United States v. Domina*, 784 F.2d 1361 (9th Cir. 1986); *United States v. Famulari*, 447 F.2d 1377 (2d Cir. 1971); *Middleton v. United States*, 401 A.2d 109 (D.C. 1979); *Com. v. Sexton*, 485 Pa. 17, 400 A.2d 1289 (1979); *People v. York*, 189 Colo. 16, 537 P.2d 294 (1975).

United States v. Famulari, supra, presents an analysis that is instructive in the instant case. In *Famulari*, a witness was unsure of his identification of the defendant from a photograph and looked through the window in the courtroom door to see whether he could identify any defendant. The parties disagreed about whether the witness had been asked by the prosecutor to look through the window. However, on appeal, the Second Circuit concluded that even if the courtroom door identification had been deliberately staged, the in-court identification was admissible. The court reasoned that the in-court identification was still admissible if it could be shown that the "identification did not result from the 'exploitation' of the 'primary illegality,' but would have been made even if the improper identification had not taken place." *Id.* at 1380, quoting *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

Except for the fact that the witness had viewed the defendant from one side of the room rather than the other and that the jury could not see him viewing the defendant, "the setting for the courtroom door identification was identical to the setting in which the courtroom identification was made, and the in-court identification was virtually contemporaneous with the pre-testimonial identification." *United States v. Famulari*, 447 F.2d at 1380-81. "[T]his was not a case in which a witness may have felt some compulsion to stick to an earlier identification even though he might not really have been sure of his identification in the courtroom." *Id.* at 1381. In sum, the court concluded that "the allegedly improper identification was so related in time and circumstance to the in-court identification that it cannot be said to have tainted [the witness'] testimony or infected the trial." *Id.* Accord *United States v. Hamilton*, 469 F.2d 880 (9th Cir. 1972).

Similarly, it is difficult to conclude that the identification techniques at issue in the instant case were impermissibly suggestive,

when the alleged taint of the in-court identification is derived from circumstances substantially indistinguishable from the in-court identification itself. Anderson sat in the courtroom, saw Faust enter the room and sit at counsel table, and identified Faust as the person she saw on April 25, 2000. Later, Anderson took the witness stand, saw Faust at counsel table, and identified her as the person she saw on April 25. In short, the pretestimonial identification was so related in time, place, and circumstances to the in-court identification that we cannot conclude the in-court identification was tainted.

We also rejected an argument similar to Faust's in *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998). In *Jacob*, a coworker and tenant of a murder victim identified the defendant, Steven Jacob, at a retrial following a reversed conviction, as being the driver of a vehicle that passed the victim's residence shortly after the murder. The witness had also identified Jacob at a pretrial hearing before the first trial. We rejected Jacob's argument that the in-court identification was tainted.

> [Jacob] argues that the trial court erred in allowing [the witness'] identification testimony into evidence. Jacob asserts that [the witness'] testimony is unreliable, is the result of a suggestive "showup" at the preliminary hearing for the first trial, and is based on seeing Jacob identified as a suspect on television and in the newspaper. Prior to trial, the court overruled Jacob's motion to suppress the eyewitness identification . . . based upon its alleged suggestive nature. The court again overruled an objection to [the witness'] identification during trial.
>
> During trial, [the witness] testified that when he saw a picture of Jacob on the news, he called the police to tell them that he had seen that person drive by shortly after the shooting. He clarified, however, that his testimony identifying Jacob as the man who drove by was based on what he saw while standing in front of the neighbor's house. The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Rules of Evidence commit the evidentiary question at issue to the discretion of the trial court. . . . The trial court did not abuse its discretion in allowing [the witness'] testimony.

(Citation omitted.) *State v. Jacob*, 253 Neb. at 981-82, 574 N.W.2d at 141.

The same principles apply in the instant case. As previously stated, the identification technique at issue in this case was not unduly suggestive. Beyond that, even had it been, in-court identification may be received when it is independent of and untainted by the impermissible identification procedures. *State v. Carter*, 241 Neb. 645, 489 N.W.2d 846 (1992). The evidence adduced at trial and at the hearing on the motion for new trial indicates, clearly, that Anderson's testimony was based upon her observations of April 25, 2000. Simply stated, the identification technique used by the State did not taint Anderson's in-court identification, and Anderson's in-court identification was properly admitted in any event.

Faust also argues that had the pretestimonial identification been disclosed, she would have been better prepared to cross-examine Anderson and discredit her in-court identification. However, we conclude that the district court did not abuse its discretion in finding that Faust had not been prejudiced by the lack of disclosure. Faust's argument rests on the contention that Anderson's in-court identification could have been undermined had she been subject to cross-examination about seeing Faust in the courtroom before testifying. However, as discussed above, the circumstances of the pretestimonial identification did not undermine the reliability of the in-court identification, because the time, place, and circumstances of each identification were nearly identical.

[8,9] Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case. *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998). The conduct of a prosecutor which does not mislead and unduly influence the jury and thereby prejudice the rights of the defendant does not constitute misconduct. *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003). Under the circumstances of this case, cross-examining Anderson with respect to the pretestimonial identification would not have discredited her in-court identification, and there was not a "'"'reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'"'" See *id.* at 354, 656 N.W.2d at 633. The district court did not abuse its discretion in failing to grant a new trial on this basis.

NEWLY DISCOVERED EVIDENCE

Faust's remaining argument with respect to her motion for new trial is that the alleged misconduct of Anderson and the State was newly discovered evidence warranting a new trial. Having rejected Faust's claims with respect to that misconduct, we also conclude that the district court did not abuse its discretion in finding no newly discovered evidence warranting a new trial.

[10,11] In order for a new trial to be granted, it must be shown that a substantial right of the defendant was adversely affected and that the defendant was prejudiced thereby. *State v. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004). A criminal defendant who seeks a new trial on the basis of newly discovered evidence must show that if the evidence had been admitted at the former trial, it would probably have produced a substantially different result. *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004). Even if we assume, for the sake of argument, that Faust was reasonably diligent in discovery of this evidence, see *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004), we conclude, based on our analysis above, that this evidence was insufficient to demonstrate that had it been admitted at trial, it would probably have produced a substantially different result. The district court did not abuse its discretion in denying Faust's motion for new trial on the basis of newly discovered evidence.

CONCLUSION

The district court did not abuse its discretion in overruling Faust's motion for new trial. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
MICHAEL W. LOYD, APPELLANT.

696 N.W.2d 860

Filed May 6, 2005. No. S-04-534.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.

2. **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.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
4. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
5. **Final Orders: Speedy Trial: Waiver: Appeal and Error.** The denial of a motion to discharge based upon speedy trial grounds is a final order, as an order affecting a substantial right made in a special proceeding, and failure to perfect an appeal within 30 days of the overruling of such a motion to discharge results in a waiver of that issue.
6. **Limitations of Actions: Words and Phrases.** A statute of limitations is not jurisdictional, but is, rather, an affirmative defense.
7. **Criminal Law: Limitations of Actions: Pleas.** The defense of the statute of limitations in a criminal case is raised by a defendant's not guilty plea.
8. **Criminal Law: Limitations of Actions: Proof.** The general issue in a criminal case interposes the defense of the statute of limitations, and the burden is on the State to prove all essential elements of the crime charged, including the fact that charges were filed within the period specified by the applicable statute of limitations.
9. **Limitations of Actions: Indictments and Informations: Convictions.** If the statute of limitations has expired before an information is filed by the State, a conviction for the offense alleged is not sustained by the evidence.
10. **Criminal Law: Pleadings.** Criminal defendants who wish to challenge the sufficiency of the charges against them do so by filing a plea in abatement or motion to quash.
11. **Pleadings.** A defect apparent on the face of the record may properly be reached by a motion to quash.
12. **Plea in Abatement.** An irregularity in the proceedings which does not appear on the face of the record and can be established only by extrinsic evidence can be raised only by a plea in abatement.
13. **Pretrial Procedure: Limitations of Actions: Pleadings.** A pretrial proceeding raising a statute of limitations defense—a challenge to the sufficiency of the charges—is brought either by a motion to quash or plea in abatement, depending on whether or not the defense appears on the face of the record.
14. **Final Orders: Pleadings.** An order overruling a plea in abatement or motion to quash is not a final, appealable order.
15. **Pleadings.** A determination as to how a motion should be regarded depends upon the substance of the motion, not its title.
16. **Judgments: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.

17. **Actions: Words and Phrases.** Where the law confers a right and authorizes a special application to a court to enforce the right, the proceeding is special, within the ordinary meaning of the term "special proceeding."
18. ____: ____. A special proceeding is, by definition, not part of an action.
19. ____: ____. An action involves prosecuting the alleged rights between the parties and ends in a final judgment, whereas a special proceeding does not.
20. **Pretrial Procedure: Limitations of Actions.** The overruling of a pretrial motion raising a statute of limitations defense neither affects a substantial right nor occurs in the context of a special proceeding.
21. **Judgments: Final Orders: Words and Phrases.** A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist.
22. **Judgments: Final Orders: Appeal and Error.** An order entered by a court may affect a substantial right and be subject to review as a final order although it could not or need not be properly denominated a judgment.
23. **Judgments: Final Orders: Jurisdiction: Appeal and Error.** An appellate court's jurisdiction is limited to the judgment or final order from which the appeal is taken.
24. **Final Orders: Appeal and Error.** An appeal from a final order may raise, on appeal, every issue presented by the order that is the subject of the appeal.
25. **Final Orders: Jurisdiction: Appeal and Error.** While an appellate court can reverse, vacate, or modify a final order, it cannot address issues that do not bear on the correctness of the final order upon which its appellate jurisdiction is based.
26. **Constitutional Law: Speedy Trial: Statutes.** The constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other.
27. ____: ____: ____. The same standards apply to a speedy trial analysis under both U.S. Const. amend. VI and Neb. Const. art. I, § 11.
28. **Constitutional Law: Speedy Trial.** Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial; rather, the factors are related and must be considered together with such other circumstances as may be relevant.
29. ____: ____. The right to a speedy trial, as guaranteed under the Sixth Amendment, is not implicated until after the accused has been charged or arrested, even though the prosecuting authorities had knowledge of the offense.
30. **Due Process: Final Orders: Pleadings.** The overruling of a motion based upon an argument that the defendant's rights under the Due Process Clause were violated by preindictment delay is not a final, appealable order.

Appeal from the District Court for Douglas County, PATRICIA A. LAMBERTY, Judge, on appeal thereto from the County Court for Douglas County, DARRYL R. LOWE, Judge. Judgment of District Court affirmed.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

GERRARD, J.

Michael W. Loyd appeals from the denial of his "motion to discharge," raising a statute of limitations defense, and a supplemental motion to discharge based upon the alleged violation of Loyd's right to a speedy trial. The issues presented in this appeal are (1) whether a motion to discharge is the appropriate procedure for raising a statute of limitations defense; (2) whether an order overruling a pretrial motion raising a statute of limitations defense is a final, appealable order; and (3) whether, when an appeal is taken from a final, appealable order, an appellate court acquires jurisdiction over issues not presented in the final order from which the appeal is taken.

BACKGROUND

Loyd was arrested on June 18, 2001, and cited by the arresting officer for driving under the influence of alcoholic liquor (DUI). On June 29, Loyd was charged by complaint in the county court with several offenses: (1) second-offense DUI, in violation of Omaha Mun. Code, ch. 36, art. III, § 36-115 (1998); (2) speeding, in violation of Neb. Rev. Stat. § 60-6,186(2) (Reissue 1998); (3) negligent driving, in violation of Omaha Mun. Code, ch. 36, art. V, § 36-131 (1980); (4) and operating a motor vehicle during a period of suspension or revocation, in violation of Neb. Rev. Stat. § 60-4,108 (Reissue 1998).

Loyd filed a motion to quash the complaint, pursuant to § 36-115 of the Omaha Municipal Code, arguing that the penalty provisions of the ordinance were inconsistent with those of Neb. Rev. Stat. § 60-6,196 (Cum. Supp. 2000). The county court granted the motion to quash; the State filed an exception; and on appeal, we agreed that the provisions were inconsistent and overruled the State's exception. Our opinion issued on January 24, 2003. See *State v. Loyd*, 265 Neb. 232, 655 N.W.2d 703 (2003).

On March 18, 2003, Loyd was charged by complaint in the county court with second-offense DUI in violation of § 60-6,196(2). Loyd filed a motion to discharge, contending that the complaint had not been filed within the 18-month statute of limitations set forth in Neb. Rev. Stat. § 29-110(1) (Reissue 1995). Loyd subsequently filed a supplemental motion to discharge based upon his federal and state constitutional rights to a speedy trial. Loyd's motion to discharge on statute of limitations grounds was denied on May 22. Loyd's supplemental motion on speedy trial grounds was denied on December 4. Loyd filed his appeal to the district court from both orders on December 4. The district court found no violation of Loyd's rights to a speedy trial and affirmed the decision of the county court, but did not discuss Loyd's statute of limitations argument. Loyd appeals.

ASSIGNMENTS OF ERROR

Loyd assigns that the county and district courts erred in failing to conclude that the complaint against Loyd should be dismissed because (1) the complaint was filed more than 18 months after the date of the alleged offense and (2) Loyd's constitutional rights to a speedy trial were violated.

STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004).

[2] 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. Covey*, 267 Neb. 210, 673 N.W.2d 208 (2004).

ANALYSIS

TIMELINESS OF APPEAL

[3] We first consider whether we have jurisdiction with respect to Loyd's statute of limitations defense. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *State v. Bao, ante* p. 127, 690 N.W.2d 618 (2005). The State argues that because

Loyd styled his statute of limitations argument as a "motion to discharge," he waived his appeal with respect to that argument because he failed to appeal within 30 days of the order overruling that particular motion. The State contends that the order overruling Loyd's statute of limitations motion was final and appealable and, thus, should have been appealed within 30 days.

[4,5] The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *State v. Perry*, 268 Neb. 179, 681 N.W.2d 729 (2004). The State relies upon *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997), in which this court held that the denial of a motion to discharge based upon speedy trial grounds is a final order, as an order affecting a substantial right made in a special proceeding, and that failure to perfect an appeal within 30 days of the overruling of such a motion to discharge results in a waiver of that issue. Since Loyd styled his statute of limitations argument as a "motion to discharge," the State asserts that he waived the statute of limitations issue by failing to appeal within 30 days.

[6-9] However, a "motion to discharge" is generally not the means by which a statute of limitations claim is raised in a criminal proceeding. The statute of limitations is not jurisdictional, but is, rather, an affirmative defense. See, *State v. Keithley*, 236 Neb. 631, 463 N.W.2d 329 (1990); *State v. Nuss*, 235 Neb. 107, 454 N.W.2d 482 (1990); *State v. Schaaf*, 234 Neb. 144, 449 N.W.2d 762 (1989); *Jacox v. State*, 154 Neb. 416, 48 N.W.2d 390 (1951). The defense of the statute of limitations in a criminal case is raised by a defendant's not guilty plea. *Nuss, supra.* The general issue in a criminal case interposes the defense of the statute of limitations, and the burden is on the State to prove all essential elements of the crime charged, including the fact that charges were filed within the period specified by the applicable statute of limitations. See *Jacox, supra.* Accord *Nuss, supra.* If the statute of limitations has expired before an information is filed by the State, a conviction for the offense alleged is not

sustained by the evidence. *Jacox, supra*. See, also, *Nuss, supra* (determining State had not satisfied burden that charges were filed within period specified by applicable statute of limitations).

[10-13] Procedurally, criminal defendants who wish to challenge the sufficiency of the charges against them do so by filing a plea in abatement or motion to quash. See, e.g., *State v. Lauck*, 261 Neb. 145, 621 N.W.2d 515 (2001); *State v. Pruett*, 258 Neb. 797, 606 N.W.2d 781 (2000); *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975); *State v. Ludwig*, 143 Neb. 278, 9 N.W.2d 292 (1943). A defect apparent on the face of the record may properly be reached by a motion to quash. *Ludwig, supra*. An irregularity in the proceedings which does not appear on the face of the record and can be established only by extrinsic evidence can be raised only by a plea in abatement. *Id.* Consequently, a pretrial proceeding raising a statute of limitations defense—a challenge to the sufficiency of the charges—is brought either by a motion to quash or plea in abatement, depending on whether or not the defense appears on the face of the record.

[14] We have consistently held that an order overruling a plea in abatement or motion to quash is not a final, appealable order. See *id.* Most recently, in *Lauck, supra*, we held that the overruling of a plea in abatement challenging the sufficiency of the evidence adduced at a preliminary hearing was not a final order, because the defendant could still make a motion to dismiss at the close of the State's case and raise on appeal the issue whether there was sufficient evidence to convict him. See, also, *Franklin, supra*. Similarly, in *Pruett, supra*, the defendant filed a motion to quash, arguing that the information failed to charge him with a crime. We determined that since the overruling of the defendant's motion did not preclude him from raising the issue on appeal, it was not a final, appealable order. See *id.*

[15] Loyd's statute of limitations argument, while styled as a "motion to discharge," presented a challenge to the sufficiency of the complaint, apparent from the face of the record. We cannot blindly treat this motion as a "motion to discharge" simply because of its title; instead, a determination as to how a motion should be regarded depends upon the substance of the motion, not its title. Cf. *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002). Regardless of how his motion was titled, Loyd's motion

was, in substance, a motion to quash, the overruling of which we have held in other circumstances not to be a final, appealable order.

[16] However, we have not specifically addressed whether the overruling of a motion to quash raising a statute of limitations defense is a final, appealable order. The holding upon which the State relies, that the denial of a motion to discharge on speedy trial grounds affects a substantial right and occurs in a special proceeding, was specifically grounded in the unique right to a speedy trial. A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing. *Lauck, supra.* This court explained, in *State v. Gibbs*, 253 Neb. 241, 245, 570 N.W.2d 326, 330 (1997), that the denial of a motion for absolute discharge based upon an accused criminal's nonfrivolous claim that his or her speedy trial rights were violated was a ruling affecting a substantial right, because the right to a speedy trial "would be significantly undermined if appellate review of nonfrivolous speedy trial claims were postponed until after conviction and sentence." The denial of such a motion "unquestionably affects the subject matter of the litigation because denial of such a motion effectively denies an appellant's speedy trial rights." *State v. Jacques*, 253 Neb. 247, 252, 570 N.W.2d 331, 335 (1997).

[17-19] This court also explained that a motion for absolute discharge based on the alleged violation of the defendant's speedy trial rights occurred in a special proceeding because a motion to discharge was a legally conferred right that authorized a special application to the court for enforcement. See *id.*, citing Neb. Rev. Stat. § 29-1208 (Reissue 1995). Where the law confers a right and authorizes a special application to a court to enforce the right, the proceeding is special, within the ordinary meaning of the term "special proceeding." *Jacques, supra.* Furthermore, this court explained that a special proceeding is, by definition, not part of an action. *Id.* An action involves prosecuting the alleged rights between the parties and ends in a final judgment, whereas a special proceeding does not. *Id.* A motion to discharge is a special proceeding, because it is a statutory remedy which is not itself an action, and because the motion

does not prosecute alleged rights between parties or end in final judgment. *Id.*

This court's reasoning in *Jacques, supra*, and *Gibbs, supra*, does not apply in this case. When Loyd's "motion to discharge" was overruled by the county court, Loyd did not suffer the diminishment of a defense previously available to him, because he could continue to challenge the sufficiency of the evidence to prove that the charges were filed within the period specified by the applicable statute of limitations. See *State v. Nuss*, 235 Neb. 107, 454 N.W.2d 482 (1990). The overruling of Loyd's motion did not affect a substantial right. Furthermore, the statutory motion to discharge that this court held to be a special proceeding in *Jacques* is not implicated here, because that statute is limited to alleged violations of the right to a speedy trial. See § 29-1208. Loyd's motion was not brought in the context of a special statutory remedy. Instead, because a statute of limitations defense is part of the general issue in a criminal case, see *Jacox v. State*, 154 Neb. 416, 48 N.W.2d 390 (1951), it addresses the merits of the State's case against the defendant, and a motion premised on such a defense is not a special proceeding, but part of the action.

[20] In short, the overruling of Loyd's motion, based on the statute of limitations, was not a final, appealable order. Loyd's motion, while titled a "motion to discharge," was in substance a motion to quash, the overruling of which we have repeatedly held is not a final, appealable order. The overruling of a pretrial motion raising a statute of limitations defense neither affects a substantial right nor occurs in the context of a special proceeding. The State's argument that Loyd was required to appeal from the overruling of his motion within 30 days is without merit.

JURISDICTION BASED ON SUPPLEMENTAL MOTION TO DISCHARGE

The next question to be considered, however, is whether the statute of limitations argument is properly before this court in this appeal. It is well established, as previously noted, that the overruling of Loyd's supplemental motion to discharge on speedy trial grounds was a final, appealable order. But while that suffices to establish appellate jurisdiction over that order, it does

not confer jurisdiction on this court to consider Loyd's statute of limitations argument.

[21,22] While the terms are closely related, there is an important distinction between a "final judgment" and a "final order" as that term is used in § 25-1902. A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist. *Custom Fabricators v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000). An order entered by a court may affect a substantial right and be subject to review as a final order although it could not or need not be properly denominated a judgment. *Western Smelting & Refining Co. v. First Nat. Bank*, 150 Neb. 477, 35 N.W.2d 116 (1948). Cf. *Akins v. Chamberlain*, 164 Neb. 428, 82 N.W.2d 632 (1957); *Wunrath v. Peoples Furniture & Carpet Co.*, 98 Neb. 342, 152 N.W. 736 (1915).

[23-25] A judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record. Neb. Rev. Stat. § 25-1911 (Reissue 1995). But pursuant to this statute, an appellate court's jurisdiction is limited to the judgment or final order from which the appeal is taken. An appeal from a final order may raise, on appeal, every issue presented by the order that is the subject of the appeal. *Tom-Wat, Inc. v. Fink*, 741 N.E.2d 343 (Ind. 2001). Cf., *Upah v. Ancona Bros. Co.*, 246 Neb. 608, 521 N.W.2d 906 (1994); *In Matter of Estate of Ruediger*, 83 Wis. 2d 109, 264 N.W.2d 604 (1978). But that jurisdiction does not extend to issues that are not presented by the final order, because an appellate court's jurisdiction to grant relief pursuant to § 25-1911 is limited to reversal, vacation, or modification of the final order from which the appeal is taken. In other words, while an appellate court can reverse, vacate, or modify a final order, it cannot address issues that do not bear on the correctness of the final order upon which its appellate jurisdiction is based.

In the instant case, the final order at issue is the overruling of Loyd's supplemental motion to discharge on speedy trial grounds. We have jurisdiction, pursuant to § 25-1911, to reverse, vacate, or modify that order. But whether or not the State's prosecution of Loyd is barred by the statute of limitations does not affect whether or not Loyd's supplemental motion to discharge on speedy trial

grounds was properly overruled. Consequently, the statute of limitations question is not relevant to our analysis of the only final order we have jurisdiction to affect in the instant appeal. Loyd's timely appeal from a final, appealable order does not confer jurisdiction on this court to consider other issues that may be present in the case, but are not implicated by the final order on appeal. As Loyd's statute of limitations claim is outside the scope of our appellate review, we do not consider it.

SPEEDY TRIAL MOTION

[26,27] Loyd has perfected an appeal from the final, appealable order overruling his supplemental motion to discharge on speedy trial grounds. The constitutional right to a speedy trial is guaranteed by U.S. Const. amend. VI and Neb. Const. art. I, § 11. The constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other. *State v. Karch*, 263 Neb. 230, 639 N.W.2d 118 (2002). In this case, Loyd's supplemental motion to discharge was based solely on the alleged violation of his right to a speedy trial under the state and federal Constitutions. We have applied the same standards to our speedy trial analysis under both U.S. Const. amend. VI and Neb. Const. art. I, § 11. See, e.g., *State v. Pilgrim*, 182 Neb. 594, 156 N.W.2d 171 (1968).

[28] Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial; rather, the factors are related and must be considered together with such other circumstances as may be relevant. *State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004).

[29] But the constitutional right to a speedy trial is not implicated until after the accused has been charged or arrested, even though the prosecuting authorities had knowledge of the offense. *State v. Meese*, 257 Neb. 486, 599 N.W.2d 192 (1999); *State v. Huebner*, 245 Neb. 341, 513 N.W.2d 284 (1994), *abrogated on*

other grounds, State v. Morris, 251 Neb. 23, 554 N.W.2d 627 (1996). In this case, Loyd seeks discharge of the charge of second-offense DUI in violation of § 60-6,196(2), but the delay on which his speedy trial argument is based occurred before that particular complaint was filed. Consequently, his speedy trial argument is without merit.

[30] We note that preindictment delay can form the basis of an argument that a defendant's rights under the Due Process Clause were violated, see *Meese, supra*, and that Loyd made a short argument in that regard. However, we held in *Meese* that the overruling of a motion based upon such a due process argument is not a final, appealable order, and we refused to consider such an argument in an interlocutory appeal. We likewise lack jurisdiction to consider such an argument in this appeal.

CONCLUSION

Loyd's speedy trial argument is without merit, as it is based on delays which occurred before the complaint which he seeks to discharge was filed. Because we do not have jurisdiction to consider Loyd's other arguments, the order of the district court, affirming the order of the county court overruling Loyd's motion to discharge on speedy trial grounds, is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
ANTHONY J. SMITH, APPELLANT.

696 N.W.2d 871

Filed May 13, 2005. No. S-03-1225.

1. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently 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. **Jurisdiction: Affidavits: Appeal and Error.** An in forma pauperis appeal is perfected when the appellant timely files a notice of appeal and an affidavit of poverty.
4. **Jurisdiction: Words and Phrases.** Jurisdiction of the subject matter means the authority to hear and determine both the class of actions to which the action before the court belongs and the particular question which it assumes to decide.
5. **Judgments: Collateral Attack.** When a judgment is attacked in a manner other than by a proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack.
6. **Collateral Attack: Jurisdiction.** Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter.
7. **Public Officers and Employees: Negligence: Appeal and Error.** Where a duty is placed upon a public officer to perform acts necessary to perfect an appeal, his or her failure to perform cannot be charged to the litigant or operate to defeat the appeal. If the negligence of the appellant or his or her agent concurs with that of the court official, it precludes the appeal.
8. **Public Officers and Employees: Negligence: Pleadings: Appeal and Error.** When an appeal has been dismissed in a civil proceeding due to the negligence of a public officer, the appropriate procedure for the appellant is a motion to reinstate the appeal, filed with the same court in which the case was adjudicated.
9. **Postconviction.** A postconviction proceeding is civil in nature.
10. **Negligence: Public Officers and Employees: Pleadings: Appeal and Error.** The appropriate procedure for securing a new appeal when an appeal is lost due to official negligence is to file a motion in the lower court and establish the factual basis for obtaining relief.
11. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
12. **Effectiveness of Counsel: Proof: Words and Phrases.** To prove prejudice for a claim of ineffective assistance of counsel, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
13. **Effectiveness of Counsel: Proof.** Where a defendant is unable to demonstrate sufficient prejudice in establishing a claim for ineffectiveness of counsel, no examination of whether counsel's performance was deficient is necessary.
14. **Motions to Suppress: Appeal and Error.** When a motion to suppress is overruled, the defendant must make a specific objection at trial to the offer of the evidence which was the subject of the motion to suppress in order to preserve the issue for review on appeal.
15. **Constitutional Law: Identification Procedures: Due Process.** An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law.

16. **Identification Procedures.** Whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures.
17. ____. The factors to be considered in determining whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness, and the length of time between the crime and the identification.
18. **Trial: Identification Procedures.** An in-court identification may properly be received in evidence when it is independent of and untainted by illegal pretrial identification procedures. A primary factor in determining whether an independent basis for an in-court identification exists is the opportunity afforded the witness to observe the defendant in circumstances free from taint.
19. **Indictments and Informations: Complaints: Pretrial Procedure: Waiver: Pleas: Jurisdiction.** A defect in the manner of charging an offense is waived if, upon being arraigned, the defendant pleads not guilty and proceeds to trial, provided the information or complaint contains no jurisdictional defect and is sufficient to charge an offense under the law. Defects and omissions which pertain to the form of the complaint or information or to the fact that the information or complaint is inartfully drawn are waived by not objecting at the preliminary stages of the proceeding or, as to some matters, before determination of the issue on the merits.
20. **Constitutional Law: Due Process: Double Jeopardy: Indictments and Informations.** Pursuant to constitutional considerations of due process and prohibition against double jeopardy, an information must inform an accused, with reasonable certainty, of the charge being made against him or her in order that the accused may prepare his or her defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense.
21. **Indictments and Informations: Complaints.** An information or complaint is sufficient unless it is so defective that by no construction can it be said to charge the offense of which the accused was convicted.
22. **Indictments and Informations.** Where an information alleges the commission of a crime using language of the statute defining that crime or terms equivalent to such statutory definition, the charge is sufficient.
23. ____. The district court, at its discretion, may permit an amendment of the information before the verdict or findings, provided no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.
24. **Trial: Evidence: Presumptions.** In a case tried to a court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant.
25. **Judges: Evidence: Presumptions.** In the absence of evidence to the contrary, the presumption is that a judge will disregard evidence that should not have been admitted.

Appeal from the District Court for Dawson County: JOHN P. MURPHY, Judge. Affirmed.

Jeffrey M. Wightman, of Wightman & Wightman, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

GERRARD, J.

I. NATURE OF CASE

Anthony J. Smith, the appellant, filed a motion for postconviction relief after his conviction and sentence for robbery were affirmed on appeal. Smith sought postconviction relief based on a defect in the information charging him with robbery and also based on the alleged ineffectiveness of his counsel. The motion was overruled, and Smith appealed. Smith's appeal was later dismissed as untimely, and he filed a second "motion for postconviction relief," asserting that he had provided the necessary documents to perfect an appeal from the first postconviction motion within the statutory time period but that a clerk's error had delayed the appeal. The district court sustained the second "postconviction motion" and "reestablished" the original order denying Smith's first motion for postconviction relief, allowing Smith to appeal from that order. Smith then filed this appeal, assigning that the district court erred in denying his first motion for postconviction relief.

II. FACTUAL AND PROCEDURAL BACKGROUND

In March 1999, an information was filed, charging Smith with robbery, use of a weapon to commit a felony, and possession of a firearm by a felon or fugitive from justice. Smith moved to suppress evidence related to a pretrial identification procedure conducted by law enforcement officers. The court overruled the motion, finding that although the photographic array used by the officers was unduly suggestive, the totality of the circumstances showed no irreparable harm to Smith with respect to the victim's subsequent identification of Smith.

Smith was found guilty of robbery and sentenced to 10 to 20 years' imprisonment. Smith appealed the conviction, assigning that the district court erred in finding sufficient evidence to sustain a conviction and in failing to suppress the pretrial identification evidence. The Nebraska Court of Appeals affirmed the judgment of the district court. See *State v. Smith*, No. A-99-1107,

2000 WL 1285496 (Neb. App. Sept. 12, 2000) (not designated for permanent publication).

In July 2001, Smith filed a motion for postconviction relief. Smith alleged that the information filed in March 1999 was defective because it failed to include an essential element of the crime charged—that is, it failed to specify against whom the robbery was alleged to have been committed. Smith also alleged that, but for the ineffective assistance of his counsel, the outcome of his direct appeal would have been different. On August 9, the district court overruled the motion for postconviction relief, finding no denial of or infringement upon Smith's federal or state constitutional rights which would render the judgment void or voidable.

Smith filed a notice of appeal on September 10, 2001, but was instructed that the appeal could not be docketed without a petition to proceed in forma pauperis and a poverty affidavit. Thereafter, Smith filed the notice of appeal and accompanying documents on September 28. The Court of Appeals dismissed the appeal as untimely. *State v. Smith*, 10 Neb. App. lv (No. A-01-1087, Nov. 7, 2001).

Smith filed a second "motion for postconviction relief" on October 3, 2002. Smith asserted that he had included the affidavit of poverty and other necessary documents with the notice of appeal filed with the clerk on September 10, 2001, but that the clerk had misplaced the documents, depriving him of his right to appeal. Smith asked the district court to permit him to appeal the August 9 order and to appoint counsel to represent him in the matter. The district court appointed counsel to represent Smith and, on October 6, 2003, sustained Smith's second "motion for postconviction relief," finding that an affidavit of poverty was included with the notice of appeal filed on September 10 and ordering the August 9 judgment to be "reestablished" in order to permit Smith to appeal the decision to the Court of Appeals.

Accordingly, Smith filed this appeal, challenging the August 9, 2001, order denying his first motion for postconviction relief.

III. ASSIGNMENTS OF ERROR

Smith assigns that the district court erred in failing to find that his constitutional rights were infringed upon as a result of his attorney's failure to object (1) at trial to pretrial identification evidence

and in-court identification, (2) to the defective information, and (3) to questioning with respect to Smith's prior convictions.

IV. STANDARD OF REVIEW

[1] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. Benzel, ante* p. 1, 689 N.W.2d 852 (2004).

V. ANALYSIS

1. JURISDICTION

[2] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Weeder v. Central Comm. College, ante* p. 114, 691 N.W.2d 508 (2005). In this case, the State argues that Smith's appeal should be dismissed for lack of jurisdiction because Smith did not timely appeal the order of August 9, 2001.

[3] In order to initiate an appeal, a notice of appeal must be filed within 30 days after entry of the judgment, decree, or final order. See Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004). An in forma pauperis appeal is perfected when the appellant timely files a notice of appeal and an affidavit of poverty. *State v. Jones*, 264 Neb. 671, 650 N.W.2d 798 (2002). The State asserts that Smith failed to file a poverty affidavit with his notice of appeal within 30 days of the August 9, 2001, order, noting that the notice and accompanying paperwork were not all filed until September 28.

However, in its October 6, 2003, order sustaining Smith's second "motion for postconviction relief," the district court found that a poverty affidavit was indeed included with the notice of appeal filed by the clerk on September 10, 2001. Consequently, the court ordered that the judgment entered on August 9, denying Smith's first motion for postconviction relief, be "reestablished" to allow Smith to take a proper appeal from the order.

The State asserts that there is no evidence to support the district court's order. However, the State did not appeal the October 6, 2003, decision of the district court. Therefore, unless the court did not have subject matter jurisdiction to order the relief contained in the October 6 decision, the only issues properly before this court are those presented by the August 9, 2001, order, denying Smith's first motion for postconviction relief.

[4] A judgment entered by a court which lacks subject matter jurisdiction is void. It is the longstanding rule in Nebraska that such a void judgment may be attacked at any time in any proceeding. *Kuhlmann v. City of Omaha*, 251 Neb. 176, 556 N.W.2d 15 (1996). Jurisdiction of the subject matter means the authority to hear and determine both the class of actions to which the action before the court belongs and the particular question which it assumes to decide. *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999).

[5,6] When a judgment is attacked in a manner other than by a proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack. *In re Applications T-851 & T-852*, 268 Neb. 620, 686 N.W.2d 360 (2004). Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). In this case, we must determine whether the district court had the subject matter jurisdiction to hear Smith's second "motion for postconviction relief" and to "reestablish" the August 9, 2001, order to allow Smith to file a proper appeal.

[7] This court has held that where a duty is placed upon a public officer to perform acts necessary to perfect an appeal, his or her failure to perform cannot be charged to the litigant or operate to defeat the appeal. *Purdy v. City of York*, 243 Neb. 593, 500 N.W.2d 841 (1993); *Harte v. Gallagher*, 186 Neb. 141, 181 N.W.2d 251 (1970). However, if the negligence of the appellant or his or her agent concurs with that of the court official, it precludes the appeal. See, *Larson v. Wegner*, 120 Neb. 449, 233 N.W. 253 (1930); *Continental Building & Loan Association v. Mills*, 44 Neb. 136, 62 N.W. 478 (1895). Consequently, if Smith's first

postconviction appeal was lost solely due to the clerk's error, Smith would be entitled to seek reinstatement of that appeal.

[8-10] In addition, we have indicated that in a civil proceeding, the appropriate procedure for the appellant to use in such cases is a motion to reinstate the appeal, filed with the same court in which the case was adjudicated. See *R. V. R. R. Co. v. McPherson*, 12 Neb. 480, 11 N.W. 739 (1882). A postconviction proceeding is civil in nature. *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003). In *McPherson, supra*, the appellant instead filed a new petition in the district court, claiming the dismissal of her appeal was error; however, on appeal, this court considered it as a motion and found no error in the district court's decision to sustain the motion and reinstate the appeal. Cf. *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000) (district court may properly reinstate direct appeal as postconviction relief), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). Therefore, the appropriate procedure for securing a new appeal when an appeal is lost due to official negligence is to file a motion in the lower court and establish the factual basis for obtaining relief. In short, the district court in this case had the power to reinstate a civil appeal upon the motion of a litigant.

Thus, the district court had the power to reinstate Smith's appeal upon a finding that his appeal was dismissed as untimely as a result of an error on the part of the court clerk. The court made such a finding in its order on October 6, 2003:

> It is clear from the record that [Smith] adamantly believes that there was an affidavit of poverty attached to the notice of appeal, which was filed on September 10, 2001. The notice of appeal includes a statement that the poverty affidavit is attached. The Clerk of the District Court of Dawson County, Nebraska, is less than adamant about the receipt of the poverty affidavit and is not clear about the telephone conversation between herself and [Smith]. It is clear that [Smith] mailed the documents for the appeal. The preponderance of the evidence indicates that included in those documents was an affidavit of poverty.

Based on that finding, the court sustained Smith's second "motion for postconviction relief" and "reestablished" the judgment

entered on August 9, 2001, allowing Smith to take a proper appeal therefrom. The district court had jurisdiction over the subject matter and the power to grant a reinstatement of the prior appeal; therefore, the State cannot attack that order in this appeal.

The State did not perfect a timely appeal from the October 6, 2003, order, nor can that order be collaterally attacked in the present appeal. If the State believed the evidence was insufficient to support the order, or that a postconviction motion was an inappropriate vehicle for such relief, the State should have presented a timely appeal. Error, if any, committed by the trial court would have been an error in the exercise of jurisdiction, but it was not outside the subject matter jurisdiction of the court. See *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999). Because the court had subject matter jurisdiction, the order granting a new appeal was not void ab initio. The State waived challenges to the court's finding that a poverty affidavit was included with the notice of appeal filed by the clerk on September 10, 2001, and to questions with respect to the court's exercise of jurisdiction, by failing to appeal the October 6, 2003, order.

The only order before us is that of August 9, 2001, denying Smith's first motion for postconviction relief. As a result, it is not proper for us to here determine whether the district court's decision "reestablishing" the August 9 order was an appropriate exercise of jurisdiction or whether a second "motion for postconviction relief" was the correct method for Smith to challenge the Court of Appeals' dismissal of his initial appeal from the August 9 order.

2. Postconviction Relief

Smith argues that the district court erred in failing to grant him postconviction relief based on the ineffectiveness of his counsel in failing to object to evidence of the pretrial identification offered at trial, to the allegedly defective information filed against him, and to improper questioning related to his prior convictions.

Neb. Rev. Stat. § 29-3001 (Reissue 1995) provides a postconviction action when a prisoner is claiming a right to be released because there was a denial or infringement of the rights of the prisoner, rendering the judgment void or voidable under the Constitution of this state or the Constitution of the United States. *State v. Hunt*, 262 Neb. 648, 634 N.W.2d 475 (2001).

[11-13] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *State v. Perry*, 268 Neb. 179, 681 N.W.2d 729 (2004). To prove prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004). Where a defendant is unable to demonstrate sufficient prejudice, no examination of whether counsel's performance was deficient is necessary. *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000).

(a) Pretrial and In-Court Identifications

Smith first argues that his counsel was deficient in failing to object to testimony at the original bench trial related to the pretrial identification procedures conducted by law enforcement officers and to the victim's in-court identification of Smith.

Smith moved to suppress evidence of the pretrial identification procedures conducted by law enforcement officers. During the hearing on Smith's suppression motion, Kenneth J. Schumacher, an investigator with the Lexington Police Department, testified about his role in investigating the robbery. He testified that the report of a robbery came in at 6:05 in the morning on February 16, 1999, and that within 2½ hours, Schumacher had met with the victim of the robbery to prepare a computerized composite of the suspect. During their meeting, the victim indicated that the male suspect was wearing a white baseball cap with a Nike insignia, a jean jacket, and dark wrap-around sunglasses. In addition, the victim stated that—from what she could see—the suspect was approximately 5 feet 10 inches tall, weighed 180 pounds, and had shorter blond hair. The victim also told Schumacher that the suspect had a light growth of facial hair—a mustache and a goatee. After the composite was completed, Schumacher testified that the victim said that the computer-generated picture closely

represented the suspect. The composite was then distributed to the media.

Another investigator, Tommy Smith, testified that he visited a local company on the day of the robbery. After sharing the victim's description of the robber with the company's head of security and showing her the composite picture, she gave Investigator Smith the name and company identification photograph of an employee—Anthony Smith—fitting the description. Investigator Smith testified that he showed the company identification photograph to the victim that day and that she indicated that the photograph looked like the suspect. Early the next morning, Smith was brought in for questioning in connection with the robbery. Later that morning, around 5:15, Investigator Smith showed the victim a photographic array that included a Polaroid photograph of Smith, taken by Schumacher that morning. The photograph of Smith used in the array was different from the company identification photograph obtained and shown to the victim the day before. As noted by the Court of Appeals in its opinion affirming Smith's conviction on direct appeal, of the six photographs used in the array, Smith is the only individual wearing a white Nike cap backward. In addition, the six individuals depicted do not look significantly similar to one another. See *State v. Smith*, No. A-99-1107, 2000 WL 1285496 (Neb. App. Sept. 12, 2000) (not designated for permanent publication).

Investigator Smith testified that, upon viewing the photographic array, the victim selected the photograph of Smith and said she was 95 percent sure that the person in the photograph was the same person who committed the robbery. Investigator Smith then arranged for the victim to view Smith through a two-way mirror, and the victim again identified Smith as the robber.

The district court overruled Smith's motion to suppress, finding that although the photographic array used by the officers was unduly suggestive, the totality of the circumstances showed no irreparable harm to Smith with respect to the victim's subsequent identification of him. At trial, the victim again identified Smith as the man who committed the robbery.

[14] Smith failed to preserve the issue for appeal when he did not object to testimony at trial regarding the pretrial identification procedures or to the victim's in-court identification of Smith

as the person who committed the robbery. When a motion to suppress is overruled, the defendant must make a specific objection at trial to the offer of the evidence which was the subject of the motion to suppress in order to preserve the issue for review on appeal. *State v. Schwartz*, 239 Neb. 84, 474 N.W.2d 461 (1991).

On appeal, Smith assigned error to the district court's refusal to suppress pretrial identification evidence. The Court of Appeals noted Smith's failure to preserve the issue for review but, nonetheless, addressed the merits of the issue, concluding that even if the pretrial identification procedure was unduly suggestive, the identification was sufficiently reliable to avoid suppression.

[15-17] An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law. *State v. Faust, ante* p. 749, 696 N.W.2d 420 (2005). Whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures. See *id.* The factors to be considered are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness, and the length of time between the crime and the identification. See *id.*

Pursuant to these directives, the Court of Appeals stated:

> If we assume, without deciding, that the trial court was correct in finding the identification procedure used in this case was unduly suggestive, application of the foregoing factors to the facts demonstrates that the identification was sufficiently reliable to avoid suppression. The very proximity of the victim and the perpetrator during the robbery dictates that the victim's opportunity to view the perpetrator was good. The victim testified that there was bright lighting at the time of the robbery, further indicating that she had a good opportunity to view the perpetrator. There is no evidence to indicate the victim's description of the perpetrator varied from Smith's physical characteristics, and when Smith was located by police, he was wearing

> clothing substantially matching the description given by the victim. The victim's level of certainty was also high. Finally, the timespan between the crime and the identifications was very short, as all identifications occurred within approximately 24 hours of the robbery. Cloaked with these indicia of reliability, the identification procedure employed in this case was not constitutionally invalid.

See *State v. Smith*, No. A-99-1107, 2000 WL 1285496 at *2 (Neb. App. Sept. 12, 2000) (not designated for permanent publication).

We agree with the Court of Appeals' analysis. The record shows that the victim had a sufficient opportunity to view the suspect; she testified that she stood across from the suspect at the cash register when he commanded her to give him the money. In addition, it is apparent that the victim paid a great degree of attention during the robbery, as she was able to describe the suspect, including his height, weight, hair color, and attire. The victim was able to recall the lighting conditions at the time, as well as the suspect's rapid walk and stern look. Further, Schumacher testified that the day after the robbery, Smith was found in attire that was similar to that described by the victim, including a jean jacket and a white Nike cap. Finally, the victim made the pretrial identification within 24 hours of the crime and testified that upon viewing Smith through the two-way mirror, she was certain that Smith was the perpetrator. Based on this analysis, the identification was not conducive to a substantial likelihood of irreparable harm. Even if Smith's counsel had objected at trial to testimony about the pretrial identification procedures and, thereby, preserved the issue for appeal, it is quite apparent that the Court of Appeals would have found the pretrial identification to be sufficiently reliable to avoid suppression.

[18] The Court of Appeals stated that the victim's in-court identification, also not objected to at trial, was "wholly separate from the alleged unduly suggestive identification" and that even if evidence of the pretrial identifications was erroneously admitted, the result was harmless error. *Smith*, 2000 WL 1285496 at *2. As we stated in *State v. Auger & Uitts*, 200 Neb. 53, 54, 262 N.W.2d 187, 189 (1978):

> An in-court identification may properly be received in evidence when it is independent of and untainted by illegal

> pretrial identification procedures. . . . A primary factor in determining whether an independent basis for an in-court identification exists is the opportunity afforded the witness to observe the defendant in circumstances free from taint.

(Citation omitted.) Accord *State v. Faust, ante* p. 749, 696 N.W.2d 420 (2005). In this case, the victim had sufficient time to observe the suspect, and she identified him in the courtroom from that recollection of his features. Even if there had been impermissible pretrial suggestions as to the perpetrator's identity, an in-court identification may be received when it is independent of and untainted by impermissible pretrial identification procedures. Thus, no prejudice could be shown to have occurred in any event. See *State v. Hunt*, 212 Neb. 304, 322 N.W.2d 624 (1982).

Therefore, we conclude that Smith was not prejudiced as a result of his trial counsel's failure to object to evidence of the pretrial identification procedures and the victim's in-court identification at trial.

(b) Defective Information

Smith next argues that his counsel was deficient in failing to object to the information filed against Smith, which failed to specify the victim of the alleged robbery. Smith argues that his counsel should have requested a bill of particulars for additional specificity.

The information charges that "on or about the 16th day of February, 1999, with the intent to steal, [Smith] forcibly and by violence, or by putting in fear, took from the person of another any money or personal property of any value whatever." Smith claims that the charge lacked specificity in failing to indicate the victim of the alleged robbery and, thus, impaired Smith's ability to properly prepare a defense. Smith argues that his counsel was ineffective in failing to object to the information through a motion to quash or request for specificity and, as a result, waived Smith's right to challenge the sufficiency of the information at trial or on direct appeal.

[19] A defect in the manner of charging an offense is waived if, upon being arraigned, the defendant pleads not guilty and proceeds to trial, provided the information or complaint contains no jurisdictional defect and is sufficient to charge an offense under the law. Defects and omissions which pertain to the form of the

complaint or information or to the fact that the information or complaint is inartfully drawn are waived by not objecting at the preliminary stages of the proceeding or, as to some matters, before determination of the issue on the merits. *State v. Laymon*, 239 Neb. 80, 474 N.W.2d 458 (1991).

In this case, Smith argues that the charge for robbery in the information was insufficient because it failed to indicate the victim of the alleged robbery. Any challenge to the sufficiency of the information was waived when Smith's trial counsel failed to challenge the information during the preliminary stages of the proceeding. However, the information was legally sufficient, and therefore, even if Smith's attorney had objected to the information on the ground that it failed to identify the victim, the case against Smith would have proceeded in the same manner.

[20-22] Pursuant to constitutional considerations of due process and prohibition against double jeopardy, an information must inform an accused, with reasonable certainty, of the charge being made against him or her in order that the accused may prepare his or her defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense. See, *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989); *State v. Wehrle*, 223 Neb. 928, 395 N.W.2d 142 (1986). An information or complaint is sufficient unless it is so defective that by no construction can it be said to charge the offense of which the accused was convicted. Furthermore, where an information alleges the commission of a crime using language of the statute defining that crime or terms equivalent to such statutory definition, the charge is sufficient. *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993).

Neb. Rev. Stat. § 28-324(1) (Reissue 1995) states that "[a] person commits robbery if, with the intent to steal, he forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever." As quoted above, the charge of robbery set forth in the information in this case uses the exact language of the statute, supporting a presumption of sufficiency. In addition, Smith does not assert that he did not understand the nature of the charge against him and offers no explanation as to how he was prevented from preparing an appropriate defense. Moreover, the record shows

that Smith's attorney conducted cross-examinations of the State's witnesses and that Smith testified in his own behalf at trial. We fail to see how Smith's defense would have changed if the robbery charge had identified the victim of the alleged crime.

[23] Furthermore, this court has previously held that the district court, at its discretion, may permit an amendment of the information before the verdict or findings, provided no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. See *State v. Aldrich*, 226 Neb. 645, 413 N.W.2d 639 (1987). Consequently, if an objection to the information had been made in this case, the State could have amended the information to include the identity of the victim if the court found it necessary, and the case would have proceeded to trial.

Thus, we conclude that Smith was not prejudiced as a result of his counsel's failure to challenge the information or request a bill of particulars for specificity and preserve such issues for appeal.

(c) Improper Questioning at Trial

Finally, Smith argues that his counsel was deficient in failing to object to improper questioning at trial relating to Smith's prior criminal convictions. Smith sets forth the following trial excerpt in support of his argument:

> [State:] Mr. Smith, have you ever been convicted of a crime involving dishonesty?
>
> [Smith:] No.
>
> Q Theft?
>
> A No, no.
>
> Q Have you even been convicted of a felony?
>
> A Yes, I have.
>
> Q And that was in 1993?
>
> A Yeah.
>
> Q Is that correct? And that was for domestic abuse?
>
> A That was for domestic violence.
>
> Q In 1987 weren't you also found guilty of felony theft?
>
> A Yes. I stole a car.
>
> Q Okay. So, that would be a theft or a crime involving theft.
>
> A Yes, yes.

Q Okay.
THE COURT: That's not a crime involving dishonesty.
[State:] That is not?
THE COURT: No.
[State:] Okay.

Smith argues that the State's inquiry into his prior convictions was prejudicial and improper under the rules of evidence prohibiting the admission of evidence of convictions greater than 10 years old and of crimes not punishable by death or at least 1 year's imprisonment or involving dishonesty.

[24,25] This court has held that "[i]n a case tried to a court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant." *State v. Zaritz*, 235 Neb. 599, 607, 456 N.W.2d 479, 485 (1990). In the absence of evidence to the contrary, the presumption is that a judge will disregard evidence that should not have been admitted. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). In this case, Smith was convicted in a bench trial. Thus, even if the State improperly questioned Smith about his prior convictions, the district court is presumed to have considered only properly admissible evidence in reaching its decision. In fact, at trial, the court stated that the prior theft conviction about which the State inquired did not involve dishonesty, demonstrating that the court was familiar with the pertinent evidentiary rules and their applicability to the testimony set forth above. Such a statement by the court supports an even stronger presumption that the court disregarded the inadmissible evidence in making its decision. Thus, we conclude that Smith was not prejudiced by his counsel's failure to object to improper questioning by the State at trial because the district court is presumed to have considered only legally admissible evidence in deciding the case.

VI. CONCLUSION

For each of the above reasons, we find no infringement of Smith's constitutional rights such as to make the underlying criminal judgment void or voidable and, accordingly, affirm the decision of the district court denying Smith's motion for post-conviction relief.

AFFIRMED.

KENDRA JOHNSEN AND JAMIE KOCH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, APPELLANTS, AND JAMIE LONGWELL, APPELLEE, V. STATE OF NEBRASKA ET AL., APPELLEES.

697 N.W.2d 237

Filed May 13, 2005. No. S-03-1319.

1. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Rebecca L. Gould, of Nebraska Appleseed Center for Law in the Public Interest, Welfare Due Process Project, for appellants.

Jon Bruning, Attorney General, Royce N. Harper, and Mike Rumbaugh, Special Assistant Attorney General, for appellees.

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

CONNOLLY, J.

Neb. Rev. Stat. §§ 68-1202 to 68-1210 (Reissue 2003) allow the State to subsidize certain social services, including child-care. Acting under the auspices of these statutes, the Nebraska Department of Health and Human Services (DHHS) has created the "Child Care Subsidy Program." In 2002, DHHS adopted new regulations that would require that a family have income of less than 120 percent of the federal poverty level to be eligible for the Child Care Subsidy Program. The new regulations superseded regulations that had set the income eligibility level for the Child Care Subsidy Program at 185 percent of the federal poverty level.

The appellants, Kendra Johnsen and Jamie Koch, represent a class of persons whose income is between 120 and 185 percent of the federal poverty level and who lost the benefits they were receiving because of the new income eligibility level. They contend that the new regulation violates the principle of separation of powers found in Neb. Const. art. II, § 1, because it conflicts with an income eligibility level adopted by the Legislature. In

addition, Johnsen argues that DHHS violated her due process rights by notifying her before the new regulation went into effect that the new regulation would result in her losing benefits. We are not persuaded by either argument and affirm the district court's judgment.

I. BACKGROUND

For persons who are ineligible for the aid to dependent children program (ADC), there are two childcare assistance options in Nebraska. The first is transitional childcare, which provides childcare assistance to families who have previously received cash assistance under ADC, but are no longer eligible for ADC. Families can receive childcare assistance for up to 24 months after they have stopped receiving ADC if the family's income is at or below 185 percent of the federal poverty level. Neb. Rev. Stat. § 68-1724(1)(c) (Reissue 2003).

The second childcare assistance option and the one at issue is the Child Care Subsidy Program. The Child Care Subsidy Program, as implemented by DHHS regulations, provides childcare assistance to low-income families who either have never received ADC benefits or have not received ADC benefits within the last 24 months.

No statute expressly creates the Child Care Subsidy Program. But according to the parties, it is authorized by §§ 68-1202 to 68-1210. Section 68-1202 provides that social services, including childcare,

> may be provided on behalf of recipients with payments for such social services made directly to vendors. Social services shall include those mandatory and optional services to former, present, or potential social services recipients provided for under the federal Social Security Act, as amended, and described by the State of Nebraska in the approved State Plan for Services.

Section 68-1204 authorizes DHHS to "adopt and promulgate rules and regulations, enter into agreements, and adopt fee schedules with regard to social services described in section 68-1202."

In 1998, DHHS adopted 474 Neb. Admin. Code, ch. 7, § 002.01B2 (1998), which set the income eligibility limit for the Child Care Subsidy Program at 185 percent of the federal poverty

level, the same level that § 68-1724(1)(c) sets for transitional childcare. Under both options, the amount of aid an individual family received was set by a sliding scale. The closer a family was to the income eligibility limit, the less aid they received. See, § 68-1724(1)(c); 474 Neb. Admin. Code, ch. 7, § 002.02B (2000).

Here, the dispute found its impetus in 2002 Neb. Laws, L.B. 1309, an appropriations bill meant to address a shortfall in the 2001 budget. Section 74 of L.B. 1309 contained budget appropriations for DHHS program No. 347. Program No. 347 included the Child Care Subsidy Program, as well as a wide array of other public assistance programs. As initially presented to the Governor, L.B. 1309 provided enough funding in program No. 347 so that the income eligibility level for the Child Care Subsidy Program could remain at 185 percent of the federal poverty level.

The Governor, however, returned L.B. 1309 with several line-item vetoes. To notify the Legislature of his line-item vetoes, the Governor sent a letter and an attachment. The attachment included what the Governor referred to as "individual vetoes." One of these "individual vetoes" listed program No. 347 and gave the following description: "Return non-ADC child care subsidy eligibility to 120% FPL [federal poverty level]." The Legislature did not override the Governor's veto of funding for program No. 347.

After the Legislature failed to override the Governor's line-item veto, DHHS drafted new regulations for the Child Care Subsidy Program, one of which, 392 Neb. Admin. Code, ch. 3, § 004.01D (2002), reduced the income eligibility level for the program from 185 percent of the federal poverty level to 120 percent of the federal poverty level. The regulations were adopted and filed with the Secretary of State on June 12, 2002.

Over the course of the following week, DHHS caseworkers sent letters to those who would no longer be eligible for the Child Care Subsidy Program because of the new regulations. These notices informed the recipients that the changes would go into effect on July 1, 2002.

On June 26, 2002, Johnsen and Koch, individually and on behalf of all others similarly situated, filed a petition for injunctive and declaratory relief in Lancaster County District Court. They initially alleged seven causes of action, but they later dismissed five of those causes of action. In the first of their remaining causes

of action, the appellants alleged that by adopting 392 Neb. Admin. Code, ch. 3, § 004.01D, DHHS had violated the principle of separation of powers by exceeding the rulemaking authority granted to it by the Legislature. In the second, they alleged that by sending out termination-of-benefits notices before the effective date of § 004.01D, DHHS had violated their due process rights. The appellants requested that the court certify the action as a class action and declare § 004.01D unconstitutional and enjoin its enforcement.

After the court certified the action as a class action, both the appellants and the State moved for summary judgment. The court entered summary judgment for the State on both of the appellants' causes of action.

II. ASSIGNMENTS OF ERROR

The appellants assign that the district court erred in holding that (1) the director of DHHS can determine income eligibility requirements for the Child Care Subsidy Program and (2) the class members' due process rights were not violated when notices were sent to them before the effective date of 392 Neb. Admin. Code, ch. 3, § 004.01D.

III. STANDARD OF REVIEW

[1] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Contreras*, 268 Neb. 797, 688 N.W.2d 580 (2004).

IV. ANALYSIS

1. Separation of Powers

The appellants first argue that 392 Neb. Admin. Code, ch. 3, § 004.01D, violates the constitutional principle of separation of powers. Neb. Const. art. II, § 1, 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."

The appellants' separation of powers argument has been a moving target throughout this litigation. Initially, they seemed to

argue that the Legislature had not properly delegated the authority to DHHS to set income eligibility for the Child Care Subsidy Program. This argument appeared to be based on the rule that the "Legislature may enact statutes to set forth the law, but it may not delegate that function to the executive or judicial branches of government." *Clemens v. Harvey*, 247 Neb. 77, 82, 525 N.W.2d 185, 189 (1994). In other words, the appellants were claiming that the Legislature had attempted to delegate to DHHS the authority to set eligibility for the Child Care Subsidy Program, but that this delegation was invalid because it would have ceded the Legislature's constitutional power to the executive branch. If we accepted this argument, however, it would mean not only that the regulation setting income eligibility at 120 percent of the federal poverty level was unconstitutional, but that no valid income eligibility rule existed for the Child Care Subsidy Program. Under such a ruling, the entire program would collapse.

Apparently realizing that a court order causing the collapse of the Child Care Subsidy Program would do little to advance their cause, the appellants recast their argument. Before this court and the district court, they have argued that the Legislature has set an income eligibility level for the Child Care Subsidy Program and that by adopting a different, lower eligibility level, DHHS acted outside its rulemaking authority. See *Capitol City Telephone v. Nebraska Dept. of Rev.*, 264 Neb. 515, 528, 650 N.W.2d 467, 478 (2002) ("administrative agency cannot use its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering"). It is this argument that we consider. It is, however, a murky and complex argument, and to understand it, we need to cut through the thicket of the federal scheme that funds the Child Care Subsidy Program.

(a) Federal Law Providing Funding for Child Care Subsidy Program

In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996). PRWORA made significant changes to federal oversight and funding of public assistance programs, including childcare programs. Before PRWORA, the states received funding for childcare programs primarily from

the following four sources: (1) Part of the federal Social Security Act guaranteed childcare assistance to families participating in the aid to families with dependent children program (AFDC); (2) another part of the federal Social Security Act guaranteed childcare assistance to families transitioning off AFDC; (3) a third part of the federal Social Security Act granted funds to the states to create programs to assist working parents not eligible for AFDC, but at risk of becoming dependent upon AFDC; and (4) the Child Care and Development Block Grant Act of 1990 (CCDBGA) provided childcare assistance to low-income families who were working or in education or training programs. See, generally, Jo Ann C. Gong, *Child Care in the Wake of the Federal Welfare Act*, 30 Clearinghouse Rev. 1044 (1997).

The childcare provisions of the PRWORA were meant to streamline what was considered to be a confusing system. See *id.* States now receive most of their federal funding for childcare assistance out of the childcare and development fund. This fund is created out of three primary funding streams. The first stream is set out at 42 U.S.C. § 618(a)(1) (2000), part of subchapter IV of the Social Security Act. The second stream is found at 42 U.S.C. § 9858 (2000), part of the CCDBGA. The third stream is set out at 42 U.S.C. § 618(a)(2), also part of subchapter IV of the Social Security Act. In addition to these three funding streams, states have the option of diverting 30 percent of the funds they receive under the temporary assistance for needy families program, which supplanted AFDC, to the childcare and development fund. See 42 U.S.C. § 604(d)(1)(B) (2000). See, also, Gong, *supra.*

As noted, these funding streams flow into the childcare and development fund, which is governed by the CCDBGA. So, although the funding streams originate in different places, once they flow into the childcare and development fund, they are subject to the "requirements and limitations of [the CCDBGA]." 42 U.S.C. § 618(c).

The CCDBGA contains many limitations and requirements, but for the purposes of this case, the pertinent limitation is 42 U.S.C. § 9858n(4) (2000). It defines an eligible child as one:

> (A) who is less than 13 years of age;
>
> (B) *whose family income does not exceed 85 percent of the State median income for a family of the same size*; and

(C) who—

(i) resides with a parent or parents who are working or attending a job training or educational program; or

(ii) is receiving, or needs to receive, protective services and resides with a parent or parents not described in clause (i).

(Emphasis supplied.) This provision, however, does not require that states make aid available to all children who meet the definition of "eligible child." This is made clear by 42 U.S.C. § 9858d(a) (2000), which states, "Nothing in this subchapter shall be construed . . . (2) to limit the right of any State to impose additional limitations or conditions on contracts or grants funded under this subchapter."

Therefore, the definition of "eligible child" in 42 U.S.C. § 9858n(4) acts as a cap; it prevents the states from providing aid to children whose family income exceeds 85 percent of the state median income for a family of the same size. For example, a state could limit aid to children whose family income does not exceed 40 percent of the state median income, but the state could not provide aid to a child whose family income is 95 percent of the state median income for a family of the same size.

(b) Appellants' Argument

Nothing in §§ 68-1202 to 68-1210 expressly sets out an income eligibility level for the Child Care Subsidy Program. But § 68-1204 states in part, "For the purpose of providing or purchasing [childcare] the state hereby accepts and assents to all applicable provisions of the federal Social Security Act, as amended." The appellants claim this language incorporates by reference the CCDBGA. The appellants then focus on the definition of "eligible child" in 42 U.S.C. § 9858h(4) of the CCDBGA. As previously discussed, this statute states in part that an eligible child is someone whose family income does not exceed 85 percent of the state's median income for a family of the same size, an amount that, according to the parties, is roughly 270 percent of the federal poverty level. The appellants acknowledge that this definition acts as a cap on income eligibility. But, they argue that because the Legislature has not expressly adopted a lower income eligibility level, it must have intended that the

CCDBGA's definition of eligible child govern the income eligibility limit for the Child Care Subsidy Program.

In other words, according to the appellants, the Legislature, by incorporating the CCDBGA, has mandated that the income eligibility level for the Child Care Subsidy Program be 85 percent of the state median income (i.e., roughly 270 percent of federal poverty level) and that DHHS has no authority to set a lower income eligibility level. Thus, DHHS' decision to set income eligibility at 120 percent of the federal poverty level ran afoul of a direct legislative command and therefore violates the principle of separation of powers. The appellants further point out that if we were to accept their argument, it would mean that the predecessor to 392 Neb. Admin. Code, ch. 3, § 004.01D, which set the income eligibility level at 185 percent of the federal poverty level, was also unconstitutional.

(c) Resolution

Initially, we are skeptical that § 68-1204 incorporates the CCDBGA. A statute may adopt all or a part of another statute by a specific reference, and the effect is the same as if the statute or part thereof adopted had been written into the adopting statute. *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994). Section 68-1204 states that the State of Nebraska "accepts and assents to all applicable provisions of the federal Social Security Act." Both DHHS and the appellants assume that the CCDBGA is part of the federal Social Security Act. The federal Social Security Act, however, consists of 21 subchapters. See 42 U.S.C. §§ 301 to 1397jj (2000 & Supp. I 2001). The CCDBGA is codified at 42 U.S.C. §§ 9858 to 9858q (2000). Thus, although the CCDBGA operates in conjunction with the federal Social Security Act, it is not actually part of that act.

We, however, need not definitively decide whether § 68-1204 incorporates the CCDBGA. Even if we assume that it does, the appellants draw the incorrect inference from that incorporation. The incorporation would mean that Nebraska has "accepted and assented" to the requirements and limitations imposed by the CCDBGA, therefore limiting the ability of DHHS to adopt regulations that contravene the CCDBGA. One of the requirements of the CCDBGA is that states not provide federal aid to children

whose family income is greater than 85 percent of the state median income for families of the same size (i.e., roughly 270 percent of the federal poverty level). Thus, § 68-1204, if it does in fact incorporate the CCDBGA, would prevent DHHS from adopting regulations that set an income eligibility level above 85 percent of the state median income for families of the same size. DHHS would remain free, however, to adopt regulations that, like the ones here, set the income eligibility level below 85 percent of the state median income level for a family of the same size. So, even if we assume that the Legislature has incorporated the CCDBGA, that fact would not mean that DHHS, in adopting 392 Neb. Admin. Code, ch. 3, § 004.01D, violated the principle of separation of powers. Therefore, we reject the appellants' first assignment of error.

2. Due Process

DHHS' regulations require written notice from caseworkers to clients when a provided service is to be reduced or eliminated. 392 Neb. Admin. Code, ch. 4, § 002.03 (2002) (effective June 17, 2002). The notice must include a statement of what action the worker intends to take, the reasons for the intended action, and the corresponding manual reference. *Id.* The caseworker must send the notice 10 calendar days before the adverse action is effective. 392 Neb. Admin. Code, ch. 4, § 002.03A (2002) (effective June 17, 2002). If the client files a notice within 10 days after the date the notice was mailed, then the services cannot be reduced or eliminated until "a fair hearing decision is made." 392 Neb. Admin. Code, ch. 4, § 002.03D (2002) (effective June 17, 2002).

Johnsen was sent a notice on June 15, 2002, informing her that on July 1, the benefits she was receiving under the Child Care Subsidy Program would be terminated because of the adoption of 392 Neb. Admin. Code, ch. 3, § 004.01D. When notice was sent, § 004.01D had been signed by the Governor and was on file with the Secretary of State. But it had only been on file with the Secretary of State since June 12, i.e., for 3 days. Under Neb. Rev. Stat. § 84-906 (Reissue 1999), "[n]o rule or regulation of any agency shall be valid as against any person until five days after such rule or regulation has been filed with the Secretary of State." Consequently, when Johnsen's caseworker mailed her the termination-of-benefits notice, § 004.01D was not yet effective.

Johnsen argues that because 392 Neb. Admin. Code, ch. 3, § 004.01D, was not effective when the notice was sent, the notice was a nullity. She claims that § 004.01D could not be enforced against her or similarly situated members of the class until they received another notice sent after the effective date of the regulation.

We also note that Koch claims that she, too, was sent a premature termination-of-benefits notice. However, during the proceedings before the district court, DHHS conceded that the notice that it had originally sent to Koch had not contained information required by DHHS regulations. DHHS agreed to send Koch and those in a similar situation a new notice and provide them with an additional month of benefits. These new notices would have been sent well after 392 Neb. Admin. Code, ch. 3, § 004.01D, had been on file with the Secretary of State for 5 days, and thus, the appellants' second assignment of error concerns only Johnsen and those whose situation mirrored hers.

Johnsen relies on our decision in *Gausman v. Department of Motor Vehicles*, 246 Neb. 677, 522 N.W.2d 417 (1994). In that case, Russell Gausman's driver's license was automatically revoked after he was arrested for driving under the influence of alcohol. Gausman appealed, and a revocation hearing was held by the Department of Motor Vehicles (DMV). The DMV had not filed with the Secretary of State its rules governing practice and procedure for contested license revocations either at the time of the arrest or at the time of the hearing. So, under § 84-906, those rules were not valid. We concluded that because the rules used to govern the revocation hearing were not valid at the time of the hearing, Gausman had been denied due process. We rejected the DMV's argument that due process had been satisfied because Gausman had been given notice of his hearing and of the procedures that the DMV used in the revocation proceedings.

This case, however, presents a factual situation different than that presented by *Gausman, supra*. Gausman had his driver's license revoked and his appeal of that revocation heard before the rules and procedures governing license revocations were in place. The situation in *Gausman* was similar to the State's trying and convicting a person for a crime under criminal procedure rules proposed but not yet enacted by the Legislature. Under such

circumstances, the risk of abuse is obvious and prejudice will be assumed.

In contrast to Gausman, who lost his license before any rules or procedures were in place, Johnsen did not lose her childcare benefits before 392 Neb. Admin. Code, ch. 3, § 004.01D, became effective. Rather, Johnsen's benefits ended on July 1, 2002, 13 days after § 004.01D became effective. Further, nothing in the record indicates that Johnsen was harmed by her caseworker's sending the notice before § 004.01D went into effect. Moreover, unlike *Gausman, supra*, it is not clear to us how the premature notice could have possibly harmed her. In fact, it benefited her. The loss of her childcare benefit undoubtedly created a financial crisis for Johnsen. The premature notice meant that she had a few extra days to secure alternative childcare arrangements. In short, the State gave Johnsen more process than was due to her, not less, and therefore, its conduct was not unconstitutional.

V. CONCLUSION

We are not persuaded by the appellants' argument that DHHS violated the principle of separation of powers by adopting an income eligibility rule for the Child Care Subsidy Program that conflicted with an income eligibility rule set by the Legislature. We also reject Johnsen's argument that DHHS violated her due process rights by sending her a termination-of-benefits notice before the operative date of 392 Neb. Admin. Code, ch. 3, § 004.01D.

AFFIRMED.

NORRIS OLSON, APPELLEE, V. LE MARS MUTUAL INSURANCE COMPANY OF IOWA, APPELLANT.

696 N.W.2d 453

Filed May 13, 2005. No. S-04-045.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing 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: Final Orders: Appeal and Error.** When adverse parties have each moved for summary judgment and the trial court has sustained one of the

motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as the court deems just.

3. **Insurance: Contracts: Appeal and Error.** The meaning 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. **Insurance: Contracts: Intent: Appeal and Error.** In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.
5. **Insurance: Contracts: Words and Phrases.** Regarding words in an insurance policy, the language should be considered not in accordance with what the insurer intended the words to mean but according to what a reasonable person in the position of the insured would have understood them to mean.
6. **Insurance: Contracts: Damages: Words and Phrases.** As used in a property insurance policy, the phrase "actual cash value" is a limitation on the amount of recovery for the protection of the insurer and not a substantive measure of damages.
7. **Insurance: Contracts.** In the context of property insurance, actual cash value of property means the market value of it; that market value is the amount for which property may be sold by a willing seller who is not compelled to sell it to a buyer who is willing but not compelled to buy it. In determining such value, the finder of fact should consider the situation and condition of the property as it was at the time of loss and all other facts and circumstances shown by the evidence that affected or had a tendency to establish its value.
8. ____: ____. Under an actual cash value policy which does not expressly provide otherwise, an insurer may not deduct depreciation from the cost of repairing partial damage to insured property where the actual cash value of the property, as repaired, does not exceed its actual cash value at the time of loss.

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

Albert M. Engles, Jason R. Yungtum, and Robert B. Quigley, of Engles, Ketcham, Olson & Keith, P.C., for appellant.

Kenneth F. George, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellee.

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

STEPHAN, J.

A grain storage building owned by Norris Olson and insured by Le Mars Mutual Insurance Company (Le Mars) was damaged by hail. The cost of repairing the damage was $95,040. The issue

presented is whether the insurance policy permits the insurer to deduct a depreciation factor from the repair cost in adjusting the loss. We agree with the district court for Buffalo County that it does not.

BACKGROUND

Olson purchased a commercial property insurance policy from Le Mars to insure a grain storage building located in Buffalo County, Nebraska, for the period from March 20, 2002, through March 20, 2003. The policy insured the property against various types of loss, including hail. The coverage limit was $160,000, with coinsurance of 80 percent and a $500 deductible. The policy included the following provisions:

> 4. **Loss Payment**
>
> a. In the event of loss or damage covered by this Coverage Form at our option, we will either:
>
> 1) Pay the value of lost or damaged property;
>
> 2) Pay the cost of repairing or replacing the lost or damaged property;
>
> 3) Take all or any part of the property at an agreed or appraised value; or
>
> 4) Repair, rebuild or replace the property with other property of like kind and quality.
>
> b. We will give notice of our intentions within 30 days after we receive the sworn statement of loss.
>
> c. We will not pay you more than your financial interest in the Covered Property.
>
> . . . .
>
> 7. **Valuation**
>
> We will determine the value of Covered Property in the event of loss or damage as follows:
>
> a. At actual cash value as of the time of loss or damage . . . .

The policy also included various "optional coverages," including replacement cost coverage, which Olson did not purchase. With respect to this coverage, the policy provided "Replacement Cost (without deduction for depreciation) replaces Actual Cash Value in the Loss Condition, Valuation, of this Coverage Form."

On June 12, 2002, the insured building was damaged by hail. The building was 42 years old at the time of the damage. Between

June 13 and 28, an employee of Interstate Structures, Inc., inspected and examined the building at Olson's request and determined that the cost for material, labor, and equipment to repair the hail damage would be $95,040.

Olson demanded payment from Le Mars for $94,540, representing the cost of repair less the $500 deductible. On July 18, a claims service prepared an adjuster summary for Le Mars in which it estimated total repair costs at $94,576 and deducted $36,710.40 from that total for depreciation, thereby arriving at an "ACV," or actual cash value, in the amount of $57,865.60. Le Mars thereafter claimed the actual cash value of the claim was $57,865.60 and offered Olson $57,365.60 (representing $57,865.60 less the $500 deductible), which he refused.

Olson filed a petition in the district court for Buffalo County seeking judgment against Le Mars in the amount of $94,540 and an attorney fee. The parties subsequently filed cross-motions for summary judgment. In support of his motion, Olson submitted the pleadings, a copy of the insurance policy, the adjuster's summary, his affidavit, and the affidavits of Dennis Land, a Nebraska general real estate certified appraiser, and the employee of Interstate Structures. In their affidavits, Land and Olson stated that shortly before the building was damaged, Land offered to purchase it from Olson for $200,000, and Olson made a counteroffer to sell for $225,000. Land had leased the building from Olson for the 3-year period prior to his offer and had extensive, full, and complete knowledge and information regarding the building. Land averred that he was still willing to pay $200,000 for the building immediately prior to the damage. In his affidavit, the certified appraiser stated that the building had a fair market value of $200,000 as of June 12, 2002, immediately prior to the hail damage. On September 1, Olson sold the building to Land in its damaged state for $100,000.

Le Mars submitted the affidavits of an underwriter employed by Le Mars and an analyst of market conduct regulatory compliance and coverage interpretation. The underwriter stated in his affidavit that it was "the standard and practice of the insurance industry to adjust a partial loss for property damage to the insured premises on a policy such as the one issued to [Olson] by reducing the actual cash value (cost to repair) by depreciation." He

opined that because the building was approximately 40 years old at the time of the loss and had a useful life of 100 years, it was appropriate for Le Mars to apply a 40-percent depreciation factor. The analyst stated in his affidavit that the "correct and only method for determining 'actual cash value' under [Olson's] policy is replacement cost less depreciation."

The district court granted summary judgment in favor of Olson, noting that the facts were generally undisputed and that the dispositive issue involved interpretation of the meaning of "actual cash value" as used in the policy. The court was not persuaded by Le Mars' experts, noting that the underwriter "defines actual cash value as cost to repair . . . then states that the insurance practice is to reduce actual cash value by depreciation" and that the analyst

> suggests that actual cash value must mean "replacement costs less depreciation." If the definition[s] of [Le Mars'] own experts are to have meaning one must also then conclude that cost of repair is synonymous with cost of replacement [and] must equate actual cash value with replacement costs absent a deduction for depreciation.

Opining that Le Mars was seeking to utilize "a special meaning and definition for actual cash value as a term of art in the insurance industry," the court held that actual cash value means fair market value, noting that the "determination of fair market value in of [sic] itself includes depreciation of the asset from its original value," and awarded Olson $99,500 to reflect the loss of fair market value to the building less the $500 deductible. Olson was allowed to amend his petition to conform to the evidence and the amount of damages awarded by the court.

ASSIGNMENTS OF ERROR

Le Mars assigns, consolidated and restated, that the district court erred (1) in determining that actual cash value in the general loss provision of a property insurance policy means the market value of real property before and after a loss, rather than repair cost minus depreciation; (2) in failing to find that a deduction for depreciation upholds the terms of the policy as intended by the parties at the time of policy formation in this case; and (3) in making its determination as to actual cash value based on insufficient evidence.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing 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. *Dworak v. Farmers Ins. Exch., ante* p. 386, 693 N.W.2d 522 (2005); *Range v. Abbott Sports Complex, ante* p. 281, 691 N.W.2d 525 (2005).

[2] When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as the court deems just. *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004).

[3] The meaning 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. *Auto-Owners Ins. Co. v. Home Pride Cos.*, 268 Neb. 528, 684 N.W.2d 571 (2004); *Poulton v. State Farm Fire & Cas. Cos.*, 267 Neb. 569, 675 N.W.2d 665 (2004).

ANALYSIS

Key facts are not in dispute. Olson's building was insured under the Le Mars policy when it was partially damaged by hail, which is one of the causes of loss covered by the policy. The cost of repairing the hail damage was $95,040. The dispute involves whether Le Mars is obligated under its policy to pay this entire amount, less Olson's deductible, or whether it is permitted to deduct a depreciation factor from the repair cost in order to arrive at a net amount due. Le Mars contends that because it insured the building for actual cash value, not replacement cost, the deduction of depreciation is proper.

[4,5] Whether the policy permits this deduction is a question of law. In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of a contract are clear, they are to be accorded their plain

and ordinary meaning. *Auto-Owners Ins. Co. v. Home Pride Cos., supra*; *Poulton v. State Farm Fire & Cas. Cos., supra.* Regarding words in an insurance policy, the language should be considered not in accordance with what the insurer intended the words to mean but according to what a reasonable person in the position of the insured would have understood them to mean. *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003); *Decker v. Combined Ins. Co. of Am.*, 244 Neb. 281, 505 N.W.2d 719 (1993).

ACTUAL CASH VALUE

[6] As used in a property insurance policy, the phrase "actual cash value" is a limitation on the amount of recovery for the protection of the insurer and not a substantive measure of damages. *Borden v. General Insurance Co.*, 157 Neb. 98, 59 N.W.2d 141 (1953); *Clouse v. St. Paul Fire and Marine Ins. Co.*, 152 Neb. 230, 40 N.W.2d 820 (1950); 12 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 175:26 (1998). Where, as here, the policy does not include a specific definition, it has been noted that

> there is a priority of rules to determine actual cash value as follows, (1) where market value is easily determined, actual cash value is market value, (2) if there is no market value, replacement or reproduction cost may be used, (3) failing the other two tests, any evidence tending to formulate a correct estimate of value may be used.

12 Russ & Segalla, *supra*, § 175:24 at 175-32, citing *Sullivan v. Liberty Mutual Fire Ins. Co.*, 174 Conn. 229, 384 A.2d 384 (1978).

[7] We have directly addressed the meaning of "actual cash value" in the context of property insurance in two cases. In *Borden v. General Insurance Co., supra*, we held that the actual cash value of property "means the market value of it; that market value is the amount for which property may be sold by a willing seller who is not compelled to sell it to a buyer who is willing but not compelled to buy it." 157 Neb. at 113, 59 N.W.2d at 149-50. We further stated that in determining such value, the finder of fact "should consider the situation and condition of the property as it was at the time [of loss] and all other facts and circumstances shown by the evidence that affected or had a tendency to establish its value." *Id.* at 114, 59 N.W.2d at 150. We applied the

same definition to actual cash value, as used in a coinsurance clause, in *Erin Rancho Motels v. United States F. & G. Co.*, 218 Neb. 9, 352 N.W.2d 561 (1984). We were urged by the insurer in that case, as we are in this case by Le Mars, to adopt the "broad evidence rule," which permits a finder of fact to

> "consider every fact and circumstance which would logically tend to the formation of a correct estimate of the building's value, including the original cost, the economic value of the building, the income derived from the building's use, the age and condition of the building, its obsolescence, both structural and functional, its market value, and the depreciation and deterioration to which it has been subjected."

Id. at 14, 352 N.W.2d at 564-65, quoting *Messing v. Reliance Ins. Co.*, 77 N.J. Super. 531, 187 A.2d 49 (1962). While indicating that we had "no particular quarrel with that definition," we stated that

> actual cash value must still be measured as an economic unit, i.e., related to what, in terms of value, one could receive for his or her property. Fair market value is a term which has been used and is generally understood by experts and lay people alike, and which may be found by employing, if you will, the broad evidence rule. . . . We continue to approve that definition for "actual cash value" *wherever it is used in a policy of property damage insurance.*

(Emphasis supplied.) *Erin Rancho Motels v. United States F. & G. Co.*, 218 Neb. at 14, 352 N.W.2d at 565. Applying either a market value test or the broad evidence rule, there is undisputed evidence in this case that the value of the insured building as an economic unit, and therefore its actual cash value, was $200,000 immediately prior to the occurrence of the hail damage.

Depreciation Deduction From Cost of Repair

Under the policy at issue in this case, Le Mars had four options for paying Olson's insured hail loss. It could have paid the value of the property, determined at actual cash value as of the time of loss. In the alternative, it could elect to pay the cost of repairing or replacing the damaged property; take all or any part of the property at an agreed or appraised value; or repair, rebuild, or replace the property with other property of like kind and quality. Because the policy gave Le Mars the right to select the payment

option, it effectively insured the property for the lesser of actual cash value or the cost to repair or replace the damaged property.

It is apparent from the record that Le Mars chose the second option, in that it calculated its proferred payment on the undisputed cost of repairing the partially damaged building. Le Mars argues that because the optional replacement cost coverage, which Olson did not purchase, is defined by the policy as being "without deduction for depreciation," it necessarily follows that the basic actual cash value coverage, for which a lower premium is charged, permits a deduction for depreciation from the cost of repair. This would be a persuasive argument if we were dealing with the total destruction of a building insured for an actual cash value determined solely on the basis of replacement cost. In that circumstance, application of a depreciation factor would serve to indemnify the insured for the value of that which was lost, but no more, and it would prevent the insured from receiving a windfall in the form of full replacement cost coverage for which no premium was paid.

In this case, however, we are presented with partial damage to a building which will be repaired, not replaced. The Le Mars policy does not specifically provide for a depreciation deduction in this circumstance. Cf. *Voges v. Mechanics Ins. Co.*, 119 Neb. 553, 230 N.W. 105 (1930). The evidence offered by Le Mars regarding standard loss adjustment practices in Nebraska is not useful in resolving the legal issue of whether deducting depreciation from repair costs is permissible under the language of this specific policy.

Cases from other jurisdictions can be found to support or refute the argument that depreciation should be deducted from repair costs under actual cash value coverage. In *Ins. Co. of North America v. City of Coffeyville*, 630 F. Supp. 166 (D. Kan. 1986), the court held that the insurer was entitled to deduct depreciation from the cost of repairing a structure partially damaged by fire. In that case, the insured did not purchase replacement cost coverage, which was defined as the full cost of repair or replacement and was not subject to a depreciation deduction, and the parties' prior course of dealing demonstrated that the insured shared the insurer's definition of actual cash value. See, also, *Zochert v. National Farmers Union Property*, 576 N.W.2d 531 (S.D. 1998)

(permitting deduction of depreciation from repair cost where policy differentiated between actual cash value and replacement cost coverages, and insured elected former).

On the other hand, the court in *Kane v. State Farm Fire and Cas. Co.*, 841 A.2d 1038, 1047 (Pa. Super. 2003), held that "in the absence of clear language to the contrary, an insurer may not deduct depreciation from the replacement cost" and that the phrase " 'actual cash value' may not be interpreted as including a depreciation deduction, where such deduction would thwart the insured's expectation to be made whole." The court concluded that "[w]here qualifying language is absent and an insured is promised 'actual cash value,' the insured is entitled to the cost to repair or replace the damaged property." *Id.* In *Glens Falls Ins. Co. v. Gulf Breeze Cottages*, 38 So. 2d 828, 830 (Fla. 1949), the Florida Supreme Court affirmed a chancellor's refusal to permit a depreciation deduction from the cost of repairing storm damage to insured structures, reasoning that "[i]f depreciation were allowed, it would cast upon the owner an added expense which we do not believe was contemplated by the parties when they entered into the insurance contract." See, also, *McIntosh et al. v. Hartford Fire Ins. Co.*, 106 Mont. 434, 78 P.2d 82 (1938) (holding that depreciation could not be deducted from cost to repair building to its condition prior to fire under actual cash value policy).

Most of the cases addressing this issue focus on the principle that an insured under an actual cash value policy is entitled to be indemnified for the actual amount of property loss, but should not be permitted to benefit from the loss. See, e.g., *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982) (agreeing that principle of indemnity is best served by considering evidence relevant to effect of over and under insurance); *Elberon Bathing Co. v. Ambassador Insurance Co.*, 77 N.J. 1, 8, 389 A.2d 439, 442 (1978) ("allowing pure replacement cost would violate the principle of indemnity by providing a windfall to the insured"). See, also, 6 John Alan Appleman & Jean Appleman, Insurance Law and Practice § 3823 (1972 & Cum. Supp. 2005). The parties in this case agree with this general principle, but disagree as to its application to these facts.

[8] We agree with the district court that on the record presented, the policy did not permit the depreciation deduction

claimed by Le Mars. As we have previously determined, the insured building had an actual cash value of $200,000 at the time of the loss. In its damaged condition, its value was reduced to $100,000, the price for which Olson sold it to Land. Le Mars elected to calculate its payment under the policy based upon the cost of repairing the partial damage, which was $95,040. There is no evidence that the repairs would cause the actual cash value of the building to exceed $200,000. Recovery of the full repair costs without a depreciation deduction will therefore restore the value of the insured property that existed immediately prior to the loss, but will not enhance that value. Accordingly, we conclude that under an actual cash value policy which does not expressly provide otherwise, an insurer may not deduct depreciation from the cost of repairing partial damage to insured property where the actual cash value of the property, as repaired, does not exceed its actual cash value at the time of the loss.

Although we agree with the district court that Le Mars was not entitled to a deduction for depreciation, we disagree with its entry of judgment in the amount of $99,500. Le Mars' liability under its policy is limited to the repair cost of $95,040 less the insured's $500 deductible. Accordingly, we reduce the amount of the judgment to $94,540 and affirm as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V.
MOHAMED EL-TABECH, APPELLANT.

696 N.W.2d 445

Filed May 13, 2005. No. S-04-527.

1. **Motions for New Trial: DNA Testing: Appeal and Error.** A motion for new trial based on newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Cum. Supp. 2004), is addressed to the discretion of the district court, and unless an abuse of discretion is shown, the court's determination will not be disturbed.
2. **Motions for New Trial: DNA Testing.** To warrant a new trial, the district court must determine that newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Cum. Supp. 2004), is of such a nature that if it had been offered and admitted at the trial, it probably would have produced a substantially different result.

3. **DNA Testing.** A movant may obtain DNA testing if, inter alia, the testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced.
4. **Motions to Vacate: Motions for New Trial: DNA Testing.** A court may vacate and set aside the judgment in circumstances where DNA testing results are either completely exonerative or highly exculpatory—when the results, when considered with the evidence of the case which resulted in the underlying judgment, show a complete lack of evidence to establish an essential element of the crime charged. In other circumstances where the evidence is merely exculpatory, the court may order a new trial if the newly discovered exculpatory DNA evidence is of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result.
5. **Motions for New Trial: DNA Testing: Time.** The DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Cum. Supp. 2004), permits the testing of relevant biological material and provides the means by which a person in custody may seek relief based upon newly discovered exculpatory DNA test results obtained after the statutory time period for requesting a new trial based upon newly discovered evidence has expired.
6. **Constitutional Law: Effectiveness of Counsel: Proof.** An ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

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

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

WRIGHT, J.

NATURE OF CASE

Mohamed El-Tabech appeals from the judgment of the Lancaster County District Court which held that the results of DNA testing did not afford him relief in the form of an order vacating or setting aside his convictions and sentences or an order granting him a new trial.

SCOPE OF REVIEW

[1] A motion for new trial based on newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act, Neb.

Rev. Stat. §§ 29-4116 to 29-4125 (Cum. Supp. 2004), is addressed to the discretion of the district court, and unless an abuse of discretion is shown, the court's determination will not be disturbed. *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004).

[2] To warrant a new trial, the district court must determine that newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act is of such a nature that if it had been offered and admitted at the trial, it probably would have produced a substantially different result. See *State v. Buckman, supra.*

FACTS

On June 24, 1984, police and emergency personnel were dispatched to El-Tabech's home. The paramedic who entered the home first saw El-Tabech seated on the floor, rocking back and forth and pointing to the back of the house. Lynn El-Tabech, El-Tabech's wife, was found lying on a bed with a white terry cloth bathrobe belt tied so tightly around her neck that it had to be cut off with scissors. Both the condition and temperature of the victim's body indicated that she had not been dead for very long.

During the trial, circumstantial evidence was produced which indicated that El-Tabech had killed his wife. A neighbor testified to hearing a long argument between the couple on the day of the murder. A member of El-Tabech's church testified that El-Tabech had called him numerous times on the day of the murder. El-Tabech sounded upset and wanted to talk about problems he was having with his wife. El-Tabech told the man that El-Tabech's wife was leaving him.

A waitress testified that she waited on El-Tabech and his wife the day of the murder and that the couple had argued loudly. Another neighbor's testimony placed El-Tabech at the scene of the crime during the estimated time of death. The victim's mother and sister testified that El-Tabech was controlling of his wife's behavior and that she often did not favor the attention that he bestowed upon her.

At trial, Dr. Reena Roy testified regarding tests that had been performed on physical evidence gathered from the crime scene. Bloodstains on a pillowcase and the robe the victim was wearing were found to be consistent with the victim's blood. A tuft of hair was found in the knot of the belt used to kill the victim. Roy testified that the seven hairs in the tuft were consistent with the

victim's hair. An additional hair had fallen from the belt when the evidence was gathered. Roy testified that this hair could not be identified as belonging to either El-Tabech or the victim.

El-Tabech was convicted of first degree murder and use of a deadly weapon to commit a felony. See *State v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1987). He was sentenced to life imprisonment for the murder conviction and 20 years' imprisonment for the use of a deadly weapon conviction, with the sentences to run consecutively. We affirmed the convictions and sentences. *Id.*

In *State v. El-Tabech*, 234 Neb. 831, 453 N.W.2d 91 (1990), we addressed El-Tabech's motion for postconviction relief on the ground that his convictions were unconstitutional because he was not afforded effective assistance of counsel. We found no merit to his arguments.

El-Tabech next brought a motion pursuant to Nebraska's postconviction statutes seeking to compel state-funded DNA testing. In *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000), we affirmed the district court's denial of this motion, holding that there was no recourse then available by which a prisoner alleging actual innocence could bring a claim after the time period had run for bringing a motion for new trial based on newly discovered evidence. We further held that there was no statutory means by which a prisoner could compel state-funded DNA testing at that time.

In 2001, the Legislature enacted the DNA Testing Act, which permits a person in custody, at any time after conviction, to request DNA testing of certain biological material. El-Tabech subsequently filed a motion to compel the testing of evidence pursuant to the DNA Testing Act.

An evidentiary hearing was held in the Lancaster County District Court on December 17, 2002. At the hearing, testimony was adduced from Roy regarding the tests that had been performed on the physical evidence found at the crime scene. The district court then ordered DNA testing of 29 pieces of evidence, including the seven hairs found in the knot made from the bathrobe belt that was used to strangle the victim. Also tested was the hair that had fallen off the belt when the evidence was gathered at the crime scene.

On February 26, 2004, a hearing was held concerning the results of the testing. After the hearing, but prior to the filing of a motion to vacate or set aside the judgment or a motion for new trial, the district court issued an order stating that it viewed "this stage of the proceeding as a Motion Vacate [sic] and Set Aside the Judgment, or, in the alternative a Motion for New Trial."

The district court held that the test results warranted neither an order vacating and setting aside the judgment nor an order granting a new trial. El-Tabech timely perfected an appeal.

ASSIGNMENT OF ERROR

El-Tabech assigns as error the district court's failure to find the new DNA evidence sufficient to set aside his convictions and grant him a new trial.

ANALYSIS

In this case, we examine a decision made by the district court pursuant to § 29-4120 of the DNA Testing Act, which provides in part:

> (1) Notwithstanding any other provision of law, a person in custody pursuant to the judgment of a court may, at any time after conviction, file a motion, with or without supporting affidavits, in the court that entered the judgment requesting forensic DNA testing of any biological material that:
>
> (a) Is related to the investigation or prosecution that resulted in such judgment;
>
> (b) Is in the actual or constructive possession or control of the state or is in the possession or control of others under circumstances likely to safeguard the integrity of the biological material's original physical composition; and
>
> (c) Was not previously subjected to DNA testing or can be subjected to retesting with more current DNA techniques that provide a reasonable likelihood of more accurate and probative results.

Section 29-4123 provides guidance for dealing with the results of such testing:

> (2) Upon receipt of the results of such testing, any party may request a hearing before the court when such results exonerate or exculpate the person. Following such hearing, the court may, on its own motion or upon the motion of any

party, vacate and set aside the judgment and release the person from custody based upon final testing results exonerating or exculpating the person.

(3) If the court does not grant the relief contained in subsection (2) of this section, any party may file a motion for a new trial under sections 29-2101 to 29-2103.

[3,4] In *State v. Buckman*, 267 Neb. 505, 518, 675 N.W.2d 372, 383 (2004), we set out the procedural framework for seeking relief pursuant to the DNA Testing Act:

> First, a movant may obtain DNA testing if, inter alia, the testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced. See § 29-4120(5). Second, the court may vacate and set aside the judgment in circumstances where the DNA testing results are either completely exonerative or highly exculpatory—when the results, when considered with the evidence of the case which resulted in the underlying judgment, show a complete lack of evidence to establish an essential element of the crime charged. See, § 29-4123(2); [*State v.*] *Bronson*, [267 Neb. 103, 672 N.W.2d 244 (2003)]. This requires a finding that guilt cannot be sustained because the evidence is doubtful in character and completely lacking in probative value. Third, in other circumstances where the evidence is merely exculpatory, the court may order a new trial if the newly discovered exculpatory DNA evidence is of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result. See, §§ 29-4123(3) and 29-2101(6); *Bronson, supra.*

El-Tabech admits that the DNA test results in the case at bar do not exonerate him. As such, he does not argue that the district court erred in denying him the relief afforded by § 29-4123(2). Instead, he contends that the results warrant a new trial pursuant to Neb. Rev. Stat. § 29-2101(6) (Cum. Supp. 2004) (newly discovered exculpatory DNA evidence obtained under DNA Testing Act). El-Tabech asserts that the language of § 29-2101, when read in pari materia, warrants that a new trial should be granted when there is a basis to believe that the DNA test results "could reasonably have produced a different result." Brief for appellant at 15.

El-Tabech argues that the test results with respect to the seven hairs found in the knot of the belt used to murder the victim dramatically change the nature of the circumstantial case against him. He contends that because the State's expert testified at trial that the seven hairs came from the victim, but the testing showed that one of these hairs could not be identified as belonging to either the victim or El-Tabech, some other person was obviously present at the time of the murder. He claims that had he known at the time of trial that one of the hairs belonged to neither him nor the victim, the defense strategies and arguments would clearly have been different.

[5] In the case at bar, the issue is whether the DNA test results, if admitted at trial, probably would have produced a substantially different result. The DNA Testing Act permits the testing of relevant biological material and provides the means by which a person in custody may seek relief based upon newly discovered exculpatory DNA test results obtained after the statutory time period for requesting a new trial based upon newly discovered evidence has expired.

In *State v. Bronson*, 267 Neb. 103, 112-13, 672 N.W.2d 244, 251-52 (2003), we stated:

> We have not previously reviewed a district court's ruling on a motion for new trial under § 29-2101(6) based on evidence obtained pursuant to the DNA Testing Act. We therefore take this opportunity to address the proof required to succeed on such a motion and the standard of review an appellate court should apply to the trial court's ruling on a motion for new trial under § 29-2101(6).
>
> With respect to the trial court's consideration of a motion for new trial based on newly discovered evidence, we have stated in a similar context under § 29-2101(5) that where a motion for new trial is based on newly discovered evidence, such "'"evidence must be of such a nature that if it had been offered and admitted at the former trial it probably would have produced a substantially different result.". . .'" *State v. Boppre*, 243 Neb. 908, 924, 503 N.W.2d 526, 536 (1993). We have further stated that "[a] motion for new trial based on newly discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion

> is shown, the trial court's determination will not be disturbed." *State v. Bjorklund*, 258 Neb. 432, 496, 604 N.W.2d 169, 220 (2000). We determine that the standards just quoted are applicable to motions for new trial pursuant to § 29-2101(6) based on newly discovered evidence obtained under the DNA Testing Act.

El-Tabech claims that the defendant's burden of proof in a motion for new trial based on newly discovered DNA evidence is too strict. In support of this contention, he points out that this standard is higher than the burden of proof for certain constitutional violations, such as ineffective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). El-Tabech asserted at oral arguments before this court that he should have succeeded on his request for a new trial if the test results would have been material to the defense at trial. This argument fails to consider the rationale behind the requirement of a higher burden of proof for granting relief based upon newly discovered evidence as opposed to a claim of ineffective assistance of counsel.

[6] An ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

A defendant who requests a new trial based upon newly discovered evidence faces a higher standard. Such a request is not based upon a claim that the defendant did not receive a fair trial or that a fundamental right was violated. Fundamental rights under the Constitution are not implicated in such a motion.

> The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. . . . An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower.

Strickland v. Washington, 466 U.S. at 694.

In considering a motion for new trial based upon newly discovered evidence pursuant to either § 29-2101(5) or (6), we apply a higher standard in order to promote the finality of the judgment based upon the presumption that the defendant received a fair trial and no fundamental rights were violated. In *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004), we restated the standard to be applied to motions pursuant to § 29-2101(6). In doing so, we rejected the defendant's argument that this standard was too restrictive and that a movant should be entitled to have his conviction vacated and set aside if the results of DNA testing showed a reasonable probability that the result of the proceeding would have been different had the DNA evidence been available at trial.

The proper standard for reviewing motions for new trial pursuant to § 29-2101(6) is the same as the standard for reviewing a motion for new trial based upon newly discovered evidence pursuant to § 29-2101(5). To warrant a new trial, the district court must determine that newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act is of such a nature that if it had been offered and admitted at the trial, it probably would have produced a substantially different result. See *State v. Buckman, supra*. A motion for new trial based on newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act is addressed to the discretion of the district court, and unless an abuse of discretion is shown, the court's determination will not be disturbed. *Id.*

Applying the standard of review for motions for new trial pursuant to § 29-2101(6) to the case at bar, it is clear that the district court did not abuse its discretion in denying El-Tabech's request for a new trial. The district court ordered that DNA testing be conducted on 29 pieces of evidence, including the seven hairs found in the knot made by the bathrobe belt used to strangle the victim, El-Tabech's wife. Also tested was a hair that had fallen off the belt when evidence was gathered at the crime scene.

In its order, the district court commented on the results of the testing:

> [Twenty six] hairs from various locations were subjected to DNA testing. Seven of the hairs submitted had insufficient material to conduct a test. Eighteen of the hairs belonged either to the defendant or the victim. One hair that fell from

the belt that was tied around the victim's neck could not be identified at trial, but DNA testing established that it belonged to the defendant. One of the seven hairs in the knot in the belt was found through DNA testing to be neither the defendant's nor the victim's. At trial it was thought that all seven belonged to either the defendant or victim. Three items containing blood stains were submitted for DNA testing. All blood stains were determined to come from the victim.

The district court noted that the evidence relating to the hairs found at the crime scene was so insignificant that it was not even mentioned in this court's discussion of the facts on direct appeal in *State v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1987). Regarding the hair that was found to belong to neither El-Tabech nor the victim, the district court held that, at a minimum, because the hair was found bound in the knot, the hair was present before the murder.

El-Tabech argues that the results of the DNA testing dramatically change the nature of the circumstantial case against him. He contends that because the testing showed that one of the hairs from the knot in the belt could not be identified as belonging to either the victim or El-Tabech, some other person was obviously present at the time of the killing. He claims that the defense strategies and arguments clearly would have been different had he known of these results.

The results of the DNA testing revealed two new facts: (1) one of the seven hairs found in the knot in the belt belonged to neither the victim nor El-Tabech and (2) the hair that fell from the belt during the gathering of evidence belonged to El-Tabech. However, this new evidence does not establish that a substantially different result probably would have been produced had these facts been presented at trial.

The State's expert testified at trial that the hair which fell from the belt could not be identified as coming from either the victim or El-Tabech. Thus, the jury was presented with a hair of unknown origin that had originated, but later fallen, from the belt used to strangle the victim. The results of the DNA testing placed a hair of unknown origin in the knot in the belt, rather than falling from the belt during the gathering of evidence. We cannot say that had the jury known that a hair of unknown origin was in the knot,

the evidence probably would have produced a substantially different result.

The evidence presented at trial can be summarized as follows: A neighbor placed El-Tabech at the scene of the crime during the estimated time of his wife's murder. When authorities arrived at the scene, El-Tabech was sitting on the floor and apparently had not attempted to remove the belt that was used to strangle his wife. Another neighbor testified to hearing a long argument between the couple on the day of the murder. A member of El-Tabech's church testified that El-Tabech had called him numerous times on the day of the murder. El-Tabech sounded upset and wanted to talk about problems he was having with his wife. El-Tabech told the man that El-Tabech's wife was leaving him. A waitress testified that she had waited on El-Tabech and his wife the day of the murder and that the couple argued loudly.

It cannot be said that the evidence from the DNA testing probably would have produced a substantially different result at trial. As such, the district court did not abuse its discretion in denying El-Tabech's request for a new trial.

CONCLUSION

The newly discovered DNA evidence is not of such a nature that it probably would have produced a substantially different result if it had been offered and admitted at trial. The district court did not abuse its discretion in concluding that El-Tabech was not entitled to relief pursuant to the DNA Testing Act. For the reasons stated above, the judgment of the district court is affirmed.

AFFIRMED.

IN RE GUARDIANSHIP OF ROBERT D., A MINOR. LISA M., APPELLEE, V. PATRICK D. AND KATHRYN D., APPELLEES, AND ROBERT D., APPELLANT.

696 N.W.2d 461

Filed May 20, 2005. No. S-04-973.

1. **Guardians and Conservators: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2004), are reviewed for error on the record.

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. **Rules of Evidence: Appeal and Error.** Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. § 27-401 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion.
4. **Minors: Witnesses: Appeal and Error.** Whether a child witness should be permitted to testify is committed to the discretion of the trial court.
5. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
6. **Child Custody: Parental Rights.** Under the parental preference principle, a parent's natural right to the custody of his or her child trumps the interests of strangers to the parent-child relationship and the preferences of the child.
7. **Constitutional Law: Parental Rights: Presumptions.** Absent circumstances which terminate a parent's constitutionally protected right to care for his or her child, due regard for the right requires that a biological or adoptive parent be presumptively regarded as the proper guardian for his or her child.
8. **Parental Rights: Guardians and Conservators: Presumptions.** In guardianship termination proceedings involving a biological or adoptive parent, the parental preference principle serves to establish a rebuttable presumption that the best interests of the child are served by reuniting the minor child with his or her parent.
9. **Parental Rights: Guardians and Conservators: Proof.** An individual who opposes the termination of a guardianship bears the burden of proving by clear and convincing evidence that the biological or adoptive parent either is unfit or has forfeited his or her right to custody. Absent such proof, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent.
10. **Parental Rights.** Parental rights may be forfeited by a substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection.
11. **Guardians and Conservators.** Guardianships are designed to temporarily relieve parents of the rigors of raising a child.
12. **Parental Rights: Guardians and Conservators: Proof.** The nature of a guardianship makes it particularly inappropriate to establish the forfeiture of parental rights by solely focusing on a parent's failure to discharge the duties of parental care and protection. There must also be clear and convincing evidence of substantial, continuous, and repeated neglect of a child. This may be established by the complete indifference of a parent for a child's welfare over a long period of time.
13. **Trial: Witnesses: Testimony.** The credibility of witnesses and the weight to be given their testimony are for the trier of fact.
14. **Attorneys at Law: Minors.** Whether to appoint an attorney to represent a minor child pursuant to Neb. Rev. Stat. § 30-2616(c) (Reissue 1995) is a matter entrusted to the discretion of the trial court.
15. **Guardians Ad Litem.** A guardian ad litem's duties are to investigate the facts and learn where the welfare of his or her ward lies and to report these facts to the appointing court.

16. **Guardians Ad Litem: Attorneys at Law.** A guardian ad litem may be an attorney, but an attorney who performs the functions of a guardian ad litem does not act as an attorney and is not to participate in the trial in an adversarial fashion such as calling or examining witnesses or filing pleadings and briefs.
17. **Guardians Ad Litem: Attorneys as Law: Minors.** An attorney appointed under Neb. Rev. Stat. § 30-2616(c) (Reissue 1995) is an advocate for the minor child and is not a guardian ad litem. The court-appointed attorney shall act as the attorney for the minor child, but shall not testify in the proceedings.

Appeal from the County Court for Box Butte County: JAMES T. HANSEN, Judge. Affirmed.

Michael T. Varn for appellant.

Brenda L. Bartels, of Douglas, Kelly, Ostdiek, Bartels & Neilan, P.C., for appellee Lisa M.

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

GERRARD, J.

NATURE OF CASE

Robert D., a minor child, by and through appointed counsel, appeals from the order of the county court terminating the guardianship of Patrick D. and Kathryn D., his maternal grandparents, and ordering Robert returned to the custody of Lisa M., his biological mother. The issues presented in this appeal are whether the court erred in concluding that Lisa had not forfeited her superior parental right to custody of Robert, refusing to permit Robert to testify at the guardianship termination hearing, and failing to appoint counsel to represent Robert until after entry of the order terminating the guardianship. We find no reversible error and affirm the judgment of the county court.

BACKGROUND

PROCEDURAL HISTORY

Robert was born on April 28, 1990. Lisa was 16 years old at the time of Robert's birth. On May 3, Patrick and Kathryn filed a petition in the county court for appointment of a guardian for Robert. Specifically, Patrick and Kathryn sought to be appointed coguardians for Robert. The petition alleged that "it is very important that the co-guardians be appointed because of the

necessity of immediately having said minor covered for medical insurance on the medical insurance" of Patrick and Kathryn. Lisa also signed the petition, affirming that the allegations in the petition were true. Robert's biological father is not mentioned in these filings, and his identity is not relevant to this appeal.

On May 31, 1990, the county court entered an order appointing Patrick and Kathryn coguardians of Robert. The order provided that "[a]ll parental rights of custody over the minor have been terminated or suspended by circumstances or prior court order." The basis for this provision is not apparent from the record, and the parties agree that no formal or legal termination of Lisa's parental rights took place.

On May 4, 2004, Lisa filed a motion to terminate Patrick and Kathryn's guardianship of Robert. The motion alleged that Lisa had been misled into signing the guardianship, believing it was simply for insurance reasons. The motion further alleged that Patrick and Kathryn had promised to terminate Robert's guardianship on numerous occasions, but had failed to do so, and refused to allow Robert to spend time with Lisa and her family. Lisa alleged that Robert was not receiving proper care from Patrick and Kathryn and that it was in Robert's best interests that the guardianship be terminated.

In response, Patrick and Kathryn denied Lisa's allegation that she had been misled into signing the consent to the guardianship. They also denied promising to terminate the guardianship. They alleged that Lisa had been afforded "reasonable visitation" and that Robert was satisfied with the frequency of visitation Lisa had been permitted. They alleged that Robert did not want the guardianship terminated and did not wish to live with Lisa.

On July 16, 2004, the matter came on for hearing. The evidence adduced at the hearing will be summarized below. On July 29, the court entered an order terminating Patrick and Kathryn's guardianship. The court found that Lisa did not understand her consent to the guardianship to be a termination or suspension of her parental rights. The court found that at the time the guardianship was ordered, Lisa, Patrick, and Kathryn understood that the purpose of the guardianship was to provide health insurance for Robert. The court concluded that the guardianship order may have been voidable, but was not void.

However, the court also found no evidence that Lisa was unfit to be a parent, noting that she was a fit and proper parent to four other children, Robert's half-siblings. The court further determined that Lisa had not forfeited her parental rights to custody, finding that Lisa

> was at all times willing and able to be a mother to Robert . . . . Unfortunately, Patrick and Kathryn . . . decided they would be better parents than their own daughter, and refused to return Robert . . . to Lisa . . . . Unfortunately, such a decision has estranged Robert . . . from his own mother, but even more unfortunately, has prevented Robert from enjoying a childhood with his half brothers, and all the benefits that memories of a childhood shared with four brothers would provide.

Citing *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004), the court concluded that "[a]bsent proof of unfitness or forfeiture [of] custody rights, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent." Thus, the court terminated the guardianship and ordered Robert's reunification with Lisa.

Hearing Evidence

Lisa testified that she had been living for 9 years in Alliance, Nebraska, with her husband of 12 years, Randy M., and their four sons. Lisa stated that at the time of Robert's birth, she was living in Alliance with Patrick and Kathryn. Lisa testified that when she signed the consent to guardianship in 1990, she had been told that it was to cover Robert's medical costs, and she only found out later that she had signed guardianship papers. At the time, Lisa was not employed, and her parents had medical insurance available for Robert.

Lisa continued to live with her parents until she married in June 1992. Robert stayed with Patrick and Kathryn during Lisa and Randy's honeymoon, and when they returned, Robert moved to Scottsbluff, Nebraska, with Lisa and Randy. Robert then moved with Lisa and Randy to North Platte, Nebraska. Lisa testified that in 1993, her grandfather was ill and wanted to spend time with Robert. On June 7, 1993, Patrick and Kathryn visited Lisa and

Randy in North Platte, and Robert went with Patrick and Kathryn to their home in Alliance. Lisa said that even at that point, she did not understand that Patrick and Kathryn were Robert's guardians. Lisa and Randy stayed in North Platte for roughly 1½ years, and then they moved back to Alliance.

Lisa stated that she became aware of the legal effect of the guardianship only after her grandfather's death, when she asked Kathryn to pack Robert's belongings so he could return to Lisa's home. Lisa said that Kathryn told her, at that point, that Lisa could not take Robert because of the guardianship.

Kathryn testified that the guardianship had been fully explained to Lisa before it was ordered and that Lisa indicated she understood. Patrick also testified that the guardianship had been explained to Lisa. Kathryn denied any discussion of insurance with Lisa. Kathryn explained that she did not understand the effect of the guardianship at the time that Lisa was married and felt it was important for Robert to be with Lisa. Kathryn said she had understood the appointment of "co-guardians" to mean that she, Patrick, and Lisa would all take care of Robert together. After she and Patrick had picked Robert up in North Platte, however, they had the guardianship documents examined by a lawyer, who, according to Kathryn, told Kathryn and Patrick that they were Robert's legal guardians and that Robert needed to stay with them. Patrick said that his understanding from the outset had been that he and Kathryn would be the caretakers for Robert.

Lisa testified that after moving back to Alliance, she had a great deal of normal family interaction with Robert. She testified that they had been shopping on many occasions and that she purchased clothes for him to start preschool. Lisa admitted that she had not provided her parents with money to support Robert, but also said that they had not requested any support. Lisa stated that Robert spent holidays with her family. Lisa testified that they had interacted with Robert through school activities, attending Robert's band concerts and school programs. Lisa testified at length regarding the activities and games she and Randy played with Robert and their other children. Lisa said:

> I have tried to be involved in every part of his life. I wanted to be there for the first day of preschool, didn't know when it was. I wanted to be there for the first day of kindergarten,

> didn't know when it was. I have tried very hard to keep in touch with him, let him know how his brothers are doing, let him know how things are going with the family.

Lisa explained that Kathryn had prevented her from attending Robert's parent-teacher conferences and that Robert's school refused to provide Lisa with information about Robert because of the guardianship.

Lisa said that she had become estranged from her parents about 6 months before the hearing, after another family custody dispute, between two of Lisa's siblings. Lisa said that as a result, she had not been able to spend a lot of time with Robert. Lisa testified regarding several specific instances in which she was denied visitation with Robert. Lisa said that since she filed her motion to terminate the guardianship, she had been unable to visit with Robert beyond the court-ordered visitation. She also said that when she tried to telephone her parents for more visitation, she "seem[ed] to get a machine." Lisa testified at length regarding her concerns that Patrick and Kathryn were not properly caring for Robert.

Kathryn agreed that Lisa had been allowed to visit liberally with Robert until the last few months before the hearing. Kathryn testified that the family situation had deteriorated because of charges she said Lisa had filed against Patrick. However, Kathryn stated that she had not thought there had been a problem with visitation. Kathryn said that on some occasions, as Robert had become older, he had chosen not to visit on the occasions Lisa had requested, and that Patrick and Kathryn felt that at Robert's age, they should honor his wishes. Kathryn testified that she had never forbidden contact between Lisa and Robert and that Lisa had always "been more than welcome." Kathryn claimed that Lisa had not frequently sought information about what was going on with Robert or when his school events were.

Lisa testified that she had not asked the court to terminate the guardianship sooner because she had talked to Patrick "[m]any times over the years" and had believed his assurances that he would have the guardianship terminated. Lisa said that it was her understanding that Kathryn opposed terminating the guardianship. Randy testified that he had been present when Patrick had told Lisa that Patrick would terminate the guardianship and that

Patrick had also made statements to Randy to the same effect. Randy said that Patrick had indicated a willingness to terminate the guardianship, but that Patrick always said he would " 'have to check with Kathy.' "

Kathryn claimed, however, that Lisa had not asked about Robert's return since Lisa and Randy were first married. Kathryn said that at that time, they did not know much about Randy, and that she and Patrick needed to make sure that the marriage would last. Patrick testified that Lisa had asked about terminating the guardianship, "five or six years ago maybe." Patrick said he told Lisa that he would consider it, but that he never promised to end the guardianship.

Lisa also said that she felt uncomfortable challenging her parents, because she had a strong relationship with her family, and that she had felt she would be causing problems if she sought to have the guardianship terminated. Lisa explained that it took her 11 years to challenge her parents because she had trusted them. She said that she wanted to parent Robert all along, but had "come to the reality that Mom and Dad are not going to do this upon my request." Lisa also explained that it had been only recently that she had obtained the money to hire an attorney to pursue the matter. Randy said that they had waited 11 years because they had tried to work things out peacefully with Patrick and Kathryn and that "the last thing [Lisa] wanted to do" was have to go to court and "cause any hurt to her parents."

Representation of Robert

Prior to the hearing, on June 1, 2004, Patrick and Kathryn filed a motion for the court to consider the appointment of an attorney to represent Robert's interests. The motion alleged that Robert, then age 14, "has stated to counsel that he objects to the termination of the guardianship, and the interests of the minor may be best represented by counsel specifically appointed to represent the minor." The court appointed a guardian ad litem for Robert prior to the hearing on Lisa's motion.

At the beginning of the hearing, the guardian ad litem sought clarification as to what his role would be. The guardian ad litem said that "[a]s guardian ad litem, typically I would not ask questions . . ." but that "[o]n the other hand, [Robert] is 14 and I could

have been appointed as attorney for him." In response, the court stated that "the guardian ad litem should also perform the duties of counsel for the juvenile and to express and advocate for his desires, so if that would require that you do some questioning, we'll have you do some questioning."

At the hearing, counsel for both sides indicated that they intended to question Robert. However, the court found no relevancy in Robert's testimony, as the only issue to be determined at the hearing was whether Lisa's parental rights had been forfeited. Over Patrick and Kathryn's objection, the court refused to permit Robert to testify. The guardian ad litem also indicated that he believed Robert's preferences were relevant to the issues presented and made an offer of proof that Robert preferred to remain with Patrick and Kathryn.

After entering the order terminating the guardianship, on August 24, 2004, the court entered an order appointing different counsel to represent Robert directly, as opposed to as a guardian ad litem. Through that counsel, Robert appeals from the order terminating his guardianship.

ASSIGNMENTS OF ERROR

Robert assigns that the court erred in (1) determining that Lisa had not forfeited her rights to custody of Robert by substantial, continuous, and repeated neglect of Robert and a failure to discharge the duties of parental care and protection; (2) refusing to either interview Robert to determine his wishes or allow him to testify at the hearing; and (3) failing to appoint an attorney to represent Robert until after the hearing on the motion to terminate the guardianship and after the court entered its order terminating the guardianship.

STANDARD OF REVIEW

[1,2] Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2004), are reviewed for error on the record. *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004). 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. *Id.*

[3-5] Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. § 27-401 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion. *In re Estate of Jeffrey B., supra.* Whether a child witness should be permitted to testify is also committed to the discretion of the trial court. See, *Beran v. Beran*, 234 Neb. 296, 450 N.W.2d 688 (1990); *Krohn v. Krohn*, 217 Neb. 158, 347 N.W.2d 869 (1984); *State v. Hitt*, 207 Neb. 746, 301 N.W.2d 96 (1981). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004).

ANALYSIS

[6,7] This is a proceeding by a biological parent, Lisa, to terminate a guardianship with respect to her child, Robert. Under the parental preference principle, a parent's natural right to the custody of his or her child trumps the interests of strangers to the parent-child relationship and the preferences of the child. *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). Absent circumstances which terminate a parent's constitutionally protected right to care for his or her child, due regard for the right requires that a biological or adoptive parent be presumptively regarded as the proper guardian for his or her child. *Id.*

[8,9] Consequently, in guardianship termination proceedings involving a biological or adoptive parent, the parental preference principle serves to establish a rebuttable presumption that the best interests of the child are served by reuniting the minor child with his or her parent. *Id.* In other words, an individual who opposes the termination of a guardianship bears the burden of proving by clear and convincing evidence that the biological or adoptive parent either is unfit or has forfeited his or her right to custody. *Id.* Absent such proof, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent. *Id.*

Forfeiture of Parental Rights

[10] Robert first argues that the evidence presented at the hearing established that Lisa forfeited her parental rights. Generally, parental rights may be forfeited by a substantial, continuous, and

repeated neglect of a child and a failure to discharge the duties of parental care and protection. *Id.*

[11,12] However, guardianships are designed to temporarily relieve parents of the rigors of raising a child. *Id.* Thus, the nature of a guardianship makes it particularly inappropriate to establish the forfeiture of parental rights by solely focusing on a parent's failure to discharge the duties of parental care and protection. There must also be clear and convincing evidence of substantial, continuous, and repeated neglect of a child. *Id.* This may be established by the complete indifference of a parent for a child's welfare over a long period of time. See *id.*

The record, as summarized above, does not establish such neglect or indifference. Although there was some conflict in the testimony, the record establishes beyond dispute that Lisa made substantial and repeated efforts to maintain a relationship with Robert throughout the guardianship. Compare *id.* The county court's determination that Lisa did not forfeit her parental rights is supported by competent evidence.

[13] The primary concern in this case is not the level of interest Lisa maintained in Robert, but the length of time that the guardianship was permitted to continue before Lisa sought Robert's return. The length of a guardianship is not irrelevant to a determination of neglect or indifference, and there may be circumstances in which duration and disinterest combine to produce clear and convincing evidence of substantial, continuous, and repeated neglect. However, such circumstances are not present here. Lisa explained the reasons that Patrick and Kathryn's guardianship was allowed to persist, and the county court, having heard and observed the witnesses, concluded that Lisa was a willing parent whose wishes were frustrated by Patrick and Kathryn. The credibility of witnesses and the weight to be given their testimony are for the trier of fact. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994). Here, the court credited Lisa's testimony with respect to her delay in challenging the guardianship, and the court's determination was not arbitrary, capricious, or unreasonable.

Testimony of Minor Child

Robert next argues that the court erred in refusing to interview him or permit him to testify at the hearing. Robert relies on the

general principle that in determining custody arrangements, one of the factors a court should consider is the desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning. Neb. Rev. Stat. § 42-364(2)(b) (Reissue 2004). While the wishes of a child are not controlling in the determination of custody, if a child is of sufficient age and has expressed an intelligent preference, the child's preference is entitled to consideration. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002).

However, this is not a custody dispute between two parents. Rather, as previously noted, this is a guardianship termination proceeding involving a biological parent, and under the parental preference principle, "a parent's natural right to the custody of his or her children trumps the interest of strangers to the parent-child relationship *and the preferences of the child.*" (Emphasis supplied.) *In re Guardianship of D.J.*, 268 Neb. 239, 244, 682 N.W.2d 238, 243-44 (2004). Furthermore, as discussed above, the issue to be decided in this proceeding was whether Lisa had forfeited her parental rights. The county court did not err in determining that Robert's preferences about where to live were not relevant to the issues before the court at the hearing on Lisa's motion to terminate the guardianship.

Robert cites *State ex rel. Cochrane v. Blanco*, 177 Neb. 149, 128 N.W.2d 615 (1964), for the proposition that a child's wishes are relevant in a guardianship termination proceeding. That case did not involve the termination of a guardianship, but was a habeas corpus action brought by the plaintiff, a biological mother, against her own mother, the defendant, for custody of the plaintiff's two biological children. The children had been raised by the defendant since they were infants, and were 15 and 11 years of age at the time we issued our opinion. In that opinion, we discussed the wishes of the two children in reaching our conclusion that the district court had erred in awarding the plaintiff custody of the children. See *id.*

However, our discussion of the wishes of the children was relevant in that case, insofar as we had determined, as a preliminary matter, that the plaintiff had forfeited her preferential right to the custody of her biological children through persistent neglect, and

that she was not a fit and proper custodian for the children. Once it had been established that the plaintiff had forfeited her superior right, the issue before us was custody, to be determined by reference to the best interests of the children. The wishes of the children were relevant to that determination. In the instant case, however, the county court concluded that Lisa had not forfeited her superior parental right, and we have already determined that conclusion is supported by competent evidence. Thus, in this case, unlike *State ex rel. Cochrane, supra*, there is no issue presented to which Robert's preferences are relevant.

It should be noted that Robert's argument, and Patrick and Kathryn's argument in the trial court, is that Robert's testimony should have been allowed so that he could express his preferences about where to live. Obviously, there may be circumstances in which a minor child is competent to offer testimony relevant to parental unfitness or forfeiture of parental rights. However, in this case, the sole basis for which Robert's testimony was offered was to express his desire to live with Patrick and Kathryn. While Robert's desire to explain his wishes is understandable, his preferences were simply not relevant to the legal issues before the court. The court did not abuse its discretion in precluding his testimony.

Representation of Minor Child

[14] In his final assignment of error, Robert argues that he should have been appointed counsel before the hearing on, and disposition of, Lisa's motion to terminate the guardianship. Section 30-2616(c) provides that if, at any time in guardianship removal proceedings, the court determines that the interests of the ward are, or may be, inadequately represented, the court may appoint an attorney to represent the minor, giving consideration to the preference of the minor if the minor is 14 or more years of age. We have stated that the appointment of a guardian ad litem for a minor child is a matter within the discretion of the trial court. See *Robinson v. Robinson*, 236 Neb. 879, 464 N.W.2d 193 (1991). Similarly, whether to appoint an attorney to represent a minor child pursuant to § 30-2616(c) is also a matter entrusted to the discretion of the trial court.

We find no prejudicial error to be present in this case. There is no evidence in the record to suggest that Robert's interests were

inadequately represented by the parties and the guardian ad litem, nor does Robert's appellate brief explain how independent representation for Robert would have affected these proceedings. Simply stated, Robert has not offered any argument showing what, if anything, an attorney representing him would have done to add to the hearing. In the absence of any evidence supporting the appointment of an attorney pursuant to § 30-2616(c), and any showing of prejudice resulting from the failure to make such an appointment, we find no prejudicial abuse of discretion.

[15-17] We do note, although it is not expressly discussed by the parties, that the court erred in suggesting to the guardian ad litem that he "should also perform the duties of counsel for the juvenile and to express and advocate for his desires, so if that would require that you do some questioning, we'll have you do some questioning." A guardian ad litem's duties are to investigate the facts and learn where the welfare of his or her ward lies and to report these facts to the appointing court. *Betz v. Betz*, 254 Neb. 341, 575 N.W.2d 406 (1998). A guardian ad litem may be an attorney, but an attorney who performs the functions of a guardian ad litem does not act as an attorney and is not to participate in the trial in an adversarial fashion such as calling or examining witnesses or filing pleadings and briefs. *Id.* In contrast, an attorney appointed under § 30-2616(c) is an advocate for the minor child and is not a guardian ad litem. Cf. *Betz, supra*. The court-appointed attorney shall act as the attorney for the minor child, but shall not testify in the proceedings. See *id.* Consequently, the court erred in suggesting the guardian ad litem could serve both as guardian ad litem and an advocate for Robert.

However, the record affirmatively demonstrates that no prejudice resulted from this erroneous suggestion. The guardian ad litem's participation in these proceedings was limited to supporting Patrick and Kathryn's offer of proof with respect to Robert's proffered testimony, testifying as a witness who had interviewed Robert and the parties, and a brief closing statement urging the court to continue the guardianship. While the guardian ad litem was placed in a difficult position by the trial court's erroneous suggestion that the guardian ad litem perform inconsistent functions during the hearing, see *Betz, supra*, the record does not suggest that any of the parties were prejudiced by the error. See

In re Interest of Kantril P. & Chenelle P., 257 Neb. 450, 598 N.W.2d 729 (1999). Thus, while these inconsistent roles prevented the guardian ad litem from acting as a substitute for counsel appointed pursuant to § 30-2616(c), for the reasons stated above, we find no reversible error.

CONCLUSION

The county court's determination that Lisa did not forfeit her parental rights is supported by competent evidence. The county court did not abuse its discretion by not permitting Robert to testify, and did not prejudicially abuse its discretion by not appointing counsel for Robert pursuant to § 30-2616(c). The judgment of the county court, terminating Patrick and Kathryn's guardianship over Robert, is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KENNY WAYNE GASS, APPELLANT.

697 N.W.2d 245

Filed May 20, 2005. No. S-04-1105.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Sentences.** The imposition of an indeterminate sentence, even where the maximum term is life imprisonment, requires that the minimum term be affirmatively stated. When a flat sentence of "life imprisonment" is imposed and no minimum sentence is stated, by operation of law, the minimum sentence is the minimum imposed by law under the statute.
3. **Sentences: Time.** A sentence validly imposed takes effect from the time it is pronounced.
4. **Sentences.** When a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed.
5. **Sentences: Judges: Records.** The circumstances under which a judge may correct an inadvertent mispronouncement of a sentence are limited to those instances in which it is clear that the defendant has not yet left the courtroom; it is obvious that the judge, in correcting his or her language, did not change in any manner the sentence originally intended; and no written notation of the inadvertently mispronounced sentence was made in the records of the court.
6. **Sentences.** Pursuant to Neb. Rev. Stat. § 83-1,106(1) (Reissue 1999), a court must give credit for time served on a charge when a prison sentence is imposed for that charge.

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

Dennis R. Keefe, Lancaster County Public Defender, Andrea D. Snowden, and Sarah P. Newell, Senior Certified Law Student, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Kenny Wayne Gass pled no contest to second degree murder in the district court for Lancaster County. On September 1, 2004, the court entered an order sentencing Gass to imprisonment "for a period of life." Later that day and contrary to the sentence initially imposed, the court entered an order nunc pro tunc stating that the sentence was "for a period of not less than nor more than life." The next day, the court filed an amended order of commitment reflecting the language of the order nunc pro tunc. Gass appeals, claiming that the terms of the amended order of commitment are inconsistent with the sentence imposed. Gass' argument has merit. Accordingly, we vacate the amended order of commitment and remand the cause with directions.

STATEMENT OF FACTS

On November 26, 2003, the State filed an information charging Gass with first degree murder and use of a weapon to commit a felony in connection with the September 2003 death of James R. Hagan. Pursuant to a plea agreement, on July 6, 2004, Gass pled no contest to the reduced charge of second degree murder, and the use of a weapon charge was dropped. The court accepted Gass' plea and found him guilty.

A sentencing hearing was held on September 1, 2004. The hearing began at 1:36 p.m. The court stated the facts of the case and the various factors considered in sentencing. The court concluded its remarks by stating on the record:

> It is therefore the judgment and the sentence of the Court that you, Kenny W. Gass, be and hereby are ordered committed to an institution under the jurisdiction of the Nebraska Department of Correctional Services *for a period of life*, no part of which shall be in solitary confinement except for violation of prison rules. You shall pay the costs of this action.
>
> You should be and hereby are remanded to the custody of the Nebraska Department of Correctional Services for execution of sentence, a commitment is to issue accordingly.
>
> This sentence is to be served consecutive to any other sentence imposed against you.

(Emphasis supplied.) The court then stated that the matter was concluded and adjourned the hearing at 2:02 p.m.

An order of sentence was filed at 2:31 p.m. on September 1, 2004, which stated in part:

> IT IS, THEREFORE, the judgment and sentence of the court, that the defendant Kenny Wayne Gass be, and hereby is, ordered committed to an institution under the jurisdiction of the Nebraska Department of Correctional Services *for a period of life*, no part of which shall be in solitary confinement, except for violation of prison rules. The defendant shall pay the costs of this prosecution.

(Emphasis supplied.) There is no dispute that a commitment order providing for the sentence as recited above was issued.

Thereafter, at 3:48 p.m. on September 1, 2004, Gass, Gass' attorney, and the State's attorney appeared, and the court went back on the record. The court stated that "there appeared to have been some confusion" regarding the sentence pronounced. The court further acknowledged that an issue existed under *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000). The court stated its intent had been that Gass "be sentenced for a period of not less than nor more than life." The court also stated for the record that "I had signed an order of sentence that had on it life, that the Lancaster County Clerk's Office had issued a commitment, that . . . Gass had left the courtroom." The court continued that notwithstanding these facts, "I'm sure from reading the record and from the fact that I did not give him any credit for time served that the intent was to be life to life." The court stated that it would issue an order nunc pro tunc and direct that an

order of commitment consistent with the order nunc pro tunc be issued.

Gass' attorney objected to the proceeding. Gass' attorney offered that it was not clear to him what the minimum sentence was at the time of the sentencing and asked that Gass receive credit for the time in custody. The court stated that it would not give Gass credit for time in custody because it intended to give him a life to life sentence. Court was adjourned at 3:52 p.m.

At 3:54 p.m., on September 1, 2004, an order of sentence nunc pro tunc was entered stating in part:

> IT IS, THEREFORE, the judgment and sentence of the court, that the defendant Kenny Wayne Gass be, and hereby is, ordered committed to an institution under the jurisdiction of the Nebraska Department of Correctional Services *for a period of not less than nor more than life*, no part of which shall be in solitary confinement, except for violation of prison rules. The defendant shall pay the costs of this prosecution.

(Emphasis supplied.)

The next day, September 2, 2004, at 2:54 p.m., an "Amended Commitment" providing that Gass was ordered committed "for a period of not less than, nor more than Life" was filed. Gass appeals.

ASSIGNMENT OF ERROR

Gass asserts that the district court erred in entering the "amended commitment" order because such order contained sentencing terms inconsistent with the original order of sentence.

STANDARD OF REVIEW

[1] This appeal presents questions of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Jonusas, ante* p. 644, 694 N.W.2d 651 (2005).

ANALYSIS

Gass argues that based on the precedent of *Schnabel, supra*, the amended order of commitment entered by the district court was in error because it contained sentencing terms inconsistent with the original order of sentence that was pronounced in court, reduced to a written order, and reflected in the original order of

commitment. In response, the State urges this court to reconsider our holding in *Schnabel* and affirm the order nunc pro tunc regarding sentencing and to approve the amended order of commitment. We agree with Gass that *Schnabel* controls the outcome of this case, and we decline the State's suggestion to reconsider our holding in that case. We conclude that the amended order of commitment must be vacated.

[2] At the sentencing hearing, the court sentenced Gass to imprisonment "for a period of life." No minimum term was affirmatively stated. The imposition of an indeterminate sentence, even where the maximum term is life imprisonment, requires that the minimum term be affirmatively stated. *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000). When a flat sentence of "life imprisonment" is imposed and no minimum sentence is stated, by operation of law, the minimum sentence is the minimum imposed by law under the statute. *Id.*

Gass was convicted of second degree murder, which is a Class IB felony. Neb. Rev. Stat. § 28-304(2) (Reissue 1995). Under Neb. Rev. Stat. § 28-105 (Cum. Supp. 2004), the minimum penalty for a Class IB felony is 20 years' imprisonment. Therefore, the court's pronouncement in this case of a flat sentence of imprisonment "for a period of life" effectively imposed a maximum term of life imprisonment and by operation of law a minimum term (for parole eligibility purposes) of 20 years' imprisonment. See *Schnabel, supra*. The amended order of commitment states that the minimum term of Gass' sentence is life imprisonment, and in regard to the minimum term, the amended order of commitment is inconsistent with the sentence actually imposed by the court.

The court in this case attempted to rectify what it described as "some confusion" regarding Gass' sentence by calling the parties back into court and entering an order nunc pro tunc which stated that Gass' sentence of imprisonment was "for a period of not less than nor more than life." However, as a matter of law, the court's efforts were ineffective in changing the previously imposed sentence. *Schnabel, supra*.

[3-5] In *Schnabel*, we stated:

> A sentence validly imposed takes effect from the time it is pronounced. *State v. Carlson*, 227 Neb. 503, 418 N.W.2d

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

260 Neb. at 623, 618 N.W.2d at 703.

In the hearing that started at 3:48 p.m. on September 1, 2004, the district court acknowledged that after it had previously pronounced a sentence of imprisonment "for a period of life," it "had signed an order of sentence that had on it life, that the Lancaster County Clerk's Office had issued a commitment, [and] that . . . Gass had left the courtroom." The court stated that contrary to the original sentence pronounced, its intent had been a sentence of "life to life."

The circumstances under which a judge may correct an inadvertent mispronouncement of sentence are limited, and the circumstances of this case do not fall within the category which permits correction. As the court stated when the parties appeared later on September 1, 2004, the defendant had left the courtroom and a written notation of the original sentence had been made in the records of the court. Therefore, the court's statement that Gass' sentence ought to be "for a period of not less than nor more than life" and the corresponding order nunc pro tunc were inconsistent with the terms of the original sentence and were not effective to change the sentence already imposed. The amended

commitment order, which reflects the language of the order nunc pro tunc, does not reflect the sentence actually imposed, and the amended commitment order must be vacated.

[6] Finally, we note that both the State and Gass ask in their briefs that if the amended commitment is vacated, then the cause be remanded with directions to the district court to apply a credit for time served. Pursuant to Neb. Rev. Stat. § 83-1,106(1) (Reissue 1999), a court must give credit for time served on a charge when a prison sentence is imposed for that charge. See *State v. Banes*, 268 Neb. 805, 688 N.W.2d 594 (2004). In this case, the sentence originally pronounced is the sentence imposed in this case. Because the sentence in this case is 20 years to life, pursuant to § 83-1,106(1), credit is to be given. We therefore direct the district court on remand to apply the appropriate credit for time served.

CONCLUSION

We conclude that the district court erred by entering the amended order of commitment because the sentencing terms set forth in that order were inconsistent with the sentence actually imposed by the court. The amended order of commitment is vacated, and the cause is remanded to the district court with directions to enter an order of commitment that is consistent with this opinion. The district court is further directed to apply an appropriate credit for time served.

ORDER VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
DAVID C. HEMBERTT, APPELLANT.

696 N.W.2d 473

Filed May 20, 2005. No. S-04-1124.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Rules of Evidence: Hearsay.** The admission of hearsay is controlled by the Nebraska Evidence Rules.

3. **Constitutional Law: Appeal and Error.** An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause, and reviews the underlying factual determinations for clear error.
4. **Rules of Evidence: Hearsay.** For a statement to qualify as an excited utterance, the following criteria must be met: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event.
5. **Rules of Evidence: Hearsay: Time.** The key requirement for an excited utterance is spontaneity, which requires a showing the statements were made without time for conscious reflection.
6. **Rules of Evidence: Hearsay.** The underlying theory of the excited utterance exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterance free of conscious fabrication.
7. ____: ____. The true test in spontaneous exclamations is not when the exclamation was made, but whether under the circumstances of the particular exclamation, the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act in issue.
8. **Rules of Evidence: Hearsay: Time.** To be excited utterances, statements need not be made contemporaneously with the exciting cause but may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated.
9. **Constitutional Law.** The analysis of the right to confrontation under Neb. Const. art. I, § 11, is the same as that under the Sixth Amendment to the U.S. Constitution.
10. **Constitutional Law: Trial: Rules of Evidence: Hearsay.** Where testimonial statements are at issue, the Confrontation Clause demands that such hearsay statements be admitted at trial only if the declarant is unavailable and there had been a prior opportunity for cross-examination.
11. **Constitutional Law: Hearsay.** The initial step in a Confrontation Clause analysis is to determine whether the statements at issue were testimonial in nature.
12. **Constitutional Law: Police Officers and Sheriffs.** Statements taken by police officers in the course of interrogations are testimonial for Confrontation Clause purposes.
13. ____: ____. Police interrogation, for Confrontation Clause purposes, requires some kind of structured police questioning, intended to elicit information for use in a contemplated prosecution.
14. **Constitutional Law: Evidence: Intent.** The inquiry under the Confrontation Clause is whether, under the circumstances, the declarant intended to bear testimony against the accused. The determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial.
15. ____: ____: ____. Whether a statement is testimonial for Confrontation Clause purposes depends on the purpose or expectation of the declarant in making the statement, and the circumstances surrounding the statement illuminate the purpose or expectation of the declarant.

Appeal from the District Court for Douglas County, GERALD E. MORAN, Judge, on appeal thereto from the County Court for Douglas County, EDNA R. ATKINS, Judge. Judgment of District Court affirmed.

Thomas C. Riley, Douglas County Public Defender, Joseph Kehm, and, on brief, Horacio J. Wheelock for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

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

GERRARD, J.

NATURE OF CASE

The defendant, David C. Hembertt, was convicted in the county court of assault and battery, based in part on the testimony of an Omaha police officer regarding statements made by the alleged victim when police arrived at the scene after the assault. The alleged victim did not testify at trial. The issues presented in this appeal are whether the officer's testimony as to the alleged victim's statements was properly admitted into evidence under the excited utterance exception to the hearsay rule and, if so, whether the statements were "testimonial" within the meaning of the Confrontation Clause standards explained in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

BACKGROUND

At approximately 10 a.m. on April 15, 2004, John Sherman, a police officer for the city of Omaha, was on routine patrol and received an emergency call from 911 dispatching him to an Omaha residence to check on the well-being of a resident. Sherman and another officer arrived at the residence about 3 to 5 minutes after receiving the call, but were unable to get inside. A man then pulled up in front of the residence and told police he had made the 911 emergency call.

A few seconds later, a woman "came running" out of the residence. Over continuing hearsay and Confrontation Clause objections, Sherman testified at trial that the woman was "crying hysterical, trembling. She began to identify herself as the — as the residence — resident there and that she had — that she had been assaulted." The woman went directly to the man who had made the emergency call, "crying and pointing to the house saying . . . he's inside. He's upstairs." Sherman testified that he observed bruises on the woman's face and body.

Sherman testified that before police asked any questions, the woman "began to explain the story that he had been attacking her, head butting her and that he had threatened her with a knife." The woman explained that "they had gotten into an argument. That he was somewhat accusing her of sleeping with another man. And as a result he started to beat her, head butted her I believe she said, threw her across a counter and up against the wall and threatened her with a knife." The woman said the incident had happened "[m]oments prior to [the officers'] arrival."

Sherman stated that they did not allow the woman to go into any more detail about the assault at that time, because they were concerned about locating the alleged assailant. Sherman and the other officer entered the residence, located the alleged assailant, and arrested him. Sherman identified Hembertt at trial as the man they arrested. A steel switchblade knife was found underneath the bed upon which Hembertt was lying.

After Hembertt was arrested, Sherman went back to interview the alleged victim. At trial, however, the county court sustained Hembertt's hearsay and Confrontation Clause objections to Sherman's testimony regarding this later questioning of the alleged victim.

Hembertt testified at trial in his own defense. Hembertt admitted knowing the alleged victim, who Hembertt testified was his girl friend. Hembertt testified that she had gotten a black eye in a fight with an emergency room nurse about a week before the alleged assault, but that he had not seen her other bruises and did not know what caused them. Hembertt denied assaulting the alleged victim.

Following a bench trial in the county court, Hembertt was convicted of assault and battery in violation of Omaha Mun. Code, ch. 20, art. IV, § 20-61 (1980), and sentenced to 90 days in jail. An appeal bond was set, and Hembertt appealed. The district court affirmed the judgment of the county court.

ASSIGNMENTS OF ERROR

Hembertt assigns that (1) the district court erred in not finding that the county court erred when it overruled his hearsay objections to Sherman's testimony and (2) even if the alleged victim's statements were properly admitted under the excited utterance hearsay exception, those statements should have been barred

pursuant to the Confrontation Clause of the Sixth Amendment to the U.S. Constitution.

STANDARD OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. King, ante* p. 326, 693 N.W.2d 250 (2005). The admission of hearsay is controlled by the Nebraska Evidence Rules. State v. Pruett, 263 Neb. 99, 638 N.W.2d 809 (2002). See *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993).

[3] An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause, and reviews the underlying factual determinations for clear error. See, *U.S. v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005); *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000), *overruled on other grounds, Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

ANALYSIS

EXCITED UTTERANCE

We first consider Hembertt's argument that the trial court erred in overruling his hearsay objection to Sherman's testimony. Under Neb. Rev. Stat. § 27-801(3) (Reissue 1995), hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. *State v. Duncan*, 265 Neb. 406, 657 N.W.2d 620 (2003). Hearsay is not admissible except as provided by the rules of evidence or by other rules adopted by the statutes of the State of Nebraska or by the discovery rules of this court. Neb. Rev. Stat. § 27-802 (Cum. Supp. 2004); *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995). Sherman's testimony in this case, with respect to the statements made at the scene by the victim, clearly contains hearsay, but it was admitted pursuant to the excited utterance exception to the hearsay rule. Neb. Rev. Stat. § 27-803(1) (Cum. Supp. 2004) provides that even when the declarant is available as a witness, the hearsay rule does not exclude "[a] statement relating to a startling

event or condition made while the declarant was under the stress of excitement caused by the event or condition."

[4,5] For a statement to qualify as an excited utterance, the following criteria must be met: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event. *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000). The key requirement is spontaneity, which requires a showing the statements were made without time for conscious reflection. *State v. Tlamka*, 244 Neb. 670, 508 N.W.2d 846 (1993), *abrogated on other grounds, State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996). Hembertt does not contest the trial court's finding that there was, in this case, a startling event to which the statements at issue related. Hembertt argues that the statements were not spontaneous.

[6-8] The underlying theory of the excited utterance exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterance free of conscious fabrication. *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990). The true test in spontaneous exclamations is not when the exclamation was made, but whether under the circumstances of the particular exclamation, the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act in issue. *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993), quoting 6 John H. Wigmore, Evidence in Trials at Common Law § 1745 (James H. Chadbourn rev. 1976). Accord *Tlamka, supra*. Statements need not be made contemporaneously with the exciting cause but may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated. *Jacob, supra*, quoting 6 Wigmore, *supra*, § 1750.

The record in this case clearly establishes the element of spontaneity necessary for the declarant's statements to be an excited utterance. According to Sherman's testimony, the woman said that the assault had occurred moments prior to the officers' arrival and that her statement was volunteered. Assuming Sherman's testimony to be correct, as we do on appeal, there had not been time for the exciting influence to have been dissipated. See *Jacob, supra*. Given Sherman's testimony, the trial court did not err in

concluding that foundation for the excited utterance exception to the hearsay rule had been established.

Hembertt relies on *State v. Sullivan*, 236 Neb. 344, 461 N.W.2d 84 (1990), in which we found that a statement that a robber had driven a particular model of vehicle was not an excited utterance because it was made in response to a specific suggestion from a police officer. Hembertt claims that the statements at issue in the instant case were also made in response to police questioning. However, Hembertt's claim is not supported by the record. Hembertt's appellate brief quotes the following colloquy from the State's direct examination of Sherman:

> Q. . . . When [the alleged victim] initially came out to speak with [the 911 caller] and yourselves, did you inquire about — or inquire further into the nature of the call?
>
> A. Yes, we did.

According to Hembertt, this colloquy shows that the statements were made under police interrogation. Hembertt claims that "it is undeniable that [the declarant's] statements were made in direct response to Officer Sherman's inquiry into the 'nature of the call.' Indeed, [she] made her statements only after being invited to do so by Officer Sherman." Brief for appellant at 10.

However, Hembertt fails to acknowledge the testimony immediately following that colloquy:

> Q. Okay. And was she volunteering information or were you asking her questions? How did — how did it — how did it start?
>
> A. She was volunteering information.

Sherman later specifically agreed that the declarant's testimony at this time "was not in response to a question that [he] or another officer asked." In fact, the declarant's later statements, made in response to police interrogation, were excluded from evidence by the trial court. Hembertt's claim that the statements at issue here were made in response to police questioning is contradicted by the record. When asked, Sherman specifically testified that the declarant's statements were made before any questions were asked.

Hembertt also argues that later testimony establishes that the declarant's statements were made in response to questioning. Hembertt refers to testimony in which Sherman stated that "one of our first questions was are there any weapons in the house. And

she responded that yes there was. He had threatened — threatened me with a knife." It is not entirely clear from the record, however, whether this exchange occurred before or after the initial statements made when the declarant emerged from the home.

Furthermore, even if a question regarding weapons in the house were asked before the declarant's statements, such a question would not implicate the reasoning we relied upon in *State v. Sullivan*, 236 Neb. 344, 461 N.W.2d 84 (1990). In *Sullivan*, the investigating officer made a specific suggestion of a type of vehicle, prompting the declarant's response. Because the declarant in that case identified the vehicle only after a particular model was suggested by the officer, we concluded that the statement had been made after conscious reflection. See *id.* However, under the circumstances of this case, asking the declarant whether there were weapons in the house would not undermine the conclusion that the declarant was still speaking under the stress of nervous excitement and shock produced by the act in issue. See *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993).

The trial court correctly determined that appropriate foundation was present for Sherman's testimony to be allowed under the excited utterance exception to the hearsay rule. His first assignment of error is without merit.

CONFRONTATION CLAUSE

[9] The Confrontation Clause, U.S. Const. amend. VI, provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." Neb. Const. art. I, § 11, provides, in relevant part: "In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . . ." We have held that the analysis under article I, § 11, is the same as that under the Sixth Amendment to the U.S. Constitution. *State v. Vaught*, 268 Neb. 316, 682 N.W.2d 284 (2004).

[10,11] Where "testimonial" statements are at issue, the Confrontation Clause demands that such hearsay statements be admitted at trial only if the declarant is unavailable and there had been a prior opportunity for cross-examination. *Vaught, supra*, citing *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Thus, our initial step is to determine whether

the statements at issue in the present case were testimonial in nature. See *id.* The U.S. Supreme Court in *Crawford* declined to provide a comprehensive definition of "testimonial," but stated that the term applied at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations. *Vaught, supra.* And, although the U.S. Supreme Court has not fully defined "testimonial," it did provide three formulations of the core class of testimonial statements.

> "In the first, testimonial statements consist of 'ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.' . . . The second formulation described testimonial statements as consisting of 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.' . . . Finally, the third explained that testimonial statements are those 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' . . . While the Court declined to settle on a single formulation, it noted that, '[w]hatever else the term [testimonial] covers, it applies . . . to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations. These are the modern abuses at which the Confrontation Clause was directed.' "

Vaught, 268 Neb. at 325, 682 N.W.2d at 291, quoting *Horton v. Allen*, 370 F.3d 75 (1st Cir. 2004), *cert. denied* 543 U.S. 1093, 125 S. Ct. 971, 160 L. Ed. 2d 905 (2005).

[12] The U.S. Supreme Court in *Crawford* further expounded upon the scope of "testimonial" statements by explaining the history underlying the common-law right of confrontation, specifically with reference to police interrogation. In *Crawford*, the declarant made a statement while in police custody regarding an incident in which the defendant, her husband, had allegedly stabbed the victim. The defendant admitted the incident but claimed self-defense; his wife, who was present, did not support the self-defense claim. When the wife was unavailable to testify

at trial, her statement was admitted as a statement against penal interest. Thus, the Court considered whether statements made during formal police interrogation were "testimonial" for purposes of Confrontation Clause analysis.

> Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not *sworn* testimony, but the absence of oath was not dispositive. Cobham's examination was unsworn, see 1 Jardine, Criminal Trials, at 430, yet Raleigh's trial has long been thought a paradigmatic confrontation violation, see, *e.g., Campbell*, 30 S. C. L., at 130. Under the Marian statutes, witnesses were typically put on oath, but suspects were not. See 2 Hale, Pleas of the Crown, at 52. Yet [several authorities] went out of their way to caution that such unsworn confessions were not admissible against anyone but the confessor. . . .
>
> That interrogators are police officers rather than magistrates does not change the picture either. Justices of the peace conducting examinations under the Marian statutes were not magistrates as we understand that office today, but had an essentially investigative and prosecutorial function. See 1 Stephen, Criminal Law of England, at 221; Langbein, Prosecuting Crime in the Renaissance, at 34-45. England did not have a professional police force until the 19th century, see 1 Stephen, *supra*, at 194-200, so it is not surprising that other government officers performed the investigative functions now associated primarily with the police. The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.
>
> In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class.

(Emphasis in original.) *Crawford v. Washington*, 541 U.S. 36, 52-53, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Furthermore, the Court clarified that the term "interrogation" was used in its

colloquial, rather than any technical legal, sense. *Id.* "Just as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation,' and we need not select among them in this case." 541 U.S. at 53 n.4. We note, for clarity's sake, that whether particular evidence is "testimonial," for Confrontation Clause purposes, may be quite different from whether it is "testimonial" as that word is used in other contexts. Compare, e.g., *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000).

[13] Given the Court's reasoning in *Crawford*, and the underlying facts of the case, other courts to have subsequently addressed the subject have concluded that "police interrogation," within the meaning of *Crawford*, requires some kind of structured police questioning, intended to elicit information for use in a contemplated prosecution. See *State v. Alvarez*, 210 Ariz. 24, 107 P.3d 350 (Ariz. App. 2005). See, e.g., *Mungo v. Duncan*, 393 F.3d 327 (2d Cir. 2004); *Jenkins v. State*, 278 Ga. 598, 604 S.E.2d 789 (2004); *State v. Barnes*, 854 A.2d 208 (Me. 2004); *People v. Coleman*, 16 A.D.3d 254, 791 N.Y.S.2d 112 (2005); *State v. Staten*, 364 S.C. 7, 610 S.E.2d 823 (S.C. App. 2005); *People v. Kilday*, 123 Cal. App. 4th 406, 20 Cal. Rtpr. 3d 161 (2004), *review granted* 105 P.3d 114, 23 Cal. Rptr. 3d 693 (2005); *Hammon v. State*, 809 N.E.2d 945 (Ind. App. 2004).

[14] The inquiry is whether, under the circumstances, the declarant intended to bear testimony against the accused. The determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial. *U.S. v. Saget*, 377 F.3d 223 (2d Cir. 2004), *cert. denied* 543 U.S. 1079, 125 S. Ct. 938, 160 L. Ed. 2d 821 (2005). See, also, *U.S. v. Cromer*, 389 F.3d 662 (6th Cir. 2004); *Staten, supra*; *Lopez v. State*, 888 So. 2d 693 (Fla. App. 2004); *People v. Vigil*, 104 P.3d 258 (Colo. App. 2004), *cert. granted* No. 04SC532, 2004 WL 2926003 (Colo. Dec. 20, 2004); *State v. Forrest*, 164 N.C. App. 272, 596 S.E.2d 22 (2004); *People v. Cervantes*, 118 Cal. App. 4th 162, 12 Cal. Rptr. 3d 774 (2004). Thus, some excited utterances are testimonial and others are not, depending upon the circumstances in which the particular statement was made. *Stancil v. U.S.*, 866 A.2d 799 (D.C. 2005). See, also, *Staten, supra*; *Lopez, supra*; *Kilday, supra*; *State v. Orndorff*, 122 Wash. App. 781, 95 P.3d 406 (2004); *Forrest,*

supra. Under *Crawford*, statements obtained during police interrogations are testimonial fundamentally because police officers who obtain a statement during an interrogation are performing investigative and evidence-producing functions formerly handled by justices of the peace. *Kilday, supra*. Extension of this rationale indicates that a statement made at or near the scene of a crime may be an excited utterance, yet may also be testimonial under *Crawford* if obtained through questioning by a police officer acting in an investigative capacity to produce evidence in anticipation of a potential criminal prosecution. *Kilday, supra*.

[15] The underlying assumption in these cases is that a declarant responding to police questioning, structured and conducted for the purpose of producing evidence in anticipation of a potential criminal prosecution, should reasonably anticipate his or her testimony being used against the accused. See *Saget, supra*. Cf. *Alvarez, supra*. As the Court noted in *Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), "testimony" is " 'made for the purpose of establishing or proving some fact.' . . . An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." In other words, whether a statement is testimonial depends on the purpose or expectation of the declarant in making the statement, and the circumstances surrounding the making of the statement illuminate the purpose or expectation of the declarant.

Considered in that framework, the statements at issue in this case were not "testimonial" within the meaning of *Crawford*. The statements at issue on appeal, if they occurred in response to any questioning at all, certainly did not occur in the context of structured police questioning. When police arrived at the scene, the declarant was frightened and the area and suspect were unsecured. Compare, e.g., *Leavitt v. Arave*, 383 F.3d 809 (9th Cir. 2004); *Stancil, supra*; *People v. Kilday*, 123 Cal. App. 4th 406, 20 Cal. Rptr. 3d 161 (2004), *review granted* 105 P.3d 114, 23 Cal. Rptr. 3d 693 (2005). Police who respond to emergency calls for help and ask preliminary questions to ascertain whether the victim, other civilians, or the police themselves are in danger are not obtaining information for the purpose of making a case against a suspect. *Stancil, supra*. See, also, *Mungo v. Duncan*, 393 F.3d 327

(2d Cir. 2004); *People v. Coleman*, 16 A.D.3d 254, 791 N.Y.S.2d 112 (2005); *Key v. State*, No. 12-04-00030-CR, 2005 WL 467167 (Tex. App. Feb. 28, 2005); *Kilday, supra*; *Hammon v. State*, 809 N.E.2d 945 (Ind. App. 2004). The statements at issue in this case were not made in anticipation of eventual prosecution, but were made to assist in securing the scene and apprehending the suspect. We agree with the trial court's determination that the statements were not testimonial.

This conclusion, while based on the facts of this case, is consistent with the reasoning and conclusions of several courts to have considered similar circumstances. Courts have almost uniformly held that statements made to police officers responding to an emergency call for help were, at the initial stage of the encounter, not testimonial, because they were intended to help officers assess the situation and secure the scene. See, e.g., *Mungo, supra*; *Leavitt, supra*; *Stancil v. U.S.*, 866 A.2d 799 (D.C. 2005); *State v. Barnes*, 854 A.2d 208 (Me. 2004); *Key, supra*; *People v. King*, No. 02CA0201, 2005 WL 170727 (Colo. App. Jan. 27, 2005); *People v. Corella*, 122 Cal. App. 4th 461, 18 Cal. Rptr. 3d 770 (2004); *Rogers v. State*, 814 N.E.2d 695 (Ind. App. 2004); *State v. Forrest*, 164 N.C. App. 272, 596 S.E.2d 22 (2004). But see *Lopez v. State*, 888 So. 2d 693 (Fla. App. 2004).

The facts of *Kilday, supra*, present an excellent illustration of how the principles of *Crawford* operate under circumstances similar to those presented here. In *Kilday*, police were called to a hotel by the hotel manager's daughter, after the manager asked a resident (the declarant) about an injury the manager observed on her body, and the declarant admitted she had been intentionally burned by her live-in boyfriend (the defendant). Police officers arrived and encountered the declarant in the lobby, upset, frightened, and reluctant to speak to the officers. She told the police that she had been beaten by the defendant on a number of occasions, including that day. Because of the declarant's reticence to speak, a female detective was summoned, who met the declarant in the lobby and asked the declarant more questions about her visible injuries. Finally, after the defendant was arrested outside the hotel, the detective conducted a tape-recorded interview with the declarant in the declarant's hotel room. *Id.*

Applying *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the California Court of Appeals concluded that the third and second statements were testimonial, but the first was not. Considering the statements in reverse order, the court explained that the third statement, taken in an interview in the declarant's hotel room, was substantially similar to the custodial statement at issue in *Crawford*. The second statement was testimonial, according to the court, because the detective was acting in an investigatorial capacity in anticipation of an eventual criminal prosecution and because at that time, the area had been secured and the police had assessed and resolved any exigencies. The court also noted that before questioning the declarant, the detective had learned what was going on from the police officers who had initially responded; this allowed the detective to conduct a more purposeful and focused questioning. The court stated that where a different officer had been summoned to the scene to question the victim, focus had clearly shifted from securing a scene to the production of evidence. See *People v. Kilday*, 123 Cal. App. 4th 406, 20 Cal. Rptr. 3d 161 (2004), *review granted* 105 P.3d 114, 23 Cal. Rptr. 3d 693 (2005).

The first statement, however, was found to not be testimonial. When the statement was made, the officers were not aware of the nature of the crime at issue or the identity of the alleged assailant, whether the defendant was on or near the premises, whether he was armed or dangerous, or whether the declarant needed medical attention. The court declined to adopt a blanket rule that all statements obtained by police officers responding to emergency calls were nontestimonial; rather, the court stated that the determination whether the statement is testimonial was a case-specific, fact-intensive inquiry, centering around the principles of *Crawford* we have discussed above. Since the officers in *Kilday* were, when the first statement was made, still principally in the process of securing and assessing the scene, the California court concluded that the statement elicited was not testimonial. See *id.*

Similarly, the statements at issue in this case were not testimonial, because they were made while officers had barely begun the process of assessing and securing the scene. The trial court drew an entirely appropriate distinction between those statements

and Sherman's testimony regarding later statements made by the declarant in response to interrogation, which were excluded from evidence. The trial court did not err in concluding that the statements at issue in this appeal were not testimonial statements within the meaning of *Crawford.*

Because the U.S. Supreme Court specifically referred to testimonial statements in its holding in *Crawford*, the effect of the Confrontation Clause on the admission of nontestimonial hearsay statements post-*Crawford* is unclear. See *State v. Vaught*, 268 Neb. 316, 682 N.W.2d 284 (2004), citing *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The Court made no explicit statement regarding nontestimonial statements but did suggest that either such statements required no Confrontation Clause scrutiny or that prior standards developed under *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), *overruled, Crawford, supra*, or its progeny still applied to nontestimonial hearsay evidence. See *Vaught, supra.*

However, we need not answer that question in this case because, even under the standards developed under *Roberts, supra*, the nontestimonial hearsay at issue in this case would be admissible. In *Roberts*, the U.S. Supreme Court determined that when a witness is unavailable for cross-examination, his or her statements are admissible only if they bear adequate indicia of reliability. Reliability can be inferred, without more, in a case in which the evidence falls within a firmly rooted hearsay exception. *Vaught, supra.* The hearsay exception for excited utterances is firmly rooted. See, *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992); *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990). Consequently, this nontestimonial hearsay is admissible regardless of whether it is subject to Confrontation Clause scrutiny.

The trial court correctly overruled Hembertt's Confrontation Clause objection to the nontestimonial hearsay statements at issue in this appeal. We reject Hembertt's second and final assignment of error.

CONCLUSION

The county court properly determined that Sherman's testimony regarding statements made by the alleged victim were properly admissible under the excited utterance exception to the

hearsay rule, and were not barred by the Confrontation Clause. The district court correctly affirmed the judgment of the county court. The district court's judgment is affirmed.

AFFIRMED.

WASTE CONNECTIONS OF NEBRASKA, INC., A DELAWARE CORPORATION, DOING BUSINESS AS MIDWEST REFUSE AND RECYCLING SERVICE, INC., AND BUTLER COUNTY LANDFILL, INC., A NEBRASKA CORPORATION, APPELLANTS, V. CITY OF LINCOLN, NEBRASKA, A CITY OF THE PRIMARY CLASS OF THE STATE OF NEBRASKA, APPELLEE.

697 N.W.2d 256

Filed May 27, 2005. No. S-03-1356.

1. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; 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. **Constitutional Law: Ordinances: Appeal and Error.** The constitutionality of an ordinance presents a question of law, in which an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court.
3. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy.
4. **Standing.** Either a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding.
5. **Standing: Claims: Parties.** In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties.
6. **Standing: Proof.** In order for a party to establish standing to bring suit, it is necessary to show that the party is in danger of sustaining direct injury as a result of anticipated action, and it is not sufficient that one has merely a general interest common to all members of the public.
7. **Constitutional Law: Discrimination: States.** The dormant Commerce Clause is the negative implication of the Commerce Clause. Under the dormant Commerce Clause, states may not enact laws that discriminate against or unduly burden interstate commerce.
8. **Constitutional Law: Political Subdivisions: Discrimination: States.** The dormant Commerce Clause denies states, and their political subdivisions, the power to unjustifiably discriminate or burden the interstate flow of articles of commerce.
9. **Constitutional Law: Ordinances: States.** The equal treatment of in-state and out-of-state haulers under an ordinance is not a burden on interstate commerce; rather, it is a

burden on intrastate commerce, which is not protected under the dormant Commerce Clause.

10. **Equal Protection: Statutes.** Equal protection guarantees that similar persons will be dealt with similarly by the state, but does not foreclose the state from classifying persons or from differentiating one class from another when enacting legislation.
11. **Equal Protection.** The Equal Protection Clause simply keeps governmental decision-makers from treating differently persons who are in all relevant aspects alike.
12. **Equal Protection: Statutes.** In an equal protection challenge, when a fundamental right or suspect classification is not involved, the act is a valid exercise of police power if the act is rationally related to a legitimate governmental purpose.
13. **Equal Protection: Statutes: Proof.** The party attacking a statute as violative of equal protection has the burden to prove that the classification violates the Equal Protection Clause.
14. **Constitutional Law: Taxation.** The uniformity and proportionality requirements of Neb. Const. art. VIII, § 1, do not apply to excise taxes.
15. **Taxation: Words and Phrases.** An excise tax is defined as a tax imposed on the manufacture, sale, or use of goods, or on an occupation or activity.
16. **Actions: Pleadings: Proof.** There is a fundamental principle that the burden of proof in any cause rests upon the party who, as determined by the pleadings or the nature of the case, asserts the affirmative of an issue.
17. **Actions: Proof.** The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to recovery.

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

Stephen D. Mossman and J.L. Spray, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellants.

Dana W. Roper, Lincoln City Attorney, Margaret Blatchford, and William F. Austin, of Erickson & Sederstrom, P.C., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Waste Connections of Nebraska, Inc. (Waste Connections), and Butler County Landfill, Inc. (collectively the appellants), sought declaratory judgment and injunctive relief and challenged the constitutionality of an occupation tax imposed by the City of Lincoln on licensed haulers of solid waste. The district court denied the appellants' motion for injunction. Thereafter, the appellants filed an amended verified petition, which set forth an

additional allegation that the city had judicially admitted that the occupation tax did not apply to the appellants under an exception to the tax because a portion of their waste was destined for interstate commerce. The appellants then filed a second motion for injunction, which was denied by the district court. The district court dismissed with prejudice all of the appellants' theories of recovery. The appellants filed an appeal, and we granted their motion to bypass the Nebraska Court of Appeals.

BACKGROUND

Waste Connections is a Delaware corporation authorized to do business in the State of Nebraska. Waste Connections does business in the city as Midwest Refuse and Recycling Service, Inc., a licensed solid waste hauler which controls an estimated 20 percent of Lincoln's solid waste. Waste Connections also operates two solid waste landfills in Nebraska: Butler County Landfill, which is located outside David City, and G & P Landfill, which is located outside Milford. The appellants allege that of the approximately 39 licensed solid waste haulers servicing Lincoln, Waste Connections is the only one not owned by residents of Lincoln or Lancaster County. The appellants claim that Waste Connections is also the only licensed hauler in the Lincoln solid waste market that does not regularly take Lincoln-generated waste to the Lincoln-operated public landfill, commonly referred to as the "Bluff Road Landfill." Instead, Waste Connections hauls Lincoln-generated waste to the Butler County Landfill and to the G & P Landfill. According to the appellants, these facilities charge less than the $17-per-ton disposal fee charged at the Bluff Road Landfill.

In 1992, the Nebraska Legislature enacted the Integrated Solid Waste Management Act (the Act). See Neb. Rev. Stat. § 13-2001 et seq. (Reissue 1997 & Cum. Supp. 2004). The Act set waste reduction and recycling goals, banned selected materials from landfills, and required local jurisdictions to prepare comprehensive solid waste management plans. In response to the Act, the city, through its comprehensive solid waste management plan, established programs for the collection and processing of banned materials. The city also initiated a countywide recycling program and a household hazardous waste collection

program. Historically, these programs have been funded in part by the gate fees from the Bluff Road Landfill.

The city acknowledges that Waste Connections' deportation of waste outside the city negatively affected the revenues collected by the Bluff Road Landfill and, therefore, revenue used to fund the city's comprehensive solid waste management program. In response, the city sought a mechanism to ensure that its waste management programs continued to be offered in the city. The city states that it contemplated the adoption of a flow control ordinance, which would have ensured that all waste generated within the jurisdiction would be directed to the Bluff Road Landfill, but recognized that such ordinances had not been received favorably by the U.S. Supreme Court. Therefore, the city instead adopted an occupation tax, which would fund the city's various waste collection programs, and reduced the tipping fee at the Bluff Road Landfill from $17 to $10. According to the city, the purpose of the tipping fee reduction was so that the tipping fee would reflect the actual cost of the landfill operation and not the subsidies for the various collection programs.

On March 17, 2003, Lincoln enacted ordinance No. 18149 and resolution No. A-82000. Ordinance No. 18149 amended Lincoln Mun. Code § 8.32 (1991) relating to solid wastes. Among other things, ordinance No. 18149 eliminated the previous annual occupation tax of $100 per refuse vehicle and established in lieu thereof an occupation tax of $7 per ton on all refuse collected within corporate limits of the city or any refuse deposited at the public sanitary landfills. Under § 5(d)(1) of ordinance No. 18149, the occupation tax is not imposed on refuse destined for deposit at any location outside the state. Resolution No. A-82000, in turn, reduced the tipping fees at the Bluff Road Landfill from $17 per ton to $10 per ton. Both measures were effective June 1, 2003.

Thereafter, the appellants instituted the present action. The appellants sought declaratory judgment pursuant to Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1995 & Cum. Supp. 2004) and a temporary and permanent injunction pursuant to Neb. Rev. Stat. § 25-1062 et seq. (Reissue 1995 & Cum. Supp. 2004) on the bases that ordinance No. 18149 violates the dormant Commerce Clause and the 14th Amendment and that the occupation tax is

not uniform, in violation of art. VIII, § 1, of the Nebraska Constitution, and is confiscatory.

Shortly following the filing of the appellants' verified complaint, the district court held a temporary injunction hearing. Following this hearing, the district court entered its first order. In this order, the district court found that the purpose of the ordinance was to raise revenue, not regulate flow; that the occupation tax did not violate the Commerce Clause; that the categories in the ordinance are "logical and reasonable"; that the occupation tax is not confiscatory; and that the ordinance is constitutional and authorized by statute.

The appellants then filed a verified amended complaint in which they set forth the additional allegation that the city had judicially admitted that waste destined for material recovery facilities is exempt from the occupation tax. Material recovery facilities are facilities which sort out garbage and place the recyclables from the garbage into the stream of commerce. As alleged by the appellants, the Butler County Landfill is a material recovery facility and, therefore, waste destined for the facility is exempt from the tax; thus, there is no basis for waste destined for that facility to be weighed prior to leaving the city limits.

The appellants then filed a second motion for temporary injunction on the verified amended complaint. A hearing was held on this motion, and the district court entered its second order. In that order, the court held that the new allegation contained in the appellants' verified amended petition was without merit and that the appellants had not sufficiently shown irreparable injury entitling them to injunctive relief. The district court also held in the second order that under the "balance test" set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970), the burden imposed on the plaintiffs is not clearly excessive in relation to the putative local benefit of raising revenue. Subsequently, the district court entered its third order in which it dismissed with prejudice all theories of recovery in the appellants' verified amended petition. The appellants timely appealed, and we granted their motion to bypass the Court of Appeals pursuant to Neb. Ct. R. of Prac. 2B (rev. 2002) and Neb. Rev. Stat. § 24-1106(2) (Reissue 1995).

ASSIGNMENTS OF ERROR

The appellants assign, restated and consolidated, that the district court erred in concluding that (1) ordinance No. 18149 did not violate the dormant Commerce Clause of the U.S. Constitution; (2) ordinance No. 18149 did not violate the Equal Protection Clauses of the U.S. and Nebraska Constitutions; (3) ordinance No. 18149 is statutorily authorized; (4) ordinance No. 18149 did not contain unreasonable classifications in violation of art. VIII, § 1, of the Nebraska Constitution; and (4) the occupation tax contained in ordinance No. 18149 is reasonable and not a confiscatory fee.

STANDARD OF REVIEW

[1] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; 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. *County of Sarpy v. City of Gretna*, 267 Neb. 943, 678 N.W.2d 740 (2004).

[2] The constitutionality of an ordinance presents a question of law, in which an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court. *Village of Winslow v. Sheets*, 261 Neb. 203, 622 N.W.2d 595 (2001).

ANALYSIS

Relying on various federal cases, the appellants argue on appeal that the occupation tax imposed by the ordinance is actually a fee, not a tax. The appellants also argue that the district court erred in determining that ordinance No. 18149 is constitutional. They claim that the ordinance violates the dormant Commerce Clause in that it is discriminatory in both purpose and effect. Applying the two-tiered analysis adopted by the U.S. Supreme Court, the appellants claim that the ordinance is subject to the "strictest scrutiny" because it discriminates against interstate commerce. Brief for appellants at 21. Consequently, the burden falls on the city to demonstrate that all other alternatives to the ordinance are ineffective, a burden the appellants maintain the city cannot meet. See *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 114 S. Ct. 1345,

128 L. Ed. 2d 13 (1994). The appellants further claim that the ordinance violates their equal protection rights because it treats licensed waste haulers such as Waste Connections differently than other haulers. For example, the ordinance does not require that the occupation tax be paid by homeowners who haul refuse from their residence to the public sanitary landfills, individuals hauling or conveying building rubbish or demolition, or individuals hauling lawn waste. The appellants maintain that there exists no rational basis for the creation of this distinction. Finally, the appellants argue that the ordinance is not authorized by statute because it is not uniform, which violates the Nebraska Constitution, and that the occupation tax is confiscatory.

The city argues that the district court properly dismissed the appellants' theories of recovery. It maintains that contrary to the appellants' contentions, the levy imposed by ordinance No. 18149 is a true and valid tax. It further claims that because the issue is the constitutionality of a tax, the appropriate dormant Commerce Clause test to apply is the four-part analysis found in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977). Under that test, a court looks at whether (1) the tax is applied to an activity with a substantial nexus with the taxing state, (2) the tax is fairly apportioned, (3) the tax does not discriminate against interstate commerce, and (4) the tax is fairly related to the services provided by the state. The city claims that if the tax meets this test, as the city maintains it does, the tax is deemed valid and the court need not undertake a balancing of benefits and burdens of the tax.

Butler County Landfill Standing

The city contends that Butler County Landfill lacks standing to bring the present appeal. We disagree.

[3,4] Standing is the legal or equitable right, title, or interest in the subject matter of the controversy. *County of Sarpy v. City of Gretna*, 267 Neb. 943, 678 N.W.2d 740 (2004). It is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. *Id.* Either a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding. *In re Trust Created by Del Castillo*, 268 Neb. 671, 686 N.W.2d 900 (2004).

[5,6] In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties. *County of Sarpy v. City of Gretna, supra*. In order for a party to establish standing to bring suit, it is necessary to show that the party is in danger of sustaining direct injury as a result of anticipated action, and it is not sufficient that one has merely a general interest common to all members of the public. *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (2002).

The ordinance imposes an occupation tax of $7 on each ton of refuse collected by a refuse hauler within the corporate limits of the city. The appellants allege that the imposition of this tax makes it financially unfeasible for Waste Connections to continue dumping its refuse at the Butler County Landfill, thereby reducing Butler County Landfill's revenues. We conclude that the appellants have alleged an injury sufficient to give Butler County Landfill standing in the present action. See *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003) (holding that imminent loss of business as result of enforcement of contested state constitutional amendment satisfied injury-in-fact requirement of standing).

DORMANT COMMERCE CLAUSE

[7,8] The appellants claim that the district court erred in determining that ordinance No. 18149 does not violate the dormant Commerce Clause. The Commerce Clause grants Congress the authority to regulate commerce. U.S. Const. art. I, § 8, cl. 3. The dormant Commerce Clause is the negative implication of the Commerce Clause. Under the dormant Commerce Clause, states may not enact laws that discriminate against or unduly burden interstate commerce. *South Dakota Farm Bureau, Inc. v. Hazeltine, supra* (citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992)). The concern of the dormant Commerce Clause is the raising of barriers by states against the free flow of interstate commerce. Therefore, the clause denies states, and their political subdivisions, the power to unjustifiably discriminate or burden the interstate flow of articles of commerce. See, *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 114 S. Ct. 1345, 128

L. Ed. 2d 13 (1994); *Blue Circle Cement v. Board of County Com'rs*, 27 F.3d 1499 (10th Cir. 1994). In the present case, the ordinance does not burden interstate commerce, and therefore, it does not violate the dormant Commerce Clause.

Ordinance No. 18149 states in pertinent part:

> (a) There is hereby imposed an occupation tax of $7.00 on each ton of refuse collected by a refuse hauler within the corporate limits of the City of Lincoln, and a tax of $7.00 on each ton of refuse collected by a refuse hauler outside the corporate limits of the City of Lincoln and deposited in the public sanitary landfills as designated in Section 8.32.040 of the Lincoln Municipal Code. The occupation taxes authorized herein shall be used exclusively for funding solid waste management programs, including the payment of principal and interest on revenue bonds issued by the City of Lincoln.
>
> . . . .
>
> (c) All refuse collected by refuse haulers within the corporate limits, whether destined for deposit in the public sanitary landfills as designated in Section 8.32.040 or for deposit elsewhere, shall, before leaving the corporate limits of the City of Lincoln, be weighed at the scales located at the public sanitary landfill at 56th Street and Bluff Road or at such other scales approved by the Director of Public Works and Utilities. The refuse hauler shall, at that time, advise the sanitary landfill operator or his designated representative of the amount of such tonnage destined for deposit outside the State of Nebraska. Any refuse not being deposited at the public sanitary landfills designated under Section 8.32.040, whether destined for deposit inside or outside the State of Nebraska, shall be weighed and the driver of the refuse vehicle shall be provided a certificate of weight which shall be displayed upon demand to any police officer of the City of Lincoln.
>
> (d) The occupation tax provided herein shall not be imposed upon (1) refuse destined for deposit at any location outside the State of Nebraska, or (2) building rubbish or demolition debris lawfully being deposited in the 48th Street public sanitary landfill.

[9] The ordinance imposes an occupation tax of $7 per ton on all haulers operating within the city limits without regard to a hauler's locality. Thus, a hauler from another state pays the same tax as a hauler from Nebraska if waste collected within the city limits is destined for deposit within Nebraska. Similarly, if the waste is destined for deposit outside Nebraska, neither a hauler from Nebraska nor a hauler from any other state is required to pay the tax. This equal treatment of in-state and out-of-state haulers under an ordinance is not a burden on interstate commerce; rather, it is a burden on intrastate commerce, which is not protected under the dormant Commerce Clause. We therefore determine that the ordinance does not violate the dormant Commerce Clause.

EQUAL PROTECTION

The appellants claim that the district court erred in failing to find that the ordinance unconstitutionally violates the Equal Protection Clauses of the U.S. Constitution and the Nebraska Constitution. The appellants contend that the ordinance violates equal protection because it treats licensed waste haulers differently than homeowners who haul refuse from their residence to the public sanitary landfills, individuals hauling or conveying building rubbish or demolition, and individuals hauling lawn waste.

[10,11] Equal protection guarantees that similar persons will be dealt with similarly by the state, but does not foreclose the state from classifying persons or from differentiating one class from another when enacting legislation. *Gas 'N Shop v. City of Kearney*, 248 Neb. 747, 539 N.W.2d 423 (1995). The clause simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike. *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000).

[12,13] In an equal protection challenge, when a fundamental right or suspect classification is not involved, the act is a valid exercise of police power if the act is rationally related to a legitimate governmental purpose. *Gas 'N Shop v. City of Kearney, supra*. The party attacking a statute as violative of equal protection has the burden to prove that the classification violates the Equal Protection Clause. *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003).

The appellants claim that there is no rational basis for failing to charge an occupation tax to all haulers of waste within the city limits. The city's brief claims there is a rational basis for exempting individuals who haul their refuse to landfills because these individuals are not "refuse haulers" as set forth in the ordinance. Brief for appellee at 22. A further rational basis is that the city wants to encourage households to bring their trash to the landfill as opposed to illegal dumping along the roadside. As for exempting building rubbish and demolition debris, this refuse can be deposited only at the 48th Street public landfill, where it is beneficial as a fill. The city, therefore, has provided a rational basis even though it was not its burden to do so. The appellants, on the other hand, have failed to offer any evidence that the tax is not rationally related to the city's purposes of imposing a tax. Consequently, the appellants have not met their burden of showing that the ordinance violates equal protection.

UNIFORMITY

The appellants further claim that the ordinance is not statutorily authorized because the occupation tax is not uniform.

[14,15] Neb. Const. art. VIII, § 1, provides as follows:

> The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct. . . . Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises . . . . Taxes other than property taxes may be authorized by law.

In *State v. Galyen*, 221 Neb. 497, 378 N.W.2d 182 (1985), we held that the uniformity and proportionality requirements of Neb. Const. art. VIII, § 1, do not apply to excise taxes. An excise tax is defined as a "tax imposed on the manufacture, sale, or use of goods . . . or on an occupation or activity." Black's Law Dictionary 605 (8th ed. 2004). See *State v. Galyen, supra.*

The "occupation tax" in the present case is imposed on all licensed haulers who wish to haul refuse within the city limits. As such, it is an excise tax, not a fee as alleged by the appellants, and is not subject to the uniformity and proportionality requirement of the Nebraska Constitution. See *Licking v. Hays Lumber Co.*, 146 Neb. 240, 19 N.W.2d 148 (1945) (holding tax imposed as annual charge upon right to continue corporate existence is excise tax).

CONFISCATORY

In *Hoyt Bros. v. City of Lincoln*, 130 Neb. 79, 263 N.W. 898 (1936), the undisputed evidence was that Lincoln was charging the plaintiff's peddlers a monthly license fee of $15 and a monthly occupation tax of $40, for a total of $55 per month. The evidence further showed that each peddler's average earnings was only $2 per day. This court held that the ordinances approving these charges, as applicable to the plaintiff, were confiscatory and amounted to a prohibition to transact business in Lincoln. This court noted that if the license fee and occupation tax were enforced, "[p]rofit, the incentive to private enterprise, will be gone." *Hoyt Bros. v. City of Lincoln*, 130 Neb. at 81, 263 N.W. at 899.

Another instructive case is *Petersen Baking Co. v. City of Fremont*, 119 Neb. 212, 228 N.W. 256 (1929). In *Petersen Baking Co.*, we held that where the net profit of a bakery was $420 per year, and the tax imposed by Fremont was $300, the incentive to sell and deliver bread in Fremont would be destroyed, amounting to an illegal prohibition of the right to do so.

[16,17] Since it is the appellants' contention that the occupation tax is confiscatory, it is the appellants' burden to prove this allegation. It is a fundamental principle that the burden of proof in any cause rests upon the party who, as determined by the pleadings or the nature of the case, asserts the affirmative of an issue. *Miller v. Westwood*, 238 Neb. 896, 472 N.W.2d 903 (1991). The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to recovery. *Id.*; *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996).

The appellants have failed to put forth any evidence establishing that they are unable to carry on their business as a result of the occupation tax. Because they have failed to meet their burden of proof, we determine that the appellants' final claim is without merit.

CONCLUSION

For the reasons set forth in this opinion, we affirm the district court's denial of the appellants' requests for injunctive relief.

AFFIRMED.

KERI LEA EMERY, APPELLEE, V. ROBBIE EXTON MOFFETT, APPELLANT.

697 N.W.2d 249

Filed May 27, 2005. No. S-04-225.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
2. **Child Support.** There is no precise mathematical formula for calculating child support when subsequent children are involved; the calculation is left to the discretion of the court as long as the court considers the obligations to both families and the income of the other parent of the subsequent children.
3. **Child Support: Appeal and Error.** Whether a child support order should be retroactive is entrusted to the discretion of the trial court and will be affirmed absent an abuse of discretion.
4. **Modification of Decree: Child Support: Time.** Absent equities to the contrary, modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification.
5. **Child Support.** In the absence of a showing of bad faith, it is an abuse of discretion for a court to award retroactive child support when the evidence shows the obligated parent cannot pay retroactive support and still meet current obligations.
6. **Modification of Decree: Attorney Fees: Appeal and Error.** In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
7. **Divorce: Attorney Fees.** The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.
8. **Attorney Fees: Evidence: Appeal and Error.** Evidence concerning the time required for preparation and trial of a case and customary charges is needed to meaningfully review an award of attorney fees.
9. **Modification of Decree: Taxation.** A tax dependency exemption is nearly identical in nature to an award of child support or alimony.
10. **Child Support: Taxation: Presumptions.** The general rule is that a custodial parent is presumptively entitled to the federal tax exemption for a dependent child. But, a court may exercise its equitable powers to allocate the exemption to a noncustodial parent.
11. **Child Support: Taxation: Appeal and Error.** An award of a dependency exemption is reviewed de novo to determine whether the trial court abused its discretion.

Appeal from the District Court for Douglas County: J. RUSSELL DERR, Judge. Affirmed in part, and in part reversed.

James R. Kozel for appellant.

Richard J. Henkenius for appellee.

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

CONNOLLY, J.

Robbie Exton Moffett appeals the district court's order increasing his child support obligation, ordering the increase retroactive to the date of the application, and awarding the dependency exemption and attorney fees to the appellee, Keri Lea Emery. On appeal, Moffett contends that the district court abused its discretion when it (1) incorrectly calculated child support because it failed to adequately consider his obligation to three subsequent children, (2) made the increase in child support retroactive because he is unable to pay the retroactive award, (3) awarded attorney fees to Emery, and (4) allowed Emery to keep the dependency exemption. We affirm the district court's support calculation but reverse the award of retroactive support and attorney fees.

BACKGROUND

Moffett and Emery's marriage was dissolved in 1992; the couple had one child, Shaunessy Robyn Emery, born July 21, 1987, and Emery was awarded custody. The court ordered Moffett to pay $228 per month in child support. Because the award of retroactive support hinges on accusations that Moffett delayed the proceedings, we set out the pertinent dates. In June 1999, the Nebraska Health and Human Services System notified Emery that it would refer the original support order to the authorized attorney for possible modification because the child support guidelines indicated a 10-percent or greater increase from the current support amount. Moffett also received a copy of the letter. Emery, however, did not file an application for modification at that time.

Approximately 32 months later, in February 2002, Emery applied for a modification of child support. On February 21, Moffett entered a voluntary appearance and waived service of summons. In July, Moffett filed a notice that he served discovery responses. Although the record is not clear, some time between July and September, the case was dismissed by the court, but was reinstated after a joint stipulation was filed.

On February 26, 2003, a referee held a hearing. At the hearing, both parties presented evidence about their incomes. The evidence showed that Moffett had a monthly net income of $2,043 and average living expenses of $2,829 and that he was married and had three children, ages 5, 2, and 1. He testified that his wife did not work because of the high cost of childcare. The record also shows that Moffett does not have any investments or savings.

The referee calculated support by determining the support obligations for the three subsequent children at $884 and then deducting that amount from Moffett's income before calculating support for Shaunessy. This resulted in $369.56 per month for Shaunessy's support. The referee determined that Moffett had not acted in bad faith and that Moffett could not afford to pay retroactive support. Therefore, the referee did not make support retroactive to the date of the application for modification. The referee also did not award attorney fees.

Emery filed exceptions to the referee's report. Citing to *Prochaska v. Prochaska*, 6 Neb. App. 302, 573 N.W.2d 777 (1998), the district court determined support by using a joint custody support calculation for the three subsequent children. The court stated that using the joint support figure took into consideration that a family living together has fewer expenses than parents who are maintaining two homes. As a result, the court subtracted only $404.05 from Moffett's income and calculated support for Shaunessy at $475.90 per month.

The court also ordered retroactive support. The court stated that had the application been filed several years before, there would have been a significant increase in support, and that Moffett had failed to timely respond to discovery demands. The record contains a notice that answers to discovery requests were filed, but does not include a motion to compel or other information about delays. The court also awarded attorney fees. The record, however, does not contain evidence of the amount of time Emery's attorney spent on the case or the charges for his services. Instead, the only evidence is Emery's attorney's oral unsworn statement at the hearing on the motion for new trial that Emery expended around $2,800. Finally, the court ordered that Moffett pay the retroactive support and fees after Shaunessy reached the age of majority by paying 19 additional installments of $300.53.

The court did not address the dependency exemption, which Emery had previously been awarded; but nothing in the record shows that Moffett asked the court to award him the exemption.

Moffett moved for a new trial, contending that the court erred in its support calculations, retroactive award, and award of attorney fees. At the hearing on the motion, Moffett's attorney conceded that it would be difficult to argue that attorney fees were not warranted in the case. The attorney did not, however, waive the issue. The court denied the motion, and Moffett appeals.

ASSIGNMENTS OF ERROR

Moffett assigns, rephrased, that the district court erred by (1) incorrectly calculating support, (2) making the support retroactive, (3) ordering support after the age of majority, (4) awarding attorney fees to Emery, and (5) not awarding him the dependency exemption.

STANDARD OF REVIEW

[1] Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003).

ANALYSIS

Calculation of Child Support

Moffett argues that the district court should have followed the referee's recommendation when it calculated support. However, relying on *Prochaska v. Prochaska*, 6 Neb. App. 302, 573 N.W.2d 777 (1998), Emery argues that the referee improperly calculated support and that the district court correctly determined the amount of child support.

In *Prochaska*, the Nebraska Court of Appeals held that when determining a support obligation involving children from a subsequent marriage, the support for each child should be determined after a deduction for support to the subsequent family. In *Prochaska*, the trial court calculated a deviation from the guidelines by first using the guidelines to determine the support obligation for the subsequent child and then deducted that amount

from the parent's income before calculating support for the children from the previous marriage. The Court of Appeals held that such a method improperly provided a benefit to the parent's current family at the expense of the other family. The court then recalculated support using "interdependent arithmetic," with little explanation of the method used. *Id.* at 308, 573 N.W.2d at 781.

[2] We addressed *Prochaska* and the method of considering subsequent children when calculating support in *Brooks v. Brooks*, 261 Neb. 289, 622 N.W.2d 670 (2001). In *Brooks*, we determined that there is no precise mathematical formula for calculating child support when subsequent children are involved. We determined that the calculation is left to the discretion of the court as long as the court considered the obligations to both families and the income of the other parent of the subsequent children. Thus, we held the trial court has discretion to choose if and how to calculate the deviation, but must do so in a manner that does not benefit one family at the expense of the other.

The referee calculated support using the method that was disapproved of in *Prochaska*. Here, the district court recalculated support using a joint custody calculation for support for Moffett's three subsequent children in order to consider the obligation to both families without benefiting one family over the other. The court noted several ways it could perform the calculation and chose a method that it found most equitable under the circumstances. Because the court calculated support in an interdependent manner that considered the obligation to both families, the court did not abuse its discretion.

Retroactive Support

Moffett argues that because he cannot afford to pay a retroactive order and did not act in bad faith, the district court erred in ordering the support to be retroactive.

[3-5] Whether a child support order should be retroactive is entrusted to the discretion of the trial court and will be affirmed absent an abuse of discretion. See *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001). Absent equities to the contrary, modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification. *Noonan v. Noonan*, 261 Neb. 552, 624

N.W.2d 314 (2001). But circumstances may exist when a noncustodial parent cannot afford to pay retroactive support. *Riggs v. Riggs, supra*. The Court of Appeals has addressed that issue and held that in the absence of a showing of bad faith, it is an abuse of discretion for a court to award retroactive child support when the evidence shows the obligated parent cannot pay retroactive support and still meet current obligations. *Cooper v. Cooper*, 8 Neb. App. 532, 598 N.W.2d 474 (1999).

Here, the record shows that Moffett's average living expenses exceed his monthly income. Thus, the record shows that he cannot afford to pay retroactive support and still meet his current obligations. The district court noted a delay in response to discovery requests when it ordered retroactive support, but the record does not contain evidence that Moffett delayed the proceedings. Instead, the record supports the conclusion that Emery did not promptly pursue the action.

It appears that the court recognized that Moffett could not afford to pay retroactive support but delayed payment until after Shaunessy reached the age of majority. But here, the support was not previously ordered and forcing payment after the age of majority obscures the fact that under the present circumstances, Moffett cannot afford retroactive support. Accordingly, we determine that because Moffett cannot afford to pay retroactive support and meet current obligations and because the record does not show that he acted in bad faith, the district court abused its discretion when it awarded retroactive support.

Attorney Fees

Moffett next contends that the court erred when it awarded Emery attorney fees of $1,000. He argues that the record lacks evidence to allow a meaningful review.

[6,7] In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002). The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and

presentation of the case, customary charges of the bar, and the general equities of the case. *Bowers v. Lens*, 264 Neb. 465, 648 N.W.2d 294 (2002).

[8] The Court of Appeals has held that evidence concerning the time required for preparation and trial of the case and customary charges is needed to meaningfully review an award of attorney fees. *Mace v. Mace*, 9 Neb. App. 270, 610 N.W.2d 436 (2000). We agree. Without a stipulation or evidence, an award appears arbitrary and leaves us with nothing in the record to allow for meaningful review. See *id.* We further note that adducing such evidence is not onerous. Because there is no evidence in the record to support the fee award, we reverse the award of attorney fees.

Dependency Exemption

Moffett contends that the court should have awarded him the dependency exemption for Shaunessy. However, he did not ask the district court to award him the exemption but contends that we should award it to him through our de novo review on appeal.

[9-11] A tax dependency exemption is nearly identical in nature to an award of child support or alimony. See *Hall v. Hall*, 238 Neb. 686, 472 N.W.2d 217 (1991). We have stated that the general rule is that a custodial parent is presumptively entitled to the federal tax exemption for a dependent child. See, I.R.C. § 152(e) (2000); *Hall v. Hall, supra*. But, we have also held that a court may exercise its equitable powers to allocate the exemption to a noncustodial parent. *Hall v. Hall, supra*. An award of a dependency exemption is reviewed de novo to determine whether the trial court abused its discretion. See *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997).

Here, the custodial parent, Emery, has previously taken the dependency exemption. Nothing in our review of the record convinces us that the district court abused its discretion by not changing that. Accordingly, we determine that this assignment of error is without merit.

CONCLUSION

The district court did not abuse its discretion when calculating support, and we affirm the award. We also affirm the award of the dependency exemption to Emery. However, the court did abuse

its discretion when it ordered retroactive support and awarded attorney fees. Accordingly, we affirm in part, and in part reverse.

AFFIRMED IN PART, AND IN PART REVERSED.

JASON BLAIR, APPELLANT AND CROSS-APPELLEE, V. STATE FARM INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT.

DALE E. PRICKETT, PERSONAL REPRESENTATIVE OF THE ESTATE OF TRACI A. PRICKETT, DECEASED, APPELLANT AND CROSS-APPELLEE, V. STATE FARM INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT.

DANIEL R. KOST, SR., PERSONAL REPRESENTATIVE OF THE ESTATE OF DANIEL R. KOST, JR., DECEASED, APPELLANT AND CROSS-APPELLEE, V. STATE FARM INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT.

697 N.W.2d 266

Filed May 27, 2005. Nos. S-04-280, S-04-308, S-04-325.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing 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. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. 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. **Insurance: Contracts: Motor Vehicles: States.** Under Neb. Rev. Stat. § 44-6408 (Reissue 2004), when an insurer delivers, issues for delivery, or renews an automobile liability policy, the policy must provide underinsured motorist coverage if Nebraska is the state where the insured intends to keep the vehicle most often compared to any other state during the policy period.

Appeals from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded for further proceedings.

Jeff Lapin, of Friedman Law Offices, for appellant Jason Blair.

Robert F. Bartle, of Bartle & Geier Law Firm, for appellant Dale E. Prickett.

William D. Sutter, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellant Daniel R. Kost, Sr.

Cathy S. Trent, Stephen L. Ahl, and Melanie J. Whittamore-Mantzios, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee.

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

CONNOLLY, J.

After running a red light, an underinsured driver struck Marcelle A. DeWitt's vehicle. Jason Blair, the driver of DeWitt's vehicle, was injured, and Daniel R. Kost, Jr., and Traci A. Prickett, passengers in the vehicle, were killed. The automobile liability policy that insured DeWitt's vehicle, issued by State Farm Insurance Company (State Farm), did not provide underinsured motorist (UIM) coverage. But Blair and the personal representatives of the estates of Kost and Prickett (collectively the appellants) sued State Farm, alleging that Neb. Rev. Stat. § 44-6408 (Reissue 2004) required the policy to provide such coverage. Section 44-6408(1) requires an automobile liability insurance policy to provide UIM coverage if the policy is "delivered, issued for delivery, or renewed with respect to any motor vehicle principally garaged in [Nebraska]." The district court granted summary judgment for State Farm.

We hold that under § 44-6408, when an insurer delivers, issues for delivery, or renews an automobile liability policy, the policy must provide UIM coverage if Nebraska is the state where the insured intends to keep the vehicle most often compared to any other state during the policy period. Because a fact question exists whether—when her parents renewed the policy—Nebraska was the state where DeWitt intended to keep her vehicle most often compared to any other state during the policy period, we remand the cause for further proceedings.

BACKGROUND

DeWitt is a resident of Wyoming, but attended college in Nebraska from 1997 to 2000. In December 1999, DeWitt loaned her vehicle to her boyfriend. Her boyfriend went to a dance club

with Blair, Kost, and Prickett. After leaving the club, DeWitt's boyfriend decided that he had drunk too much to drive safely and asked Blair to drive DeWitt's vehicle. Blair agreed. As they were proceeding through an intersection, the driver of another vehicle, who was fleeing police, ran a red light and crashed into DeWitt's vehicle. Kost and Prickett were killed, and Blair suffered serious injuries. We note that DeWitt's boyfriend was also injured in the collision, but is not a party to this appeal.

At the time of the collision, State Farm provided automobile liability insurance to DeWitt under a policy issued to her parents, who live in Wyoming. According to the parties, Wyoming, unlike Nebraska, does not require UIM coverage, and it is undisputed that the State Farm policy did not expressly provide for UIM coverage.

Following the collision, the negligent driver's insurer paid the appellants the limits of the driver's policy. But according to the appellants, this did not completely compensate them for their injuries. So, each commenced actions against State Farm. In support of their claims, the appellants relied on § 44-6408. They alleged that DeWitt's vehicle was principally garaged in Nebraska and that as a result, State Farm was required to provide UIM coverage.

Movement of Vehicle

Because the focus of the dispute is on where DeWitt's vehicle was principally garaged, it is necessary to review where DeWitt spent time and where her vehicle was located in 1999. As noted, DeWitt attended college in Nebraska from 1997 to 2000. She estimated that while attending college, she would typically spend 200 days per year in Nebraska. The only periods when she was not in Nebraska were holidays and summers.

During the spring of 1999, DeWitt purchased the vehicle in Lincoln, Nebraska. She did not register her vehicle in Nebraska. But according to DeWitt, in May 1999, after purchasing the vehicle, her mother informed the family's State Farm insurance agent that DeWitt was using the vehicle in Nebraska. DeWitt testified that she believed her mother had filled out a form sent to the family by State Farm.

In June 1999, DeWitt's family renewed the insurance policy. The declarations page sent to them at the time of renewal states

that the policy period was from June 17, 1999, to February 10, 2000.

At the time of the renewal, neither DeWitt nor the vehicle was in Nebraska. Instead, DeWitt had the vehicle with her in New York, where she worked as a nanny over her 1999 summer break. DeWitt did not know if anyone had notified State Farm that the vehicle would be in New York during the summer of 1999. When the nanny job ended, DeWitt returned to Nebraska for the fall 1999 semester. She remained in Nebraska until December 2000.

District Court's Grant of Summary Judgment

State Farm moved for summary judgment in each case. The cases were consolidated for the purposes of the motion.

In support of its motion, State Farm made two arguments. First, it argued that under § 44-6408, the place where a vehicle is principally garaged is the same as the insured's domicile, and that because DeWitt was domiciled in Wyoming, Nebraska law did not require that the policy provide UIM coverage. Second, State Farm argued that in the alternative, the place where DeWitt's vehicle was principally garaged was the place it was being kept at the time that the policy was renewed. According to State Farm, because the vehicle was in New York when the policy was renewed, New York was the place it was principally garaged and therefore, State Farm was not required to provide UIM coverage.

Initially, the court denied summary judgment. But after State Farm moved for reconsideration, the court adopted State Farm's second argument and granted it summary judgment.

ASSIGNMENTS OF ERROR

The appellants assign that the district court erred in granting summary judgment to State Farm.

On cross-appeal, State Farm assigns that the district court erred in failing to conclude that a vehicle is principally garaged in the same place as the insured's domicile.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing 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. *Dworak v. Farmers Ins. Exch., ante* p. 386, 693 N.W.2d 522 (2005).

[2] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Destiny 98 TD v. Miodowski, ante* p. 427, 693 N.W.2d 278 (2005).

ANALYSIS

We first note that the case does not require us to resolve a conflict between the law of Nebraska and the law of Wyoming. The parties agree that Nebraska law, specifically § 44-6408, controls whether State Farm was required to provide UIM coverage. Thus, we turn to that statute.

Section 44-6408 provides:

> (1) No policy insuring against liability imposed by law for bodily injury, sickness, disease, or death suffered by a natural person arising out of the ownership, operation, maintenance, or use of a motor vehicle within the United States, its territories or possessions, or Canada *shall be delivered, issued for delivery, or renewed with respect to any motor vehicle principally garaged in this state* unless coverage is provided for the protection of persons insured who are legally entitled to recover compensatory damages for bodily injury, sickness, disease, or death from . . . (b) the owner or operator of an underinsured motor vehicle in limits of twenty-five thousand dollars because of bodily injury, sickness, disease, or death of one person in any one accident and, subject to such limit for one person, fifty thousand dollars because of bodily injury, sickness, disease, or death of two or more persons in any one accident.

(Emphasis supplied.) Whether § 44-6408 required State Farm to provide UIM coverage turns on how to interpret and apply the term "principally garaged."

"Principally Garaged" as Place of Named Insured's Domicile

We begin by considering State Farm's cross-appeal. It argues that we should treat a vehicle as being principally garaged in the

same place as the named insured's domicile. This rule, however, is not consistent with the language of the statute. In choosing to make the UIM coverage requirement depend on where the "motor vehicle" is "principally garaged," the Legislature chose terms which placed the focus of the inquiry on the vehicle's location. But if we adopted State Farm's argument, the focus would not be on the location of the vehicle, but instead on the insured's physical presence and his or her intent to remain in that place. See *In re Estate of Craven*, 265 Neb. 41, 45, 654 N.W.2d 196, 199 (2002) ("domicile is obtained only through a person's physical presence accompanied by the present intention to remain indefinitely at a location or by the present intention to make a location the person's permanent or fixed home"). We cannot read a meaning into a statute that is not there, *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004), and thus, we do not adopt State Farm's domicile argument.

"Principally Garaged" as State Where Insured Intends to Keep Vehicle Most Often During Policy Period

Instead of focusing on the named insured's domicile, we read "principally garaged" to mean where a vehicle is "primarily or chiefly kept." *Chalef v. Ryerson*, 277 N.J. Super. 22, 27, 648 A.2d 1139, 1141 (1994). In other words, a vehicle is principally garaged in the place where it is kept most often. This is consistent with the plain meaning of the words "principally" and "garaged."

Although the term "principally garaged" is not difficult to define, it is difficult to apply in a temporal context. To determine where a vehicle is kept most often, one must establish a defined period of time and then determine the place that the vehicle was located more often than any other place during that time period. The difficulty with § 44-6408 is that it does not clearly specify what defined period should be used to make this calculation.

The trial court concluded that the period for determining whether a vehicle is principally garaged in Nebraska is the period during which the policy was delivered, issued for delivery, or renewed. Here, the last of these three events was the policy's renewal in June 1999. Because it is undisputed that during this period, DeWitt had the vehicle with her in New York, the court concluded that State Farm was not required to provide UIM coverage and granted it summary judgment.

In contrast to the district court's interpretation, the appellants argue that the period to be used in determining where a vehicle is principally garaged is the period during which the policy will be in effect, i.e., the policy period. Thus, according to them, if an insurer delivers, issues for delivery, or renews a policy on a vehicle that the insured intends to keep in Nebraska most often compared to any other state during the policy period, the policy must contain UIM coverage. They argue that a fact question exists whether—when DeWitt's parents renewed the policy—Nebraska was the state where she intended to keep her vehicle most often compared to any other state during the policy period.

We believe that the appellants' argument is the better position because under the district court's reading of § 44-6408, the UIM coverage requirement hinges on happenstance. Two examples demonstrate this point. First, suppose that a resident of Nebraska drives to Wyoming for a 2-week vacation. During that 2-week vacation, the Nebraska resident renews her automobile liability policy. Under the district court's interpretation of § 44-6408, the policy would not be required to contain UIM coverage because during the period when the policy was renewed, the Nebraska resident kept the vehicle exclusively in Wyoming. This would be the result even if the insured intended to keep her vehicle in Nebraska for the remaining 50 weeks during which the policy would be in effect.

Second, assume a resident of Wyoming vacations in Nebraska for 2 weeks and renews her insurance during this period. Under the district court's interpretation of § 44-6408, the policy would be required to provide UIM coverage even if the insured intended to keep her vehicle in Wyoming for the remaining 50 weeks of the policy period. We doubt the Legislature intended to adopt a law which would cause such erratic results. See *Nicholson v. General Cas. Co. of Wis.*, 262 Neb. 879, 883, 636 N.W.2d 372, 376 (2001) ("appellate court will, if possible, try to avoid a statutory construction which would lead to absurd results").

[3] The appellants' interpretation of § 44-6408, in contrast to the district court's interpretation, results in a system more likely to reflect the legitimate expectations of both insureds and insurers. Instead of focusing on the location of the vehicle at the exact moment the policy is delivered, issued, or renewed, it focuses on

what state the vehicle will be kept most often during the policy period. If the insured intends to keep the vehicle in Nebraska more often than in any other state, then the policy must comply with the UIM requirement. Therefore, we hold that under § 44-6408, when an insurer delivers, issues for delivery, or renews an automobile liability policy, the policy must provide UIM coverage if Nebraska is the state where the insured intends to keep the vehicle most often compared to any other state during the policy period. Consequently, the district court's grant of summary judgment to State Farm was based on an incorrect interpretation of § 44-6408.

RESOLUTION

Next, we must decide whether the grant of summary judgment can be justified under our interpretation of § 44-6408. The State Farm policy was renewed in June 1999. The policy states the policy period was from June 17, 1999, to February 10, 2000. Thus, summary judgment for State Farm cannot be justified if there is some evidence showing that—at the time the policy was renewed—Nebraska was the state where DeWitt intended to keep her vehicle most often compared to any other state during the policy period. That evidence exists. DeWitt's deposition testimony suggests that at the time the policy was renewed, she intended to spend most of the time during the policy period attending college in Nebraska and that while doing so, she would keep the vehicle with her. Therefore, the court erred in granting summary judgment to State Farm.

CONCLUSION

We reverse the district court's grant of summary judgment to State Farm and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GERRARD and STEPHAN, JJ., not participating.

WRIGHT, J., concurring in the result.

I concur in the result. Neb. Rev. Stat. § 44-6408(1) (Reissue 2004) makes reference to "any motor vehicle principally garaged in this state." As the majority has stated, the term "principally garaged" is not difficult to define, but it makes the application of § 44-6408 difficult.

The requirement for underinsured motor vehicle coverage should be based upon where the vehicle is principally *operated* rather than where it is principally *garaged*, because it is the operation of the vehicle that creates the need for underinsured motor vehicle coverage.

KERI L. CHASE, APPELLEE, V. BEVERLY NETH, DIRECTOR OF THE NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

697 N.W.2d 675

Filed May 27, 2005. No. S-04-501.

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. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
5. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
6. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
7. **Constitutional Law: Statutes: Proof.** The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional.
8. **Constitutional Law: Search and Seizure.** The provisions of both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect against unreasonable seizures.
9. **Constitutional Law: Search and Seizure: Evidence.** Inasmuch as the Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, the exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect.
10. ____: ____: ____. Under the exclusionary rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure.

11. **Constitutional Law: Administrative Law: Motor Vehicles: Licenses and Permits: Revocation.** The Fourth Amendment exclusionary rule is inapplicable to administrative license revocation proceedings, except as it may apply indirectly through Neb. Rev. Stat. § 60-498.02(4)(a) (Supp. 2003).
12. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Blood, Breath, and Urine Tests.** Administrative license revocation is a civil remedy with a nonpunitive purpose. Administrative license revocation serves different purposes when it is imposed for refusal to submit to a chemical test. In the context of failing a chemical test, the purpose of administrative license revocation is limited to protecting public health and safety. In the context of refusal to submit to a chemical test, administrative license revocation both protects public health and safety and facilitates the gathering of evidence, which is yet another nonpunitive purpose.
13. **Motor Vehicles: Licenses and Permits: Revocation: Due Process.** Suspension of issued motor vehicle operators' licenses involves state action that adjudicates important property interests of the licensees. In such cases, the licenses are not to be taken away without that procedural due process required by the 14th Amendment.
14. **Administrative Law: Motor Vehicles: Licenses and Permits: Due Process.** Before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case.
15. **Administrative Law: Due Process: Notice: Evidence.** In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Reversed and remanded for further proceedings.

Jon Bruning, Attorney General, and Milissa Johnson-Wiles for appellant.

Russel L. Jones, of Jones Law Office, for appellee.

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

STEPHAN, J.

The district court for Lincoln County held that Neb. Rev. Stat. § 60-498.01 (Supp. 2003), which is part of the Nebraska administrative license revocation (ALR) procedure, violates due process rights when applied to persons who refuse to submit to a chemical test of their breath or blood because it does not allow such persons to raise Fourth Amendment challenges at the ALR hearing. The Department of Motor Vehicles filed this timely appeal. Based

upon our independent review, we reverse, and remand for further proceedings.

BACKGROUND

At approximately 1:20 a.m. on November 8, 2003, Nebraska State Patrol Trooper Matthew Naughtin observed a vehicle traveling on U.S. Highway 83 in Lincoln County, Nebraska, without its headlights illuminated. Naughtin stopped the vehicle, which was operated by Keri L. Chase. Naughtin observed that Chase seemed confused, and he detected the odor of alcohol. Naughtin asked Chase for her license, registration, and proof of insurance, but she was unable to produce these documents from among other documents in her purse. Naughtin then asked Chase to exit her vehicle and walk back to his patrol unit. Once inside the patrol unit, Naughtin again detected the odor of alcohol as Chase spoke to him.

Naughtin asked Chase if she had been drinking, and she replied that she had three " 'Grand Marniers boom boom boom.' " Naughtin administered several field sobriety tests, which Chase was unable to perform successfully. Naughtin then attempted to administer a preliminary breath test; Chase refused, despite Naughtin's explanation that refusal to take the test constituted a separate offense. At that point, Naughtin arrested Chase for driving under the influence (DUI) and transported her to the Great Plains Regional Medical Center in North Platte, Nebraska. He requested that she submit a blood sample for alcohol testing, again advising her that refusal to submit to the test was a separate chargeable offense. According to Naughtin, Chase refused to give a blood sample for the test.

Chase did not testify at the ALR hearing, but offered her affidavit stating that she refused to take the blood test because she had worked in the health care industry and knew there was a risk in taking blood samples. Chase averred that she wanted to verify the credentials of the person drawing the blood and verify that the person was using proper procedures. She averred that she was not given an opportunity to speak with the person because Naughtin just assumed she was refusing the blood test and that if she had been satisfied with the procedure and the credentials, she would have submitted to the test.

At the conclusion of the evidence, Chase's counsel argued to the hearing officer that her refusal to take the blood test was reasonable. In the alternative, counsel argued that because there was no evidence presented that Chase was driving a motor vehicle at a time when headlights would be required by Nebraska law, there was no reasonable suspicion to stop the vehicle.

On December 22, 2003, the hearing officer issued an order finding that Naughtin's initial stop of Chase's vehicle was reasonable; that Naughtin had probable cause to believe Chase had been operating a motor vehicle under the influence of alcohol, based on his observations of her physical condition, her performance on the field sobriety tests, and her admission that she had been drinking; and that a reasonable person in the position of Naughtin would believe that Chase had refused the chemical test. The hearing officer thus recommended that Chase's license be revoked. On December 23, the director of the Department of Motor Vehicles formally adopted the order of the hearing officer, and Chase's license was revoked for a period of 1 year. See Neb. Rev. Stat. § 60-498.02 (Supp. 2003).

Chase appealed to the district court, pursuant to the Administrative Procedure Act. In an order entered on March 26, 2004, the district court reversed, based upon its determination that Chase's right to due process was violated because the ALR statutes did not permit her to directly or indirectly challenge the validity of her arrest. The district court based its decision on "a logical extension of the rationale" contained in *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). The Department filed this timely appeal, as well as a notice of constitutional question pursuant to Neb. Ct. R. of Prac. 9E (rev. 2001).

ASSIGNMENT OF ERROR

The Department's sole assignment of error is that the district court erred in finding § 60-498.01 unconstitutional as it applies to cases where the motorist refuses to submit to a chemical test.

STANDARD OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for

errors appearing on the record. *Hass v. Neth, supra*; *American Legion v. Nebraska Liquor Control Comm.*, 265 Neb. 112, 655 N.W.2d 38 (2003). 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] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Hass v. Neth, supra*; *In re Application of Lincoln Electric System*, 265 Neb. 70, 655 N.W.2d 363 (2003).

[4] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *Hass v. Neth, supra.*

ANALYSIS

Applicable Statutes

At the time of Chase's arrest on November 8, 2003, Neb. Rev. Stat. § 60-6,197(1) (Supp. 2003) provided:

> 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.

Refusal to submit to such testing subjects the motorist to criminal prosecution as well as to ALR procedures. § 60-6,197(3) and (4). Regarding the latter, § 60-498.01(2) provided in relevant part:

> If a person arrested pursuant to section 60-6,197 refuses to submit to the chemical test of blood, breath, or urine required by that section . . . the arresting peace officer . . . shall verbally serve notice to the arrested person of the intention to immediately confiscate and revoke the operator's license of such person and that the revocation will be automatic thirty days after the date of arrest unless a petition for hearing is filed within ten days after the date of arrest . . . . The arresting peace officer shall within ten days

> forward to the director a sworn report stating (a) that the person was arrested . . . and the reasons for such arrest, (b) that the person was requested to submit to the required test, and (c) that the person refused to submit to the required test.

Section 60-498.01(6)(c) provided that if an ALR revocation hearing was requested in such a situation, the issues under dispute were limited to:

> (A) Did the peace officer have probable cause to believe the person was operating or in the actual physical control of a motor vehicle in violation of section 60-6,196 or a city or village ordinance enacted pursuant to such section; and
>
> (B) Did the person refuse to submit to or fail to complete a chemical test after being requested to do so by the peace officer[.]

Although the hearing officer in this case addressed the validity of the traffic stop which preceded Chase's arrest and her refusal to submit to alcohol testing, neither party argues that the hearing officer was permitted or required to do so under § 60-498.01(6)(c). We conclude that he was not.

This statutory restriction of the scope of the ALR hearing also applies to the circumstance in which a motorist submits to a chemical test of blood or breath which discloses an alcohol concentration greater than the lawful limit. *Id.*; *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). In that instance, however, the relevant statutes also provide for dismissal of the ALR proceeding or reinstatement of a license administratively revoked if there is no criminal prosecution for DUI or if such charges are dismissed or the defendant found not guilty after trial. § 60-498.02(4)(a). Thus, administrative revocation for DUI is contingent upon a successful prosecution of the motorist in a criminal DUI proceeding in which Fourth Amendment issues may be raised. *Hass v. Neth, supra.* We noted in *Hass* that because the Fourth Amendment exclusionary rule could prevent a conviction in a criminal case, it would also "indirectly [determine] the outcome of the ALR proceeding." 265 Neb. at 327, 657 N.W.2d at 20. Thus, we framed the issue presented in *Hass* as "not based on the 4th Amendment," but, rather, "whether 14th Amendment due process is violated by excluding 4th Amendment issues from the ALR proceeding and reserving those issues for the criminal DUI proceeding." 265 Neb.

at 327, 657 N.W.2d at 20. We concluded that there was no due process violation.

There is no similar statutory linkage between an ALR and a criminal proceeding based upon a motorist's refusal to submit to chemical testing. The statutes permit an ALR in this circumstance regardless of whether criminal charges are filed or successfully prosecuted. As a result of an amendment to § 60-498.01, which became operative on October 1, 2003, the State is no longer required by statute to establish the validity of the arrest in order to obtain an ALR. 2003 Neb. Laws, L.B. 209. Cf. *Young v. Neth*, 263 Neb. 20, 24, 637 N.W.2d 884, 888 (2002) (holding previous version of statute required ALR to be based on "valid arrest"). Thus, the issue presented in this case is whether 14th Amendment due process is violated by the complete exclusion of 4th Amendment issues from the ALR proceedings. Resolution of that issue necessarily requires that we determine whether the Fourth Amendment exclusionary rule applies to a civil ALR proceeding, an issue which we identified but were not required to reach in *Hass*.

[5-7] In considering the constitutionality of the statutes at issue in this case, we are guided by certain well-established principles and presumptions. The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *Hass v. Neth, supra*; *State ex rel. Stenberg v. Omaha Expo. & Racing*, 263 Neb. 991, 644 N.W.2d 563 (2002). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Hass v. Neth, supra*; *Andrews v. Schram*, 252 Neb. 298, 562 N.W.2d 50 (1997). The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional. *Hass v. Neth, supra*; *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996).

Applicability of Exclusionary Rule

[8-10] The provisions of both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect against unreasonable seizures. *State v. Allen, ante* p. 69, 690 N.W.2d 582 (2005); *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000). The U.S. Supreme Court has held that the "wrong condemned by the [Fourth] Amendment is 'fully accomplished' by the unlawful search or seizure itself." *United States*

v. Leon, 468 U.S. 897, 906, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), quoting *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974). Inasmuch as the "Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands," the exclusionary rule "operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect." *Arizona v. Evans*, 514 U.S. 1, 10, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995). Under the exclusionary rule, "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure." *United States v. Calandra*, 414 U.S. at 347. See *State v. Allen, supra.*

A seizure occurred when Naughtin stopped the vehicle operated by Chase and requested that she produce her license, registration, and proof of insurance. See, *State v. Allen, supra*; *State v. Burdette, supra.* Chase contends that the traffic stop was an unreasonable seizure because Naughtin did not have legal grounds to initiate the stop and that all subsequent proceedings are thus invalidated by the exclusionary rule. She argues that the ALR statutes are unconstitutional as applied to her because they do not permit her to raise this defense. The State argues that the Fourth Amendment exclusionary rule does not apply to civil ALR proceedings and that therefore, the ALR statutes cannot be held unconstitutional as applied to motorists who refuse to give consent to alcohol testing.

In *United States v. Janis*, 428 U.S. 433, 96 S. Ct. 3021, 49 L. Ed. 2d 1046 (1976), the U.S. Supreme Court considered whether the exclusionary rule could be applied in a federal civil tax proceeding to exclude evidence seized by state officers pursuant to a defective search warrant. The Court noted that it had never previously applied the rule "to exclude evidence from a civil proceeding, federal or state." 428 U.S. at 447. It recognized that the " 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct.' " 428 U.S. at 446, quoting *United States v. Calandra, supra.* It further stated that " 'in sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.' " 428

U.S. at 446. Declining to extend the exclusionary rule to the federal civil proceeding, the Court in *Janis* reasoned that the extension of the rule would hamper the enforcement of admittedly valid laws and would render unavailable concededly relevant and reliable evidence. It determined that there was no need for a deterrent in the civil context because law enforcement is already " 'punished' " by the exclusion of the evidence in a criminal trial. 428 U.S. at 448. The Court stated, "In short, we conclude that exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion." 428 U.S. at 454. Applying this same general balancing test, the Court has similarly refused to expand the applicability of the exclusionary rule beyond criminal trials. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984) (exclusionary rule not applicable to civil deportation proceeding); *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974) (exclusionary rule not applicable to federal grand jury proceeding). But see *Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 85 S. Ct. 1246, 14 L. Ed. 2d 170 (1965) (exclusionary rule applied to civil forfeiture proceeding where forfeiture was penalty for criminal offense).

A majority of state courts considering the issue has held that the Fourth Amendment exclusionary rule is inapplicable to ALR proceedings. See, generally, Annot., 23 A.L.R.5th 108 (1994). In most instances, courts have applied the balancing test articulated in *Janis*. For example, in *Tornabene v. Bonine ex rel. Highway Dept.*, 203 Ariz. 326, 54 P.3d 355 (Ariz. App. 2002), the court reasoned that because evidence obtained in violation of the Fourth Amendment would be inadmissible in a criminal proceeding, application of the rule in a civil license suspension proceeding would have only a marginal deterrent effect on police conduct. In addition, the court reasoned that applying the exclusionary rule in the administrative context would unnecessarily complicate the system and exclude otherwise reliable evidence that the motorist was driving while intoxicated. Addressing the lower court's finding that not applying the exclusionary rule to ALR proceedings " 'would allow the State virtually the unlimited

right to stop citizens and force them to take a breathaly[z]er test for any reason or for no reason at all,' " the court stated:

> First, law enforcement officers are only required to have a reasonable, articulable suspicion of criminal activity, not the higher standard of probable cause, before making an investigatory stop. . . . Second, the [applicable Arizona] statute plainly requires that law enforcement officers have "reasonable grounds to believe" that a motorist was driving or in actual physical control of a motor vehicle while under the influence of alcohol or drugs before requesting that the motorist submit to testing. . . . Finally, we find it unlikely that law enforcement officers, lacking any reasonable suspicion of DUI, will assign scarce resources to randomly stop motorists on the chance that the officers will develop reasonable grounds to permit them to request the motorist to submit to testing.

(Citations omitted.) *Tornabene v. Bonine ex rel. Highway Dept.*, 203 Ariz. at 336, 54 P.3d at 365. Other courts have similarly concluded that in a civil ALR contest, the marginal deterrent effect of the exclusionary rule is outweighed by the substantial societal cost of losing reliable information used to remove intoxicated drivers from the highways. *State v. Brabson*, 976 S.W.2d 182 (Tex. Crim. App. 1998); *Powell v. Secretary of State*, 614 A.2d 1303 (Me. 1992); *Green v. Director of Revenue*, 745 S.W.2d 818 (Mo. App. 1988); *Glass v. Commonwealth, Dept. of Transp., Bur. of T. S.*, 460 Pa. 362, 333 A.2d 768 (1975). Other courts reaching the same result have noted that the ALR statutes at issue did not require the State to establish the validity of the arrest. *Jacobs v. Director, Div. of Motor Vehicles*, 149 N.H. 502, 823 A.2d 752 (2003); *Beavers v. State, Dep't of Mtr. Vehicles*, 109 Nev. 435, 851 P.2d 432 (1993).

There is also a minority view on this issue. In *State v. Lussier*, 171 Vt. 19, 23, 757 A.2d 1017, 1020 (2000), the court concluded that the Vermont Legislature "assumed that a constitutional stop would be a necessary predicate" to a finding of reasonable grounds for suspicion of DUI under Vermont's ALR statutes. The court applied a balancing test similar to that used in *United States v. Janis*, 428 U.S. 433, 96 S. Ct. 3021, 49 L. Ed. 2d 1046 (1976), but concluded that the deterrent effect of the exclusionary rule "is

just as necessary to deter unlawful police conduct in the context of civil suspension proceedings as it is in related criminal [DUI] proceedings." 171 Vt. at 32, 757 A.2d at 1026. See, also, *People v. Krueger*, 208 Ill. App. 3d 897, 567 N.E.2d 717, 153 Ill. Dec. 759 (1991) (statutory language required application of exclusionary rule in civil ALR proceeding); *Pooler v. MVD*, 306 Or. 47, 755 P.2d 701 (1988) (same); *Olson v. Com'r of Public Safety*, 371 N.W.2d 552 (Minn. 1985) (assuming without rationale that exclusionary rule applied in civil ALR proceeding).

[11,12] We adopt the majority view and hold that the Fourth Amendment exclusionary rule is inapplicable to ALR proceedings, except as it may apply indirectly through § 60-498.02(4)(a). See *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). As noted, the statutes in effect at the time of Chase's arrest do not require the State to establish the validity of the arrest, that requirement having been specifically removed from the statutes by the 2003 amendments. Unlike the statutory scheme before us in *Hass*, which operated as a form of statutory exclusionary rule, the Legislature did not provide that an ALR for refusal to submit to a chemical test was dependent upon a successful criminal prosecution for that offense. We have held that an ALR is a civil remedy with a nonpunitive purpose and that

> [a]dministrative license revocation serves different purposes when it is imposed for refusal to submit to a chemical test. In the context of failing a chemical test, the purpose of administrative license revocation is limited to protecting public health and safety. In the context of refusal to submit to a chemical test, administrative license revocation both protects public health and safety and facilitates the gathering of evidence, which is yet another nonpunitive purpose.

State v. Howell, 254 Neb. 247, 256, 575 N.W.2d 861, 867 (1998). See, also, *Schindler v. Department of Motor Vehicles*, 256 Neb. 782, 593 N.W.2d 295 (1999). We agree with those courts which have concluded that extension of the exclusionary rule to this type of civil proceeding would accomplish little in terms of deterring improper police conduct, given the applicability of the rule in criminal proceedings. We also agree that any marginal deterrent value would be outweighed by the public health and

safety interests which the ALR statutes are intended to protect. Thus, we conclude that the absence of a statutory procedure for challenging the validity of the traffic stop on Fourth Amendment grounds does not render the ALR statutes unconstitutional as applied to motorists who refuse to submit to a chemical test of alcohol concentration.

DUE PROCESS

[13] The remaining question is whether the provisions of the ALR statutes pertaining to refusal to submit satisfy Chase's right to due process. The first step in this analysis is to identify a property or liberty interest entitled to due process protections. *Hass v. Neth, supra*; *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). Suspension of issued motor vehicle operators' licenses involves state action that adjudicates important property interests of the licensees. In such cases, the licenses are not to be taken away without that procedural due process required by the 14th Amendment. *Id.*

[14,15] Once it is determined that due process applies, the question remains what process is due. *Id.* Though the required procedures may vary according to the interests at stake in a particular context, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Id.* Thus, before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case. *Id.* In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board. *Id.*

In *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), the U.S. Supreme Court set forth three factors to be considered in resolving an inquiry into the specific dictates of due process: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the

fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The private interest at issue in this case is the driver's interest in continued possession of a motor vehicle operator's license. A driver's interest in his or her driving privileges is significant in today's society, as the loss of a driver's license may entail economic hardship and personal inconvenience. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003); *Marshall v. Wimes, supra*. The second factor to be considered under the *Mathews* analysis is the risk of an erroneous determination and the value, if any, of alternative procedures. In *Hass*, this involved the risk of the revocation of a driver's license despite the existence of a potentially valid Fourth Amendment challenge to the driver's arrest. *Hass v. Neth, supra*. Here, the nature of risk is substantially different because the Fourth Amendment exclusionary rule does not apply and there is no statutory correlation between an ALR and a criminal prosecution for refusal to submit. In this context, we must consider the risk that a license could be administratively revoked despite the existence of a potentially valid statutory defense. Because the current statutory scheme gives the motorist a reasonable time and opportunity to present evidence regarding the accusations and any potential statutory defense, we conclude that this risk is slight, if it exists at all. The third and final factor to be considered in a *Mathews* analysis is the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Hass v. Neth, supra*. Here, one governmental interest is the same as that articulated in *Hass*: a "substantial governmental interest in protecting public health and safety by removing drunken drivers from the highways." 265 Neb. at 329, 657 N.W.2d at 21. In addition, the government has an interest in enforcement of its implied consent law so as to facilitate the gathering of evidence necessary to identify those motorists who are under the influence and thus pose a risk to public health and safety. See *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998). Considering each of these factors, we conclude that the administrative hearing and judicial review provisions of § 60-498.01 provided Chase with meaningful notice and an opportunity to be heard, and thus fully comport with due process. See *Mathews v. Eldridge, supra*.

CONCLUSION

For the reasons set forth above, we conclude the district court erred in determining that the absence of a statutory procedure to challenge a motorist's arrest in an ALR case based upon postarrest refusal to submit constitutes a denial of due process and that the applicable ALR statutes satisfied Chase's right to due process. The judgment of the district court is therefore reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
DONALD P. SANDERS, APPELLANT.

697 N.W.2d 657

Filed May 27, 2005. No. S-04-581.

1. **Rules of Evidence: Appeal and Error.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
2. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
3. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of erroneous jury instructions, the appellant has the burden to show that the questioned instructions were prejudicial or otherwise adversely affected a substantial right of the appellant.
4. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
5. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. An abuse of

discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result.

6. **Constitutional Law: Statutes.** A facial challenge is a challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face.
7. **Constitutional Law: Juries: Discrimination: Proof.** In order to establish a prima facie violation of the fair-cross-section requirement under the Sixth Amendment, a defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community, (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.
8. **Statutes: Intent.** In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
9. **Rules of Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Rev. Stat. § 27-401 (Reissue 1995) and prejudice under Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision regarding them will not be reversed absent an abuse of discretion.
10. **Jury Instructions: Appeal and Error.** The failure to object to instructions after they have been submitted to counsel for review or to offer more specific instructions if counsel feels the court-tendered instructions are not sufficiently specific will preclude raising an objection on appeal, unless there is a plain error indicative of a probable miscarriage of justice.
11. **Jury Instructions.** In giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute.
12. **Motions to Dismiss: Directed Verdict: Waiver: Convictions: Appeal and Error.** A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution, and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict, but may challenge sufficiency of the evidence for the defendant's conviction.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, Shawn Elliott, and Andrea Snowden for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Following a jury trial in the district court for Lancaster County, Donald P. Sanders was convicted of first degree sexual assault and procuring alcohol for a minor. Sanders was sentenced to 5 years' probation on the sexual assault conviction and 90 days in jail and a $500 fine on the alcohol conviction. Prior to trial, Sanders challenged the jury selection process in Lancaster County. The court overruled Sanders' jury selection challenge. During the course of the proceedings, Sanders unsuccessfully raised issues relating to the admission of evidence. Following trial, Sanders filed a motion for new trial, which was denied. On appeal, Sanders challenges the correctness of the jury instructions and various rulings. We affirm.

STATEMENT OF FACTS

On September 12, 2002, the State filed an information charging Sanders with first degree sexual assault and procuring alcohol for a minor. The statute pertaining to procuring alcohol is found at Neb. Rev. Stat. § 53-180 (Reissue 2004), and the first degree sexual assault statute is found at Neb. Rev. Stat. § 28-319 (Reissue 1995). Section 28-319(1) provides as follows:

> Any person who subjects another person to sexual penetration (a) without consent of the victim, or (b) who knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct, or (c) when the actor is nineteen years of age or older and the victim is less than sixteen years of age is guilty of sexual assault in the first degree.

The charges in this case grew out of an incident which occurred between Sanders and the alleged victim, J.F., on July 7, 2002. In the charge relating to first degree sexual assault, the State alleged in the information that Sanders did "subject [J.F.] to sexual penetration without the consent of the victim" or "knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct."

Prior to trial, Sanders filed a motion in limine requesting, inter alia, that the State be prohibited from offering evidence concerning "whether the alleged victim suffered any injuries as a result

of the commission of the alleged offense, and any opinion that said injuries are inconsistent with a consensual sexual act." In particular, Sanders objected to expected testimony by Jill Ross, a nurse who had examined J.F. after the alleged assault. Following a hearing, the trial court denied Sanders' motion to the extent it requested that Ross "not be permitted to testify about observations she made of injuries to the alleged victim" but granted the motion to the extent it sought "to prevent . . . Ross from rendering any opinion about the cause or source of the injuries."

Also prior to trial, on April 7, 2003, Sanders filed a motion entitled "Motion for a Hearing on Whether § 25-1628 is Constitutional." Neb. Rev. Stat. § 25-1628 (Reissue 1995) generally provides for the manner in which jury lists are assembled from voter registration lists and motor vehicle operator lists. At the time this motion was filed, no trial date had been set and jury selection had not begun. Trial eventually began on January 20, 2004.

In the April 7, 2003, motion, Sanders requested "a hearing to determine whether the manner in which the composition of a jury venire is determined by Neb. Rev. Stat. § 25-1628 is constitutional." Sanders, who is African-American, generally claimed that African-Americans were underrepresented on juries. In the motion, Sanders referenced The Nebraska Minority and Justice Task Force Final Report, State Justice Inst. (2003), as support for his motion. He also asserted that he had "a constitutional right to a jury which is comprised of a fair cross section of the community." Sanders requested a hearing on his motion. On April 9, the court held a hearing on various motions including Sanders' "Motion for a Hearing on Whether § 25-1628 is Constitutional." The court ordered an evidentiary hearing on the motion and set a schedule for discovery.

On April 18, 2003, Sanders filed a "Supplemental Motion to Discover," in which he requested access to (1) the current jury pool list for Lancaster County and the pool lists for 2000 through 2002; (2) practice, policies, and regulations governing the manner in which a jury pool is created for any jury convened in the district court; and (3) jury pool questionnaire forms maintained by the jury commissioner for all individuals called for jury service in 2000 through 2003. On May 21, the court ruled on the discovery motion. The court noted that Neb. Rev. Stat. § 25-1635 (Reissue

1995) made it unlawful for the jury commissioner and court officers to disclose the identity of jurors without court order and that good cause must be shown to warrant such disclosure. The court concluded that while there was good cause for disclosure of the master jury list, there was not good cause to disclose the identity of jurors in individual cases. The court reasoned that

> if there is no significant difference in the racial makeup of the Master Jury Pool compared to the racial make up of [Lancaster] county, and the methods used to select the jury venire for a particular case are random at each step, the result will satisfy the requirements of due process even though a particular jury venire, or even several jury venire [sic], may not be representative of the racial make up of the community.

The court therefore stated that before good cause could be established to disclose the identity of jurors, "there must be a showing that either the Master Jury Pool is not representative, or that one of the steps taken to select a jury venire in a particular case is not random."

On May 30, 2003, Sanders filed a motion entitled "Motion Pursuant to Neb. Rev. Stat. § 25-1637." Neb. Rev. Stat. § 25-1637 (Reissue 1995) generally provides that a party may move to stay proceedings, or quash the entire jury panel or seek other relief based on a substantial failure to comply with the statutory jury selection processes "in selecting the grand or petit jury." In the May 30 motion, Sanders again asserted that The Nebraska Minority and Justice Task Force Final Report presented a legitimate issue as to whether or not minorities are underrepresented on juries, and he therefore requested a hearing to determine whether Lancaster County's system of selecting juries violated his statutory rights.

A hearing on Sanders' jury challenges was held on October 14, 2003. Evidence at the hearing generally indicated the following regarding the jury selection process used in Lancaster County: Each year, a master jury list is prepared by the jury commissioner by electronically combining the voter registration list of Lancaster County with the drivers' license records for Lancaster County maintained by the Department of Motor Vehicles (DMV). Duplicate names are identified and eliminated. The remaining

names make up the master jury list. The race of the driver is not contained in the data communicated by the DMV to the jury commissioner, and race is not contained in voter registration records. Each juror on the master jury list is assigned a unique juror number. Thereafter, the jury commissioner, in the presence of a district judge, selects a random digit from 0 to 9, literally by drawing a piece of paper from a hat. The jury commissioner then directs the county information services division to compile a smaller list composed of those persons whose unique juror number ends in the digit selected from the hat. This list is called the annual jury list and is the group from which jurors are selected for the term year. About a month before a jury term is to begin, the jury commissioner requests from the information services division the names of approximately 700 randomly selected jurors from the annual list. Questionnaires designed to determine if the selected persons statutorily qualify for jury duty are then sent to those persons. The trial court found that 25 to 50 names are eliminated from the jury term panel due to inaccurate addresses. Others are eliminated because of specific exclusions permitted by statute. About a week prior to trial, the jury commissioner requests the information services division to again electronically randomly select the jury venire for a particular trial. The jurors selected are then ordered to appear on the first day of trial.

Following the hearing on Sanders' jury-related motions, the court on October 27, 2003, overruled Sanders' motion to declare § 25-1628 unconstitutional and his motion pursuant to § 25-1637. The court noted evidence which showed that pursuant to 2000 census data, the percentage of persons over age 18 in Lancaster County who were nonwhite was 8.5 percent. Evidence also showed that while race could not be determined for 24 percent of those on the master jury list for Lancaster County, of those who could be identified, 7.5 percent were nonwhite. Sanders' expert testified that if all the persons on the master jury list whose race could not be identified were white, the percentages would not change significantly. The court concluded that Sanders had not presented evidence that the list was not reasonably representative of the total population of Lancaster County. The court further concluded that there was no evidence to suggest anything other than random selection of jurors from the master jury list for jury trials

and that Sanders could not show any aspect of the selection process that had a racial bias. The court therefore rejected Sanders' motions, concluding that based on the evidence presented by Sanders, "the court cannot find that NEB. REV. STAT. §25-1628 is unconstitutional or that the jury commissioner has failed to follow the statutes in the preparation of the juries in this county."

Trial began on January 20, 2004. J.F. testified at trial that at the time of the incident, she was 20 years old and was a student at the University of Nebraska. J.F. worked at the same nightclub as Sanders, and J.F. thought that Sanders was the manager of the club and her supervisor. Prior to July 7, 2002, Sanders and J.F. had a friendly working relationship but not a romantic or sexual relationship. Sanders had on occasion given J.F. rides home from work because J.F. did not have a car. J.F. testified that at the time of the incident, she was not interested in having any relationship with Sanders other than the working relationship they had.

After the nightclub closed at 1 a.m. on July 7, 2002, J.F. worked with other employees cleaning and doing other typical postclosing tasks. When the work was finished, J.F. was preparing to leave with a coworker when Sanders asked her to stay so that he could teach her to tend bar. The coworker left after Sanders told him that Sanders could give J.F. a ride home. J.F. and Sanders remained in the bar talking, and Sanders showed her how to mix drinks. J.F. recalled consuming only one full drink. J.F. did not recall what happened after she finished her drink. She remembered nothing until she awoke later that morning on the floor of the bar wearing nothing other than a shirt; her pants, underwear, and shoes were off. She saw Sanders sleeping on a sofa, and he was also naked from the waist down. J.F. felt pain in her vaginal area, and because of the pain, she thought she had been sexually penetrated. She had not felt the pain prior to that morning.

J.F. got dressed and left the club. She called another employee to pick her up and take her home. J.F. also called a friend who met her at her apartment, and after J.F. told him what had happened, he called the police to report a sexual assault. The police arrived and questioned J.F. and took her to a hospital. J.F. concluded her direct testimony by stating that she had never wanted to engage in sexual intercourse with Sanders and that she did not give her consent on July 7, 2002. On cross-examination, J.F. acknowledged

that while testifying at her deposition, she had said that because she did not remember the time during which the alleged assault occurred, it was possible that she consented but that she did not think she would have.

At the hospital, J.F. was examined by Ross. Ross testified at trial regarding her training and experience as a nurse and testified that she had received specialized training as a sexual assault nurse examiner. Ross testified that in her examination of J.F., she found various abrasions, redness, and bruising in the vaginal area. Toward the end of the examination, at approximately 3 p.m., Ross took a blood specimen from J.F.

The forensic chemist who tested J.F.'s blood testified that her blood alcohol level was .10 grams per hundred milliliters. The chemist also tested J.F.'s urine and the contents of drinking glasses that had been taken from the nightclub. The chemist testified that no drugs could be found in either sample. He testified that a urine test is the best way to test for the presence of a "date rape" drug, such as "GHB" or "Rohypnol," but that no such drugs were found in J.F.'s urine sample.

Sanders unsuccessfully moved to dismiss the sexual assault charge at the end of the State's case, and he thereafter testified in his defense at trial. Sanders testified that he worked as a disk jockey at the nightclub and managed marketing for the club. Sanders testified that in the early hours of July 7, 2002, he taught J.F. how to mix various drinks. Depending on how the drinks turned out, they would either share them or throw them out. He estimated that they shared two to six drinks. Sanders admitted that he knew that J.F. was under 21. Sanders testified that J.F. appeared to be enjoying herself; that in addition to mixing drinks, he played some music and J.F. occasionally danced to the music; and that they ate some snack food. According to Sanders, between 6 and 6:30 a.m., the two ended up in a seating area of the nightclub. J.F. sat on his lap, and they talked. They began to kiss and hug, and eventually they attempted to have consensual sexual intercourse. He testified, however, that he was not fully able to penetrate J.F. because he was having difficulty maintaining an erection. They cuddled and talked for some time afterward, and when J.F. got up to use the restroom, he fell asleep on the couch. By the time he woke up, J.F. had left. On cross-examination, Sanders

admitted that he had penetrated J.F. and that such testimony was contrary to what he had originally told police investigators. He attributed his original denial to nervousness and embarrassment over being required to discuss the situation, including his inability to maintain an erection during the encounter.

Sanders moved for "directed verdict" at the close of his defense. The motion was overruled. The jury was instructed, and the case was submitted to the jury. On January 23, 2004, the jury returned verdicts finding Sanders guilty of first degree sexual assault and procuring alcohol for a minor. Sanders moved for the court to reject the verdicts as being the result of racial bias. The court took the motion under advisement and scheduled a hearing for January 27. At the hearing, the court indicated that it considered the motion to be a renewed motion to dismiss and announced that after reviewing the record, the court found no evidence of racial bias and therefore accepted the verdicts and found Sanders guilty on both counts.

Sanders filed a motion for new trial. In ruling on the motion for new trial, the court considered the issue of whether the jury instruction regarding the elements of first degree sexual assault was erroneous. The court concluded that the instruction was not erroneous and overruled Sanders' motion for new trial. The court subsequently sentenced Sanders to 5 years' probation on the first degree sexual assault conviction and to a jail sentence of 90 days and a fine of $500 on the conviction for procuring alcohol for a minor. Sanders appeals.

ASSIGNMENTS OF ERROR

Sanders asserts that the district court erred in (1) denying him access to information regarding individuals called for jury service as part of his challenge to the jury selection process; (2) denying his challenges to the jury selection process; (3) permitting testimony by Ross when the State had not established foundation or relevance for such testimony; (4) instructing the jury to consider the "without consent" element of first degree sexual assault; (5) failing to instruct the jury that the State must prove that J.F. suffered from a "significant abnormality," such as severe intoxication, and that Sanders knew of such "abnormality"; (6) "failing to direct a verdict" in Sanders' favor at the close of the

State's case on the charge of first degree sexual assault; and (7) imposing an excessive sentence on his conviction for procuring alcohol for a minor.

STANDARDS OF REVIEW

[1] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

[2] Whether jury instructions given by a trial court are correct is a question of law. *State v. Al-Sayagh*, 268 Neb. 913, 689 N.W.2d 587 (2004). 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.*

[3] In an appeal based on a claim of erroneous jury instructions, the appellant has the burden to show that the questioned instructions were prejudicial or otherwise adversely affected a substantial right of the appellant. *Wisinski, supra.*

[4] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004).

[5] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Banes*, 268 Neb. 805, 688 N.W.2d 594 (2004). An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result. *Id.*

ANALYSIS

Jury Challenge.

In his first two assignments of error, Sanders asserts that the district court erred in denying him access to information regarding individuals called for jury service and in ultimately denying his challenges to the jury selection process. As noted below, Sanders' challenge to the constitutionality of § 25-1628 must be deemed a facial challenge. Further, his challenge under § 25-1637 is properly limited to the manner in which the jury selection process was carried out as reflected in his case. We conclude that Sanders failed to establish any constitutional violation or any failure to follow statutes in the jury selection process and that therefore, the district court did not err in denying his challenges. We further conclude that the district court did not err in denying Sanders access to additional juror information because Sanders did not demonstrate that such information was necessary for evaluation of his challenges.

[6] We have described a facial challenge as a "challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face." *State v. Hynek*, 263 Neb. 310, 315, 640 N.W.2d 1, 6 (2002). A facial challenge is contrasted to a challenge to a statute "as applied" to the individual. See, e.g., *Van, supra*; *State v. VanAckeren*, 263 Neb. 222, 639 N.W.2d 112 (2002). At the time Sanders challenged the constitutionality of § 25-1628, no trial date had been set, and it was uncertain which master jury list would eventually be applied to his trial. The master jury list compiled pursuant to the manner prescribed in § 25-1628 had not in fact been applied to Sanders, and therefore, the proper consideration of Sanders' motion challenging the constitutionality of § 25-1628 is limited to a facial challenge.

Regarding Sanders' facial challenge to the constitutionality of § 25-1628, we note that this court has previously rejected a challenge to § 25-1628 and the general statutory scheme for jury selection. *State v. Garza*, 241 Neb. 934, 492 N.W.2d 32 (1992). *Garza* involved the statute under review pursuant to which voter registration and licensed driver lists serve as the source for the master jury list. In *Garza*, we stated that " '[i]t is difficult to conceive of a fairer or more practical method of selecting jurors than that used in Nebraska.' " 241 Neb. at 954, 492 N.W.2d at 46-47,

quoting with approval *State v. Gutierrez*, 187 Neb. 383, 191 N.W.2d 164 (1971).

[7] We read Sanders' constitutional challenge to § 25-1628 as an assertion that the statute violates the fair-cross-section requirement under the Sixth Amendment. See, *Duren v. Missouri*, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979); *Garza, supra.* In *Duren*, the U.S. Supreme Court observed that in order to establish a prima facie violation of the fair-cross-section requirement under the Sixth Amendment as to venires, a defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community, (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process. The U.S. Supreme Court described "systematic exclusion" as exclusion "inherent in the particular jury-selection process utilized." 439 U.S. at 366.

Duren involved a constitutional challenge to venires from which juries were selected, whereas Sanders' challenge in this case is a challenge to § 25-1628 and the method of preparing master jury lists. As courts elsewhere have done, we logically extend and apply the fair-cross-section concepts of *Duren* to Sanders' challenge to the preparation of the master jury list pursuant to § 25-1628. See, similarly, *State v. Cienfuegos*, 144 Wash. 2d 222, 25 P.3d 1011 (2001) (applying *Duren* standards in challenge to master jury list); *People v. Currie*, 87 Cal App. 4th 225, 104 Cal. Rptr. 2d 430 (2001) (applying *Duren* standards and stating that Sixth Amendment rights apply at every stage of jury selection process, including compilation of master list of potential jurors and selection of venires from that list). Contrary to Sanders' claims that minorities were underrepresented, the evidence showed that minorities on the master list were fairly represented in relation to the community. In addition, the evidence presented regarding Lancaster County's procedures for calling jurors from the master jury list failed to show exclusion of minorities much less "systematic exclusion." Sanders' evidence did not show that § 25-1628 violated the fair-cross-section requirement of the Sixth Amendment or that there is "no valid application" of § 25-1628.

We conclude that the court did not err in rejecting Sanders' constitutional challenge to § 25-1628.

Sanders also asserted a challenge under § 25-1637. Section 25-1637(1) provides:

> A party may move to stay the proceedings, to quash the entire panel, or for other appropriate relief on the ground of substantial failure to comply with Chapter 25, article 16, in selecting the grand or petit jury. Such motion shall be made within seven days after the moving party discovered or by the exercise of diligence could have discovered the grounds for such motion, and in any event before the petit jury is sworn to try the case.

[8] By its term, § 25-1637(1) provides that a party may move for various forms of relief based on a failure to comply with chapter 25, article 16, of the Nebraska Revised Statutes, where such failure manifests itself in connection with "selecting the grand or petit jury." It is a familiar canon of statutory construction that in construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless. *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004). Given the presence of the phrase "in selecting the grand or petit jury," we determine that a motion brought by a party under § 25-1637(1) must be triggered by a perceived failure to comply with chapter 25, article 16, as evidenced by the selection of a particular grand or petit jury. There is no indication of the use of a grand jury in this case and the specific jury which ultimately heard this case was not yet in the process of being selected when Sanders filed his motion. As such, Sanders' motion made under § 25-1637 was premature. Therefore, we conclude that the court did not err in rejecting Sanders' challenge under § 25-1637.

Sanders also asserts that the district court erred in denying his request for discovery of additional information regarding jurors called for jury service. The district court in this case concluded that pursuant to § 25-1635, such information could not be disclosed except for good cause and that good cause had not been demonstrated. The district court did not err in these determinations.

Section 25-1635 provides as follows:

> It shall be unlawful for a jury commissioner or the officer in charge of the election records, or any clerk or deputy thereof, or any person who may obtain access to any record showing the names of persons drawn to serve as grand or petit jurors to disclose to any person, except to other officers in carrying out official duties or as herein provided, the name of any person so drawn or to permit any person to examine such record or to make a list of such names, except under order of the court. The application for such an order shall be filed in the form of a motion in the office of the clerk of the district court, containing the signature and residence of the applicant or his [or her] attorney and stating all the grounds on which the request for such order is based. Such order shall not be made except for good cause shown in open court and it shall be spread upon the journal of the court. Any person violating any of the provisions of this section shall be guilty of a Class IV felony. Notwithstanding the foregoing provisions of this section, the judge or judges in any district may, in his [or her] or their discretion, provide by express order for the disclosure of the names of persons drawn from the revised key number list for actual service as grand or petit jurors.

We agree with the district court that Sanders' request for discovery in this case can be considered an application for an order requiring disclosure of potential juror names under § 25-1635. We also agree that such an order shall not be made except for good cause shown. We note for completeness that § 25-1635 elsewhere provides that "the judge or judges in any district may, in his [or her] or their discretion, provide by express order for the disclosure of the names of persons drawn from the revised key number list for actual service as grand or petit jurors." However, because Sanders requested the information pursuant to the first portion of § 25-1635, the present case is controlled by the first portion of the statute wherein good cause must be shown and not under the last portion of § 25-1635 wherein judges may provide for disclosure in their discretion.

Section 25-1628 is limited to preparation of the master jury list, and therefore Sanders' constitutional challenge to § 25-1628 was limited to preparation of the master jury list. It follows that

production of the additional information Sanders sought concerning jury selection procedures after the compilation of the master jury list was not warranted. We further note that whether or not the requested information would be relevant to a proper challenge under § 25-1637, as discussed above, Sanders' motion made under § 25-1637 was premature, and therefore good cause for discovery was not shown. We conclude that the court did not err in rejecting Sanders' request under § 25-1635 for discovery of additional information regarding jurors called for service.

Testimony of Nurse Ross.

Sanders asserts that the district court erred in admitting certain testimony of Ross over his objections on grounds of foundation and relevance. We determine that the court did not err in admitting Ross' testimony.

Ross was the nurse who examined J.F. on the afternoon following the alleged assault. Ross testified at trial regarding her qualifications as a nurse and her specialized training as a sexual assault nurse examiner. She also testified regarding her examination of J.F. and her observations, which included abrasions, redness, and bruising in J.F.'s vaginal area. Prior to trial, Sanders filed a motion in limine in which he sought to prevent the State from offering evidence regarding, inter alia, "whether the alleged victim suffered any injuries as a result of the commission of the alleged offense, and any opinion that said injuries are inconsistent with a consensual sexual act." Sanders asserted that Ross, whose testimony the State intended to offer, lacked sufficient qualification to render an opinion, and in addition, that such evidence was not relevant. The court granted Sanders' motion in limine to the extent it sought "to prevent . . . Ross from rendering any opinion about the cause or source of the injuries." The court denied the motion in limine to the extent it requested that Ross "not be permitted to testify about observations she made of injuries to the alleged victim."

During Ross' testimony at trial, Sanders made certain objections which the court sustained based on its previous order on the motion in limine. The court overruled other objections and allowed Ross to testify regarding her observations of injuries to J.F.'s vaginal area. Ross did not opine regarding the cause of J.F.'s injuries.

Sanders argues on appeal that none of Ross' testimony regarding injuries to J.F. should have been allowed. He argues that the only relevant purpose for such testimony was to establish the element of penetration and that because he admitted in a pretrial statement that penetration had occurred, there was no reason to introduce such evidence and that the evidence served only to inflame the jury. We do not agree.

[9] The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Rev. Stat. § 27-401 (Reissue 1995) and prejudice under Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision regarding them will not be reversed absent an abuse of discretion. *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003). We determine that the court did not abuse its discretion in admitting Ross' testimony.

A review of the record shows that Ross' observations regarding the injuries to J.F.'s vaginal area were relevant to the issue of whether penetration had occurred. Because Sanders' pretrial statements were indefinite as to whether penetration had occurred, when the State presented its case, it could not be certain whether Sanders would testify or, if he testified, whether Sanders would admit to penetration. The State needed to prove penetration as an element of first degree sexual assault, and Ross' testimony was relevant to that issue. Further, Ross' observations were conveyed in a professional manner without opinion and cannot be said to have been prejudicial as understood under § 27-403. We conclude that the court did not abuse its discretion in determining that Ross' testimony was relevant and allowing its admission.

Instruction Regarding "Without Consent."

Sanders asserts that the district court erred in instructing the jury that it could consider whether Sanders subjected J.F. to sexual penetration "without consent." Sanders claims there was insufficient evidence to support this instruction. We conclude that there was sufficient evidence to support the instruction and that the court did not err in giving the instruction.

In instruction No. 4, the court instructed the jury on the elements of first degree sexual assault as follows:

> Regarding the crime of First Degree Sexual Assault, the State must prove beyond a reasonable doubt that . . . Sanders:

1. subjected [J.F.] to sexual penetration; and

2. did so on or about July 7, 2002, in Lancaster County, Nebraska; and

3. did so either:

a. without the consent of [J.F.]; or

b. at a time when . . . Sanders knew or should have known that [J.F.] was incapable of resisting or appraising the nature of . . . Sanders' conduct.

Although Sanders raised no objection to instruction No. 4 at the jury instruction conference, during the hearing on Sanders' motion for new trial, the issue of whether there was sufficient evidence to instruct on "without consent" was considered. In its order denying the motion for new trial, the court noted that on direct examination, J.F. had testified that she did not consent, but that on cross-examination, she acknowledged that she had stated at an earlier deposition that because she did not remember the actual incident, it was possible she consented, but that she did not think she would have consented. The court concluded that, considering all the evidence,

> a reasonable jury could have concluded that [J.F.'s] indication that it was possible she consented was referring to the period of time that she does not remember, rather than a period of conscious recollection. *That would leave standing her statement on direct examination that she did not consent to sexual intercourse with the defendant.* Viewed in this light, there is sufficient evidence to warrant an instruction on the consent alternative.

(Emphasis supplied.)

Sanders failed to object to instruction No. 4, including the "without consent" language. Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error indicative of a probable miscarriage of justice. *State v. Haltom*, 264 Neb. 976, 653 N.W.2d 232 (2002). Sanders argues that despite his failure to object to the instruction, it was plain error for the court to instruct on the "without consent" language. He argues that there was insufficient evidence to merit the instruction because J.F. conceded that she might have consented and that because J.F. did not remember the

time during which penetration occurred, she could not unequivocally testify that she had not consented.

Upon review of the record, we do not find plain error indicative of a probable miscarriage of justice in the court's giving of instruction No. 4, including the "without consent" language. As the court noted in denying the motion for new trial, J.F. testified on direct examination that she did not consent. Although on cross-examination J.F. acknowledged that in a deposition she had stated that she might have consented, such testimony did not nullify her direct testimony. Instead, the matter became an issue of J.F.'s credibility, and the jury could consider the cross-examination testimony in determining the credibility of J.F.'s direct testimony that she did not consent. Despite the cross-examination, J.F.'s direct testimony provided evidence from which the jury could have concluded that J.F. did not consent. Therefore, we conclude that the issue of consent was appropriately presented to the jury and that the court did not commit plain error by instructing on the "without consent" element.

Failure to Instruct Jury Regarding "Significant Abnormality."

Sanders asserts that the court committed plain error by failing to instruct the jury that the State was required to prove as an element of first degree sexual assault that "the alleged victim suffered from a significant abnormality, such as severe intoxication or other substantial mental or physical impairment" and that "the accused had knowledge of such abnormality." We conclude that the court did not err in failing to so instruct the jury.

Referring to *State v. Rossbach*, 264 Neb. 563, 650 N.W.2d 242 (2002), Sanders argues that the court was required to give an instruction including the language quoted above. In *Rossbach*, we determined that the State had presented sufficient evidence at a preliminary hearing to bind the defendant over for trial on two counts of first degree sexual assault. In *Rossbach*, we stated that the issue in that case was "whether alleged victims of sexual assault can voluntarily intoxicate themselves so as to render themselves 'physically incapable of resisting or appraising the nature of [their] conduct' under § 28-319(1)(b)." 264 Neb. at 570, 650 N.W.2d at 248-49. We stated that "[u]nder § 28-319(1)(b), the

two-part analysis requires a significant abnormality, such as severe intoxication or other substantial mental or physical impairment, on the part of the alleged victim, and knowledge of the abnormality on the part of the alleged attacker." 264 Neb. at 572, 650 N.W.2d at 250.

Sanders argues that based on *Rossbach*, the instructions in this case were insufficient because they did not explicitly set forth that the State must prove (1) that J.F. was suffering from a severe abnormality, such as severe intoxication or other substantial mental or physical impairment, and (2) that Sanders had knowledge of such severe abnormality. In instruction No. 4, quoted above, the court used the language of the statute to instruct that Sanders could be found guilty of first degree sexual assault if he subjected J.F. to sexual penetration "at a time when . . . Sanders knew or should have known that [J.F.] was incapable of resisting or appraising the nature of . . . Sanders' conduct."

[10] Sanders did not object to instruction No. 4 and did not request an instruction including the *Rossbach* language he now argues was required. The failure to object to instructions after they have been submitted to counsel for review or to offer more specific instructions if counsel feels the court-tendered instructions are not sufficiently specific will preclude raising an objection on appeal, unless there is a plain error indicative of a probable miscarriage of justice. *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003).

[11] We conclude that the court did not commit plain error when it instructed the jury using the language of the first degree sexual assault statute, § 28-319. We have said that in giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute. *State v. Brown*, 258 Neb. 330, 603 N.W.2d 419 (1999). Although the language of *Rossbach* might be an appropriate instruction elaborating on the considerations under § 28-319(1)(b) if requested by the defendant, there is nothing in *Rossbach* that requires that its language be used in a jury instruction or which indicates that use of the statutory language would result in a miscarriage of justice. In the present case, in the absence of a request by Sanders, it was not plain error for the court to give an instruction based on the statutory language. We reject this assignment of error.

Sufficiency of Evidence.

Sanders asserts that the court erred in failing to "direct a verdict" on the charge of first degree sexual assault because there was insufficient evidence to support a conviction on that charge. We conclude that there was sufficient evidence to support the conviction.

[12] We note that Sanders' assignment of error relates solely to the failure to direct a verdict in his favor on the first degree sexual assault charge "at the end of the State's case." Sanders waived his appellate right to challenge the overruling of his motion for "directed verdict" made at the close of the State's case when he presented evidence in his defense. A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution, and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict, but may challenge sufficiency of the evidence for the defendant's conviction. *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002). Despite the wording of his assignment of error, we read Sanders' argument as briefed as a challenge to the sufficiency of evidence for his conviction, and we consider the assignment of error as such.

At the close of the State's case, Sanders moved to dismiss the charge of first degree sexual assault. He argued there was insufficient evidence to support the charge because J.F. claimed to have no memory of the incident and therefore could not deny that she had consented. He also argued that there was insufficient evidence that she was "incapable of resisting" because she had testified that she had become intoxicated on previous occasions and had not experienced memory loss and because there was no evidence that she had been drugged. J.F. testified that on the night in question, she had only one drink, and Sanders argued that one drink would not have been enough to sufficiently impair her ability to resist or to appraise the situation. The court overruled the motion to dismiss, and Sanders presented evidence in his defense. At the end of all the evidence, Sanders moved for "directed verdict," and the court overruled the motion.

Sanders argues on appeal that the evidence was insufficient to support a finding that penetration occurred "without consent." However, as discussed above in connection with the jury instruction regarding "without consent," we conclude that there was sufficient evidence from which the jury could have found that J.F. did not consent and that the issue was submissible.

Sanders further argues that there was insufficient evidence to establish that J.F. was incapable of resisting or of appraising the situation and to establish that Sanders knew this to be the case. Sanders argues that evidence that J.F. had been drinking was not enough to establish that she was intoxicated. Although there was evidence that her blood alcohol level was .10 grams per hundred milliliters the afternoon following the alleged assault, Sanders argues that witnesses who interacted with her at that time did not think she appeared intoxicated. Sanders further notes that there was no evidence that J.F. had been drugged.

In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004). Reviewing the evidence in this manner, we determine that there is sufficient evidence from which the jury could have found either that J.F. did not consent or that she was incapable of resisting Sanders or appraising the circumstances. Viewing J.F.'s testimony most favorably to the State, the jury could have determined that J.F. was not sexually interested in Sanders and the jury could have found that she did not consent. The jury could otherwise have found that J.F. was incapable of resisting or of appraising the situation. In this regard, the jury could have found from J.F.'s testimony regarding her memory loss, and from the evidence regarding her blood alcohol level, that at the time of penetration, she was so incapacitated that she was incapable of resisting Sanders or appraising the circumstances. The jury could also have found that Sanders was aware of, and took advantage of, J.F.'s incapacity. Viewing and construing the evidence in this case

most favorably to the State, we conclude that there was sufficient evidence to support Sanders' conviction for first degree sexual assault.

Excessive Sentence in Procuring Alcohol Conviction.

Finally, Sanders asserts that his sentence for procuring alcohol for a minor is excessive. We conclude that the district court did not abuse its discretion in sentencing Sanders on this count.

Sanders was sentenced to 5 years' probation on the first degree sexual assault conviction and to 90 days in jail and a $500 fine on the conviction for procuring alcohol for a minor. Sanders argues that the sentence in the alcohol conviction was excessive because he should not have been given imprisonment on that conviction when he was given probation on the sexual assault conviction. He argues that if grounds existed to make probation appropriate for the sexual assault conviction, the same grounds should have required probation rather than imprisonment on the alcohol conviction.

Procuring alcohol for a minor in violation of § 53-180 is a Class I misdemeanor. Neb. Rev. Stat. § 53-180.05(1) (Reissue 2004). The maximum penalty for a Class I misdemeanor is "not more than one year imprisonment, or one thousand dollars fine, or both." Neb. Rev. Stat. § 28-106(1) (Cum. Supp. 2000). Therefore, Sanders' sentence of 90 days in jail and a $500 fine is within statutory limits, and his sentence will not be disturbed on appeal absent an abuse of discretion by the district court. See *State v. Banes*, 268 Neb. 805, 688 N.W.2d 594 (2004).

As the State notes and the record supports, this was Sanders' second conviction for procuring alcohol for a minor. Sanders was also previously convicted of selling alcohol without a license and of violating a permit for a public dance. Whereas Sanders had a prior history of alcohol offenses, he lacked a prior history of violent crimes. Considering that Sanders had previous convictions related to alcohol offenses, we do not find the sentence on this count excessive. Contrary to Sanders' argument, it was not an abuse of discretion to sentence Sanders to imprisonment on the alcohol conviction while sentencing him to probation on the assault conviction because different factors came to bear in the sentencing considerations for each offense. We find no abuse of

discretion in Sanders' sentence on the procuring alcohol for a minor offense.

CONCLUSION

We conclude that the district court did not err in rejecting Sanders' various challenges to the jury selection process and in overruling his request for discovery of information regarding jurors. We also conclude that the court did not err in permitting the testimony of Ross, in instructing the jury on "without consent," and in failing to instruct regarding "significant abnormality." We further conclude that there was sufficient evidence to support Sanders' conviction for first degree sexual assault. Finally, we conclude that Sanders' sentence for procuring alcohol for a minor was not an abuse of discretion. We therefore affirm Sanders' convictions and sentences.

AFFIRMED.

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

697 N.W.2d 273

Filed May 27, 2005. No. S-04-747.

1. **Confessions: Appeal and Error.** A district court's finding and determination that a defendant's statement was voluntarily made will not be set aside on appeal unless this determination is clearly erroneous.
2. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. Concerning questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
3. **Constitutional Law: Miranda Rights: Self-Incrimination.** To safeguard an uncounseled individual's Fifth Amendment privilege against self-incrimination, suspects interrogated while in police custody must be told that they have a right to remain silent, that anything they say may be used against them in court, and that they are entitled to the presence of an attorney, either retained or appointed, at the interrogation.
4. **Miranda Rights.** There is nothing magic about the particular words used to ensure that a suspect knows his or her *Miranda* rights.
5. **Miranda Rights: Waiver.** Neither exhaustion nor intoxication will necessarily invalidate a *Miranda* waiver.

6. **Confessions.** Intoxication is not conclusive on the issue of the voluntariness of a statement.
7. **Confessions: Appeal and Error.** In determining whether a statement is voluntary, an appellate court applies a totality of the circumstances test. The determination reached by the trial court will not be disturbed on appeal unless clearly wrong.
8. **Confessions: Miranda Rights: Waiver.** When considering whether intoxication rendered a waiver of *Miranda* rights involuntary, the defendant must be so intoxicated that he or she is unable to understand the meaning of his or her statements. If the trial judge is satisfied that under the totality of the circumstances, the defendant was able to reason, comprehend, or resist, the statements are to be admitted.
9. **Trial: Rules of Evidence: Testimony: Proof: Appeal and Error.** Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked.
10. **Jury Instructions: Appeal and Error.** Failure to timely object to jury instructions prohibits a party from contending on appeal that the instructions were erroneous.
11. **Trial: Effectiveness of Counsel: Proof: Appeal and Error.** To establish a right to relief because of a claim of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
12. **Jury Instructions.** Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error.

Appeal from the District Court for Douglas County: J. RUSSELL DERR, Judge. Affirmed.

A. Michael Bianchi for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

CONNOLLY, J.

Decabooter Williams appeals his convictions and sentences for two counts of felony murder. He contends that (1) he did not voluntarily waive his *Miranda* rights because he was sleep deprived and intoxicated, and therefore his confession should be suppressed; (2) he should have been allowed to use a transcript of a taped statement to refresh a witness' recollection; and (3) the court improperly instructed the jury. We affirm.

BACKGROUND

SUMMARY

This appeal arises from a house fire that killed Victoria Burgess and her daughter LaTisha Tolbert. According to testimony at trial, before the fire, Burgess had accused Williams of stealing money from her purse. Another man later confronted Williams and took money from Williams and gave it to Burgess, which resulted in an argument between Williams and Burgess. Angry, Williams left and went to a neighbor of Burgess and asked the neighbor to loan him a gun. The neighbor refused, and Williams then went to a convenience store where he filled a wine bottle with gasoline and obtained matches.

Williams returned to the neighbor's home and stated that he was going to burn Burgess' house down; he then went to Burgess' house. Diane Williams (Diane), a former girl friend of Williams, lived with Burgess, and stated that Williams woke her and warned her to leave because he was going to burn the house down. Williams then poured gasoline around the interior of the house and lit it. Diane escaped through a window, but Burgess and Tolbert perished in the fire.

INTERROGATION AT POLICE STATION

Investigators learned that Williams was at the scene when the fire occurred and found him and Diane at Williams' home the morning after the fire. Williams consented to accompany the investigators to the station for questioning; he was left in an interview room for about 30 minutes before the interview started. During this time, he dozed off periodically. When the interview began, a police detective, Daniel R. Hayes, asked preliminary questions to determine whether Williams could understand questions and engage in conversation and whether he was under the influence of drugs or alcohol. In response to a question about drug and alcohol use, Williams responded that he had been drinking "[a] little earlier, yeah[, a] lot earlier" and that he had drunk "a buncha beer and gin." Hayes concluded that Williams was not under the influence and that he understood the questions and could engage in conversation.

Hayes read a *Miranda* rights advisory form to Williams and noted his responses on the form. A videotape in the record shows

that Williams stated "yes" to the following questions: Do you understand (1) that you have the right to remain silent, (2) that your statement could be used against you, (3) that you have the right to a lawyer and that the lawyer could be present during the questioning, and (4) that if you cannot afford a lawyer, the court will appoint one to represent you. Hayes did not read the final question on the form, "Knowing your rights in this matter, are you willing to talk to me now?" Instead, he asked Williams if he was going to talk about the fire, and Williams stated he did not know what happened. Hayes then asked whether Williams was going to answer questions, and Williams stated, "Yeah." Hayes wrote on the advisory form that Williams' answer to the last question was, "Go ahead, yes." This statement does not appear in the videotape of the interview.

Williams initially denied any involvement with the fire and stated that as he was coming down the alley near the house, he saw Diane run out of the house. Williams was periodically left alone in the interview room. During that time, police interviewed Diane. She initially denied involvement, but later changed her story. According to Diane, a disagreement arose between Williams and Burgess about some missing money and property, and Williams poured gasoline around the interior of the house and lit it. Hayes went back into the interview room and informed Williams that Diane told him what had happened; Williams then confessed to starting the fire. Williams moved to suppress the statements because he stated he was not properly advised of his *Miranda* rights and because the statements were involuntary. After a hearing, the motion was overruled.

Attempt to Refresh Diane's Memory

At trial, Diane testified about Williams' actions in setting the fire. She stated that she was sleeping when Williams came over to the house and knocked on the door to her room. She then opened the door, came out, and saw Williams start the fire. During cross-examination, Diane was asked if she recalled telling the police that when she opened the door, the fire was "already there." She answered, "No, I don't remember that." She was then asked whether it would refresh her recollection about what she told the police if she was shown a portion of the transcript from a taped

statement that she gave to the police. The State objected before Diane answered the question, and a side-bar conference was held. The State argued that Diane's recollection could not be refreshed or her statements impeached with unsworn statements in a document made by police. The court sustained the objection. Williams did not make an offer of proof. Neither the taped interview nor a transcript of the interview is in the record.

JURY INSTRUCTIONS

The court instructed the jury on the elements of felony murder. In instruction No. 10, the jury was instructed that Williams was guilty of felony murder if he intended to commit arson and the victim died during the course of arson or attempted arson. In instruction No. 20, the court instructed the jury in part that "[i]ntent is a material element of the crime of arson charged against the defendant." Williams did not object to instruction No. 10, defining arson as an intentional crime, but did suggest alternate language. He, however, did not object to instruction No. 20. The jury found him guilty on both counts, and he was sentenced to two consecutive terms of life imprisonment without parole. Williams appeals.

ASSIGNMENTS OF ERROR

Williams assigns, rephrased, that the court erred by (1) denying his motion to suppress because he did not waive his *Miranda* rights, (2) denying his motion to suppress involuntary statements, (3) precluding him from using a transcript to refresh a witness' recollection, and (4) instructing the jury that he had been charged with arson.

STANDARD OF REVIEW

[1] A district court's finding and determination that a defendant's statement was voluntarily made will not be set aside on appeal unless this determination is clearly erroneous. *State v. Thomas*, 267 Neb. 339, 673 N.W.2d 897 (2004).

[2] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. Concerning questions of counsel's performance or prejudice to

the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. Gales, ante* p. 443, 694 N.W.2d 124 (2005).

ANALYSIS

Miranda Form Not Read Exactly

Williams argues that he was not properly advised of his *Miranda* rights because the last line of the *Miranda* form was not read exactly and that his answer was not correctly recorded. Therefore, he contends that the warning was inadequate.

[3,4] To safeguard an uncounseled individual's Fifth Amendment privilege against self-incrimination, suspects interrogated while in police custody must be told that they have a right to remain silent, that anything they say may be used against them in court, and that they are entitled to the presence of an attorney, either retained or appointed, at the interrogation. *State v. Thomas, supra.* We have stated that there is nothing magic about the particular words used to ensure that a suspect knows his or her rights. *State v. Jordan*, 229 Neb. 563, 427 N.W.2d 796 (1988).

Here, Hayes did not read the final question on the form—"Knowing your rights in this matter, are you willing to talk to me now?" Instead, he asked Williams if he was going to talk about the fire and answer questions. Williams answered, "Yeah." Although the last line of the advisory form was not read, Hayes' last question fulfilled the *Miranda* requirements. Therefore, we determine that the warnings read to Williams were adequate, even though they were not read exactly as written on the *Miranda* advisory form.

Motion to Suppress Because *Miranda* Waiver Was Involuntary

Williams argues that the court erred in not suppressing his statements because he did not knowingly and voluntarily waive his *Miranda* rights. He argues that because he was tired, sleep deprived, and intoxicated, his statements were not voluntary.

[5,6] But neither exhaustion nor intoxication will necessarily invalidate a *Miranda* waiver. *U.S. v. Korn*, 138 F.3d 1239 (8th

Cir. 1998). Thus, we have held that intoxication is not conclusive on the issue of the voluntariness of a statement. *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983).

[7,8] In determining whether a statement is voluntary, we apply a totality of the circumstances test. The determination reached by the trial court will not be disturbed on appeal unless clearly wrong. See, *State v. Thomas*, 267 Neb. 339, 673 N.W.2d 897 (2004); *State v. Lamb, supra*. Concerning intoxication, we have recognized that "'[t]he defendant must be so intoxicated that he is unable to understand the meaning of his statements. . . . If the trial judge is satisfied that under the totality of the circumstances the defendant was able to reason, comprehend, or resist, the statements are to be admitted.'" *State v. Lamb*, 213 Neb. at 504, 330 N.W.2d at 467, quoting *State v. Laffoon*, 125 Ariz. 484, 610 P.2d 1045 (1980).

Here, the trial court correctly admitted Williams' confession into evidence. Although the evidence showed that Williams was tired and had consumed alcohol, the record reflects that he was no longer intoxicated by the time of the interview and that he demonstrated his ability to understand and answer questions. In the videotaped interview, Williams appeared able to reason and comprehend the questions and he answered them coherently. Consequently, the trial court was not clearly wrong in determining that Williams knowingly and voluntarily waived his *Miranda* rights and voluntarily confessed.

DENIAL OF USE OF POLICE TRANSCRIPT ON CROSS-EXAMINATION

Williams next contends that the trial court erred when it denied the use of a police transcript of Diane's statements for the purpose of impeachment or to refresh her recollection. Williams, however, did not make an offer of proof, and the transcript is not in the record.

[9] Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked. *State v. Cortis*, 237 Neb. 97, 465 N.W.2d 132 (1991).

Here, there was no showing of the evidence sought to be introduced through Diane's statement other than the comment she may have made to police stating that the fire was already started when she responded to Williams' knock on her door. Diane never answered the foundational question whether the transcript sought to be used would refresh her recollection. Nor did she answer foundational questions necessary to determine whether the transcript could be properly used for impeachment. We are unable to determine from the record any information about the transcript of the statement sought to be used, because no offer of proof was made and the transcript sought to be used was not included in the record. Without more, we cannot perform a meaningful review of this assignment of error. Accordingly, we determine that the issue was waived.

Jury Instructions

[10] Williams contends that the court improperly instructed the jury because the instructions stated that he was "charged" with arson. Failure to timely object to jury instructions prohibits a party from contending on appeal that the instructions were erroneous. *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003). Because Williams did not object, he has waived the issue.

Ineffective Assistance of Counsel

[11,12] Williams next argues, however, that his counsel was ineffective for failing to object to the instruction. To establish a right to relief because of a claim of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *State v. Brown*, 268 Neb. 943, 689 N.W.2d 347 (2004). Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error. *State v. Anderson, ante* p. 365, 693 N.W.2d 267 (2005).

Here, Williams was not directly charged with arson. Instead, arson was the underlying felony for the charge of felony murder. The instruction at issue, however, was included to explain the

effect of intent on the underlying felony. When the instructions are read together, we find no prejudice. Williams was not denied effective assistance of counsel.

CONCLUSION

We determine that the trial court did not err in allowing Williams' confession into evidence. He waived any argument about the use of a police transcript to refresh Diane's recollection or to impeach her testimony, and he was not denied effective assistance of counsel. Accordingly, we affirm.

AFFIRMED.

IN RE INTEREST OF COREY P. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JENNIFER P., APPELLANT.

IN RE INTEREST OF MEISHA L. AND REMINGTON L., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. BRETT L., APPELLANT.

697 N.W.2d 647

Filed May 27, 2005. Nos. S-04-1079, S-04-1100.

1. **Juvenile Courts: Judgments: Appeal and Error.** Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. In reviewing questions of law arising in such proceedings, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Constitutional Law: Search and Seizure.** In Nebraska, freedom from unreasonable searches and seizures is guaranteed by U.S. Const. amend. IV and Neb. Const. art. I, § 7.
3. **Constitutional Law: Warrantless Searches: Search and Seizure.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by the exigencies which justify their initiation.
4. **Constitutional Law: Search and Seizure.** The exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect.
5. **Constitutional Law: Search and Seizure: Evidence.** Under the exclusionary rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure.

6. **Juvenile Courts.** Juvenile proceedings are civil rather than criminal in nature.
7. **Constitutional Law: Search and Seizure.** Application of the exclusionary rule in civil cases is not automatic.
8. **Constitutional Law: Search and Seizure: Motions to Suppress.** In deciding whether the exclusionary rule should apply in a particular type of proceeding, the court must weigh the deterrent effect of suppression against its societal costs to determine if evidence should be suppressed. Where little or no deterrence will result, suppression is inappropriate.
9. ____: ____: ____. When balancing the deterrent effect of suppression against its societal costs to determine if evidence should be suppressed, the court must consider the State's interest in the matter and the right sought to be protected, the purpose of the proceeding and the potential sanctions that could result from the proceeding, and the purpose of the search and its relationship to the proceeding in which the rule is sought to be invoked.
10. **Juvenile Courts: Parental Rights.** The foremost purpose and objective of the juvenile code is the protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parents where the continuation of such parental relationship is proper under the law. The goal of juvenile proceedings is not to punish parents, but to protect children and promote their best interests.
11. **Juvenile Courts: Constitutional Law.** The Fourth Amendment exclusionary rule is inapplicable in child protection proceedings.
12. **Parental Rights.** The purpose of the adjudication phase is to protect the interests of the child. The parents' rights are determined at the dispositional phase, not at the adjudication phase.
13. **Juvenile Courts: Jurisdiction: Proof.** In order for a juvenile court to assume jurisdiction of minor children under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004), the State must prove the allegations of the petition by a preponderance of the evidence. The court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247.
14. **Juvenile Courts: Evidence: Appeal and Error.** When the evidence is in conflict in a juvenile case, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.

Appeals from the Separate Juvenile Court of Douglas County: VERNON DANIELS, Judge. Affirmed.

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

Douglas R. Switzer, of Hathaway & Switzer, L.L.C., and Krisanne C. Weimer for appellant Brett L.

Stuart J. Dornan, Douglas County Attorney, Nicole Brundo Goaley, Karen Kassebaum Nelson, and Anne Armitage, Senior Certified Law Student, for appellee.

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

GERRARD, J.

NATURE OF CASE

Jennifer P. and Brett L. appeal from the order of the juvenile court adjudicating their respective children to be juveniles lacking proper parental care within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004). The evidence that provided the basis for those adjudications was obtained from a warrantless search of Jennifer and Brett's residence.

The primary issue presented on appeal is whether the exclusionary rule, designed to enforce the protections of the Fourth Amendment, applies to evidence obtained in a warrantless search and submitted in a child protection proceeding.

FACTUAL AND PROCEDURAL BACKGROUND

On March 17, 2004, at approximately 2 p.m., Deputy Alice Meyer responded to a report of a small child wandering outside in a trailer park in Omaha, Nebraska. Meyer arrived at the trailer park and spoke with the neighbor who had reported the wandering child. The neighbor had taken the child into her trailer because the child had blue lips and was very cold. Meyer testified that the child, who was 3 years old, was wearing only a pair of pink, knit pants that were wet and smelled of urine and that she appeared to have dried food around her mouth. Meyer stated that the child also smelled of "dirty and rotting food." Meyer testified that the neighbor indicated that she had seen the child wandering outside before and pointed to a trailer where she believed the child and her siblings lived.

Meyer testified that upon visiting the trailer identified by the neighbor, Jennifer answered the door and, at Meyer's request, allowed Meyer into the residence. Meyer learned that Jennifer lived at the residence with her four biological children: Corey P., Dylan P., Jasmine P., and Bryanna L. In addition, Jennifer indicated that her fiance, Brett, and his two children, Meisha L. and Remington L., also lived at the residence.

According to Meyer, Jennifer told Meyer that Brett was out with some of the other children looking for the missing 3-year-old, Jasmine, and that Jennifer had a baby, Bryanna, in the back

room of the residence. Jennifer objected when Meyer told her that to ensure Bryanna's welfare, Meyer needed to check on her without Jennifer's being present. Meyer testified that she suspected that Jasmine had been neglected and, thus, thought other children in the residence might also be at risk.

In contrast, Jennifer testified that when Meyer asked to enter the residence, Jennifer said that she was not feeling well and was not comfortable with Meyer's entering her home. Further, Jennifer indicated that Meyer and the male officer accompanying her again told Jennifer that they needed to come into the residence and that when Jennifer again denied entry, Meyer told her that she would not be permitted to see Jasmine until she allowed the officers into her home. Jennifer testified that fearing she would not get Jasmine back, she allowed Meyer to enter the home.

Meyer testified that inside Jennifer and Brett's residence, she observed an offensive odor, similar to the smell that had been coming from Jasmine. Meyer also noticed that the house was very dirty, the kitchen sink was full of dirty dishes, and there appeared to be food items "spread out." Pictures of the residence were received into evidence, which pictures Meyer testified were accurate depictions of her observations on March 17, 2004.

Meyer described the children as dirty and testified that after finding Bryanna in a crib with a urine-soaked blanket over her and observing the conditions in the bedroom, Meyer decided to take the six children, all of whom were under the age of 10, into protective custody.

On March 18, 2004, a petition (which was later amended) was filed in the separate juvenile court, alleging that Corey, Dylan, Jasmine, and Bryanna came within the meaning of § 43-247(3)(a). On the same day, a similar petition was filed, alleging that Meisha and Remington came within the meaning of § 43-247(3)(a). Motions for temporary custody were filed, requesting the court to place the six children in the custody of the Nebraska Department of Health and Human Services (DHHS). In support of the motions, the State attached affidavits completed by Meyer. Orders for immediate custody were entered by the court on March 18, ordering that the children be placed in temporary foster care.

On April 12, 2004, the court ordered the children to remain in the temporary custody of DHHS but directed that they be allowed to return to the parental home under certain conditions. Specifically, Jennifer and Brett were instructed to, among other things, cooperate with family support services and not do anything that would delay, or lead to the unsuccessful termination of, those services; enroll their school-aged children in school; maintain a sanitary and safe home; keep the children clean; participate in a pretreatment assessment; obtain and maintain a stable source of income; and submit the children for immediate physical and dental examinations.

On August 12, 2004, the State filed a motion in each case, citing the "need for PLACEMENT OF THE CHILDREN IN THE TEMPORARY CUSTODY OF NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES FOR PLACEMENT TO EXCLUDE THE HOME OF" the parent, Jennifer or Brett. Attached to the motions, the State provided affidavits completed by a case manager from DHHS and a family support worker assigned to work with the family. In her affidavit, the DHHS case manager described in detail her observations upon visiting the home on August 12, indicating that the home was dirty, cluttered, and malodorous and recommending that the children be removed from the residence immediately. In a separate affidavit, the family support worker described her weekly visits to the home and the goals she had instructed the family to work toward. The family support worker explained that Jennifer and Brett had failed to make any progress toward the goals, that the home continued to be dirty, and that the children were sleeping on soiled mattresses with no bedding. The juvenile court ultimately entered orders for placement of the children in foster care, excluding the home of Jennifer and Brett.

Prior to the adjudication hearing, Jennifer and Brett filed motions to suppress or, alternatively, motions in limine, asking that any evidence obtained as a result of Meyer's warrantless entry into their home on March 17, 2004, be excluded as having been gathered in violation of their rights under the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution. The court overruled the motions, finding that exigent circumstances justified the search.

After the adjudication hearing, the court found Corey, Dylan, Jasmine, Bryanna, Meisha, and Remington to be within the meaning of § 43-247(3)(a). Further, the court ordered the children to remain in the temporary custody of DHHS for placement, excluding the home of Jennifer and Brett, until further order of the court.

Jennifer and Brett filed separate appeals from the order of the juvenile court. The appeals were docketed and argued separately in this court, but the underlying facts are the same. Therefore, we have consolidated the cases for purposes of disposition of these appeals.

ASSIGNMENTS OF ERROR

Both Jennifer and Brett assign that the juvenile court erred in allowing evidence obtained during Meyer's visit to their home on March 17, 2004, to be used in the proceedings.

In addition, Jennifer assigns that the court erred in finding sufficient evidence to order the continued detention of her children and in finding sufficient evidence to support the finding that the children came within the meaning of § 43-247(3)(a). Brett does not make any sufficiency of evidence arguments.

STANDARD OF REVIEW

[1] Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. In reviewing questions of law arising in such proceedings, an appellate court reaches a conclusion independent of the lower court's ruling. *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002).

ANALYSIS

Fourth Amendment Exclusionary Rule Does Not Apply in Child Protection Proceedings.

Jennifer and Brett argue that the court erred in failing to exclude evidence obtained during Meyer's search of their home. Specifically, they argue that Meyer's entry into their home was a violation of their Fourth Amendment rights and that, thus, any evidence or information gathered during Meyer's visit should have been excluded from the proceedings. In response, the State argues that the Fourth Amendment does not apply to juvenile

proceedings and that, alternatively, even if it does apply, the remedy of exclusion should not apply to juvenile proceedings. The State also argues that exigent circumstances were present during Meyer's visit to Jennifer and Brett's home and that, thus, under that exception to the warrant requirement, the entry was reasonable.

[2,3] In Nebraska, freedom from unreasonable searches and seizures is guaranteed by U.S. Const. amend. IV and Neb. Const. art. I, § 7. *State v. Kelley*, 265 Neb. 563, 658 N.W.2d 279 (2003). Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by the exigencies which justify their initiation. *State v. Allen, ante* p. 69, 690 N.W.2d 582 (2005).

The State initially argues that the Fourth Amendment should not apply in juvenile proceedings and cites cases in which this court has concluded that certain constitutional rights do not apply in juvenile cases. See, *In re Interest of Brian B. et al.*, 268 Neb. 870, 689 N.W.2d 184 (2004) (heightened standards of Sixth Amendment Confrontation Clause are not applicable in juvenile proceedings); *In re Interest of C.P.*, 235 Neb. 276, 455 N.W.2d 138 (1990) (Sixth Amendment right to speedy trial applies only in criminal trials and thus does not apply in parental termination proceedings). However, the rights found to be inapplicable in juvenile proceedings in those cases are rights directly implicated during other court proceedings. In other words, they are procedural rights intended to govern the conduct of criminal trials. In contrast, the Fourth Amendment protections against unreasonable search and seizure are implicated whenever state action intrudes on a citizen's legitimate expectation of privacy. "The right of the people to be secure in their persons, houses, papers, and effects" applies to their persons, houses, papers, and effects, regardless of the venue of any subsequent litigation. U.S. Const. amend. IV. Instead, the question is whether, in a juvenile proceeding, those Fourth Amendment protections demand the use of the exclusionary rule as a remedy for their violation.

[4-7] The exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect.

Allen, supra. Under the exclusionary rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. *Id*. However, juvenile proceedings are civil rather than criminal in nature. *In re Interest of Joshua R.*, 265 Neb. 374, 657 N.W.2d 209 (2003). Application of the exclusionary rule in civil cases is not automatic. See *City of Omaha v. Savard-Henson*, 9 Neb. App. 561, 615 N.W.2d 497 (2000).

In *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974), the U.S. Supreme Court addressed whether to extend the exclusionary rule to grand jury proceedings. The Court stated, "[t]he purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim . . . . Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." 414 U.S. at 347. Further, the Court said the rule's application has been restricted to areas where its remedial objectives are most effectively served. *Id*. The Court concluded that application of the rule would greatly interfere with the "effective and expeditious discharge of the grand jury's duties" and would not significantly further the goal of deterrence. 414 U.S. at 350. Therefore, the Court held that the Fourth Amendment exclusionary rule should not be extended to grand jury proceedings. *Id*.

Similarly, in *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1041, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984), the U.S. Supreme Court addressed whether to extend the exclusionary rule to civil deportation hearings and discussed the "framework for deciding in what types of proceeding application of the exclusionary rule is appropriate." The Court stated:

> Imprecise as the exercise may be . . . there is no choice but to weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs. On the benefit side of the balance "the 'prime purpose' of the [exclusionary] rule, if not the sole one, 'is to deter future unlawful police conduct.' " . . . On the cost side there is the loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs.

Id., citing *United States v. Janis*, 428 U.S. 433, 96 S. Ct. 3021, 49 L. Ed. 2d 1046 (1976). In *Lopez-Mendoza*, the Court weighed the costs and benefits of applying the exclusionary rule in civil deportation hearings and, finding the costs to outweigh the benefits, concluded that the rule should not apply in such proceedings.

[8] We acknowledged the limited application of the exclusionary rule in *State v. Tyrrell*, 234 Neb. 901, 453 N.W.2d 104 (1990), and, citing the balancing test announced in *Janis, supra*, also stated that a court must weigh the deterrent effect of suppression against its societal costs to determine if evidence should be suppressed. Where little or no deterrence will result, suppression is inappropriate. *Tyrrell, supra*. Accord *State v. Allen, ante* p. 69, 690 N.W.2d 582 (2005) (where exclusionary rule does not result in significant deterrence, its use is not warranted). Most recently, we held that the Due Process Clause does not require that the Fourth Amendment exclusionary rule be applied to administrative license revocation proceedings. *Chase v. Neth, ante* p. 882, 697 N.W.2d 675 (2005). We noted the civil, nonpunitive nature of administrative license revocation proceedings and determined that application of the rule in such proceedings would accomplish little in terms of deterring improper police conduct, given the applicability of the rule in criminal proceedings. *Id.* In addition, we concluded that any deterrent value would be outweighed by the public health and safety interests which the administrative license revocation statutes are intended to protect. *Id.* See, also, *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003).

[9] Although we have yet to address the application of the Fourth Amendment exclusionary rule in the context of juvenile proceedings, we now utilize the balancing test set forth by the Court to determine if such application is warranted. Only if the rule does apply in the context of child protection proceedings is it necessary for us to determine whether the search involved in this case was conducted in violation of the Fourth Amendment. See *State ex rel. A.R. v. C.R.*, 982 P.2d 73 (Utah 1999). In the course of our analysis, we must consider the State's interest in the matter and the right sought to be protected, the purpose of the proceeding and the potential sanctions that could result from the proceeding, and the purpose of the search and its relationship to

the proceeding in which the rule is sought to be invoked. See *Matter of Diane P.*, 110 A.D.2d 354, 494 N.Y.S.2d 881 (1985).

[10] We have observed that the foremost purpose and objective of the juvenile code is the protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parents where the continuation of such parental relationship is proper under the law. *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004). Thus, the goal of juvenile proceedings is not to punish parents, but to protect children and promote their best interests. Application of the exclusionary rule in criminal proceedings may result in a crime's going unpunished, a price that society is willing to pay in order to protect the right to be free from unreasonable intrusions. In contrast, application of the rule in juvenile proceedings may lead to an erroneous conclusion that there has been no abuse or neglect, leaving innocent children to remain in unhealthy or compromising circumstances. See *Matter of Diane P., supra.* Any possible benefits of the exclusionary rule do not justify such a costly result in child protection proceedings.

Moreover, the potential impact on parents in such proceedings does not justify application of the exclusionary rule. The potential consequences of child protection proceedings range from an order requiring supervision of the child by a child protection agency, to leaving the child in the custody of the parents, to an order for the temporary or permanent removal of the child. These consequences are designed to protect innocent children, not to punish parents; their effect on the parents is merely collateral to their main purpose. Although parents may ultimately be prosecuted on the basis of the underlying acts of a child protective proceeding, in a criminal prosecution, any evidence obtained in an unlawful search would be inadmissible at trial. Thus, the deterrent effect of the exclusionary rule would be adequately served by the exclusion of illegally seized evidence in that context. See *id.* See, also, *Matter of Anne BB*, 202 A.D.2d 806, 609 N.Y.S.2d 111 (1994); *Care & Protection of Frank*, 409 Mass. 492, 567 N.E.2d 214 (1991); *In re Mary S.*, 186 Cal. App. 3d 414, 230 Cal. Rptr. 726 (1986); *In re Robert P.*, 61 Cal. App. 3d 310, 132 Cal. Rptr. 5 (1976).

[11] Considering the purpose of the rule, and the State's overwhelming interest in protecting innocent children, it would be improper to exclude evidence obtained during a warrantless search in subsequent child protection proceedings. On balance, the State's interest in protecting abused or neglected children and the undesirable consequences to the children if they are left in compromising circumstances far outweigh any deterrent effect that may result from applying the exclusionary rule. We, therefore, hold that the Fourth Amendment exclusionary rule is inapplicable in child protection proceedings. Thus, it is unnecessary to consider in this case whether the search by Meyer was unreasonable under the Fourth Amendment. We conclude that the juvenile court did not err in overruling Jennifer and Brett's motions to exclude evidence obtained during Meyer's search of their home.

Detention Hearing Issue Is Moot.

Jennifer argues that the juvenile court erred in ordering the continued detention of her children. Jennifer asserts that the testimony offered at the detention hearing on August 18 and 25, 2004, was general and insufficient to support the order of continued detention. However, since we cannot undo the temporary detention order keeping the children in the custody of DHHS pending adjudication, the issue is moot and we need not consider this assignment of error. See *In re Interest of Phoebe S. & Rebekah S.*, 11 Neb. App. 919, 664 N.W.2d 470 (2003). If Jennifer wished to challenge the temporary detention, she should have appealed from the order of continued detention prior to adjudication.

Order of Adjudication Was Supported by Sufficient Evidence.

[12,13] Finally, Jennifer argues that the court erred in finding her children to be within the meaning of § 43-247(3)(a). The purpose of the adjudication phase is to protect the interests of the child. The parents' rights are determined at the dispositional phase, not at the adjudication phase. *In re Interest of Sabrina K.*, 262 Neb. 871, 635 N.W.2d 727 (2001). In order for a juvenile court to assume jurisdiction of minor children under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance

of the evidence. *In re Interest of Heather R. et al., ante* p. 653, 694 N.W.2d 659 (2005). The court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247. See *In re Interest of Sabrina K., supra.*

In this case, the amended petitions alleged that the six children at issue come within the meaning of § 43-247(3)(a), lacking proper parental care by reason of the faults or habits of their parents in that Jasmine was found wandering alone outside without proper clothing; the home of the children was found to be in a filthy, unwholesome condition; and the children were found to be in a filthy, unwholesome condition, placing the children at risk of harm.

In support of these allegations, Meyer testified extensively about her observations when she arrived at the home of Jennifer and Brett on March 17, 2004, as previously detailed. Several photographs, which Meyer testified were accurate depictions of the residence, were offered and received into evidence. Meyer's testimony and the photographs of the residence offered at the adjudication hearing provide sufficient evidence to support the allegations in the amended petition.

[14] Although Jennifer testified that the photographs were not accurate depictions of the residence and implied that law enforcement had created some of the mess illustrated in the photographs, we give deference to the juvenile court's explicit decision to accept Meyer's testimony in this matter. When the evidence is in conflict in a juvenile case, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Heather R. et al., supra.* Having reviewed the photographs and other evidence in the record, we find sufficient evidence to conclude, as did the juvenile court, that the children come within the meaning of § 43-247(3)(a).

CONCLUSION

We find on our de novo review that the evidence supports the juvenile court's finding that the children at issue come within the meaning of § 43-247(3)(a). Because the exclusionary rule does not apply in child protection proceedings, the juvenile

court did not err in overruling the Fourth Amendment objections to that evidence. Thus, we affirm the adjudication orders of the juvenile court.

AFFIRMED.

SHANNON M. WILKINS, APPELLANT AND CROSS-APPELLEE, V. JOSEPH A. WILKINS, APPELLEE AND CROSS-APPELLANT.

697 N.W.2d 280

Filed June 3, 2005. No. S-04-252.

1. **Modification of Decree: Child Support.** Modification of child support is entrusted to the discretion of the trial court.
2. **Modification of Decree: Child Support: Appeal and Error.** An appellate court reviews proceedings for modification of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion.
3. **Child Support: Rules of the Supreme Court: Presumptions.** The Nebraska Child Support Guidelines are to be applied as a rebuttable presumption to both temporary and permanent support, and any deviation from the guidelines must take into consideration the best interests of the children.
4. ____: ____: ____. A court may deviate from the Nebraska Child Support Guidelines when one or both of the parties have provided sufficient evidence to rebut the presumption.
5. **Child Support: Rules of the Supreme Court: Proof.** The party requesting a deviation from the Nebraska Child Support Guidelines based upon an obligation to support offspring of a subsequent relationship bears the burden of providing evidence regarding the obligation, including the income of the other parent of the child or children of the subsequent relationship.
6. **Child Support: Appeal and Error.** Whether a child support order should be retroactive is entrusted to the discretion of the trial court and will be affirmed absent an abuse of discretion.
7. **Modification of Decree: Child Support: Time.** Absent equities to the contrary, the modification of child support orders should be applied retroactively to the first day of the month following the filing date of the application for modification.
8. **Modification of Decree: Child Support.** In a modification of child support proceeding, the child and custodial parent should not be penalized, if it can be avoided, by the delay inherent in our legal system.

Appeal from the District Court for Fillmore County: PAUL W. KORSLUND, Judge. Affirmed as modified.

Joseph H. Murray, P.C., L.L.O., of Germer, Murray & Johnson, for appellant.

Sally A. Rasmussen, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellee.

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

WRIGHT, J.

NATURE OF CASE

Shannon M. Wilkins appeals from the trial court's order modifying the decree that dissolved her marriage to Joseph A. Wilkins. The court increased Joseph's child support obligation, denied retroactive application of the child support increase, and recalculated the responsibility for health care and childcare expenses. It declined to change the allocation of tax exemptions for the parties' minor children and denied Joseph's request that he be allowed a deduction for the entire amount of his monthly student loan payment in calculating his child support obligation. Joseph cross-appeals.

SCOPE OF REVIEW

[1,2] Modification of child support is entrusted to the discretion of the trial court. See *Emery v. Moffett, ante* p. 867, 697 N.W.2d 249 (2005). An appellate court reviews proceedings for modification of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion. *Id.*

FACTS

Shannon and Joseph were married in August 1993. A dissolution decree entered on January 11, 2001, granted custody of the parties' two minor children to Shannon, with reasonable visitation for Joseph, including 6 weeks in the summer. Joseph was ordered to pay child support of $600 per month for two children and $400 per month for one child, commencing January 1, 2001. The decree provided that child support would abate by one-half for 1 month during summer visitation. Joseph was directed to pay his student loans of approximately $80,000, and he was granted a deviation in child support based upon the student loan payments. The deviation reduced his child support obligation by $137 per month for two children and $114 per month for one child.

Shannon was directed to provide health insurance for the children when it is available through her employment, and Joseph was made responsible for one-half of any medical and health care expenses not covered by insurance. Each parent was directed to pay the daycare expenses incurred when the children were in that parent's physical custody. The decree provided that Shannon could claim one of the children as a dependent for income tax purposes and that Joseph could claim the other, as long as he was current in his child support obligation.

On November 29, 2001, Shannon filed an application for modification of the dissolution decree, asserting that there had been material changes of circumstances. She alleged that the cost of daycare had increased and requested a modification to require Joseph to pay a proportionate share of this expense. She claimed that Joseph's income had increased since the decree and that application of the Nebraska Child Support Guidelines to his current income would result in an increase in child support in excess of 10 percent of his current obligation. Shannon also asked for a court order requiring the parties to file separate applications for credit in order to separate their loan obligations.

The issues raised in the modification request were not ultimately determined until February 2004, over 2 years after it was filed. The delays were the result of a number of events.

When Shannon filed the application for modification in November 2001, she did not have Joseph served with a summons. He entered a voluntary appearance on February 7, 2002. In an amended answer, Joseph asserted that the trial court should take into consideration his obligation to make monthly student loan payments when determining child support. Joseph also filed a counterclaim, alleging that he should be entitled to claim both children as dependents for income tax purposes.

On December 16, 2002, the trial court ordered that Joseph's child support obligation for two minor children be increased temporarily to $900 per month, effective November 1, 2002. A final decree was subsequently entered, and Joseph filed a motion for new trial or to alter or amend the judgment. He also filed a motion to recuse the trial judge because of ex parte communications between the judge and Shannon's counsel. The judge subsequently recused himself.

On May 2, 2003, a different judge sustained Joseph's motion for new trial and vacated and set aside the orders of the first trial judge. The second judge ordered continuation of the temporary child support during the pendency of the action and scheduled a new trial for July 1. Shannon's counsel filed a motion for continuance on June 30 because his residence had sustained severe tornado damage and he did not have adequate time to prepare for trial.

Following the new trial, the trial court entered an order on September 30, 2003, modifying the original decree. The court found a material change in circumstances in that Joseph's annual income had increased while Shannon's income had remained the same. As to Joseph's request for a deduction of his $1,029 per month student loan payments in calculating child support, the court found some evidence that the student loans might have been taken into consideration at the time of the decree. The court granted a deduction of 25 percent of the monthly loan payment, or $257.25, from Joseph's monthly income in calculating child support. It ordered monthly child support of $907 for two children and $627 for one child.

Shannon had requested that the modification of child support be made retroactive to the month following the filing of her application. The trial court noted that Joseph had paid $900 per month for approximately 10 months under the temporary child support order. It concluded that the delays in the case could not be specifically attributed to either party and that it would create a hardship on Joseph to make his child support obligation retroactive to December 1, 2001. The court found that the temporary child support had given Shannon adequate relief, and the modified child support obligation was made effective October 1, 2003.

The trial court ordered that each party would be responsible for one-half of the children's medical expenses not covered by insurance, in accordance with the child support guidelines. The court made no change in the allocation of tax exemptions. It ordered Joseph to reimburse Shannon for 50 percent of work-related childcare and ordered Shannon to reimburse Joseph for 50 percent of work-related childcare during summer visitation.

At the new trial, Joseph presented evidence that he had remarried and that his wife was expecting a child relatively soon. He requested credit for the support of this child in the calculation of his child support obligation. The trial court found it not appropriate to do so prior to the birth of the child. It stated, "However, it appears that [Joseph] would certainly be entitled to such a credit upon the birth of the child, and it is hoped that the parties can reach a stipulation in that regard." The court indicated a willingness to enter a further order of modification if an application was filed and the parties stipulated to the modification. The court stated that if no agreement could be reached concerning a further application to modify, it would consider entering a temporary order after notice and hearing, with all evidence to be presented by affidavit.

On October 2, 2003, Joseph filed a motion to reopen his rest or for new trial in order to present evidence of the birth of his daughter on September 27. Shannon filed a motion for new trial on October 6.

The trial court overruled the motions for new trial but granted Joseph's motion to reopen his rest for the limited purpose of providing evidence of the birth of the child. After evidence was offered, the court took the matter under advisement.

The final order modifying the dissolution decree was entered on February 23, 2004. The trial court found a material change in circumstances based on the 47-percent increase in Joseph's income while Shannon's income remained the same. The court again granted Joseph the student loan deduction of 25 percent. It made the child support modification effective March 1, 2004, finding that the temporary child support had given Shannon adequate relief and that the delays could not be specifically attributed to either party. Each party was directed to be responsible for one-half of any medical expenses in excess of $480 per calendar year per child up to a maximum of Joseph's monthly child support obligation. The court granted no change in the tax exemptions.

As a deviation from the child support guidelines, the trial court allowed Joseph a deduction of $411 from his income as the amount of his child support obligation for the child born

September 27, 2003. The court based this deduction on a worksheet provided by Joseph. Joseph was ordered to pay child support of $792.35 per month for two children and $548.94 for one child. Shannon appealed, and Joseph has filed a cross-appeal.

ASSIGNMENTS OF ERROR

Shannon assigns as error the trial court's abuse of discretion in (1) calculating child support on the basis of Joseph's total monthly income less $411 attributable to his obligation to support a child born September 27, 2003; (2) failing to make the child support order effective as of December 1, 2001, the first day of the month after Shannon filed her application for modification of the decree; and (3) failing to make Joseph's requirement to contribute to childcare expenses retroactive to December 1, 2001.

On cross-appeal, Joseph asserts that the trial court erred in (1) failing to grant him a credit in the amount of his entire student loan payment, which resulted in an increase in his child support payments, and (2) failing to award Joseph the tax exemptions for both minor children.

ANALYSIS

Child Support for Subsequently Born Child

Shannon's first assignment of error asserts that the trial court abused its discretion in granting Joseph a deviation from the child support guidelines based upon his obligation to support a subsequently born child.

The Nebraska Child Support Guidelines contain two provisions related to credit that may be given for other children. In paragraph E(6), the guidelines state: "Other Children. Subject to Paragraph T, credit may be given for biological or adopted children for whom the obligor provides regular support." Paragraph T, which went into effect on September 1, 2002, provides:

> Limitation on Decrease. An obligor shall not be allowed a reduction in an existing support order solely because of the birth, adoption, or acknowledgement of subsequent children of the obligor; however, a duty to provide regular support for subsequent children may be raised as a defense to an action for an upward modification of such existing support order.

Joseph raised the defense of subsequent children at the trial held on August 19, 2003. When Joseph was asked if he and his current wife had any children, he responded that they were expecting a child in about a month. Shannon objected when Joseph was asked when the child was due. The trial court reserved ruling on the relevancy objection and allowed Joseph to make a record. Joseph testified that the child was due September 22. At the hearing on the motions for new trial, the court received into evidence the birth certificate of the child, showing that she was born on September 27. In its order of February 23, 2004, the court allowed Joseph a deduction of $411 from his income for the support of the third child.

[3-5] The child support guidelines are to be applied as a rebuttable presumption to both temporary and permanent support, and any deviation from the guidelines must take into consideration the best interests of the children. See *Dueling v. Dueling*, 257 Neb. 862, 601 N.W.2d 516 (1999). A court may deviate from the guidelines when one or both of the parties have provided sufficient evidence to rebut the presumption. *Czaplewski v. Czaplewski*, 240 Neb. 629, 483 N.W.2d 751 (1992). In *Brooks v. Brooks*, 261 Neb. 289, 292-93, 622 N.W.2d 670, 673 (2001), this court stated, "The party requesting a deviation from the guidelines based upon an obligation to support offspring of a subsequent relationship bears the burden of providing evidence regarding the obligation, including the income of the other parent of the child or children of the subsequent relationship."

In *Emery v. Moffett, ante* p. 867, 697 N.W.2d 249 (2005), we cited *Brooks* and noted that there is no precise mathematical formula for calculating child support when subsequent children are involved. "[T]he calculation is left to the discretion of the court as long as the court considered the obligations to both families and the income of the other parent of the subsequent children." *Emery v. Moffett, ante* at 871, 697 N.W.2d at 254. The trial court "has discretion to choose if and how to calculate the deviation, but must do so in a manner that does not benefit one family at the expense of the other." *Id.*

Joseph presented evidence concerning his income and that of his current wife, including their joint income tax return for 2002 and their pay stubs. The trial court used this information in

calculating Joseph's child support obligation for the two children born of his marriage to Shannon. The court found that it was equitable to grant a deduction of $411 for the child born subsequent to the dissolution decree in calculating the modification of child support for the prior children.

Shannon concedes that it is "certainly fair, at some point, to give [Joseph] a reduction for the support of subsequently born children." Brief for appellant at 22. However, she argues that the circumstances of the case had not yet reached that point and that the trial court abused its discretion in allowing a deviation from the guidelines.

Two questions are presented: (1) whether the trial court abused its discretion in allowing a deduction for the support of the child born to Joseph and his current wife and (2) whether the amount of the deduction was an abuse of discretion.

Modification of child support is entrusted to the discretion of the trial court. See *Emery v. Moffett, supra.* An appellate court reviews proceedings for modification of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion. *Id.* It is true that if the case had been decided earlier, the child of Joseph and his current wife would not have been a consideration that affected the child support calculation. However, under the circumstances of this case, it was not an abuse of discretion to allow a deviation from the child support guidelines pursuant to paragraph T. This case was plagued by delays, none of which were necessarily attributable to either party.

The district court calculated child support for the children of Joseph's first marriage while taking into consideration his obligation to the child of his second marriage. The court therefore determined child support in an interdependent manner that considered the obligation to each family, and we find no abuse of discretion in that determination. See *Emery v. Moffett, supra.*

Retroactive Application of Modification

Shannon argues that the trial court abused its discretion in failing to make the modified child support order effective December 1, 2001, which was the first day of the month after she filed her application for modification of the dissolution decree. Shannon argues that although Joseph paid $900 in temporary support for

14 months during the proceedings, he paid only $600 per month during the first 11 months the case was pending. She also argues that the court abused its discretion in failing to make Joseph's requirement to contribute to childcare expenses retroactive to December 1, 2001.

[6-8] Whether a child support order should be retroactive is entrusted to the discretion of the trial court and will be affirmed absent an abuse of discretion. *Emery v. Moffett, ante* p. 867, 697 N.W.2d 249 (2005). Absent equities to the contrary, the modification of child support orders should be applied retroactively to the first day of the month following the filing date of the application for modification. *Erica J. v. Dewitt*, 265 Neb. 728, 659 N.W.2d 315 (2003). In a modification of child support proceeding, the child and custodial parent should not be penalized, if it can be avoided, by the delay inherent in our legal system. *Id.*

The trial court found that the delays in this case were not attributable to either party. The delays resulted from, inter alia, a motion to recuse the judge who initially handled the case, the failure of the court clerk to notify Joseph of the entry of an order, and tornado damage to the home of Shannon's attorney.

The Nebraska Court of Appeals has addressed the retroactivity of a modification of child support by stating:

> The rule providing that the status, character, and situation of the parties and attendant circumstances should be considered in determining whether to make child support modifications retroactive naturally requires consideration of the obligated party's ability to pay the lump sum that will necessarily result in such a retroactive order. We find no cases in which the ability of the obligated party to pay the retroactively ordered support is discussed, but we think the ability to pay is a paramount factor. We think that in the absence of a showing of bad faith, it is an abuse of discretion for a court to award retroactive child support when the evidence shows the obligated parent does not have the ability to pay the retroactive support and still meet current obligations.

Cooper v. Cooper, 8 Neb. App. 532, 538, 598 N.W.2d 474, 478 (1999).

It appears that Shannon is seeking an additional $300 per month for 11 months, or $3,300. The trial court found that it

would create a hardship on Joseph to make the child support modification retroactive to the month following the filing of the application for modification and that the temporary child support had given Shannon adequate relief.

Joseph testified that he did not have the means to pay a retroactive award. He offered into evidence an account summary from Wells Fargo Bank which showed that as of August 15, 2003, he had $1,945.86 in his checking account and $339.32 in his savings account. Joseph stated that the checking account was a bill-paying account and that there were outstanding checks. The savings account was Joseph's only source of savings.

There was no showing of bad faith on the part of Joseph to suggest that he had other funds available to pay a retroactive award of child support, and he offered evidence that his average living expenses exceeded his monthly net income. The trial court's finding that a retroactive order would create a hardship on Joseph is supported by the record. The court did not abuse its discretion in failing to order retroactive payment of child support or childcare expenses.

Cross-Appeal

On cross-appeal, Joseph asserts that the trial court erred in failing to deduct the entire amount of his monthly student loan payment from his monthly income when the court calculated his child support obligation. This assignment of error is without merit.

The trial court granted a deduction from monthly income equal to 25 percent of Joseph's monthly student loan payment. Joseph argues that the court's failure to deduct 100 percent of the student loan payment ignored the fact that it is a fixed, legally unavoidable expense, and he complains that the court did not explain its reasoning for a deduction of only 25 percent.

In the dissolution decree, Joseph was directed to pay his student loans of approximately $80,000, and as a result, he was granted a deviation in child support. His child support was decreased by $137 per month for two children and $114 per month for one child. Neither party filed an appeal following the entry of the dissolution decree.

When the second trial judge assumed this case, he noted that Joseph was requesting a deduction of $1,029 (the amount of his

monthly student loan payment) from his monthly income in the calculation of child support. The court found that the student loans contributed to Joseph's ability to earn his present income and that the loans may have been taken into consideration at the time of the dissolution decree. The court concluded that it was equitable to grant Joseph some deviation from the child support guidelines, and it ordered a deduction of 25 percent of Joseph's monthly student loan payment, or $257.25, from his monthly income.

A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree and (2) was not contemplated when the decree was entered. See *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003). In this case, the amount of Joseph's student loan payments was known to the parties when the dissolution decree was entered, and it was considered in determining child support at that time. Joseph did not appeal from the dissolution decree. Therefore, he has no basis for arguing that the total amount of his monthly student loan payment should be deducted from his monthly income in calculating child support upon Shannon's application for modification. He was not allowed to deduct the entire amount in the dissolution decree, and he cannot relitigate that issue upon an application for modification.

Joseph also argues that the trial court should have carried over the $137 and $114 reductions for two children and one child respectively from the monthly child support. We conclude that the reduction in support for the student loan payments was determined in the original decree and should not have been changed by the court upon the application to modify.

Joseph also asserts that the trial court erred when it denied his request that he be allowed to claim both of the minor children as dependents for income tax purposes. We find no abuse of discretion in the court's denial of this request.

CONCLUSION

For the reasons stated above, the judgment of the trial court is modified as follows: Joseph is ordered to pay $737 per month as child support for two children and $479 per month as child support for one child, effective February 23, 2004, the date of the

final order of modification entered by the trial court. Each party shall pay his or her own costs and attorney fees.

AFFIRMED AS MODIFIED.

STEPHAN, J., not participating.

ROBERT SALTS, APPELLANT, V. LANCASTER COUNTY, NEBRASKA, AND BERNIE HEIER ET AL., AS THE LANCASTER COUNTY BOARD OF COMMISSIONERS FOR LANCASTER COUNTY, NEBRASKA, APPELLEES.

697 N.W.2d 289

Filed June 3, 2005. No. S-04-642.

1. **Judgments: Final Orders: Appeal and Error.** A judgment rendered or final order made by a district court may be reversed, vacated, or modified for errors appearing on the record.
2. **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.
3. **Counties: Public Assistance.** The extent of a county's duty to provide assistance to indigent persons must be determined by reference to the applicable statutes which create the duty.
4. **Political Subdivisions: Counties: Legislature: Statutes.** A county is a political subdivision of the state and has only that power delegated to it by the Legislature. It follows that a county may not employ its rulemaking power to modify, alter, or enlarge portions of a statute pursuant to which it acts.
5. **Statutes.** A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme.
6. ____. 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.
7. ____. A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded for further proceedings.

Rebecca L. Gould, of Nebraska Appleseed Center for Law in the Public Interest, Welfare Due Process Project, for appellant.

Kristy Mundt, Deputy Lancaster County Attorney, and Julie Agena, Senior Certified Law Student, for appellee.

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

STEPHAN, J.

In this appeal, Robert Salts contends that Lancaster County exceeded its statutory authority in establishing certain durational residency requirements for primary health care benefits through its general assistance program. We agree and reverse the decision of the district court, and remand the cause for further proceedings.

FACTS

On March 17, 2003, Salts moved to Lancaster County in order to receive substance abuse treatment at Cornhusker Place of Lincoln-Lancaster County, Inc. (Cornhusker Place). Immediately prior to this move, Salts lived in Beatrice for 1 month, Kearney for 3 months, and Lexington for 1½ years. On May 29, Salts applied for medical and dental benefits under Lancaster County's general assistance program to enable him to obtain primary health care for large tumors on his arm and rib cage, an ear infection, an ingrown toenail, and dental problems. General assistance programs are made available by each Nebraska county to provide benefits to indigent persons who are not eligible for other state and federal assistance programs. See Neb. Rev. Stat. §§ 68-104 to 68-156 (Reissue 2003).

Although Salts qualified as an indigent person under the general assistance guidelines promulgated by Lancaster County, his application was denied on the basis that he did not meet eligibility requirements with respect to residence as set forth in the Lancaster County General Assistance Guidelines (rev. 2003). Guideline 2:101 provides:

> **Residency**: An applicant must reside within the geographic boundaries of Lancaster County in order to make application through the Lincoln Office. Individuals residing outside Lancaster County should be referred to the appropriate county office for assistance. If an individual is not permanently residing in Nebraska and/or Lancaster County, temporary assistance may be granted provided all other eligibility criteria are met.

Guideline 3:101 provides:

Residency: An applicant must meet the requirements of 2:101. Applicants not residing in Lancaster County must also meet the following criteria:

1. The applicant did not enter Lancaster County for the sole purpose of obtaining medical care; and

2. The illness or injury for which medical assistance is requested arose in Lancaster County, Nebraska; and

3. The medical care is provided for a life threatening or life trauma condition.

Salts filed a timely appeal in which he alleged that the Lancaster County residency requirements were contrary to law. A hearing officer for the Lancaster County Board of Commissioners upheld the denial of Salts' application, and Salts then filed a timely appeal to the district court for Lancaster County. The district court affirmed the denial, reasoning that the applicable Nebraska statutes grant counties discretion in providing general assistance to nonresidents and that the eligibility requirements adopted by Lancaster County were within this statutory discretion. Salts filed this timely appeal, which we moved 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).

ASSIGNMENT OF ERROR

In his sole assignment of error, Salts assigns, restated, that the district court erred in holding that Lancaster County did not exceed its statutory authority in establishing the residency requirements for its general assistance program found in general assistance guidelines 2:101 and 3:101.

STANDARD OF REVIEW

[1] A judgment rendered or final order made by a district court may be reversed, vacated, or modified for errors appearing on the record. Neb. Rev. Stat. § 25-1911 (Reissue 1995).

[2] 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. See *In re Claims Against Atlanta Elev., Inc.*, 268 Neb. 598, 685 N.W.2d 477 (2004).

ANALYSIS

[3,4] Counties had no common-law duty to provide assistance to indigent persons. *Mary Lanning Memorial Hospital v. Clay County*, 170 Neb. 61, 101 N.W.2d 510 (1960). However, since the inception of our state, the county board by statute has been "made the overseer of the poor and the county has a mandatory duty to provide for poor persons whether they are residents or nonresidents of the county." *Creighton-Omaha Regional Health Care Corp. v. Douglas County*, 202 Neb. 686, 690, 277 N.W.2d 64, 67 (1979). See, *Mary Lanning Memorial Hospital v. Clay County, supra*; Rev. Stat. ch. 40, §§ 1-23 (1866). The current statutes governing county general assistance programs for the poor are codified at §§ 68-104 et seq. The extent of a county's duty to provide assistance to indigent persons must be determined by reference to the applicable statutes which create the duty. *Mary Lanning Memorial Hospital v. Clay County, supra.* A county is a political subdivision of the state and has only that power delegated to it by the Legislature. *Guenzel-Handlos v. County of Lancaster*, 265 Neb. 125, 655 N.W.2d 384 (2003). It follows that a county may not employ its rulemaking power to modify, alter, or enlarge portions of a statute pursuant to which it acts.

The issue in this case is whether Lancaster County exceeded its statutory authority by imposing certain durational residency requirements for primary health care benefits under its general assistance program. In upholding the validity of Lancaster County's residency requirements, the district court focused on a portion of § 68-114 which provides in part:

> Whenever any nonresident shall fall sick in any county in this state, not having money or property to pay his or her board, or whenever any poor person not having a legal settlement in the county is found in distress, without friends or money, so that he or she is likely to suffer, it shall be the duty of the county board to furnish such temporary assistance to such person as it shall deem necessary; and if any such person shall die, the county board shall provide all necessary means for a decent burial of such person.

In *Mary Lanning Memorial Hospital v. Clay County, supra*, this court held that § 68-114 applied to an indigent nonresident of the state who was injured while walking along a Nebraska highway.

In the instant case, the district court held that the statute also applied to a Nebraska resident who did not reside in the county in which he sought medical care under a general assistance program. The district court reasoned that § 68-114 gave Lancaster County "broad discretion on how it chooses to address the medical needs of nonresidents" and therefore upheld the county's denial of medical benefits to Salts because he was a nonresident of the county and his medical needs were not life-threatening. The district court agreed with the determination of the hearing examiner that Salts should apply for general assistance in Dawson County, where he had established legal settlement for purposes of general assistance, and request that he be permitted to remain in Lancaster County for treatment.

[5] We agree with Salts' contention that § 68-114 should not be considered in isolation, but, rather, in conjunction with other statutory provisions which govern the provision of county general assistance benefits to indigent persons. A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. *Mogensen v. Board of Supervisors*, 268 Neb. 26, 679 N.W.2d 413 (2004). The starting point in our analysis is § 68-104, which obligates the county board of each county to "furnish such medical service as may be required for the poor of the county who are not eligible for other medical assistance programs and general assistance for the poor of the county." This statute further states that in providing such medical assistance, "the county board shall make use of any existing facilities, including tax-supported hospitals and charitable clinics so far as the same may be available."

Each Nebraska county is required by § 68-133(1) to "[p]rovide that all individuals desiring to make application for general assistance shall have opportunity to do so . . . ." Each county is further required by § 68-133(2) to provide a schedule of goods and services, including medical expenses, which are "necessary for the maintenance of minimum decency and health for families of various sizes, including single persons." Lancaster County provides certain primary health care benefits for persons participating in its general assistance program, as well as specialty physician services and hospital care when certified as "medically necessary" by the primary physician. Treatment for

a condition is considered medically necessary "if the condition will worsen without medical intervention and interfere with the client's self-sufficiency or ability to work." See Lancaster County General Assistance Guidelines 1:116. The record includes a letter from the medical director of Cornhusker Place dated July 24, 2003, verifying Salts' medical condition and stating that the nursing staff at Cornhusker Place has "made many, many attempts to get . . . Salts approved for General Assistance to help with all of his current medical needs without any success." The letter further indicated that Salts' tentative discharge from his long-term substance abuse treatment program was not scheduled until August or September 2004 and that the staff of Cornhusker Place was "at a loss in attempting to help this individual with his medical needs."

With respect to Nebraska residents, the place of "legal settlement" is an essential factor in determining responsibility for general assistance benefits. Section 68-131 states in part:

> When any poor person does not have a spouse, parent, or stepparent supporting him or her or is not eligible for other general assistance programs, the poor person shall receive such relief, referred to as general assistance for purposes of sections 68-131 to 68-148, out of the treasury of the county in which he or she has legal settlement at the time of applying for assistance, in the manner provided in sections 68-131 to 68-148.

The term "legal settlement" for purposes of all public assistance programs is defined by § 68-115 in part as follows:

> Every person, except those hereinafter mentioned, who has resided one year continuously in any county, shall be deemed to have a legal settlement in such county.
>
> Every person who has resided one year continuously within the state, but not in any one county shall have a legal settlement in the county in which he or she has resided six months continuously.
>
> (2) The time during which a person has been an inmate of any public or private charitable or penal institution, or has received care at public expense in any type of care home, nursing home, or board and room facility licensed as such and caring for more than one patient or guest, and each

> month during which he or she has received relief from private charity or the poor fund of any county shall be excluded in determining the time of residence hereunder, as referred to in subsection (1) of this section.

The significance of an indigent person's county of "legal settlement" is apparent from §§ 68-143 through 68-145. Section 68-143 provides that "[a]ny person becoming chargeable as a poor person in this state shall be chargeable as such in the county in which he or she has established a legal settlement as defined in section 68-115." Section 68-144 then provides:

> If any person shall become chargeable in any county in which he or she has not established a legal settlement at the time of applying for aid, he or she shall be duly taken care of by the proper authority of the county where he or she may be found. It shall be the duty of the clerk of the county board to send a notice by mail to the clerk of the county board of the county in which such poor person has a legal settlement that such person has become chargeable as a poor person, and requesting the authorities of such county to promptly remove such poor person and to pay the expense accrued in taking care of him or her.

Section 68-145 provides:

> If a poor person, by reason of sickness or disease, or by neglect of the authorities of the county in which he or she has a legal settlement, or for any other sufficient cause, cannot be removed, then the county taking charge of such individual may sue for, and recover from the county to which such individual belongs, the amount expended for and in behalf of such poor person and in taking care of such person.

In this case, it is undisputed that Salts met the financial prerequisites for entitlement to general assistance. The dispute arises from the fact that Salts' need for medical care arose while he was physically present in Lancaster County at a time when his place of "legal settlement" was Dawson County. Lancaster County argues that its duty under § 68-114 was to provide only that medical care which it deemed "necessary," which did not include treatment for medical conditions which were not life-threatening, and that therefore, it had no obligation to provide the medical care

needed by Salts. Thus, the issue presented is one of statutory interpretation, requiring our independent review.

[6,7] 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. *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004); *Gilroy v. Ryberg*, 266 Neb. 617, 667 N.W.2d 544 (2003). Moreover, a court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose. *City of Gordon v. Ruse*, 268 Neb. 686, 687 N.W.2d 182 (2004); *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004). The statutory scheme summarized above clearly contemplates that a person eligible for general assistance benefits may apply for such benefits in a county other than his or her county of "legal settlement." Likewise, a county in which the eligible applicant has not established "legal settlement" may be responsible for providing necessary services, although it would then have a right to seek reimbursement from the county in which the recipient had legal settlement and which, under § 68-131, bears ultimate financial responsibility for such general assistance benefits. Construed as a whole, the only reasonable interpretation of the general assistance statutes is that a county must provide to all eligible persons located in the county that assistance which is necessary to maintain minimum health and decency, subject to its right to seek financial reimbursement from another county in which a recipient has "legal settlement." The phrase "shall deem necessary" in § 68-114 does not authorize a county to provide a level of medical assistance to nonresidents of the county which is different from that which it provides to its own eligible residents. Rather, we conclude that the general assistance statutes obligate each county to provide to all eligible persons, whether or not they are residents of that county, the minimum level of care which it has undertaken pursuant to § 68-133(2). This statutory interpretation should not impose an undue financial burden on those counties having a concentration of medical facilities because of the requirement that general assistance benefits are to be paid "out of the treasury of the county in which [the recipient] has legal settlement at the time of applying for assistance," and because a

county providing necessary medical care through its general assistance program has a right of reimbursement from the recipient's county of legal settlement. See §§ 68-131, 68-144, and 68-145. Based upon our independent review, we conclude that the district court erred in determining that § 68-114 granted the county discretion to adopt the Lancaster County General Assistance Guidelines 2:101 and 3:101.

CONCLUSION

For the reasons set forth, we reverse the judgment of the district court and remand the cause to the district court with directions to reverse the determination of the Lancaster County Board of Commissioners and remand the matter to that body for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HYANNIS EDUCATION ASSOCIATION, AN UNINCORPORATED ASSOCIATION, APPELLEE AND CROSS-APPELLANT, V. GRANT COUNTY SCHOOL DISTRICT NO. 38-0011, ALSO KNOWN AS HYANNIS HIGH SCHOOL, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE.

698 N.W.2d 45

Filed June 10, 2005. No. S-04-133.

1. **Commission of Industrial Relations: Appeal and Error.** The applicable standard of review in an appeal from the Commission of Industrial Relations in a case involving wages and conditions of employment is as follows: Any order or decision of the commission may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other: (1) if the commission acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the commission do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.
2. **Commission of Industrial Relations: Jurisdiction.** The statutory jurisdiction of the Commission of Industrial Relations is to settle pending controversies.
3. **Labor and Labor Relations: Teacher Contracts.** A dispute over the presence of a deviation clause in a teacher contract is the subject of mandatory bargaining.
4. **Commission of Industrial Relations: Teacher Contracts.** A deviation clause in a teacher contract falls under the category of "wages, hours, and other terms of

employment, or any question arising thereunder," as stated in Neb. Rev. Stat. § 48-816(1) (Reissue 1998), and is a subject of mandatory bargaining.

5. **Commission of Industrial Relations: Contracts.** The Commission of Industrial Relations' orders are not designed to force a party into a contract, but, rather, are to exercise the commission's authority to settle disputes.
6. **Commission of Industrial Relations: Evidence: Words and Phrases.** A prevalence determination by the Commission of Industrial Relations is a subjective determination. The standard inherent in the word "prevalent" will be one of general practice, occurrence, or acceptance.
7. **Commission of Industrial Relations: Evidence.** A valid prevalence analysis by the Commission of Industrial Relations does not require as a prerequisite a complete identity of provisions in the array.
8. ____: ____. As a general rule, it may be said that the factors most often used by the Commission of Industrial Relations to determine comparability are geographic proximity, population, job descriptions, job skills, and job conditions.
9. **Commission of Industrial Relations: Evidence: Appeal and Error.** Absent a showing that the entities considered by the Commission of Industrial Relations did not present a suitable array, an appellate court cannot say that the commission erred in refusing to consider every other or additional entity, wherever located, which might also be comparable.
10. **Commission of Industrial Relations: Wages: Evidence.** The requirement that the Commission of Industrial Relations select a suitable array does not obligate the commission to consider every conceivable comparable array, but only to consider a sufficient representative array so that the commission can determine whether the wages paid or the benefits conferred are comparable.
11. **Commission of Industrial Relations: Evidence.** Determinations made by the Commission of Industrial Relations in accepting or rejecting claimed comparables for purposes of establishing an array are within the field of its expertise and should be given due deference.

Appeal from the Nebraska Commission of Industrial Relations. Affirmed in part, and in part reversed and remanded for further proceedings.

Rex R. Schultze, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellant.

Mark D. McGuire, of McGuire & Norby, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

This industrial dispute over wages and conditions of employment for the 2002-03 contract year is between the appellant and

cross-appellee, Grant County School District No. 38-0011 (the District), and the appellee and cross-appellant, Hyannis Education Association (the Association), the collective bargaining unit for teachers employed by the District. The District and the Association were unable to reach a negotiated agreement for the 2002-03 contract year, and the Association filed a petition with the Nebraska Commission of Industrial Relations (the CIR) seeking to invoke the CIR's authority to resolve the parties' industrial dispute over wages, fringe benefits, and other contract terms.

Following a hearing, the CIR determined that the fringe benefit issues raised by the parties were moot, but that it nonetheless could and did decide the issue regarding the appropriate salary schedule. The CIR also determined that it was without authority to resolve an issue raised by the parties concerning the inclusion of a deviation clause in the parties' agreement, which clause permitted the District to deviate upward from the agreement's base salary schedule in the course of hiring teachers. In order to resolve the parties' wage dispute, the CIR determined the array of comparable school districts against which contract terms were compared and, based upon this array, established the base salary.

On appeal, the District challenges, in summary, the CIR's determinations concerning the mootness of the fringe benefit issues, the CIR's professed inability to resolve the parties' dispute concerning the deviation clause, and the CIR's selection of the array of comparable school districts. For its cross-appeal, the Association essentially challenges the CIR's refusal to consider the deviation clause.

As explained below, we conclude that the deviation clause is the subject of mandatory bargaining and that the CIR has the authority to consider the parties' dispute over the deviation clause. We therefore reverse the CIR's order to the extent it states that the CIR is without authority to consider the deviation issue in this case. The cause is remanded for such consideration, and our ruling resolves the cross-appeal. The parties' remaining assignments of error are without merit. Accordingly, we affirm in part, and in part reverse the order of the CIR and remand the cause for further proceedings.

STATEMENT OF FACTS

The relevant facts are essentially undisputed. The District is a Class VI school district, maintaining Hyannis High School, which is located in Hyannis, Grant County, Nebraska, and educating students in grades 7 through 12 under the direction of a single school board. See Neb. Rev. Stat. 79-102(6) (Reissue 2003). For the 2002-03 contract year, the school had 103 students, 21 in grades 7 and 8, and 82 in grades 9 through 12. The District employed 14 staff members.

The Association is a labor organization formed by teachers employed by the District for the purpose of representation in matters of employment relations. See Neb. Rev. Stat. § 48-801(6) (Reissue 2004). On March 5, 2003, the Association filed a petition with the CIR, seeking the resolution of an industrial dispute involving wages and conditions of employment pursuant to the Industrial Relations Act, Neb. Rev. Stat. §§ 48-801 to 48-838 (Reissue 1998 & Cum. Supp. 2002). Specifically, the petition alleged that an "industrial dispute" pursuant to § 48-801(7) existed between the District and the Association, because the parties had negotiated on items concerning wages and other conditions of employment for the 2002-03 contract year, and such negotiations had failed to result in an agreement between the parties. Pending the successful negotiation and execution of an agreement for the 2002-03 contract year, the District had continued to apply the provisions of the last negotiated agreement between the parties, which pertained to the 2001-02 contract year.

The Association's petition came on for hearing before the CIR on June 18, 2003. Prior to the hearing, the parties entered into a pretrial order in which they stipulated to certain facts and to the disputed issues to be presented to the CIR. The parties also stipulated that the last day of school for the 2002-03 contract year was May 23, 2003. The disputed issues identified by the parties included the salary schedule and certain fringe benefits. Another issue identified by the parties was the inclusion of a deviation clause in the agreement. The clause, which had been part of the 2001-02 agreement, provided as follows: "The Board reserves the right to deviate from the agreement if it becomes necessary to hire teachers for a particular position." Although the deviation clause had been a negotiated term in the 2001-02

agreement, the Association sought to have the clause deleted from the 2002-03 contract.

Regarding the array of comparable school districts to be used by the CIR in resolving the parties' industrial dispute, the parties agreed that Garden County, Rushville, Gordon, and Thedford, all of which were Class VI school districts, were comparable. The Association claimed additional comparables were Rock County, West Holt, and Burwell, all of which were Class VI school districts. The District claimed additional comparables were Hay Springs, Hemingford, Chappell, South Platte, Stapleton, Paxton, Mullen, Sandhills, and Cody-Kilgore, all of which were Class III districts, meaning the school district embraced a territory with a population of more than 1,000 and less than 150,000 inhabitants that maintained both elementary and high school grades under the direction of a single school board. § 79-102(3). The District claimed that unlike the Association's comparables, all of the school districts in its array were located within 72 air miles from Hyannis.

The parties stipulated that the "[w]ork, skills, and working conditions of the bargaining unit employees at Rock County, Garden County, Rushville, West Holt, Gordon, Burwell, and Thedford are sufficiently similar to [the Association's] bargaining unit to satisfy the standards set forth in NEB. REV. STAT. § 48-818," but that by so stipulating, the District did not agree that Burwell, Rock County, Thedford, and West Holt should be in the array adopted by the CIR. In its brief on appeal, the District expressed additional misgivings regarding including Gordon in the array.

As stated above, a hearing was held before the CIR on June 18, 2003. Four witnesses appeared and testified, and 39 exhibits were offered into evidence. On January 6, 2004, the CIR issued its findings and order. In summary, the CIR accepted the Association's array of comparable districts. Thus, the seven-district array as determined by the CIR included the four initially agreed-upon districts of Garden County, Rushville, Gordon, and Thedford, and the three contested array districts of Rock County, West Holt, and Burwell. Based upon the array, the CIR concluded there was no clear prevalence to permit the District to change its salary schedule, and utilizing the District's existing salary schedule, the CIR

established the District's base salary of $23,620 for the 2002-03 contract year. The CIR concluded that the fringe benefit issues raised by the parties were moot because the contract year was over, and it was impossible or impractical to retroactively change such benefits. Thus, the CIR did not specifically rule on the substance of the fringe benefit issues. Finally, the CIR determined that unless it was presented with a prevalent array of deviation clauses which happened to be identical in their terms, it was without authority to rule on the parties' dispute over the inclusion of the deviation clause in the contract. As a result, the CIR declined to rule on the appropriateness of the deviation clause.

The District appeals from the CIR's order. The Association has filed a cross-appeal from the CIR's order, essentially limited to the CIR's refusal to rule on the deviation clause.

Additional facts will be set forth below when pertinent to our analysis of the parties' arguments on appeal.

ASSIGNMENTS OF ERROR

In its appeal, the District assigns seven errors, which we restate as three. The District claims, restated, that the CIR erred (1) in determining that the fringe benefit issues were moot, while not determining the entire contract dispute was moot; (2) in determining that it was unable to resolve the parties' dispute concerning the deviation clause in the contract; and (3) in selecting the appropriate array.

In its cross-appeal, the Association assigns two errors, which we restate as one. The Association claims, restated, that the CIR erred in refusing to resolve the parties' dispute concerning the inclusion of the deviation clause in the contract and in failing to state that a deviation clause would render the parties' contract regarding salaries illusory and void.

STANDARD OF REVIEW

The parties disagree as to the proper standard of review on appeal in this case. We therefore take this opportunity to state the appropriate standard of review regarding the appeal of a case involving wages and conditions brought under § 48-818.

This case involves an industrial dispute and arises under § 48-818, which authorizes the CIR to enter orders concerning

wages and other conditions of employment. Previously, when considering appeals involving an industrial dispute over wages and conditions of employment, we derived our standard of review from case law and recited the standard as follows:

> In our review of orders and decisions of the [CIR], we are restricted to considering whether the order of that agency is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable.

Lincoln Firefighters Assn. v. City of Lincoln, 253 Neb. 837, 839, 572 N.W.2d 369, 372 (1998). See, *Hall Cty. Pub. Defenders v. County of Hall*, 253 Neb. 763, 571 N.W.2d 789 (1998); *Douglas Cty. Health Dept. Emp. Assn. v. Douglas Cty.*, 229 Neb. 301, 427 N.W.2d 28 (1988); *IBEW Local 1536 v. City of Fremont*, 216 Neb. 357, 345 N.W.2d 291 (1984); *IAFF Local 831 v. City of No. Platte*, 215 Neb. 89, 337 N.W.2d 716 (1983); *AFSCME Local 2088 v. County of Douglas*, 208 Neb. 511, 304 N.W.2d 368 (1981), *modified* 209 Neb. 597, 309 N.W.2d 65; *American Assn. of University Professors v. Board of Regents*, 198 Neb. 243, 253 N.W.2d 1 (1977).

Contrary to the standard of review noted above, the parties refer us to § 48-825, in which a standard of review was added to the industrial relations statutes. In particular, § 48-825(4) provides as follows:

> Any order or decision of the [CIR] may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other:
>
> (a) If the [CIR] acts without or in excess of its powers;
>
> (b) If the order was procured by fraud or is contrary to law;
>
> (c) If the facts found by the [CIR] do not support the order; and
>
> (d) If the order is not supported by a preponderance of the competent evidence on the record considered as a whole.

The question raised in the current appeal is whether the appropriate standard of review in a case involving wages and conditions of employment is that previously set forth by *Lincoln Firefighters Assn., supra*, or whether the standard of review

is that set forth in § 48-825(4). We conclude that § 48-825(4) controls.

Section 48-825(4) was added to the Industrial Relations Act by 1995 Neb. Laws, L.B. 382. By its terms, the standard of review in § 48-825(4) applies to "[*a*]*ny order or decision of the* [*CIR*]." (Emphasis supplied.) We believe the use of the word "any" in § 48-825(4) signifies broad application of the standard of review enunciated therein. We, therefore, conclude that the standard of review in § 48-825(4) applies to this appeal involving wages and conditions of employment. With reference to § 48-825(4), we note that, subsequent to 1995, we have applied the standard of review set forth in § 48-825(4) to cases involving allegations of prohibited practices under § 48-824. See, *International Union of Operating Engrs. Local 571 v. City of Plattsmouth*, 265 Neb. 817, 660 N.W.2d 480 (2003) (union alleged city failed to bargain in good faith with respect to mandatory topic of negotiation in violation of § 48-824(1)); *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, 265 Neb. 8, 654 N.W.2d 166 (2002) (teachers' association alleged school district's negotiator engaged in prohibited practices in violation of § 48-824(2)); *Nebraska Pub. Emp. v. Otoe Cty.*, 257 Neb. 50, 595 N.W.2d 237 (1999) (union alleged county's negotiator engaged in prohibited practices in violation of § 48-824(2)). However, to the extent cases pertaining to wages and conditions such as *Lincoln Firefighters Assn., supra*, and *Hall Cty. Pub. Defenders, supra*, diverge from the standard of review in § 48-825(4), they are disapproved.

[1] Accordingly, in our review of orders and decisions of the CIR involving an industrial dispute over wages and conditions of employment, our standard of review is as follows: Any order or decision of the commission may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other: (1) if the commission acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the commission do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole. We apply this standard of review to the instant case.

ANALYSIS

CIR Did Not Err When It Determined That Fringe Benefit Issues Were Moot but That Parties' Salary Dispute Was Capable of Resolution.

The District challenges the CIR's determination that the fringe benefit issues presented to the CIR were moot, but that the salary dispute was nevertheless capable of being decided. As we read the District's assignment of error regarding salary and mootness, the claimed error is limited to the propriety of the CIR's undertaking to make a decision regarding the salary schedule rather than the particular amount of base salary that was determined. We conclude that there is no merit to this assignment of error.

As noted above, in its order, the CIR determined that all benefits issues in the case, "such as health insurance, sick leave, sick leave bank, maternity/paternity leave, academic study leave, and travel leave" were moot because the contract year had ended and that as a result, it would be impossible or impractical to retroactively change such a benefit. The CIR ruled that any determination with regard to these fringe benefits would be merely advisory and that it was not authorized to render advisory opinions. The CIR also concluded, however, that the salary structure question was not moot, because relief could be afforded retroactively if necessary.

[2] We have previously recognized "the impossibility or impracticality of retroactively changing fringe benefits for an expired contract year." *Lincoln Firefighters Assn. v. City of Lincoln*, 253 Neb. 837, 845, 572 N.W.2d 369, 375 (1998) (affirming CIR's determination that issues involving fringe benefits such as funeral leave were moot). Moreover, we have stated that "[t]he statutory jurisdiction of the CIR is to settle pending controversies." *NAPE v. Game & Parks Comm.*, 220 Neb. 883, 885, 374 N.W.2d 46, 48 (1985) (citing § 48-810).

When the CIR heard this case, the 2002-03 contract year was completed. The impracticality of changing fringe benefits already exercised for the expired year was evident. Therefore, we conclude that the CIR's decision that the fringe benefit issues were moot was within its powers, not contrary to law, and supported by a preponderance of competent evidence.

In this case, the CIR refused to allow the District to alter its existing salary schedule that was part of the 2001-02 contract. In this connection, we further conclude that there is no merit to the District's claim that if the fringe benefit issues are deemed moot, the salary issue must necessarily be deemed moot. Unlike fringe benefits, issues involving salaries are capable of being given retroactive effect by the CIR. See *Douglas Cty. Health Dept. Emp. Assn. v. Douglas Cty.*, 229 Neb. 301, 427 N.W.2d 28 (1988) (stating that retroactive wage increase was within authority of CIR). We conclude that the CIR's decision that the salary schedule dispute could be resolved was within its powers, not contrary to law, and supported by a preponderance of competent evidence. We conclude this assignment of error is without merit.

CIR Erred When It Determined That It Was Without Authority to Rule on Inclusion of Deviation Clause in Parties' Contract.

On appeal, the District challenges the CIR's determination that it was without authority to resolve the parties' dispute concerning the deviation clause in the contract and its consequent refusal to do so. The deviation clause at issue provides as follows: "The Board reserves the right to deviate from the agreement if it becomes necessary to hire teachers for a particular position." Referring to the record and reading the 2001-02 contract as a whole, the deviation clause permits the District to pay a salary in excess of the base salary schedule. We agree with the District that the CIR's decision that it did not have authority to consider the parties' dispute over the deviation clause was contrary to law and that the CIR further erred when it failed to rule on the deviation issue. Accordingly, we reverse the portion of the CIR's order declining to consider the deviation issue and remand the cause with directions to the CIR to consider the deviation issue based on prevalence.

In its order refusing to decide the deviation issue, the CIR indicated that the District did not have a "right" to deviate from the salary schedule because deviation is a mandatory subject of bargaining. The CIR observed that the CIR's orders are not designed to force a party to enter into a contract, but, rather, are a way for the CIR to exercise its power to settle individual disputes. The

CIR also stated that it could not resolve the deviation issue because, for mathematical certainty, the only relevant comparisons "would need to be identical." In this regard, the CIR stated that "unless the [CIR] is presented with a prevalent array of identical contract provisions, the [CIR] will not determine the issue of deviation as one of prevalency."

[3,4] We agree with the CIR's observation that the parties' dispute over the presence of a deviation clause in the contract is the subject of mandatory bargaining. See *Coleridge Educ. Assoc. v. Coleridge Comm. Schools*, 13 C.I.R. 376 (2001). Pursuant to the Industrial Relations Act, mandatory collective bargaining subjects are those that relate to "wages, hours, and other terms and conditions of employment or any question arising thereunder." § 48-816(1). The Industrial Relations Act requires parties to bargain over mandatory bargaining subjects. *Id.* Teacher salary schedules have historically been the basic framework for teacher contracts and the method by which teacher wages are determined. *Coleridge Educ. Assoc., supra.* Deviation from the salary schedule pursuant to a deviation clause affects those wages. Accordingly, a deviation clause falls under the category of "wages, hours, and other terms of employment or any question arising thereunder," § 48-816(1), and, as the CIR correctly observed, is a subject of mandatory bargaining.

[5] We also agree with the CIR's general observation that its orders are not designed to force a party into a contract, but, rather, are to exercise the CIR's authority to settle disputes. However, because the parties had bargained for the deviation clause in the 2001-02 contract, we disagree with the CIR's implication that ruling on the deviation clause in this case would create a contract where none existed.

In its order, the CIR cited extensively from *Coleridge Educ. Assoc., supra*, in resolving the question of its authority to rule on the deviation issue in this case. After concluding that a deviation clause was a subject of mandatory bargaining, the CIR in *Coleridge Educ. Assoc.* examined the record therein and noted that despite the presence of a deviation provision in the agreement for at least 10 years, "there [was] no evidence" that the deviation provision was bargained for. *Id.* at 386. The CIR in *Coleridge Educ. Assoc.* therefore refused to approve application

of the deviation provision to the teachers' salaries at issue therein. In contrast to *Coleridge Educ. Assoc.*, in the instant case, the parties do not dispute that the deviation clause under consideration was bargained for in the 2001-02 contract year, and such fact is implicit in the CIR's statement that the deviation clause was "placed in the 2001-2002 contract." Unlike *Coleridge Educ. Assoc.*, approval of the deviation clause by the CIR would not force the parties into a contract term where none existed, because such term was previously agreed to. Approval of the deviation clause by the CIR would be in the nature of settling an industrial dispute, which is within the authority of the CIR. Thus, contrary to the CIR's rationale, the deviation clause at issue was bargained for as found by the CIR and capable of application if inclusion of its terms is justified based upon prevalence.

Despite acknowledging the subjective nature of a prevalence analysis, the CIR also stated in its order that "unless the [CIR] is presented with a prevalent array of identical contract provisions, the [CIR] will not determine the issue of deviation as one of prevalency." The CIR's conclusion that a prevalence standard can be used when considering deviation clauses only if the provisions in the array contain identical contract provisions is contrary to law. Accordingly, we reverse this portion of the CIR's order and remand the cause with directions to perform a prevalence analysis.

[6] It is clear that the CIR is authorized in industrial disputes involving wage issues to "establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions." § 48-818. See *Lincoln Firefighters Assn. v. City of Lincoln*, 253 Neb. 837, 572 N.W.2d 369 (1998). When discussing the CIR's authority under this provision, this court has acknowledged that "[a] prevalent wage rate to be determined by the [CIR] must almost invariably be determined after consideration of a combination of factors." *Omaha Assn. of Firefighters v. City of Omaha*, 194 Neb. 436, 440, 231 N.W.2d 710, 713 (1975). We have stated that when the members of the array to which the comparison is made "are sufficiently similar and have enough like characteristics or qualities[, then]

comparison [is] appropriate." *Id.* at 441, 231 N.W.2d at 713-14. We apply these principles stated in the context of wage rates to the instant case involving the deviation issue. We do not believe that the use of the word "prevalent" in the context under consideration requires that the employment terms elsewhere be completely identical to the provision at issue. As the CIR observed in its order, a prevalence determination is a subjective determination. The standard inherent in the word "prevalent" is one of general practice, occurrence, or acceptance, and determinations regarding "prevalent" practices are within the field of expertise of the CIR. See *Omaha Assn. of Firefighters, supra.*

Contrary to the reluctance exhibited by the CIR in the instant case, it has in the past considered a deviation clause composed of language similar to the clause at issue, utilizing a prevalence analysis in such consideration. In *Yutan Educ. Ass'n v. Saunders Co. School Dist.*, 12 C.I.R. 68 (1994), the CIR was asked to determine whether a deviation clause that permitted the school district to " 'deviate from the schedule as conditions warrant' " was prevalent. *Id.* at 71. Upon performing a prevalence analysis, the CIR determined that the contracts of 7 of the 11 array members did "not have specific contract language authorizing the school to deviate from the salary schedule, and thus, it is not prevalent to do so." *Id.* In reaching this conclusion, the CIR noted that it had "previously determined the prevalence of similar contract language in the case of *Wayne Education Association v. School District of Wayne*, 9 CIR 281 (1988) [(finding that deviation language was not prevalent and should be stricken)]." *Yutan Educ. Ass'n*, 12 C.I.R. at 71.

[7] In sum, the dispute concerning the inclusion of the deviation clause in the parties' contract for the 2002-03 contract year is a subject of mandatory bargaining. Pursuant to § 48-818, the CIR is authorized to make findings and orders which "establish rates of pay and conditions of employment," and when the CIR acts under its statutory authority pursuant to § 48-818, it ordinarily does so utilizing a prevalence standard. A valid prevalence analysis does not require as a prerequisite a complete identity of provisions in the array. Rather, prevalence involves a general practice, occurrence, or acceptance, as determined by the CIR. We conclude that the portion of the CIR's order stating that it

could not consider the parties' dispute over the inclusion of the deviation clause is contrary to law. Accordingly, given the facts, we reverse that portion of the CIR's order declining to consider the deviation issue and remand the cause to the CIR for consideration of the deviation issue under a prevalence analysis.

CIR's Selection of Array for Comparability Purposes Was Supported by Preponderance of Competent Evidence and Was Not in Excess of CIR's Powers or Contrary to Law.

The District maintains that the CIR erred in its selection of the array for comparability purposes. As noted above, the CIR selected seven school districts, of which four had been agreed to as comparable prior to the hearing. The District claims that the CIR failed to select an array that met various factors, including, inter alia, geographic proximity and population size, that could be considered when selecting an array of comparable employers. The District claims that the CIR should have utilized the school districts the District proposed when selecting an array, all of which were within 72 air miles of Hyannis, but not all of which were Class VI schools. The District claims the CIR's refusal to include nine of its proposed school districts resulted in an array which was not supported by a preponderance of the competent evidence. We do not agree.

[8-10] Under § 48-818, the CIR is empowered to establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work or workers exhibiting like or similar skills under the same or similar working conditions. Section 48-818 requires that the employers selected for a comparative array must be demonstrated to be similar, and we have stated that "[a]s a general rule, it may be said that the factors most often used to determine comparability are geographic proximity, population, job descriptions, job skills, and job conditions." *Lincoln Firefighter Assn. v. City of Lincoln*, 253 Neb. 837, 842, 572 N.W.2d 369, 373 (1998). We have also stated, however, that "[a]bsent a showing that the [entities] considered by the CIR did not present a suitable array, we cannot say that the CIR [erred] in refusing to consider every other or additional [entity], wherever located, which also might be comparable." *Lincoln Co. Sheriff's*

Emp. Assn. v. Co. of Lincoln, 216 Neb. 274, 278, 343 N.W.2d 735, 739 (1984). Moreover, the requirement that the CIR select a suitable array does not obligate the CIR "to consider every conceivable comparable [array] but only to consider a sufficient representative array so that the [CIR] can determine whether the wages paid or the benefits conferred are comparable." *Id.*

In the instant case, the CIR determined that when a considerable number of comparables existed in an array of school districts from the same class as the subject district, it did not need to consider other school districts outside of that class for comparison. The CIR then proceeded to review the parties' proposed arrays and found that prior to the hearing, the parties had four Class VI school districts in common. In addition, the CIR noted that prior to the hearing, the District and Association had stipulated, inter alia, that the "[w]ork, skills, and working conditions of the bargaining unit employees at Rock County, Garden County, Rushville, West Holt, Gordon, Burwell, and Thedford are sufficiently similar to [the Association's] bargaining unit to satisfy the standards set forth in NEB. REV. STAT. § 48-818."

The CIR reviewed the Association's proposed array members, all of which were Class VI schools. The CIR noted that the Association's proposed array members, together with the four Class VI common array members, met "the [CIR's] proximity and geographical guidelines." The CIR also reviewed the District's proposed additional array members, noting that none were Class VI schools. Following its review of the parties' proposed arrays, the CIR determined that the Association's proposed array constituted an appropriate array. The CIR therefore concluded that the array for purposes of this case consisted "of the four common array members of Garden County, Rushville, Gordon and Thedford and the contested array members of Rock County, West Holt, and Burwell."

[11] We have recognized that

> [o]f necessity, determining comparables requires the granting of some discretion to the [CIR], and unless there is no substantial evidence upon which the [CIR] could have concluded that the factors it used resulted in an appropriate array, we may not as a matter of law disallow the [CIR's] determination.

Lincoln Firefighters Assn., 253 Neb. at 843, 572 N.W.2d at 374. "Stated another way, determinations made by the [CIR] in accepting or rejecting claimed comparables [for purposes of establishing an array] are within the field of its expertise and should be given due deference." *Id.* The record contains considerable information regarding the parties' proposed arrays, not repeated here. The CIR's determination is supported by a preponderance of the competent evidence and is not in excess of its powers or contrary to law. There is no merit to this assignment of error.

District's Remaining Assignments of Error Are Without Merit.

We have considered the District's remaining assignments of error, and we conclude they are without merit.

Association's Cross-Appeal Is Resolved by Our Ruling on District's Appeal.

For its cross-appeal, the Association claims, inter alia, that the CIR erred in determining that it was unable to resolve the parties' dispute concerning the deviation clause in the contract, which clause permits the District to deviate upward from the base salary. We have addressed this argument above, and we agree with the Association that the CIR erred when it concluded it did not have authority to consider the deviation issue. To the extent the Association raises other issues in its cross-appeal, given the posture of this case and our decision to remand the cause to the CIR for further consideration of the parties' claims with regard to the deviation clause based on a prevalence analysis, we need not and do not further comment on the Association's remaining arguments.

CONCLUSION

We conclude that the CIR did not err in determining that the fringe benefit issues were moot but that the salary dispute was capable of being resolved. We also conclude that the CIR did not err in determining the comparable array for purposes of resolving the issues presented in this industrial dispute. We further conclude, however, that the deviation clause is the subject of mandatory bargaining and that the CIR has the authority to consider the parties' dispute over the deviation clause by performing

a prevalence analysis. Accordingly, we reverse that portion of the CIR's order in which the CIR declined to consider the deviation issue and remand the cause for further proceedings. In all other respects, the order of the CIR is affirmed.

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

CORNHUSKER PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE, V. CITY OF SCHUYLER, NEBRASKA, A MUNICIPAL CORPORATION AND CITY OF THE FIRST CLASS OF THE STATE OF NEBRASKA, APPELLANT.

699 N.W.2d 352

Filed June 17, 2005. No. S-04-367.

1. **Annexation: Ordinances: Equity.** An action to determine the validity of an annexation ordinance and enjoin its enforcement sounds in equity.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.
3. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy.
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: 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.
6. **Actions: Parties: Standing.** The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
7. **Standing: Claims: Parties.** In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties.
8. ____: ____: ____. The litigant must have some legal or equitable right, title, or interest in the subject of the controversy.
9. **Municipal Corporations: Annexation.** The annexation of land to cities and towns is a legislative function, and it is for their governing bodies to determine the facts which authorize the exercise of the power granted.
10. **Municipal Corporations: Annexation: Boundaries.** A municipal corporation has no power to extend or change its boundaries otherwise than provided by constitutional enactment or as it is empowered by the Legislature by statute to do.

11. **Municipal Corporations: Annexation: Statutes.** The power delegated to municipal corporations to annex territory must be exercised in strict accord with the statute conferring it.
12. **Municipal Corporations: Annexation.** The power of a municipality to annex territory is, under the specific provisions of Neb. Rev. Stat. § 16-117 (Reissue 1997), limited to annexing contiguous or adjacent land if it is urban or suburban in character, and not agricultural land that is rural in character.
13. **Ordinances: Proof.** The burden is on one who attacks an ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity.
14. **Municipal Corporations: Annexation: Words and Phrases.** The terms "contiguous" and "adjacent" are used synonymously and interchangeably. If the territory sought to be annexed is not contiguous to the municipality, the proceedings are without legal effect.
15. **Municipal Corporations: Annexation: Boundaries: Words and Phrases.** Contiguity means that the two connecting boundaries should be substantially adjacent.

Appeal from the District Court for Colfax County: MARY C. GILBRIDE, Judge. Affirmed.

Thomas B. Thomsen, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy & Nick, for appellant.

Thomas M. Maul, of Law Office of Thomas M. Maul, for appellee.

Steven G. Seglin, of Crosby Guenzel, L.L.P., for amicus curiae Nebraska Rural Electric Association.

Gary G. Krumland and Mary E. Sommermeyer for amicus curiae League of Nebraska Municipalities.

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

MCCORMACK, J.

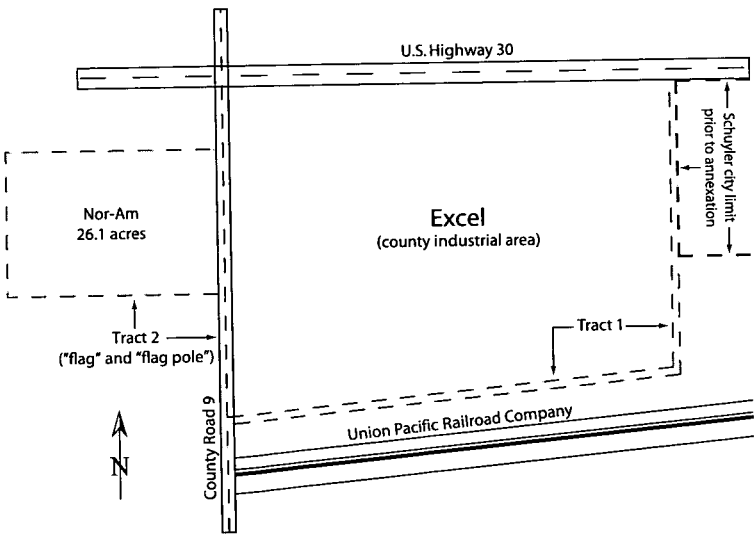
NATURE OF CASE

Nebraska law allows cities of the first class to annex "contiguous or adjacent lands, lots, tracts, streets, or highways." Neb. Rev. Stat. § 16-117(1) (Reissue 1997). Cornhusker Public Power District (Cornhusker) challenged in the district court for Colfax County the City of Schuyler's attempted annexation of certain tracts of land. The court ruled in favor of Cornhusker and enjoined Schuyler from enforcing its ordinance annexing such tracts of land. Schuyler appeals. The primary issue presented is whether

the tracts of land Schuyler attempted to annex are "contiguous or adjacent" to its existing corporate limits. We conclude that they are not and therefore affirm the judgment of the district court.

BACKGROUND

On September 2, 2003, Schuyler enacted ordinance No. 979. The ordinance defined two separate tracts of land to be annexed. For the reader's assistance, we include a sketch for illustrative purposes that is not drawn to scale in which the annexed tracts of land are shaded.



The first is a tract 30 feet wide and 4,379 feet long, consisting of approximately 3 acres. It begins on the south side of U.S. Highway 30, adjacent to the west edge of Schuyler's corporate limits, extends south to the railroad tracks, and then west to County Road 9. It lies along the eastern and southern edges of property owned by Excel Corporation (Excel).

Excel's property lies to the immediate west of Schuyler's corporate limits. Prior to August 28, 2003, all of Excel's property, including the first tract of annexed land, was designated as a

county industrial area. See Neb. Rev. Stat. §§ 13-1111 to 13-1121 (Reissue 1997). On that date, with Excel's consent, the Colfax County Board of Commissioners excluded the first tract of land (30 feet by 4,379 feet) from the county industrial area. See, generally, § 13-1119. The remainder of Excel's property is still designated as a county industrial area. Land designated as a county industrial area cannot be annexed by a city of the first class, with some exceptions. See § 13-1115.

The second tract of land takes the general shape of a flag and flagpole. It begins at the 30-foot-wide western edge of the first tract of land on County Road 9. The "flagpole" extends south 149 feet to the railroad tracks and north 1,939 feet to Highway 30 and, for much of the distance, is 37.5 feet wide. However, near Highway 30, the "flag" bulges westward to include approximately 26 acres of land, which is owned by Nor-Am Properties, L.L.C. (Nor-Am). Cornhusker and Schuyler stipulated that both tracts of annexed land are urban or suburban in character and are not part of a county industrial area. Nor-Am's property, Excel's property, and the property to the east of Excel's property are all zoned by Schuyler for industrial use.

Excel operates a meatpacking plant on its property. Nor-Am was expected to operate a refrigeration facility on its property, which was scheduled to open in December 2003. The two facilities are physically connected by a 10-foot-diameter tube that travels over County Road 9. The tube contains a conveyor belt and allows Excel to transport its products directly into the Nor-Am facility for refrigeration and storage.

Nor-Am and Excel consented to Schuyler's annexation of tracts 1 and 2. In fact, the annexation was initiated at the request of Nor-Am. Nor-Am's primary motive for requesting the annexation was to receive electrical power from Schuyler. The Excel property currently receives electrical power from Schuyler, while Nor-Am's facility lies within Cornhusker's service territory. Because the two facilities were linked by the conveyor belt, Nor-Am was concerned that if one facility, but not the other, were to lose power, it could result in considerable disruption to each business. If the annexation is valid, Schuyler could obtain the right to provide electrical power to the Nor-Am facility. See Neb. Rev. Stat. § 70-1008 (Reissue 2003).

Cornhusker filed a complaint in district court on September 16, 2003. It sought an order enjoining Schuyler from enforcing its annexation ordinance and declaring the ordinance null and void. After a trial, the district court concluded that the ordinance was invalid because:

> The annexation is not unified with, compact with, or contiguous to, the City of Schuyler. The boundary of the area sought to be annexed is not substantially adjacent to the City of Schuyler. The strip itself does not add to the development of the territory. Its only purpose is to reach out and grab the Nor-Am property. This is exactly the type of annexation which was disapproved in [*Johnson v. City of Hastings*, 241 Neb. 291, 488 N.W.2d 20 (1992)].

The district court enjoined Schuyler from enforcing the ordinance, prompting Schuyler's appeal. We moved the case to our docket on our own motion.

ASSIGNMENTS OF ERROR

Schuyler assigns, rephrased and consolidated, that the district court erred in (1) determining that Cornhusker had standing to challenge the enforcement of the ordinance and (2) finding that the ordinance was invalid because the lands annexed were not contiguous and adjacent and in enjoining Schuyler from enforcing it.

STANDARD OF REVIEW

[1,2] An action to determine the validity of an annexation ordinance and enjoin its enforcement sounds in equity. *Swedlund v. City of Hastings*, 243 Neb. 607, 501 N.W.2d 302 (1993). On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. *Detter v. Miracle Hills Animal Hosp., ante* p. 164, 691 N.W.2d 107 (2005).

ANALYSIS

STANDING

[3-5] First, we address Schuyler's argument that Cornhusker does not have standing to challenge the ordinance. The applicable rules of law are well known. Standing is the legal or equitable

right, title, or interest in the subject matter of the controversy. *County of Sarpy v. City of Gretna*, 267 Neb. 943, 678 N.W.2d 740 (2004). Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. *Id.* Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. *Id.*

[6-8] The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted. *Id.* In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties. *Id.* The litigant must have some legal or equitable right, title, or interest in the subject of the controversy. *Id.*

We recently traced the development of the law with respect to a party's standing to challenge an annexation of territory in *County of Sarpy v. City of Gretna, supra*. Currently, to establish standing to challenge an annexation, a party must show (1) a personal, pecuniary, and legal interest that has been affected by the annexation and (2) the existence of an injury to that interest that is personal in nature. *Id.* As we mentioned in *County of Sarpy*, this list of enumerated parties is not exclusive. It is undisputed that Schuyler is attempting to annex property lying within Cornhusker's service territory. In addition, the general manager of Cornhusker testified that providing electrical power to the Nor-Am facility would produce approximately $300,000 in annual revenue for Cornhusker. However, if the annexation were valid, Schuyler could obtain the right to provide electrical power to the Nor-Am facility. See § 70-1008(2) ("municipally owned electric system, serving such municipality at retail, shall have the right, upon application to and approval by the [Nebraska Power Review Board], to serve newly annexed areas of such municipality"). In *Johnson v. City of Hastings*, 241 Neb. 291, 488 N.W.2d 20 (1992), the annexation, and subsequent removal, of property within the service territory of a public power district was sufficient to convey standing on the power district to challenge the annexation. See *id.* at 301, 488 N.W.2d at 26 ("[t]his fact alone

indicates that [the rural public power district] has a personal, pecuniary, and legal interest which is adversely affected by the annexation"). Schuyler's annexation would remove property, and the revenue produced by it, from Cornhusker's service area. This assignment of error is without merit.

ANNEXATION

Schuyler is a city of the first class. See Neb. Rev. Stat. § 16-101 (Reissue 1997). A city of the first class "may by ordinance . . . include within the corporate limits of such city any contiguous or adjacent lands, lots, tracts, streets, or highways as are urban or suburban in character and in such direction as may be deemed proper." § 16-117(1). The parties have stipulated that the tracts of land Schuyler purported to annex are urban or suburban in character.

[9-13] The annexation of land to cities and towns is a legislative function, and it is for their governing bodies to determine the facts which authorize the exercise of the power granted. *Johnson v. City of Hastings, supra.* However, a municipal corporation has no power to extend or change its boundaries otherwise than provided by constitutional enactment or as it is empowered by the Legislature by statute to do. *Id.* The power delegated to municipal corporations to annex territory must be exercised in strict accord with the statute conferring it. *Id.* The power of a municipality to annex territory is, under the specific provisions of § 16-117, limited to annexing contiguous or adjacent land if it is urban or suburban in character, and not agricultural land that is rural in character. *Johnson v. City of Hastings, supra.* The burden is on one who attacks an ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity. *Id.*

[14,15] The issue in this case is whether the tracts of land Schuyler seeks to annex are contiguous or adjacent to its existing corporate limits. The terms "contiguous" and "adjacent" are used synonymously and interchangeably, and if the territory sought to be annexed is not contiguous to the municipality, the proceedings are without legal effect. *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995), *disapproved on other grounds, Adam v. City of Hastings*, 267 Neb. 641, 676 N.W.2d 710 (2004).

See, also, *Swedlund v. City of Hastings*, 243 Neb. 607, 501 N.W.2d 302 (1993); *Johnson v. City of Hastings, supra*; *Village of Niobrara v. Tichy*, 158 Neb. 517, 63 N.W.2d 867 (1954). This court has held that " 'contiguity means that the two connecting boundaries should be *substantially* adjacent.' " *Swedlund v. City of Hastings*, 243 Neb. at 611, 501 N.W.2d at 305. " 'Substantial adjacency' exists when ' " '*a substantial part of the boundary thereof is adjacent to a segment of the boundary of the city or village*. Adjacent . . . means contiguous or coexistent with.' " ' " *Id.* at 611, 501 N.W.2d at 305.

An annexation of land joined to a city only by a narrow stem of land is sometimes referred to as a "strip" or "corridor" annexation. A strip or corridor annexation similar to what occurred in this case was at issue in *Johnson v. City of Hastings*, 241 Neb. 291, 488 N.W.2d 20 (1992). The City of Hastings, a city of the first class, attempted to annex the Central Community College campus, which was located approximately three-quarters of a mile east of Hastings' corporate limits. To reach the campus, Hastings annexed a 120-foot-wide strip of U.S. Highway 6 and the highway's right-of-way. This court held that Hastings' attempted annexation was void because the annexed land was not contiguous or adjacent to Hastings' corporate limits:

> [I]n this case, the City of Hastings is reaching out like a finger, along Highway 6, a 120-foot-wide strip, to the college campus. . . .
>
> We hold that as to territorial extent, the idea of a city is one of unity, not of plurality; of compactness or contiguity, not separation or segregation. . . . The requirement of contiguity has not been achieved in this case, since the boundary of the area sought to be annexed is not substantially adjacent to the boundary of the city.

(Citations omitted.) *Johnson v. City of Hastings*, 241 Neb. at 297, 488 N.W.2d at 24. Cf. *Witham v. City of Lincoln*, 125 Neb. 366, 250 N.W. 247 (1933).

Schuyler's attempted annexation does not comply with § 16-117. The boundary of the land sought to be annexed is not "substantially adjacent" to Schuyler's existing corporate limits. See *Swedlund v. City of Hastings, supra*. Therefore, the territory sought to be annexed is not contiguous to the municipality within

the meaning of § 16-117. We conclude, therefore, that Schuyler's annexation ordinance is null and void.

In support of its contention that its annexation is valid, Schuyler attempts to distinguish *Johnson* because "in Johnson the 'strip' passed through an agricultural area which specifically by statute cannot be annexed." Brief for appellant at 14. In a related argument, Schuyler contends that because all the land from its western corporate limits to Nor-Am's property is zoned for industrial use, the homogeneity of the character of the land achieves the purpose of § 16-117. We reject those arguments. The *Johnson* court expressly declined to decide whether the strip passed through urban or rural land. *Johnson* was decided solely on the basis of the "contiguous or adjacent" requirement of § 16-117, which requires substantial adjacency between the boundary of the area sought to be annexed and the boundary of the city, without contemplation of the character or use of any intervening property.

To validate its annexation, Schuyler also relies on dicta in *Johnson*, where the court said: "[T]he record does not give us enough facts to decide whether § 13-1115 precluded the annexation of the area adjacent to Highway 6, which, if it did, could provide an excuse for the strip annexation in this case." *Johnson v. City of Hastings*, 241 Neb. at 299, 488 N.W.2d at 25. Citing that statement, Schuyler suggests that if the presence of a county industrial area prevented a city from annexing contiguous land, then a strip or corridor annexation could be permitted to reach around the county industrial area. County industrial areas are governed by §§ 13-1111 to 13-1121. Section 13-1115 generally prevents a city of the first class from annexing a county industrial area.

We decline to elevate the dicta in *Johnson* to the status of law. Section 16-117 requires that annexed land be contiguous or adjacent to a city's corporate limits; it does not provide an exception to that requirement if a city's growth is boxed in by a county industrial area, unless one of the conditions set forth in § 13-1115 is met. That is not the case here.

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

DEBORA HARRIS, APPELLANT, V. OMAHA HOUSING AUTHORITY AND OMAHA TEMPORARY SERVICES, INC., APPELLEES.

698 N.W.2d 58

Filed June 17, 2005. No. S-04-555.

1. **Pleadings: Limitations of Actions.** A challenge that a pleading is barred by the statute of limitations is a challenge that the pleading fails to allege sufficient facts to constitute a cause of action.
2. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
3. **Limitations of Actions: Appeal and Error.** Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court.
4. **Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach conclusions independent of the determination made by the court below.
5. **Statutes: Time.** Procedural amendments to statutes are ordinarily applicable to pending cases, while substantive amendments are not.
6. **Limitations of Actions: Legislature.** Statutes of limitations are generally considered procedural, and legislative changes to limitation periods operate on all proceedings instituted after passage, whether the rights accrued before or after that date.
7. **Words and Phrases.** A substantive right is one which creates a right or remedy that did not previously exist and which, but for the creation of the substantive right, would not entitle one to recover. A procedural right, on the other hand, is simply the method by which an already existing right is exercised.
8. **Limitations of Actions: Statutes.** Laws prescribing the time within which particular rights may be enforced generally relate to remedies only and not substantive rights.
9. **Limitations of Actions: Legislature.** The Legislature's power to change limitation periods is subject to two restrictions. First, the Legislature may not deprive a defendant of a bar which has already become complete. Second, the Legislature may not deprive a plaintiff of an already accrued cause of action without providing the plaintiff a reasonable time in which to file the action.
10. **Limitations of Actions: Legislature: Intent: Due Process.** The restriction that the Legislature may not deprive a plaintiff of an already accrued cause of action without providing the plaintiff a reasonable time in which to file the action is intended to ensure that a plaintiff is not denied his or her constitutional right to due process of law; the question is whether the time afforded the plaintiff to file his or her claim was "reasonable" in that no such constitutional violation occurred.
11. **Limitations of Actions.** A reasonable time for prosecution of a claim must be of sufficient duration to afford full opportunity to resort to the courts for enforcement of the rights on which the statute of limitations operates.

12. **Political Subdivisions Tort Claims Act.** The exceptions set forth in Neb. Rev. Stat. § 13-910 (Reissue 1997) are affirmative defenses to claims brought pursuant to the Political Subdivisions Tort Claims Act.
13. **Statutes: Legislature: Intent.** In discerning the meaning of 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, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

Phillip G. Wright, of Wright & Associates, for appellant.

David L. Welch, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellee Omaha Housing Authority.

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

GERRARD, J.

The appellant, Debora Harris, was allegedly injured in a slip-and-fall accident on January 18, 1999, on premises owned and controlled by the Omaha Housing Authority (OHA). OHA is a public housing agency operating pursuant to the Nebraska Housing Agency Act (NHAA), Neb. Rev. Stat. § 71-1572 et seq. (Reissue 2003). The question presented in this appeal is whether the 2-year statute of limitations of the Political Subdivisions Tort Claims Act (PSTCA), Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997), applies to Harris' cause of action against OHA, despite the fact that the PSTCA was not made explicitly applicable to housing agencies until January 1, 2000. We conclude the PSTCA applies and affirm the judgment of the district court dismissing Harris' complaint.

BACKGROUND

Harris' operative complaint alleges that she was injured on January 18, 1999, when she was walking through an OHA parking lot and slipped and fell on ice. Harris' complaint alleges, generally, that her fall occurred because of negligence on the part of OHA.

Harris' initial complaint was filed in the district court on January 15, 2003. OHA filed a motion to dismiss pursuant to

Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003), asserting that Harris' complaint was barred by § 13-919, because she failed to file her claim with OHA within 1 year and did not file her lawsuit within the 2-year statute of limitations. In response, Harris filed an affidavit, attached to a letter from OHA's insurer dated July 8, 1999, indicating that OHA and its insurer were made aware of Harris' claim less than 6 months after Harris' accident. After further proceedings not relevant to this appeal, Harris filed her operative second amended complaint, and OHA again filed a rule 12(b)(6) motion to dismiss, now grounded solely in the statute of limitations.

The district court entered an order dismissing Harris' complaint as to OHA, concluding that Harris' complaint was time barred pursuant to § 13-919. The court indicated that Harris' action could continue against Harris' employer at the time of the accident, made a party to the action by virtue of workers' compensation payments it made to Harris. See Neb. Rev. Stat. § 48-118 (Reissue 1998). Harris' appeal from that order was dismissed by the Nebraska Court of Appeals for lack of a final, appealable order, and we denied Harris' petition for further review. On remand, the district court dismissed Harris' complaint as to all parties. The court again determined that Harris' complaint was time barred, and Harris perfected this appeal.

ASSIGNMENTS OF ERROR

Harris assigns, restated, that the district court erred in (1) determining that OHA was a political subdivision for purposes of the PSTCA on January 18, 1999; (2) finding that the PSTCA applied to Harris' case; and (3) determining that Harris' claim did not fall within (a) the "discretionary function" or "snow and ice" exceptions to the PSTCA set forth in §§ 13-910(2) and 13-910(10) or (b) the insurance exception to the claim requirement of the NHAA set forth in § 71-15,168.

STANDARD OF REVIEW

[1,2] A challenge that a pleading is barred by the statute of limitations is a challenge that the pleading fails to allege sufficient facts to constitute a cause of action. *Becker v. Hobbs*, 256 Neb. 432, 590 N.W.2d 360 (1999). A district court's grant of a motion to dismiss for failure to state a claim under rule 12(b)(6)

is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Anderson v. Wells Fargo Fin. Accept., ante* p. 595, 694 N.W.2d 625 (2005). See, also, *Varner v. Peterson Farms*, 371 F.3d 1011 (8th Cir. 2004) (when it appears from face of complaint that limitation period has run, statute of limitations defense may be asserted by Fed. R. Civ. P. 12(b)(6) motion to dismiss).

[3,4] Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court. *Nuss v. Alexander, ante* p. 101, 691 N.W.2d 94 (2005). The meaning of a statute is also a question of law, and a reviewing court is obligated to reach conclusions independent of the determination made by the court below. See *Cox Nebraska Telecom v. Qwest Corp.*, 268 Neb. 676, 687 N.W.2d 188 (2004).

ANALYSIS

Retroactive Applicability of PSTCA

Prior to January 1, 2000, housing authorities in Nebraska were created and operated pursuant to the Nebraska Housing Authorities Law (NHAL), Neb. Rev. Stat. §§ 71-1503, 71-1509, and 71-1518 to 71-1554 (Reissue 1996). Generally stated, the NHAL authorized cities, villages, and counties in Nebraska to create housing authorities and joint housing authorities. See § 71-1519. The commissioners for these housing authorities were appointed by the political subdivisions that created the housing authorities, and the commissioners were subject to removal for misconduct in office by the same political subdivisions. See §§ 71-1523 and 71-1526. However, the NHAL did not specify whether housing authorities were agencies of the political subdivisions that created them, political subdivisions in their own right, or some other form of public corporation. See, generally, *Fisher v. Housing Auth. of City of Omaha*, 214 Neb. 499, 503, 334 N.W.2d 636, 639 (1983) (concluding Administrative Procedure Act did not apply to OHA because "housing authorities in Nebraska are units of local government rather than state government"). Compare *Lock v. City of Imperial*, 182 Neb. 526, 531, 155 N.W.2d 924, 927 (1968) (concluding municipal airport

authorities are not agencies of city, but "supplementary, separate, and independent public corporation[s]").

Under the NHAL, a person who had a tort claim against a housing authority was required to file that claim in writing with the executive director or secretary of the authority. § 71-1553(1). If the claimant was unsatisfied with the disposition of his or her claim, or if the claim was not paid or satisfied within 90 days of the filing, the claimant was entitled to request a hearing before the board of commissioners of the authority. *Id.* The board of commissioners was required to dispose of the claim within 6 months of the filing of the claimant's written request for hearing. *Id.* The procedure for judicial review of disputed claims was not specified by the NHAL.

The NHAL was repealed in 1999 and replaced by the NHAA. See 1999 Neb. Laws, L.B. 105. Section 71-1553 was recodified as § 71-15,168, except that operative January 1, 2000, § 71-15,168(1) expressly provided that "[a]ll tort claims against a housing agency shall be governed by the Political Subdivisions Tort Claims Act." Subject to certain exceptions that are not relevant to this case, all suits permitted under the PSTCA "shall be forever barred unless begun within two years after such claim accrued." § 13-919(1).

It is not disputed in this case that Harris' claim accrued when she was injured on January 18, 1999. However, her complaint was not filed until January 15, 2003. This would be within the 4-year statute of limitations generally applicable to tort actions, see Neb. Rev. Stat. § 25-207 (Reissue 1995), but outside the 2-year statute of limitations prescribed by § 13-919(1). If the PSTCA applies to Harris' claim against OHA, her complaint is untimely, as the district court found.

In her first and second assignments of error, Harris contends that OHA was not a political subdivision when she was injured on January 18, 1999, and that the subsequent incorporation of the PSTCA by the NHAA does not operate retroactively to bar her cause of action. We do not determine whether the OHA was a political subdivision, or an agency of a political subdivision, prior to January 1, 2000, because we conclude that in any event, the statute of limitations imposed by § 13-919(1) applies to Harris' action.

[5,6] Procedural amendments to statutes are ordinarily applicable to pending cases, while substantive amendments are not. *Kratochvil v. Motor Club Ins. Assn.*, 255 Neb. 977, 588 N.W.2d 565 (1999), citing *Oviatt v. Archbishop Bergan Mercy Hospital*, 191 Neb. 224, 214 N.W.2d 490 (1974); *Haiar v. Kessler*, 188 Neb. 312, 196 N.W.2d 380 (1972). See, also, *In re Interest of Clifford M. et al.*, 261 Neb. 862, 626 N.W.2d 549 (2001). Statutes of limitations are generally considered procedural, and legislative changes to limitation periods operate on all proceedings instituted after passage, whether the rights accrued before or after that date. *Kratochvil, supra*. See, also, *Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541 (1994); *Cedars Corp. v. Swoboda*, 210 Neb. 180, 313 N.W.2d 276 (1981); *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979); *Denver Wood Products Co. v. Frye*, 202 Neb. 286, 275 N.W.2d 67 (1979).

[7,8] This is because a substantive right is one which creates a right or remedy that did not previously exist and which, but for the creation of the substantive right, would not entitle one to recover. *Kratochvil, supra*, quoting *Behrens v. American Stores Packing Co.*, 228 Neb. 18, 421 N.W.2d 12 (1988). A procedural right, on the other hand, is simply the method by which an already existing right is exercised. *Id.* Laws prescribing the time within which particular rights may be enforced generally relate to remedies only and not substantive rights. *Id.*, quoting *Whitten v. Whitten*, 250 Neb. 210, 548 N.W.2d 338 (1996).

The situation presented in *Kratochvil, supra*, is comparable to the instant case. In *Kratochvil*, an insured brought an action against an insurer to recover uninsured motorist benefits. The insured had been injured on May 15, 1991, and his action against the insurer was filed on May 14, 1996. However, the Uninsured and Underinsured Motorist Insurance Coverage Act (UUMICA), Neb. Rev. Stat. § 44-6401 et seq. (Reissue 2004), had become operative on January 1, 1995, and had created a specific limitation period as to when actions against insurers for uninsured motorist benefits could be maintained. See *id.* The insured's action had been filed outside that period. We concluded that the provisions of the UUMICA applied to bar the insured's cause of action, because, "[a]s a legislative change of

a procedural limitation period," it "operate[d] on all proceedings instituted after its passage." *Kratochvil*, 255 Neb. at 985, 588 N.W.2d at 572.

Similarly, in the instant case, the incorporation of the PSTCA's procedures into the NHAA did not serve to create or change the right to a remedy for tort claims against a housing agency. In conjunction, §§ 13-919(1) and 71-15,158 operate as a statute of limitations for a tort claim against a housing agency, as they prescribe the period within which an action may be brought upon such a claim. See *Kratochvil, supra.* Incorporation of the PSTCA was not, therefore, an alteration of a substantive right, but, rather, a procedural change that merely related to the remedy.

[9,10] The Legislature's power to change limitation periods is subject to two restrictions. First, the Legislature may not deprive a defendant of a bar which has already become complete. Second, the Legislature may not deprive a plaintiff of an already accrued cause of action without providing the plaintiff a reasonable time in which to file the action. *Kratochvil v. Motor Club Ins. Assn.*, 255 Neb. 977, 588 N.W.2d 565 (1999). The "reasonable time" restriction is intended to ensure that a plaintiff is not denied his or her constitutional right to due process of law; the question is whether the time afforded the plaintiff to file his or her claim was "reasonable" in that no such constitutional violation occurred. See *id.*

[11] However, our decision in *Kratochvil, supra*, is also dispositive of this issue. A reasonable time for prosecution of a claim must be of sufficient duration to afford full opportunity to resort to the courts for enforcement of the rights on which the statute of limitations operates. *Id.* In *Kratochvil*, we concluded that 4½ months was a reasonable time for the plaintiff to file his claim after the UUMICA became operative. That being the case, it is clear that Harris, who had over a year to file her complaint after the NHAA became effective, was afforded a reasonable time to assert her claim before it became time barred.

For the foregoing reasons, Harris' first and second assignments of error are without merit. Section 13-919(1) was applicable to Harris' cause of action against OHA.

EXCEPTIONS TO PSTCA

Harris next argues that the PSTCA does not apply to her claim because it falls within two statutory exceptions set forth in § 13-910, which provides, in relevant part:

> The Political Subdivisions Tort Claims Act . . . shall not apply to:
>
> . . . .
>
> (2) Any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion is abused; [or]
>
> . . . .
>
> (10) Any claim arising out of snow or ice conditions or other temporary conditions caused by nature on any highway . . . bridge, public thoroughfare, or other public place due to weather conditions.

[12] Harris' argument is without merit, however, because she misapprehends the nature of the exceptions set forth in § 13-910. Harris contends that the requirements of the PSTCA do not apply to claims that fall within § 13-910. In fact, the exceptions set forth in § 13-910 are affirmative sovereign immunity defenses to claims brought pursuant to the PSTCA. See, generally, *Lawry v. County of Sarpy*, 254 Neb. 193, 575 N.W.2d 605 (1998). In other words, if a political subdivision proves that a plaintiff's claim comes within an exception pursuant to § 13-910, then the claim fails based on sovereign immunity, and the political subdivision is not liable.

Harris' second assignment of error provides no basis for reversing the judgment of the district court. Even if Harris is correct in contending that her claim falls within § 13-910, such a finding would require that her complaint be dismissed.

NHAA INSURANCE EXCEPTION

In support of her final assignment of error, Harris argues that her claim falls within the "insurance exception" of the NHAA. Section 71-15,168 provides, in relevant part:

> (1) *All tort claims against a housing agency shall be governed by the Political Subdivisions Tort Claims Act.*

> (2) Every person who has any claim against a housing agency, *other than a tort claim under subsection (1) of this section*, shall file the same, in writing, with the executive director or other person who may be acting as the secretary of such agency. If the claim is in contract, the claim shall state the services provided or articles furnished, as the case may be, and shall show the amount charged and claimed due and unpaid, allowing all just credits. *The procedures set forth in this section shall not be applicable to any claim against any agency if the agency advises the claimant in writing that the liability of the agency for such claim, if any, is covered by insurance in whole or in part.*

(Emphasis supplied.)

[13] As set forth above, § 71-15,168(2) expressly states that the claim procedures of the NHAA apply to a claim "other than a tort claim" under the PSTCA. The PSTCA contains its own, specific provisions governing the effect of a political subdivision's purchase of liability insurance. See § 13-916. There is no indication that the Legislature intended tort claims against housing agencies to be treated differently. In discerning the meaning of 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, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Burlington Northern Santa Fe Ry. Co. v. Chaulk*, 262 Neb. 235, 631 N.W.2d 131 (2001). When § 71-15,168 is read as a whole, it is plain that the Legislature intended the insurance exception to apply to claims "other than a tort claim," not to claims that would otherwise be governed by the PSTCA. Regardless of whether Harris' claim is covered by OHA's liability insurance, it is a tort claim against a housing agency and is subject to the PSTCA pursuant to the plain language of § 71-15,168(1). Harris' final assignment of error is without merit.

CONCLUSION

Harris' claim against OHA was subject to the 2-year statute of limitations of the PSTCA, and her complaint was time barred. The judgment of the district court is affirmed.

AFFIRMED.

EDWARD DIETZ, APPELLANT, V. YELLOW FREIGHT SYSTEMS, INC., APPELLEE.

697 N.W.2d 693

Filed June 17, 2005. No. S-04-1078.

1. **Workers' Compensation: Appeal and Error.** In reviewing decisions of the workers' compensation court, an appellate court will consider only those errors specifically assigned to the review panel and then reassigned on appeal.
2. **Workers' Compensation: Waiver: Appeal and Error.** A party appealing from an order of the Nebraska Workers' Compensation Court waives all allegations of error not assigned in its application for review.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Ryan C. Holsten and Ricardo Enriquez, of Atwood, Holsten & Brown Law Firm, P.C., L.L.O., for appellant.

Caroline M. Westerhold and John R. Timmermier, of Timmermier, Gross & Prentiss, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Edward Dietz appeals from the order of a Workers' Compensation Court review panel which affirmed, as modified, an order entered on remand by the trial court.

SCOPE OF REVIEW

[1] In reviewing decisions of the Workers' Compensation Court, an appellate court will consider only those errors specifically assigned to the review panel and then reassigned on appeal. See, *State v. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990). See, also, *Faulhaber v. Roberts Dairy Co.*, 147 Neb. 631, 24 N.W.2d 571 (1946).

FACTS

Dietz was injured in the course of his employment with Yellow Freight Systems, Inc. (Yellow Freight), while operating a forklift. He suffered injuries to his lower back, right arm, and head.

Dietz filed a petition for benefits in the Workers' Compensation Court. The trial court subsequently entered an award finding that Dietz had suffered an accident while engaged in the duties of his employment with Yellow Freight. He was awarded 9 weeks of temporary total disability and 45$^{2}/_{7}$ weeks of temporary partial disability. The court found that Dietz was currently totally disabled, and Yellow Freight was ordered to pay Dietz benefits for so long as he remained permanently and totally disabled. Yellow Freight was also ordered to pay $568 in medical bills, and Dietz was awarded attorney fees of $10,833.

In addition, the trial court found that Dietz had been assessed an 8-percent permanent partial disability rating as to his right arm and that he was entitled to benefits for 18 weeks for this permanent partial disability. The court concluded that Yellow Freight had improperly delayed the payment of benefits for the member impairment. It ordered Yellow Freight to pay such benefits and assessed a 50-percent waiting-time penalty plus interest on any unpaid compensation.

Yellow Freight appealed the entire award to a review panel of the compensation court. Dietz cross-appealed, alleging that the trial court erred in failing to make a reasoned decision concerning his entitlement to attorney fees and interest on the penalty for late payment of benefits for the impairment to his right arm.

The review panel affirmed the award in all but two respects. It found that the trial court had erred in failing to state whether any portion of the attorney fees was related to the late payment of benefits for Dietz' member impairment. The review panel also found that the imposition of $10,833 in attorney fees for the late payment of $568 in medical expenses was unreasonable. It remanded the matter and directed the trial court to determine attorney fees pursuant to Neb. Rev. Stat. § 48-125 (Reissue 2004) for the late payment of benefits for the impairment rating and the late payment of medical expenses described in the original award.

On remand, the trial court found that attorney fees of $2,500 should be awarded to Dietz for the late payment of medical expenses and benefits for his member impairment; however, the court did not specify how much of the total was allocated to the medical expense claim versus the member impairment claim.

Yellow Freight appealed the amount of attorney fees awarded, and Dietz cross-appealed. While the record does not disclose the exact nature of this cross-appeal, it can be inferred that Dietz claimed the trial court erred in failing to award interest pursuant to § 48-125(2) when awarding attorney fees.

The review panel subsequently affirmed the award of $2,500 in attorney fees and imposed additional attorney fees of $1,500 for the appeal. Addressing Dietz' cross-appeal, the review panel noted that, as in the original award, the trial court's order on remand contained language to the effect that Dietz was entitled to interest on any unpaid compensation. The review panel held that Dietz was entitled to interest pursuant to § 48-125(2) because he was awarded attorney fees. Accordingly, the review panel modified the order on remand to clarify that pursuant to § 48-125(2), Dietz was entitled to interest for the late payment of benefits for the member impairment. Dietz perfected a timely appeal.

ASSIGNMENT OF ERROR

On appeal, Dietz assigns as error that the review panel erred in limiting the assessment of interest to the late payment of benefits for his member impairment, rather than assessing interest on the entire award.

ANALYSIS

The original award of the trial court ordered Yellow Freight to pay Dietz for past temporary total disability, past temporary partial disability, and future permanent total disability. The court also awarded Dietz past permanent partial disability benefits for his member impairment, a waiting-time penalty, and interest on any unpaid compensation. In addition, Dietz was awarded attorney fees related to the late payment of certain medical expenses.

Section 48-125(2) states in relevant part: "When an attorney's fee is allowed pursuant to this section, there shall further be assessed against the employer an amount of interest on the final award obtained . . . ." Dietz contends that pursuant to § 48-125(2), he is entitled to interest on the entire amount of the "final award obtained." Thus, he claims that the review panel should have assessed interest on both the late payment of benefits for the member impairment and the difference between the permanent partial disability benefits paid by Yellow Freight prior

to entry of the original award and the permanent total disability award that was ultimately granted. The question before this court is whether Dietz has properly preserved this issue on appeal.

Generally, the rule has been that an appellate court will consider only those errors specifically assigned in the lower court and again assigned as error on appeal to the appellate court. See *State v. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990). In *Erlewine*, we stated that the Supreme Court, in reviewing decisions of the district court which affirmed, reversed, or modified decisions of the county court, will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the Supreme Court. This rule is also applicable to appeals in workers' compensation cases.

Neb. Rev. Stat. § 48-179 (Reissue 2004) states in part:

> Either party at interest who refuses to accept the final findings, order, award, or judgment of the Nebraska Workers' Compensation Court on the original hearing may, within [14] days after the date thereof, file with the compensation court an application for review before the compensation court, plainly stating the errors on which such party relies for reversal or modification and a brief statement of the relief sought.

Workers' Comp. Ct. R. of Proc. 12 (2004) states that the party or parties appealing to the three-judge panel will be bound by the allegations of error contained in the application for review and will be deemed to have waived all others.

In *Faulhaber v. Roberts Dairy Co.*, 147 Neb. 631, 24 N.W.2d 571 (1946), we were presented with a situation similar to the appeal at bar. The plaintiff's application for workers' compensation benefits was originally denied for insufficiency of the evidence. Under the procedure then in effect, the plaintiff obtained a rehearing and was granted an award for temporary total disability. The defendant appealed to the district court, which affirmed the award. The defendant then appealed to this court, and the plaintiff cross-appealed.

On cross-appeal, one of the plaintiff's contentions was that the district court should have awarded him attorney fees for services rendered in the compensation court. As to this contention, we stated that the record did not disclose that the plaintiff had raised

the issue either in the compensation court or in a cross-appeal to the district court. We concluded the issue was not presented for decision and required no further discussion.

In the case at bar, Yellow Freight timely appealed from the original award, and Dietz cross-appealed. Dietz argued on cross-appeal that he was entitled to additional attorney fees for the late payment of benefits for the member impairment. Dietz did not complain that the trial court should have awarded interest on the entire award in addition to attorney fees.

The review panel found that Dietz was entitled to attorney fees for the late payment of medical expenses and the benefits arising from his member impairment. However, it remanded the cause for a determination of the amount of attorney fees only. On remand, the trial court determined that Dietz should be awarded $2,500 in attorney fees. Yellow Freight appealed the award of attorney fees, and Dietz cross-appealed, asserting for the first time that the trial court should have awarded interest pursuant to § 48-125(2). The review panel affirmed the award of attorney fees and assessed additional attorney fees for the appeal. For purposes of clarification, the review panel modified the order on remand to provide for interest with respect to the late payment for the member impairment. Dietz now assigns as error the review panel's failure to award interest on his entire award.

When the review panel remanded the case to the trial court, it did so only for the determination of attorney fees. Therefore, the award of attorney fees is the only issue which could be considered by this court on appeal. On appeal from the original award, Dietz could have raised the issue he attempts to raise in this appeal. He could have argued that the award of attorney fees for late payment of medical expenses entitled him to interest on the entire amount of the "final award obtained," pursuant to § 48-125(2). He could have argued, as he does now, that the award of attorney fees entitled him to interest for the late payment of benefits for the member impairment and the difference between the permanent partial disability benefits paid prior to entry of the original award and the permanent total disability award that was ultimately granted. We do not imply that this position has merit, but, rather, point out that the issue should have been raised on appeal from the original award.

[2] Rule 12 dictates that a party appealing from an order of the Workers' Compensation Court waives all allegations of error not assigned in its application for review. If an issue arises from the original award, it should be raised in the hearing before the review panel. Since Dietz did not argue that he was entitled to interest on the entire award in his original cross-appeal, he has failed to preserve the issue for appellate review.

It is true that in the appeal from the order on remand, the review panel addressed Dietz' argument concerning interest. The review panel modified the order on remand to clarify that pursuant to § 48-125(2), Dietz was entitled to interest for the late payment of benefits for the member impairment.

CONCLUSION

In his original cross-appeal to the review panel, Dietz did not assign as error the failure of the trial court to assess interest on the entire award. His failure to do so precludes him from raising the issue in this appeal. We therefore affirm the order of the review panel.

AFFIRMED.

IN RE APPLICATION OF RICHARD GLUCKSELIG FOR ADMISSION TO THE NEBRASKA STATE BAR ON EXAMINATION.

697 N.W.2d 686

Filed June 17, 2005. No. S-34-050001.

1. **Rules of the Supreme Court: Attorneys at Law: Appeal and Error.** The Nebraska Supreme Court will consider the appeal of an applicant from a final adverse ruling of the Nebraska State Bar Commission de novo on the record made at the hearing before the commission.
2. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar.
3. **Rules of the Supreme Court: Attorneys at Law: Waiver.** The Nebraska State Bar Commission does not have the authority to waive the application of Neb. Ct. R. for Adm. of Attys. 5C (rev. 2005); that power lies with the Nebraska Supreme Court.

4. ____: ____: ____. The Nebraska State Bar Commission's function in cases where waiver of Neb. Ct. R. for Adm. of Attys. 5C (rev. 2005) is at issue is to provide the applicant with the opportunity for a hearing before the commission which the Nebraska Supreme Court can review de novo on the record. The commission should also make a recommendation regarding whether it feels that waiver of rule 5C should be granted.
5. **Rules of the Supreme Court: Attorneys at Law: Waiver: Proof: Costs.** When a foreign-educated attorney seeks a waiver in order to sit for the Nebraska bar examination, the burden at all times will be on the applicant to affirmatively show that the education he or she received was equivalent to that of a law school approved by the American Bar Association, and the applicant will be responsible for the costs of providing such information.
6. **Rules of the Supreme Court: Attorneys at Law: Waiver.** Following the denial of an application and a hearing before the Nebraska State Bar Commission, the Nebraska Supreme Court will consider a waiver of Neb. Ct. R. for Adm. of Attys. 5C (rev. 2005) in cases where a strict application of that rule would result in denying admission to a qualified graduate of a foreign law school for arbitrary reasons unrelated to the essential purpose of rule 5C.

Original action. Application granted.

Richard Gluckselig, pro se.

Jon Bruning, Attorney General, Jennifer Tomka, and Heidi Karr Sleper, Senior Certified Law Student, for Nebraska State Bar Commission.

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

HENDRY, C.J.

INTRODUCTION

Richard Gluckselig filed an application with the Nebraska State Bar Commission (Commission) seeking admission to the bar on examination. The Commission denied Gluckselig's application. Thereafter, at Gluckselig's request, a hearing was held before the Commission on December 14, 2004. At that hearing, Gluckselig introduced evidence regarding his educational qualifications. On December 16, the Commission again denied Gluckselig's request "on the basis that [Gluckselig] lack[ed] a first professional degree from a law school approved by the American Bar Association." See Neb. Ct. R. for Adm. of Attys. 5C (rev. 2005). Gluckselig appeals. See Neb. Ct. R. for Adm. of Attys. 10 and 15 (rev. 2000).

FACTUAL BACKGROUND

Gluckselig is a citizen of the Czech Republic, and at the time of the hearing, he was present in the United States on a student visa. Gluckselig testified that he was engaged to be married to a Lincoln, Nebraska, resident and that they intended to settle in Nebraska.

Gluckselig graduated from Masaryk University Law College (Masaryk) in the Czech Republic with a master's degree in law and legal science in 2003. This was a 5-year program. Gluckselig graduated in the top 2 percent of his class.

During the 2000-2001 academic year, while still enrolled at Masaryk, Gluckselig studied at the University of Nebraska College of Law (Nebraska) as a "Paul J. Robitchek Scholar." While at Nebraska, Gluckselig took a total of 19 credit hours, earning a grade point average (GPA) of 7.842 on a 9.0 scale. Gluckselig's transcript shows that he took courses in contracts, constitutional law, unfair competition, law of patient and provider, commercial law: sales, and international business transactions. Gluckselig achieved the highest class grade in his commercial law course.

In addition, the record reveals that during the summer following his semester at Nebraska, Gluckselig worked as a research assistant for a professor at that same institution. In a letter supporting Gluckselig's application, that professor wrote that he had found "[Gluckselig] to be one of the most capable and qualified law students I have ever had the privilege to teach" and that he "would have great confidence as a client in having [Gluckselig] as my lawyer."

In April 2003, following his graduation from Masaryk, Gluckselig was admitted and enrolled in a master of laws (LL.M.) program at the University of Michigan Law School (Michigan). Gluckselig graduated with his LL.M. in May 2004. The record indicates Gluckselig took the following classes while at Michigan: civil procedure, enterprise organization, jurisdiction and choice of law, constitutional interpretation, mergers and acquisitions, securities regulation, international arbitration, and anatomy of a deal. Gluckselig received the highest class grade in his course on jurisdiction and choice of law, and graduated with a GPA of 3.732 on a 4.0 scale. It was noted by

one visiting professor who taught Gluckselig at Michigan that "[Gluckselig's] course selection was unique for an LLM, as he focused primarily on core classes rather than electives." That same professor observed that "[i]n his written work on his final exams, [Gluckselig] displayed strong analytical and writing skills. Although he has not completed a JD [juris doctor degree] from an American law school, his work as an LLM student at Michigan was better than virtually any JD student I have encountered in my career." Another professor at Michigan stated that he was "confident that [Gluckselig's] legal training [had] given him a legal education superior to that of the great majority of law students who graduate from [American Bar Association]-accredited law schools." A third Michigan professor noted that "[i]f I needed a lawyer—in Nebraska or elsewhere—I would hire Gluckselig with confidence."

In addition to his academic credentials, Gluckselig also performed duties as a law clerk from May to September 2002 with a Lincoln law firm. During the course of this employment, Gluckselig conducted legal research, wrote memoranda, and drafted pleadings. In support of Gluckselig's application, an attorney at that firm wrote that "[Gluckselig] functioned just as any other law clerk for our firm functions. No different standard was applied nor different work assigned because of his foreign legal education. . . . Gluckselig's work for our firm can only be described as outstanding." He further wrote that the firm has "observed no weakness of any nature in his knowledge of the fundamentals of U.S. law."

In August 2004, following the receipt of his LL.M., Gluckselig accepted employment as a law clerk with another Lincoln law firm, Scudder Law Firm, P.C., L.L.O. (Scudder), focusing primarily on corporate and business issues. At the time of the hearing before the Commission, Gluckselig was still employed with Scudder and had been offered a position with the firm. An attorney at Scudder, in support of Gluckselig's application, observed that Gluckselig had "demonstrated superior analytical and writing skills, excellent judgment, a strong work ethic, and an advanced understanding of the law for his level of experience" and that "[b]ased on [the experience of Scudder's principals, Gluckselig] performs in the upper tier of new attorneys we have seen."

In July 2004, Gluckselig sat for and passed the New York bar examination. As part of that examination, he took the Multistate Bar Examination (MBE). The record indicates that Gluckselig's scaled MBE score was a 168.1. In a nationwide comparison, Gluckselig scored higher than 90 percent of the 66,690 applicants who took the MBE in 2003.

Gluckselig also took and passed the Multistate Professional Responsibility Examination (MPRE) with a score of 133, which placed Gluckselig in the 90th percentile nationally. This court's required minimum score for the MPRE is 85. Neb. Ct. R. for Adm. of Attys. 16 (rev. 2004).

ASSIGNMENT OF ERROR

Gluckselig requests, restated, that this court determine his education to be the equivalent of a juris doctor degree available at an American Bar Association (ABA) approved school, and waive rule 5C, allowing him to sit for the Nebraska bar examination.

STANDARD OF REVIEW

[1] The Nebraska Supreme Court will consider the appeal of an applicant from a final adverse ruling of the Commission de novo on the record made at the hearing before the Commission. *In re Application of Collins-Bazant*, 254 Neb. 614, 578 N.W.2d 38 (1998); rule 15.

ANALYSIS

[2] The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar. *In re Application of Collins-Bazant, supra*. See Neb. Const. art. II, § 1, and art. V, §§ 1 and 25.

Rule 5 allows applicants to be admitted without examination if they (1) have been admitted to and are active and in good standing in the bar of another state, territory, or district of the United States; (2) have attained educational qualifications at least equal to those required for admission by examination to the Nebraska bar; and (3) have passed an examination equivalent to the Nebraska bar examination. See rule 5A(1)(a), (b), and (c). Rule 5 also allows licensed attorneys who are active and in good standing in another state, territory, or district of the United States, and

who have been actively engaged in the practice of law for 5 of the preceding 7 years, to be admitted without examination if they have attained educational qualifications at least equal to those required for admission by examination to the Nebraska bar. See rule 5A(2)(a) and (b). All other applicants, which on the record currently before us includes Gluckselig, must take a written examination. See rule 5A(4).

Prior to sitting for the Nebraska bar examination, applicants required to take the examination must meet the following educational qualifications:

> All applicants must have received at the time of the examination *their first professional degree from a law school approved by the American Bar Association.* An applicant without a first degree from an approved law school shall be permitted to take the examination if such applicant will receive a first degree from an approved law school within 60 days after the date of the examination taken. In cases of hardship, the Supreme Court may, upon written application stating the nature and reason for the hardship to the applicant, permit the examination to be taken by an applicant before all other requirements have been fulfilled.

(Emphasis supplied.) Rule 5C.

[3,4] We pause for a moment to review the procedural aspects of this appeal. As conceded by the Commission during oral argument, the Commission does not have the authority to waive rule 5C. See, generally, *In re Application of Collins-Bazant*, 254 Neb. 614, 578 N.W.2d 38 (1998); Neb. Ct. R. for Adm. of Attys. 9 (rev. 2000). The Commission's function in the circumstance presented by this appeal, following denial, is to simply provide the applicant with the opportunity for a hearing before the Commission which this court can review de novo on the record. See, *In re Application of Collins-Bazant, supra*; rules 10 and 15. We view the actions taken by the Commission with respect to Gluckselig's appeal as being consistent with that authority. In future cases, however, we request that the denial of the Commission made after the applicant's hearing include the Commission's recommendation as to whether this court should waive rule 5C, and the basis of such recommendation. This court will thereafter consider both the Commission's recommendation and the record

made before the Commission de novo. We now consider whether to waive rule 5C.

This court's rules for admission clearly state that in order to be eligible to sit for the bar examination, an applicant must have obtained his or her first professional degree from an ABA-approved law school. However, we have waived the requirement in rule 5C for a foreign-educated applicant who shows that his or her education is equivalent to the education available at an ABA-approved law school. See *In re Application of Collins-Bazant, supra.*

[5] In *In re Application of Collins-Bazant*, we were asked to waive the requirements of rule 5C in the case of Gail Collins-Bazant, a Canadian law school graduate who had practiced law in Canada for a number of years. In *In re Application of Collins-Bazant*, we recognized that although we had previously noted that rule 5 should generally be applied uniformly, "a strict application of rule 5 may be unfair in some circumstances involving attorneys educated at foreign law schools." 254 Neb. at 622, 578 N.W.2d at 44. We reasoned that admission rules were intended to "weed" out unqualified applicants, not to prevent qualified applicants from taking the bar. While recognizing that ABA accreditation serves as a useful criterion for evaluating graduates of U.S. law schools, we concluded that the same criterion can work an arbitrary hardship for some foreign-educated graduates and defeat the rule's purpose of allowing qualified applicants to sit for the examination. We then concluded:

> [W]e will consider a waiver of rule 5C to allow a graduate of a foreign law school based on the English common law to take the Nebraska bar examination upon proof that the education he or she received was equivalent to that for a juris doctorate available at an ABA-approved law school. In addition, when a foreign-educated attorney seeks a waiver in order to sit for the Nebraska bar examination, the burden at all times will be on the applicant to affirmatively show that the education he or she received was equivalent to that of an ABA-approved law school, and the applicant will be responsible for the costs of providing such information.

In re Application of Collins-Bazant, 254 Neb. 614, 623, 578 N.W.2d 38, 44 (1998).

This court then waived the applicability of rule 5C as applied to Collins-Bazant and granted her application. We concluded that Collins-Bazant had met her burden of proving that she had received an education functionally equivalent to the education available at an ABA-approved law school. In so concluding, we noted that Collins-Bazant had been educated at an English-speaking school whose teaching was based on the English common law, had taken courses similar to those taught in U.S. law schools, had 15 years of professional experience, and had taken affirmative steps to educate herself regarding the Nebraska and U.S. laws.

[6] The Commission distinguishes *In re Application of Collins-Bazant, supra*, by noting that Collins-Bazant's foreign education was based on English common law, while Gluckselig's was based on Roman civil law. However, we believe this distinction is not dispositive. If it were, it would greatly diminish the principle set forth in *In re Application of Collins-Bazant.* That principle, simply stated, is that this court will not apply a strict application of rule 5C if in doing so, it would " ' "operate in such a manner as to deny admission to a [qualified graduate of a foreign law school] arbitrarily and for a reason unrelated to the essential purpose of the rule." ' " *In re Application of Collins-Bazant*, 254 Neb. at 621, 578 N.W.2d at 43. However, in order for this court to consider a waiver of rule 5C, the burden is on the applicant to affirmatively show that his or her education, considered as a whole, was equivalent to the education that would have been received from an ABA-approved law school. We therefore turn to an examination of that record.

Our de novo review of the record before us indicates that Gluckselig has an extensive legal education which includes significant exposure to U.S. law. While enrolled at Masaryk, Gluckselig took several international law classes focusing in part on U.S. law, and he also completed a 112-page thesis, in English, which involved a comprehensive comparison of the European Union and U.S. laws on the topic of choice-of-law and forum clauses in Internet-based transactions. Further, Gluckselig spent a year of study at Nebraska and Michigan, both ABA-approved law schools, earning a total of 44 credit hours. A review of Gluckselig's transcripts from Nebraska and Michigan shows that

he successfully completed courses in, among others, civil procedure, jurisdiction, choice of law, constitutional law, contracts, torts, commercial law, and international business. Gluckselig's GPA for these courses was exemplary.

In noting that Gluckselig's education at Masaryk was not based on the English common law, the Commission directs us to both *In re Application of Collins-Bazant*, 254 Neb. 614, 578 N.W.2d 38 (1998), and *In re Appeal of Dundee*, 249 Neb. 807, 545 N.W.2d 756 (1996). In *In re Appeal of Dundee*, this court was presented with an applicant who contended that his LL.M. in taxation was a first professional degree for the purposes of our admission rules. We disagreed, noting that the applicant's specific LL.M. program was specialized and did not include examples of specific core coursework that one might expect to be "'necessary to be a properly-trained attorney.'" *Id.* at 811, 545 N.W.2d at 759. In *In re Application of Collins-Bazant*, this court distinguished *In re Appeal of Dundee* by noting, inter alia, that Collins-Bazant had taken a course in each subject noted in *In re Appeal of Dundee*.

The Commission points out that although Gluckselig has completed a number of the courses enunciated in *In re Appeal of Dundee, supra*, at Nebraska and Michigan, he has not completed all of them. In this assertion, the Commission is correct. However, our distinction of *In re Appeal of Dundee* in *In re Application of Collins-Bazant, supra*, should not be read as a "bright line" determination of what courses one must have taken as a prerequisite to a waiver of rule 5C. In *In re Appeal of Dundee*, we were presented with an LL.M. program specializing in taxation. As noted previously, Gluckselig's LL.M. program was "unique [in that it] focused primarily on core classes rather than electives."

In our de novo review, we determine that notwithstanding the fact that Gluckselig has not taken each of the courses listed in *In re Appeal of Dundee, supra*, his education as a whole is equivalent to that of an ABA-approved school. Such conclusion is supported by an academic background which includes the equivalent of 2 years of study at ABA-approved law schools, studies at Masaryk that focused on U.S. law, and Gluckselig's sitting for and passing the New York bar examination. We note that the New York bar examination included the MBE, which is a component

of the testing this court uses in assessing the proficiency of those who wish to be admitted to the Nebraska bar. Neb. Ct. R. for Adm. of Attys. 1 (rev. 2000). Further, Gluckselig has also passed the MPRE, another testing component used by this court in assessing the qualifications of applicants seeking admission to the practice of law in Nebraska. *Id.*

Upon our de novo review, we determine that Gluckselig has met his burden of affirmatively showing that he received an education functionally equivalent to the education available at an ABA-approved law school. As such, a waiver of rule 5C is appropriate. Accordingly, we will waive rule 5C as it applies to Gluckselig and allow him to sit for the Nebraska bar examination.

APPLICATION GRANTED.

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