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HARRISON SQUARE PARTNERSHIP, APPELLANT, V. SARPY COUNTY BOARD OF EQUALIZATION, APPELLEE.

574 N.W.2d 180

Filed February 3, 1998. No. A-97-455.

1. **Taxes: Equity: Valuation: Appeal and Error.** Neb. Rev. Stat. § 77-1511 (Reissue 1996) provides that the Tax Equalization and Review Commission shall hear appeals from a county board of equalization as in equity and without a jury and determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof.
2. **Taxes: Appeal and Error.** Neb. Rev. Stat. § 77-5019(1) (Reissue 1996) provides that any person aggrieved by a final decision in a case appealed to the Tax Equalization and Review Commission, whether the decision is affirmative or negative in form, shall be entitled to judicial review in the Court of Appeals.
3. ____: ____. A review by the Court of Appeals of an appeal from the Tax Equalization and Review Commission's ruling shall be conducted for errors on the record of the commission.
4. **Judgments: Appeal and Error.** When reviewing an order for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
5. **Taxes: Appeal and Error.** The Tax Equalization and Review Commission is authorized by Neb. Rev. Stat. § 77-5016(5) (Reissue 1996) to utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.
6. **Administrative Law: Taxes: Appeal and Error.** The Tax Equalization and Review Commission has no authority to consider questions not raised before a county board of equalization, as declared by 442 Neb. Admin. Code, ch. 3, § 001.04 (1996).
7. **Taxes: Appeal and Error.** An issue not presented to a county board of equalization is not properly before the Tax Equalization and Review Commission or the Court of Appeals.

Appeal from the Nebraska Tax Equalization and Review Commission. Affirmed.

Robert C. Doyle and Aimee J. Haley, of Walsh, Fullenkamp & Doyle, for appellant.

Michael A. Smith, Deputy Sarpy County Attorney, for appellee.

MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges.

MILLER-LERMAN, Chief Judge.

Harrison Square Partnership (Partnership) appeals the order of the Nebraska Tax Equalization and Review Commission

(Commission) to which the Partnership appealed the decision of the Sarpy County Board of Equalization (Board) regarding the valuation of a certain commercial property (Property) owned by the Partnership. The Partnership was afforded some relief by the Commission and denied other relief sought before the Commission and, therefore, appeals. For the reasons recited below, we affirm the order of the Commission.

BACKGROUND

The Property, a neighborhood shopping center built in the 1950's, is located at 36th and Harrison Streets in Sarpy County. The Property was half vacant when it was purchased by the Partnership at a foreclosure sale in 1993 for $565,000. The Property was assessed for 1996 tax purposes at $1,478,620.

The Partnership protested to the Board the Property's 1996 property tax assessment. There is no verbatim transcription of the hearing before the Board in the record on appeal, and this appeal proceeds on this basis. It appears from the evidence before the Commission that at the hearing before the Board conducted on July 10, 1996, the Board was advised by the county's appraiser that based on certain assumptions regarding the vacancy rate, the capitalization rate, and other variables, the Property should be valued at $1,478,620. The Partnership presented as evidence to the Board an expense statement and pricing quotes for new equipment needed to replace obsolete equipment. Following the hearing, the Board determined that the Property was properly valued for property tax purposes at $1,478,620, and the Partnership timely appealed the valuation to the Commission.

At a hearing before the Commission, William Leonard, a licensed commercial appraiser for Sarpy County, testified that he used the "income approach" to determine the Property's valuation of $1,478,620. In arriving at his valuation, Leonard assumed a gross operating income of $312,000. In addition, Leonard stated that he used a capitalization rate of 12.25 and a 5-percent vacancy rate in calculating the Property's valuation. The capitalization rate can be determined, in part, by the age and condition of a property.

Leonard acknowledged that since making his valuation of the Property, he had learned that the Property had a higher vacancy

rate than he had previously thought, but less than the figure claimed by the Partnership. Leonard stated that a 10- to 15-percent vacancy rate, rather than 5 percent, should be used in calculating valuation for the Property. Leonard testified that if actual income and expenses of the Property were used, the valuation would be $1,035,330.

Gary Clatterbuck, a partner in the Partnership, testified at the Commission hearing on behalf of the Partnership that the actual gross income from rent for the Property in 1995 was $177,486. Clatterbuck also stated that there was a similar type of property, Bellevue Plaza, which was newer and in a better location and condition than the Property. Clatterbuck stated that Bellevue Plaza nevertheless enjoyed a higher capitalization rate, resulting in a lower overall valuation. Leonard testified that there was not "a whole lot of difference" in the conditions of the Property and that of Bellevue Plaza. Clatterbuck admitted before the Commission that he had not provided the Board at the prior hearing with a different capitalization rate or information to justify a different capitalization rate when the Board heard the Partnership's protest.

At the hearing, the Commission took "judicial notice" of the pleadings in the case file, the Marshall Valuation Service, the Nebraska Department of Revenue's Nebraska Assessor's Reference Manual, a textbook on property assessment valuation, the rules and regulations of the Commission, the Nebraska Department of Revenue property tax division's 1996 ratios and measures of central tendency, and the 1996 Sarpy County commercial property profile.

On April 3, 1997, the Commission issued an eight-page detailed written order. The finding and order covers the nature of the case, the duties of the parties, a review of the evidence, an analysis referencing various tax concepts and appraisal techniques, a standard of review, findings, conclusions, and an order. The Commission found, inter alia, that "[w]hen actual income and expense figures and mass appraisal techniques are mixed, the result is an incorrect and skewed valuation." With regard to the income approach of valuation, the Commission upheld the figures used by the Board, except for the vacancy rate.

Because of Leonard's concession that the vacancy rate was mistakenly set at 5 percent, the Commission adjusted the vacancy rate to 15 percent. The Commission made no other changes to the Board's calculation of valuation of the Property. The Commission stated that "[n]o evidence came before the Commission to contradict the County's determination that 12.25% was the appropriate capitalization rate for the subject property." The Commission reversed the Board's decision and set the 1996 value for the Property at $1,322,755. The Partnership appeals the Commission's decision to this court.

ASSIGNMENTS OF ERROR

The Partnership alleges that the Commission acted arbitrarily, capriciously, and unreasonably when it (1) disregarded the evidence of gross disparity between the assessed economic rent and the actual potential economic rent and (2) failed to address the gross disparity between capitalization rates applied to the Property and other properties with better risk factors.

STANDARDS OF REVIEW

[1] Neb. Rev. Stat. § 77-1511 (Reissue 1996) provides that the Commission shall hear appeals from a county board of equalization as in equity and without a jury and determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof. Section 77-1511 further provides that the Commission shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary, or unless evidence is adduced establishing that the property of the taxpayer is assessed too low.

[2,3] Neb. Rev. Stat. § 77-5019(1) (Reissue 1996) provides that any person aggrieved by a final decision in a case appealed to the Commission, "whether the decision is affirmative or negative in form, shall be entitled to judicial review in the Court of Appeals." Although this court has held that certain procedural aspects of appeals from the Commission to this court are guided by the jurisprudence under the Administrative Procedure Act, see *McLaughlin v. Jefferson Cty. Bd. of Equal.*, 5 Neb. App. 781, 567 N.W.2d 794 (1997), pursuant to statute, the review by this court of an appeal from the Commission's ruling shall be

conducted for errors on the record of the Commission as directed by statute, § 77-5019(5). Compare Neb. Rev. Stat. § 84-917 (Reissue 1994) (providing that appeals from administrative actions to district court shall be reviewed by district court de novo on the record).

[4] When reviewing an order for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *In re Conservatorship of Estate of Marsh,* 5 Neb. App. 899, 566 N.W.2d 783 (1997).

ANALYSIS

Commission's Standard of Review.

In its order, the Commission adopted an " 'Unreasonable or Arbitrary' " standard of review and proceeded to evaluate the Board's decision under this standard. This was proper under § 77-1511. As noted above, the standard of review to be used by this court in analyzing the decision of the Commission is for errors on the record. § 77-5019(5).

Economic Rent.

The Partnership argues on appeal that the rental rates used by Leonard in his valuation based on the income approach were arbitrary and unreasonable. Essentially, the Partnership claims that in applying the income approach to valuation, the Commission should have utilized the Property's actual rental income rather than the figures supplied by Leonard. Leonard's testimony is clear that he used an income approach to valuation.

According to the Nebraska Assessor's Reference Manual, Reg-44-002.05C, the income approach is explained as "includ[ing] but is not limited to making a comparison of properties or portions of properties with known rental levels, expenses, and lease terms, to properties which are physically, functionally, and economically similar but are not presently rented or at economic rent. . . ." Economic rent is defined in International Association of Assessing Officers, Property Assessment Valuation at 204 (2d ed. 1996), as "the annual rent that is justified for the property on the basis of a careful study of comparable properties in the area."

Pursuant to Neb. Rev. Stat. § 77-112 (Reissue 1996), actual value of real property for tax purposes shall mean the market value of real property in the ordinary course of trade. Under § 77-112, actual value may be determined using professionally accepted mass appraisal techniques. Under § 77-112, three techniques are set forth as examples of acceptable mass appraisal techniques; the first one of which, § 77-112(a), is essentially the income approach as defined in the Nebraska Assessor's Reference Manual. As noted above, Leonard used the income approach in valuing the Property. Leonard's use of the income approach is thus authorized by statute.

Leonard was asked at the hearing before the Commission about his opinion regarding valuation of the Property. Leonard explained that while it was difficult to place values on different properties in a manner that would be somewhat equal between and among them, he arrived at a dollar-per-square-foot number in order to find a middle ground that is fair and reasonable to all properties. Leonard noted that the dollar-per-square-foot amount he arrived at for the bank located in the Property was among the lowest that he had used on any bank in the area. Leonard stated that he had taken into consideration as much as possible the circumstance of the Property's relatively poor location. Leonard conceded before the Commission that the 5-percent vacancy rate used in the original appraisal was in error and that a 10- to 15-percent vacancy rate should be used. The Partnership does not take issue directly with the revised vacancy rate. Finally, Leonard testified that his testimony conformed with standard and recognized appraisal practices.

[5] Following the hearing, the Commission rejected the Partnership's proposed valuation because the Commission found that it was derived from an impermissible mix of actual figures and mass appraisal statistics. Given the expertise of the members of the Commission, the Commission is authorized by Neb. Rev. Stat. § 77-5016(5) (Reissue 1996) to "utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it." We do not find error on the record in connection with the Commission's finding.

With respect to Leonard's valuation based on the income approach, there is competent evidence to support a finding that

Leonard used the income approach, and the evidence did not establish an error by Leonard in the application of the income approach. We conclude that in view of Leonard's testimony, the Commission's decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. The Partnership's assignment of error regarding economic rent is without merit.

Capitalization Rate.

The Partnership argues generally that the Commission erred in not adjusting the capitalization rate upward to give the Property a lower valuation. Specifically, the Partnership claims on appeal that the base capitalization rate is too low.

The record contains a copy of the "Final Determination" of the Board, in which the Board adopted the assessor's proposed valuation of $1,478,620 and stated: "Review of the county valuation has been completed. Appraisal methods/techniques were appropriately applied. The estimate of market value is reasonable and within the scope of sound appraisal practice." In view of the Partnership's appeal filed with the Commission challenging the capitalization rate, Clatterbuck was asked at the hearing before the Commission if he had provided the Board "with a different cap rate or information to justify a different cap rate" when the Board had heard the Partnership's protest. Clatterbuck responded, "No, I did not."

[6,7] According to the record, the issue of the appropriate capitalization rate was not presented to the Board. Pursuant to § 77-1511, the Commission shall "determine anew all questions raised before the county board of equalization . . . ." Furthermore, 442 Neb. Admin. Code, ch. 3, § 001.04 (1996), states that the Commission has no authority to consider questions not raised before a county board of equalization. See, also, *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 243 Neb. 351, 500 N.W.2d 520 (1993) (only tax liability questions raised before board of equalization are questions for adjudication by district court in its appellate jurisdiction). Because the question of the proper capitalization rate was not presented to or raised before the Board for a ruling, it was not properly before the Commission or before this court on appeal. See *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997).

CONCLUSION

The Commission's order reversing the Board's decision regarding valuation of the Property is affirmed.

AFFIRMED.

VIRGINIA A. DENNIS, APPELLEE,
v. GREGORY S. DENNIS, APPELLANT.
574 N.W.2d 189

Filed February 10, 1998. No. A-96-987.

1. **Courts: Jurisdiction: Judgments: Alimony.** A trial court has inherent power to retain jurisdiction to determine amounts due and to enforce judgments for alimony.
2. **Courts: Jurisdiction.** A court that has jurisdiction to make a decision also has the power to enforce it by making such orders as are necessary to carry its judgment or decree into effect.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Steven M. Delaney, of Hascall, Jungers, Garvey & Delaney, for appellant.

Kelly K. Brandon, of Sodoro, Daly, & Sodoro, for appellee.

MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges.

MUES, Judge.

BACKGROUND

Gregory S. Dennis and Virginia A. Dennis were divorced by decree December 19, 1988. As part of the decree, the court awarded Virginia the family residence and ordered her to pay a loan secured by a first mortgage on that residence. The court ordered Gregory to pay and hold Virginia harmless from a $25,000 home equity loan from First National Bank of Bellevue (FNB).

Gregory failed to make the FNB payments on the home equity loan, which was secured by a deed of trust (the parties refer to this deed of trust as the "second mortgage," and for convenience, we will do the same), and foreclosure proceedings were initiated. In June 1990, Virginia filed a motion asking the

court to order Gregory to appear and show cause why he should not be held in contempt for failing to comply with the terms of the divorce decree. The court ordered Gregory to appear and in August found that he was in willful contempt for failing to pay the second mortgage. The court ordered Gregory to serve 30 days in the county jail but suspended the sentence conditioned upon Gregory's making payments to FNB.

According to Virginia, Gregory did not make the required payments, and a sheriff's sale was scheduled for October 1990. According to Gregory, just a few days prior to the sale, Virginia's father, John Ransom, and Gregory reached some sort of arrangement whereby Gregory paid $3,000, which was to be applied toward the FNB debt then due on the house. The evidence reflects that the bank was paid $18,000 and gave Ransom an assignment of the bank's mortgage. The remaining $8,310.05 owing was charged off by the bank. Gregory testified that the arrangement with Ransom was that Gregory would pay as much of the debt as he could and that Ransom would pay the rest. According to Gregory, Ransom never informed him that he was going to take an assignment of the second mortgage on the house, and Gregory had heard nothing about the FNB debt after that until Virginia filed the present proceeding. Virginia did not participate in the discussions between Gregory and Ransom and was unaware of any agreement that they may have made. Ransom was not a party to these proceedings and was not called as a witness by either party.

In April 1996, Virginia filed an application to modify the December 1988 decree of dissolution. Virginia alleged, inter alia, that in order to prevent foreclosure of her and the parties' children's home, she borrowed money from Ransom to pay off the second mortgage. Virginia prayed that the court order Gregory to pay her the amount she had to pay FNB to satisfy the second mortgage and serve the deferred 30-day jail sentence ordered in 1990. The court canceled the suspended jail sentence and ordered a hearing to determine the amounts due under the decree. In its order of August 28, 1996, the court ordered, inter alia, that Gregory pay Virginia $15,000, due to his failure to satisfy the entire obligation to FNB. Gregory timely appeals from this judgment.

ASSIGNMENT OF ERROR

Gregory's sole assignment of error is that the trial court erred in awarding Virginia a judgment of $15,000 upon finding that he had failed to satisfy his obligation to pay the FNB debt as ordered by the decree of dissolution.

STANDARD OF REVIEW

After the time for appeal has passed, the meaning of a dissolution decree is determined as a matter of law from its language; neither what the parties thought the decree meant nor what the judge intended is of any relevance. *Universal Assurors Life Ins. Co. v. Hohnstein*, 243 Neb. 359, 500 N.W.2d 811 (1993).

In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court. However, where credible evidence is in conflict on a material issue of fact, the appellate court will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Hanigan v. Trumble*, 252 Neb. 376, 562 N.W.2d 526 (1997).

DISCUSSION

The decree of December 19, 1988, provides in pertinent part: "The Respondent [Gregory] should pay and hold harmless the Petitioner [Virginia] from the home equity loan from First National Bank of Bellevue." There is no dispute that the FNB debt which led to the foreclosure proceedings and which was eventually paid off with the $3,000 from Gregory and the $15,000 from Ransom was, in fact, the home equity loan referred to in that portion of the decree. There is also no dispute that the foreclosure proceedings resulted from Gregory's failure to make the required payments on that home equity loan.

[1,2] Virginia's most recent application to modify alleged, inter alia, that to prevent the foreclosure by FNB she borrowed money from Ransom to help pay the FNB debt. Since the relief she sought, a judgment for the amount she paid to FNB plus medical and insurance expenses, was actually not in the nature of a *modification*, but, rather, a determination of amounts due under the decree and an award to her of said amounts, she supplemented her application with a motion seeking such a deter-

mination. The ensuing proceeding resulted in the order of which Gregory now complains. A trial court has inherent power to retain jurisdiction to determine amounts due and to enforce judgments for alimony. *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997). A court that has jurisdiction to make a decision also has the power to enforce it by making such orders as are necessary to carry its judgment or decree into effect. *Laschanzky v. Laschanzky,* 246 Neb. 705, 523 N.W.2d 29 (1994).

Gregory's arguments on appeal are many and varied. They include the following contentions: The judgment granted Virginia by the district court gave her something more than the decree entitled her to; his "arrangement" with Ransom required Gregory to pay only $3,000 on the FNB debt, and since he fulfilled that arrangement, he thus should be deemed to have satisfied his obligation to Virginia under the decree to pay the FNB home equity loan; and the payment of the $15,000 from Ransom should be deemed as paid on Gregory's behalf and credited to him as satisfying his decree obligation. Before addressing these contentions in more detail, suffice it to say that all of Gregory's arguments disregard Virginia's testimony that the $15,000 contributed by Ransom was a loan to her. Implicit in the district court's order is a finding that in fact it was a loan. While the evidence gives rise to conflicting inferences in that regard, we consider and give weight to the fact that the trial judge, having heard and observed the witnesses, accepted one version of the facts over another. See, e.g., *Hanigan v. Trumble*, 252 Neb. 376, 562 N.W.2d 526 (1997). This loan, made on the eve of the FNB foreclosure which threatened to oust Virginia and the parties' children from their family residence, was instrumental in facilitating the FNB payoff and avoiding foreclosure.

Simply stated, it was Virginia, through a loan from Ransom, together with the $3,000 from Gregory and the $8,310.05 chargeoff by FNB, who rescued the home which had been imperiled by Gregory's noncompliance with the decree. That Ransom was involved in negotiating the payoff or physically paying the money to FNB is not alone determinative of whether this was a loan to Virginia. And while the record contains no documentary evidence of this specific loan transaction, Ransom

did obtain an assignment of FNB's rights at the time the loan was paid. This certainly evidences an intent that Ransom had not simply gifted the $15,000 with no expectation of repayment. And there is little evidence, save Gregory's understanding, to support the contention that Ransom contributed this amount as a gift to his former son-in-law, whose inaction had created the foreclosure predicament. The district court obviously rejected such findings, and we heartily agree with it doing so.

In sum, we view the action taken by the district court as nothing more and nothing less than enforcing that portion of the decree which obligated Gregory to hold Virginia harmless from the debt. As an example, and on a smaller scale, had the decree obligated Gregory to pay a credit card debt of $2,000 holding Virginia harmless on the debt and he failed to do so, resulting in a suit against Virginia who, before judgment (or after for that matter) borrowed funds from a third person to pay the amount owing, there is little doubt that an order for Gregory to reimburse that amount to Virginia would be appropriate. Here, the debt was to FNB and the amount was larger; but in all other material respects, the same rationale applies.

Gregory suggests that somehow the judgment was inappropriate because Ransom had not yet demanded payment of the loan from Virginia. Such argument borders on the frivolous. Ransom holds the papers that impose a lien on Virginia's residence, presumably as security for the money he injected into the payoff. Certainly, Virginia, by being forced to assume a personal obligation of $15,000 to protect her home, has suffered harm. The situation is no different in principle than if Virginia had had the financial means to pay the $15,000 out of her own checking account. The source of the funds is not determinative in this case, as they are funds which Virginia is obligated to pay. She has suffered a harm which the decree required Gregory to protect her from, and the court's order was within its power as one necessary to carry its decree into effect. See, e.g., *Laschanzky, supra*.

Returning now to briefly address Gregory's specific arguments, we note initially that our record contains no pleading from Gregory which raises many of the issues in district court that he now raises. More importantly, however, his arguments

have no merit. Regarding the $15,000 judgment in favor of Virginia, it did not give her more than she was entitled to. Rather, it gave her precisely what the decree contemplated. It allows her to repay the loan which she incurred as a result of Gregory's failure to hold her harmless from the FNB home equity loan, an obligation imposed on him under the decree.

Regarding the contention that the "agreement" with Ransom was fulfilled thus operating to discharge Gregory's obligation to Virginia under the decree, we are familiar with the principle cited by Gregory that in some circumstances, a judgment debtor under a decree in equity may satisfy the obligation of such decree by performing an agreement to satisfy in some manner other than provided for by the decree. See, e.g., *Gutierrez v. Gutierrez*, 5 Neb. App. 205, 557 N.W.2d 44 (1996). Assuming, without deciding, that Ransom agreed that he would seek no further moneys from Gregory under the assignment from FNB and that therefore Gregory had "fulfilled" his obligation to Ransom, we find that Gregory overlooks the undisputed fact that Virginia was not a party to any such agreement and, indeed, had no knowledge of it. Moreover, there is no evidence that Virginia authorized Ransom to make such an agreement for her whereby she would accept Gregory's payment of only $3,000 to satisfy his obligation, which was in excess of $25,000. In short, Ransom was not authorized to diminish Virginia's rights under the decree, she made no such agreement with Gregory, and the rationale of *Gutierrez* and like cases is simply inapplicable here.

Finally, Gregory cites *Hopwood v. Hopwood*, 169 Neb. 760, 100 N.W.2d 833 (1960), and *Contra Costa Cty. ex rel. Petersen v. Petersen*, 234 Neb. 418, 451 N.W.2d 390 (1990), as support for his contention that the agreement with Ransom "satisfi[ed] the mortgage [and] should have discharged his obligation under the decree." Brief for appellant at 8. Both of these cases involved payments made by third parties to judgment creditors which were found to have been paid on behalf of the judgment debtors. Thus, the latter were credited with the payments in satisfaction of certain obligations of the respective decrees. They have no application here, where the payments were not made by Ransom on behalf of Gregory but were made by the judgment creditor, Virginia, from the proceeds of a loan from a third party,

Ransom. In conclusion, we find Gregory's arguments to be without merit.

The judgment of the district court gave Gregory credit for the $3,000 which he paid, as well as the $8,310.05 FNB charged off. The $15,000 judgment was within the district court's inherent power and jurisdiction to determine amounts due and to carry into effect the hold harmless provision of the divorce decree. Being correct, the order of the district court is affirmed.

Virginia submitted a motion and affidavit before argument requesting an award of attorney fees pursuant to Neb. Ct. R. of Prac. 9F (rev. 1996). We hereby award the sum of $1,500 for fees in this court.

AFFIRMED.

STATE OF NEBRASKA EX REL. DELOMA R. CAMMARATA, APPELLEE, V. NEIL M. CHAMBERS, APPELLANT.
574 N.W.2d 530

Filed February 10, 1998. No. A-96-1007.

1. **Child Support: Actions.** The nonexistence of a support order is a prerequisite to an action under Neb. Rev. Stat. § 43-512.03 (Supp. 1995).
2. **Jurisdiction: Child Support: Actions.** A court has subject matter jurisdiction over an action brought pursuant to Neb. Rev. Stat. § 43-512.03 (Supp. 1995) only when there is no existing child support order.
3. **Child Support.** If there is an existing child support order, the State is not authorized to file a petition for payment of support pursuant to Neb. Rev. Stat. § 43-512.03 (Supp. 1995).

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded with directions.

Richard A. Rowland, of Quinn & Wright, for appellant.

Patricia Geringer, of Child Support Services of Nebraska, for appellee.

MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges.

IRWIN, Judge.

I. INTRODUCTION

The State of Nebraska, on relation of Deloma R. Cammarata, brought a child support action against Neil M. Chambers in the

district court for Douglas County, Nebraska, which entered judgment that Neil pay $293 per month support commencing October 1, 1995, and that he pay $742 per month support commencing June 1, 1996. The State brought this action pursuant to Neb. Rev. Stat. § 43-512.03 et seq. (Reissue 1993, Cum. Supp. 1994 & Supp. 1995). Neil appeals, alleging that the district court was without jurisdiction to enter the support order pursuant to § 43-512.03 because there was an existing support order in effect. Because we agree, we reverse, and remand with directions to dismiss the State's petition.

II. BACKGROUND

On May 7, 1977, Deloma and Neil were married. One child, Shannon, was born of the marriage, on August 20, 1977. On June 29, 1984, the parties' marriage was dissolved by a decree of dissolution entered by the district court for Douglas County. Pursuant to the dissolution decree, Deloma received custody of the child and Neil was ordered to pay support.

On March 24, 1987, the provisions of the decree concerning, inter alia, child support were modified by order of the district court. On September 28, 1992, the dissolution decree was modified by a stipulated modification order. The modification order provided that custody of the child would be changed to Neil, provided that Neil's support obligation was terminated, and provided that Deloma was not responsible for payment of child support until she became gainfully employed.

In June 1995, the child moved out of Neil's residence and sometime thereafter began residing with Deloma. Neither party filed any pleadings seeking to modify the September 28, 1992, order. In August 1995, Deloma began receiving aid for dependent children benefits from the State.

On September 11, 1995, the State filed a petition, instituting the case now before us. The State sought child support and medical coverage for the child pursuant to § 43-512.03 et seq. The State asserted that Deloma was in physical possession of the child, that Neil was the child's father, and that the child was in need of financial support.

On October 11, 1995, Neil filed a demurrer, alleging that the State's petition failed to state a cause of action against him. The

demurrer was overruled on November 6. On November 15, Neil filed an answer to the petition, in which he asserted that the petition constituted an impermissible collateral attack on the prior modification order of September 28, 1992.

On January 25, 1996, Neil filed a motion for summary judgment, based upon the State's failure to answer requests for admissions. The State failed to appear at the hearing on the motion, and the court sustained the motion on March 4. On March 28, the State filed a motion seeking to have the court reconsider its ruling on the summary judgment motion. Neil failed to appear at the hearing on the State's motion, and the summary judgment order was vacated on April 8.

The case then proceeded to trial; at which time, Neil moved to have the petition dismissed, reasserting the grounds raised in his prior pleadings. The court again overruled Neil's request. On August 1, 1996, the court entered a decree. The court found that jurisdiction was proper, that Deloma was the child's mother and had possession of the child, and that Neil was the child's father and had a duty to support the child. The court ordered Neil to pay support of $293 per month commencing October 1, 1995, and ordered him to pay support of $742 per month commencing June 1, 1996. Additionally, the court ordered Neil to provide health insurance for the child. Neil filed this appeal after a motion for new trial was overruled.

III. ASSIGNMENTS OF ERROR

On appeal, Neil has assigned five errors. Because we conclude that the district court lacked subject matter jurisdiction, we need not discuss further the assigned errors.

IV. ANALYSIS

1. PETITION

The petition filed by the State in this case declared that the authorized attorney was "acting pursuant to NEB. REV. STAT., Sections 43-512.03 *et. seq.* (R.S. Supp., 1992)." As such, this proceeding was brought outside of the dissolution case and was filed by the State as an independent action to establish support. Section 43-512.03 authorizes such action in certain circumstances.

In relevant part, § 43-512.03 in effect at the time of trial provides as follows:

> (1) The county attorney or authorized attorney shall:
>
> (a) On request by the Department of Social Services . . . file a petition against a nonsupporting parent or stepparent in the district, county, or separate juvenile court praying for an order for child or medical support in cases when there is no existing child or medical support order.

2. EXISTING ORDER

Both in the district court below and in this court on appeal, Neil asserts that there was an existing child support order which precluded the district court from having jurisdiction to entertain the State's petition in this case. Neil points to the modification order of September 28, 1992, as an existing support order. As a result of the existing order, Neil argues, the State's petition constitutes an impermissible collateral attack on the modification order.

The modification orders of March 24, 1987, and September 28, 1992, as well as the original dissolution decree, are not properly in the record before us. However, it is apparent from Deloma's testimony that the modification order of September 28, 1992, specifically addresses the issues of custody and child support. According to Deloma's testimony, the order specifically provides that the care, custody, and control of the child were changed from Deloma to Neil. The order also provides that Neil's support obligation is terminated. Finally, the order provides that Deloma is not ordered to pay support "until [she is] gainfully employed."

Additionally, we note that in a counterclaim Neil pled that the initial dissolution decree, as well as the March 24, 1987, modification order, specifically determined the issue of child support. Both parties agree in their briefs and arguments to this court, and Deloma's trial testimony also establishes, that the September 28, 1992, modification order also discussed the issue of child support, although Neil did not plead such in his counterclaim. Deloma failed to file any reply to Neil's counterclaim, and his assertions that the decree and the first modification included orders concerning child support are, accordingly,

deemed to be true. See *Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989). See, also, Neb. Rev. Stat. § 25-842 (Reissue 1995).

The dissolution decree and the modification order which Neil refers to in his counterclaim are contained within the transcript of this appeal but are not a part of the bill of exceptions and do not appear to have ever been offered into evidence before the district court. The specific terms of these orders are, therefore, not known by this court because they were not properly preserved in the bill of exceptions. See *Johannes v. McNeil Real Estate Fund VIII*, 225 Neb. 283, 404 N.W.2d 424 (1987).

The fact that the specific terms of these orders are not before us is, however, of no consequence to our resolution of this case. According to the pleadings and Deloma's testimony, the dissolution decree and the modification orders address the issue of child support. Even if it was the case that the orders provided that no support is due from either parent, that does not change the fact that there is an existing support order. The child support issue was before the court at the time of the decree and each modification, and the issue was addressed in each order. As such, we need not address Deloma's protestations that the 1992 modification order is in part a conditional order, because regardless of that potential fact there is at least one existing order which addresses the issue of child support.

3. Resolution

[1,2] The Nebraska Supreme Court has held that the nonexistence of a support order is a prerequisite to an action under § 43-512.03. *State ex rel. Gaddis v. Gaddis*, 237 Neb. 264, 465 N.W.2d 773 (1991). As a result, a court has subject matter jurisdiction over an action brought pursuant to § 43-512.03 only when there is no existing child support order. *Id.* If there is an existing support order, the trial court lacks subject matter jurisdiction and a demurrer should be sustained. *Id.*

Child support from Neil may be attainable, for we note that under Neb. Rev. Stat. § 42-364(6) (Cum. Supp. 1994), existing child support orders in cases where a party has applied for services under title IV-D of the Social Security Act are subject to review as provided in §§ 43-512.12 through 43-512.18.

Sections 43-512.12 through 43-512.18 provide a vehicle for the State to seek a modification of an existing support order to attain support from a parent.

[3] Because there is an existing support order, the State was not authorized to file the petition in the present case and the district court did not have subject matter jurisdiction. See *State ex rel. Gaddis v. Gaddis, supra.* As such, the court should have dismissed the action pursuant to Neil's motions at the beginning of the case or at the end of the evidence, or upon its own motion. See *County of Sherman v. Evans*, 252 Neb. 612, 564 N.W.2d 256 (1997). The absence of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. *Id.* For that reason, we reverse and set aside the judgment of the district court and remand this matter to the district court with directions to dismiss the action.

V. CONCLUSION

For the reasons stated herein, the judgment of the district court is reversed, and the cause is remanded with directions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF JOELYANN H., A CHILD UNDER 18 YEARS OF AGE. DAVE R. AND ROBIN R., APPELLEES, V. LORI H., APPELLANT.

574 N.W.2d 185

Filed February 10, 1998. No. A-97-308.

1. **Appeal and Error.** An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
2. **Jurisdiction: Appeal and Error.** An appellate court has the power and duty to determine whether the appellate court has jurisdiction over the matter before it. When lack of jurisdiction is apparent on the face of the record, yet the parties fail to raise it, it is the duty of a reviewing court to raise and determine the issue of jurisdiction sua sponte.
3. **Parental Rights.** Under the Nebraska Juvenile Code, the rights of the parent and the child are protected by the separate adjudication and dispositional phases of the dependency proceeding.

4. **Parental Rights: Child Custody.** The purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child; the purpose of the dispositional phase is to determine placement and the rights of the parties in the action.
5. **Juvenile Courts: Jurisdiction.** An adjudication that a child is within the purview of the Nebraska Juvenile Code is a jurisdictional prerequisite to the dispositional phase.
6. ___: ___. In the absence of an adjudication petition and hearing in compliance with Neb. Rev. Stat. § 43-247 (Reissue 1993), a juvenile court lacks jurisdiction.
7. **Parental Rights: Due Process: Appeal and Error.** Neb. Rev. Stat. § 43-279.01 (Reissue 1993) requires that all parties to a hearing on termination of parental rights, whether or not represented by counsel, shall be informed, inter alia, of the nature of the proceedings and the possible consequences or dispositions, of the right to remain silent as to any matter of inquiry if the testimony sought to be elicited might tend to prove the parent guilty of a crime, and of the right to appeal.
8. **Jurisdiction: Appeal and Error.** When a trial court lacks the jurisdiction to adjudicate the merits of a claim, an appellate court also lacks the power to adjudicate the merits of the claim.

Appeal from the County Court for Kimball County: C.G. WALLACE, Judge. Reversed and remanded with directions to dismiss.

Thomas M. Sonntag, of Peetz, Sonntag & Goodwin, P.C., for appellant.

David L. Wilson, of Burke & Wilson, for appellees.

William C. Peters, guardian ad litem.

HANNON, SIEVERS, and INBODY, Judges.

INBODY, Judge.

Dave R. and Robin R., court-appointed guardians of Joelyann H., moved, pursuant to Neb. Rev. Stat. § 43-292 (Reissue 1993), to terminate the parental rights of Joelyann's natural mother, Lori H. The county court for Kimball County, Nebraska, sitting as a juvenile court, entered an order terminating Lori's parental rights. Lori appeals. For the reasons set forth herein, we reverse, and remand with directions to dismiss this cause.

STATEMENT OF FACTS

Joelyann was born to Lori on September 2, 1993, while Lori was a 15-year-old ward of the Nebraska Department of Social Services and living in Sidney, Nebraska. Shortly afterward,

Lori's caseworker placed her briefly in a shelter in Scottsbluff, Nebraska, and Joelyann was placed with Dave and Robin in Kimball, Nebraska. Lori later moved to her mother's home, but Joelyann stayed with Dave and Robin from December 1993 through February 1994. On February 25, 1994, Lori and Joelyann were placed in "TLC," a home for single mothers in Lincoln, Nebraska; the following September, Lori left TLC without permission. Lori's mother took Joelyann home with her; Lori went to Ogallala, Nebraska, to Scottsbluff, and then with a friend to Florida. After approximately 1 month, Lori was returned from Florida to Nebraska as a runaway; she lived briefly with her mother and then on her own with Joelyann in an apartment in Kimball.

On February 6, 1995, Lori again left Joelyann with Dave and Robin and returned to Lincoln; Joelyann has stayed with Dave and Robin since that date. In April, Dave and Robin were appointed temporary guardians of Joelyann in proceedings initiated by Lori's mother. Lori argues in her brief that she opposed this assertion of guardianship but does not cite to the record in support of this argument, nor have we located any support in the record.

In any event, Lori moved back to Kimball in January 1996 and made several visitations with Joelyann until March. At that time, a dispute erupted between Lori and Dave and Robin regarding a rumor that Lori had a health condition that would endanger Joelyann; Dave and Robin demanded a medical statement from Lori, which she refused to provide. Consequently, Dave and Robin refused to allow any more visitations.

In April 1996, Lori returned to Lincoln because she "had got [sic] in trouble for . . . forgery" in Lancaster County. Lori admits selling illegal drugs during that stay in Lincoln and testified that in late April she left Lincoln for New York State because she was assaulted, and feared further assault, by the drug dealers for whom she worked and who had accused her of not paying them. Lori testified she had intended to stay in New York "forever" but was arrested in July for petty larceny and extradited to Nebraska in August on pending Nebraska warrants. On or about October 1, she was released on a personal recognizance bond.

Also on October 1, 1996, Dave and Robin filed a petition in "the juvenile court of Kimball County," asking that Lori's parental rights in Joelyann be terminated pursuant to § 43-292 of the Nebraska Juvenile Code and asserting that Lori had abandoned Joelyann for 6 months or more, had neglected Joelyann, and was unfit because of habitual use of alcohol or drugs. The petition also alleged that such termination would be in Joelyann's best interests.

ASSIGNMENTS OF ERROR

Lori contends the court erred in concluding that she was an unfit parent for purposes of § 43-292 (1), (2), and (4). She also contends the court erred in determining that it was in the best interests of Joelyann that Lori's parental rights be terminated.

STANDARD OF REVIEW

[1] An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992).

[2] An appellate court has the power and duty to determine whether the appellate court has jurisdiction over the matter before it. When lack of jurisdiction is apparent on the face of the record, yet the parties fail to raise it, it is the duty of a reviewing court to raise and determine the issue of jurisdiction sua sponte. *In re Interest of D.W.*, 249 Neb. 133, 542 N.W.2d 407 (1996).

ANALYSIS

We do not reach Lori's assigned errors because we find a fundamental and fatal flaw in the procedures followed by the county court for Kimball County, sitting as a juvenile court—a flaw that nullifies that court's actions and order.

[3,4] That flaw becomes apparent once the structure and purpose of the Nebraska Juvenile Code are examined:

> In Nebraska, the rights of the parent and the child are protected by the separate adjudication and dispositional phases of the dependency proceedings. . . . The purpose of the adjudication phase of the proceeding is to protect the

> interests of the child; the purpose of the dispositional phase is to determine placement and the rights of the parties in the action.

In re Interest of Amber G. et al., 250 Neb. 973, 980, 554 N.W.2d 142, 148 (1996).

The adjudication phase is contained in Neb. Rev. Stat. § 43-247 (Reissue 1993), which specifically provides that termination of parental rights for a juvenile born out of wedlock is within the exclusive jurisdiction of the juvenile court. Actions in juvenile court are initiated by filing a petition pursuant to § 43-247. This was made clear by the uncontradicted comments of State Senator Vard Johnson during the floor debate for recodification of the juvenile code during the 1981 legislative session: "[T]he termination provisions in the juvenile code do not even come into play . . . until after there has been some determination made that the child is a neglected child or the child is a dependent child . . . ." Floor Debate, L.B. 346, Judiciary Committee, 87th Leg., 1st Sess. 4369 (May 4, 1981).

[5] More importantly, for purposes of this case, an adjudication that a child in question is within the purview of the juvenile code is a jurisdictional prerequisite to the dispositional phase. Compare *In re Interest of D.M.B.*, 240 Neb. at 352, 481 N.W.2d at 909 ("[i]f the pleadings and evidence at the adjudication hearing do not justify a juvenile court's acquiring jurisdiction of a child, then the juvenile court has no jurisdiction"). Although the adjudication and disposition phases may be combined, see Neb. Rev. Stat. § 43-291 (Reissue 1993) and *In re Interest of K.M.S.*, 236 Neb. 665, 463 N.W.2d 586 (1990), the adjudication phase may not be omitted altogether.

[6] Dave and Robin did not file a petition pursuant to § 43-247, and there is no record of any adjudication hearing. Proceedings, instead, began at the dispositional phase, with a hearing on Dave and Robin's petition to terminate Lori's parental rights pursuant to § 43-292. In the absence of an adjudication petition and hearing in compliance with § 43-247, the juvenile court lacked jurisdiction over Joelyann and could not entertain any effort to terminate Lori's parental rights in her. The court's order purporting to terminate parental rights pursuant to § 43-292 is therefore a nullity. " 'The juvenile court can intervene between the parent and the child only if the child's

condition requires the state to use its power to protect the welfare of the child. *The circumstances of the child must come within the statute.*'" (Emphasis supplied.) *In re Interest of Goldfaden*, 208 Neb. 93, 99, 302 N.W.2d 368, 372 (1981).

Even if we were to somehow construe the petition filed by Dave and Robin as a petition for adjudication pursuant to § 43-247, it would be deficient. Neb. Rev. Stat. § 43-274 (Reissue 1993) provides that any such petition must be filed by the "*county attorney* or any reputable person residing in the county, *with the consent of the county attorney*." (Emphasis supplied.) Nothing in the record establishes that this petition was filed by or with the consent of the county attorney.

[7] Further, the juvenile code provides, at Neb. Rev. Stat. § 43-279.01 (Reissue 1993), that all parties to a hearing on termination of parental rights, whether or not represented by counsel, "shall" be informed, inter alia, of the nature of the proceedings and the possible consequences or dispositions, of the right to remain silent as to any matter of inquiry if the testimony sought to be elicited might tend to prove the parent guilty of a crime, and of the right to appeal. Again, there is absolutely no showing that Lori was ever advised as to her rights as delineated in § 43-279.01. Even if the court had jurisdiction, this failure to advise Lori of her rights would have required reversal on those grounds. See, e.g., *In re Interest of A.D.S. and A.D.S.*, 2 Neb. App. 469, 511 N.W.2d 208 (1994) (failure to advise of rights pursuant to § 43-279.01 requires reversal, and remand for new hearing).

[8] In view of our findings as stated herein, we do not reach Lori's assigned errors. "When a trial court lacks the power, that is, jurisdiction, to adjudicate the merits of a claim, an appellate court also lacks power to adjudicate the merits of the claim." *In re Interest of D.M.B.*, 240 Neb. 349, 353, 481 N.W.2d 905, 909 (1992).

CONCLUSION

For the above-recited reasons, the judgment of the county court for Kimball County, sitting in its capacity as a juvenile court, is vacated, and the matter remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

EDWARD CUMMINGS, APPELLANT, V. OMAHA PUBLIC SCHOOLS AND ITT HARTFORD INSURANCE CO., ITS WORKERS' COMPENSATION INSURANCE CARRIER, APPELLEES.

574 N.W.2d 533

Filed February 10, 1998. No. A-97-782.

1. **Workers' Compensation.** A determination as to an injured worker's loss of earning capacity is a question of fact to be determined by the Workers' Compensation Court.
2. **Workers' Compensation: Expert Witnesses.** The Workers' Compensation Court is not bound by the opinions of medical experts.
3. **Workers' Compensation: Appeal and Error.** An appellate court is precluded from substituting its view of the facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the court.
4. **Workers' Compensation.** To be apportionable, an impairment must have been independently producing some degree of disability before an accident and must be continuing to operate as a source of disability after the accident.
5. **Workers' Compensation: Words and Phrases.** In terms of the test for determining when apportionment is appropriate, the term "disability" contemplates impairment of earning capacity, not functional disability.
6. **Workers' Compensation: Proof.** Psychological injuries are compensable, under certain circumstances, in Nebraska workers' compensation cases, but the burden to prove that a psychological disability is the result of a work-related accident is on the claimant.
7. **Workers' Compensation: Appeal and Error.** Findings of fact made by the Workers' Compensation Court after review have the same force and effect as a jury verdict and will not be set aside unless they are clearly wrong.
8. **Evidence: Appeal and Error.** When testing the sufficiency of the evidence in the record to support the findings of fact made by the court, the evidence must be considered in the light most favorable to the successful party.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

James E. Harris and Britany S. Shotkoski, of Harris, Feldman Law Offices, for appellant.

Joseph W. Grant and Lisa M. Meyer, of Gaines, Mullen, Pansing & Hogan, for appellees.

MILLER-LERMAN, Chief Judge, and IRWIN and SIEVERS, Judges.

IRWIN, Judge.

I. INTRODUCTION

Edward Cummings appeals from an order of the Workers' Compensation Court review panel (panel) which affirmed an

order of a trial judge of the Workers' Compensation Court (compensation court) on remand from this court's opinion in *Cummings v. Omaha Public Schools*, 5 Neb. App. 391, 558 N.W.2d 601 (1997). The compensation court awarded Cummings compensation for a 5-percent disability resulting from a series of work-related accidents in 1992 and 1993 which exacerbated Cummings' back injury from a prior, compensated, work-related accident in 1984. The compensation court further denied Cummings' claim for psychological injuries resulting from the 1992 and 1993 accidents. Cummings appealed to the panel, alleging that the compensation court was clearly wrong in relying on particular medical evidence in assessing his disability; that his disability should not have been apportioned between the prior, compensated injury and the new injuries; and that the court was clearly wrong in denying compensation for the alleged psychological injuries. The panel affirmed the judgment of the compensation court.

Because we find that the compensation court was not clearly wrong in assessing Cummings' disability from the 1992 and 1993 series of accidents at 5 percent or in denying compensation for the alleged psychological injuries, and because we find that the compensation court did not err in apportioning Cummings' disability between the prior, compensated accident and the new accidents, we affirm the judgment of the panel affirming the order of the compensation court.

II. BACKGROUND

Cummings is, and was at all times relevant to these proceedings, employed by Omaha Public Schools. In August 1984, Cummings injured his back in a work-related accident. As a result of that accident, Cummings received a lump-sum settlement award based upon a 25-percent disability to his body as a whole. Subsequent to the settlement, Cummings returned to work at a salary equal to or greater than his salary prior to the accident.

On June 1, 1992, Cummings was injured at work when ceiling tiles fell onto him, causing injury to his back and exacerbating his prior back condition. On November 10, Cummings suffered another injury at work when a chair rolled out from under him, causing additional injury to his back and additional exac-

erbation of his back condition. On March 1, 1993, Cummings fell on ice in the parking lot at work, causing additional injury to his back and additional exacerbation of his back condition. On April 30, Cummings was involved in an altercation at work between a student and a security guard, causing additional injury to his back and additional exacerbation of his back condition. Finally, on November 23, Cummings suffered a back spasm at work which caused him to fall to his knees, additionally exacerbating his back condition.

On June 13, 1994, Cummings filed a petition in the Workers' Compensation Court, seeking compensation for the series of accidents. Cummings alleged temporary total disability, emotional and psychological injuries, and loss of earning capacity. On June 27, Omaha Public Schools and its workers' compensation insurance carrier filed an answer.

On October 17, 1994, a hearing was held before the compensation court. At trial, the parties stipulated that Cummings was injured in a series of work-related accidents, that there was no controversy regarding payment of temporary total disability benefits, and that the only issues remaining at trial concerned Cummings' loss of earning capacity. At trial, Cummings offered evidence, including a medical report and a vocational rehabilitation report, concerning his injuries and loss of earning capacity. Omaha Public Schools and its insurer objected to the admissibility of the two reports, arguing that they had not been timely disclosed and that the medical report was not properly characterized as a rebuttal report. The compensation court sustained the objections to the two exhibits.

The compensation court received other evidence and heard testimony from Cummings and two employees of Omaha Public Schools. Included in the admitted evidence was a medical report from Dr. Lonnie Mercier, who examined Cummings in August 1993. Mercier's examination occurred prior to the back spasm incident in November 1993. The evidence also indicated that an MRI was performed on Cummings sometime after the November 1993 incident and that the MRI was not considered in Mercier's report or conclusions.

On November 8, 1994, the compensation court entered an award in favor of Cummings. The compensation court found

that the series of injuries occurred in the course and during the scope of Cummings' employment with Omaha Public Schools and that Cummings was entitled to workers' compensation benefits. The compensation court awarded 10 weeks of temporary total disability benefits. The compensation court further determined that Cummings had suffered a 5-percent loss of earning capacity from the series of injuries and the exacerbation of his prior back condition. The compensation court specifically noted that the determination concerning Cummings' loss of earning capacity was based heavily on Mercier's report. Additionally, the compensation court found that Cummings failed to satisfy his burden of proof regarding the alleged psychological injuries and denied compensation for them. Finally, the compensation court declined to award vocational rehabilitation benefits.

On November 14, 1994, Cummings filed an application for review of the compensation court's award by the panel. Cummings assigned as error the compensation court's reliance on Mercier's report rather than the objective MRI results; the compensation court's acceptance of particular vocational rehabilitation opinions; the compensation court's refusal to accept the two proffered reports into evidence; the compensation court's apportionment of Cummings' disability between his prior, compensated injury and the new series of injuries; the compensation court's denial of any compensation for alleged psychological injuries; and the compensation court's specific finding that Cummings could obtain the same or a similar salary from a different employer if his employment with Omaha Public Schools was for some reason ended.

On March 21, 1995, the panel affirmed the compensation court's award in all respects except concerning the compensation court's ruling on the admissibility of the two reports offered by Cummings. The panel ruled that the exhibits should not have been excluded on the basis upon which the compensation court excluded them, and the panel remanded the case on the limited issue of loss of earning capacity.

On May 5, 1995, the compensation court entered an order on remand. The compensation court noted that the exhibits had been received and that all of the evidence had been reconsidered. The compensation court once again concluded that Cummings' loss of earning capacity from the series of accidents was 5 percent.

On May 19, 1995, Cummings filed another application for review of the compensation court's opinion. Cummings assigned the same six errors as in his first application for review, except with regard to the previous assignment concerning the admissibility of the exhibits. In place of that assigned error, Cummings assigned as error that the compensation court's ruling was contrary to the evidence.

On April 24, 1995, the panel entered an order. The panel held that the assignments of error which had been previously rejected on the first review were not reviewable a second time, because of the law-of-the-case doctrine. With regard to the new assignment of error, the panel affirmed the compensation court's findings. Cummings timely appealed from that order.

In our decision in that appeal, *Cummings v. Omaha Public Schools*, 5 Neb. App. 391, 558 N.W.2d 601 (1997), we reversed the judgment of the panel and remanded the case with directions to the panel to reconsider Cummings' assigned errors concerning Mercier's report, the vocational rehabilitation report, and apportionment. On remand, the panel reconsidered the assigned errors and affirmed the decision of the compensation court. This timely appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Cummings has assigned five errors, which we have consolidated for discussion to three. First, Cummings asserts that the compensation court was clearly wrong to rely on Mercier's opinions and the vocational rehabilitation report based on Mercier's opinions instead of relying on the objective MRI results. Second, Cummings asserts that the compensation court was clearly wrong in apportioning his disability between the prior, compensated injury and the series of new injuries. Third, Cummings asserts that the compensation court was clearly wrong in not compensating him for his alleged psychological injuries.

IV. ANALYSIS

1. Loss of Earning Capacity

Cummings first asserts that the compensation court was clearly wrong in relying on Mercier's opinions and in relying on the vocational rehabilitation report based on Mercier's opinions

in determining Cummings' loss of earning capacity. Cummings asserts that the compensation court was clearly wrong because Mercier examined Cummings prior to the final incident, the November 1993 back spasm, and prior to the MRI that was performed on Cummings' back.

[1] A determination as to an injured worker's loss of earning capacity is a question of fact to be determined by the Workers' Compensation Court. *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996). If the record in a workers' compensation case presents conflicting medical reports and testimony, an appellate court will not substitute its judgment for that of the compensation court regarding which medical evidence to rely upon. *Kerkman v. Weidner Williams Roofing Co.*, 250 Neb. 70, 547 N.W.2d 152 (1996); *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996). The compensation court is entitled to accept the opinion of one medical expert over that of another, and as the sole trier of fact, the compensation court is the sole judge of the credibility of the medical evidence and the weight to be given to it. See *Kerkman v. Weidner Williams Roofing Co., supra.*

[2] The Nebraska Supreme Court has held that the Workers' Compensation Court is not bound by the opinions of medical experts. *Paulsen v. State, supra.* As such, it is up to the compensation court to determine which, if any, of the expert witnesses to believe. *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996). The court is free to believe or disbelieve any of the medical evidence presented. See *id.*

In the present case, Mercier's report indicated a medical opinion that Cummings had suffered a 5-percent impairment as a result of the series of accidents. Additionally, the testimony of a vocational rehabilitation counselor whose report was based in part on Mercier's opinion indicated that Cummings' loss of earning capacity from the series of accidents was "insignificant."

Cummings asserts that the compensation court was clearly wrong to rely on Mercier's opinions and the vocational rehabilitation report because Mercier's examination of Cummings was prior to the November 1993 back spasm incident and failed to consider an MRI of Cummings' back performed after Mercier's examination. Cummings argues that the compensation court should have relied upon the objective MRI results in assessing the loss of earning capacity.

We note that Cummings did not present any evidence to suggest that the November 1993 back spasm incident had any significant impact on his loss of earning capacity which would make Mercier's examination and results somehow inaccurate. Additionally, our examination of the medical and vocational rehabilitation reports in the record indicates that Cummings' loss of earning capacity attributable to this series of accidents was uniformly assessed at between 5 and 10 percent. This includes the report of a rehabilitation counselor whose report was admitted into evidence on Cummings' behalf on remand from the panel's first review.

Cummings also argues that the compensation court was clearly wrong in finding that he could obtain the same or a similar salary from another employer if his employment relationship with the school ended. One of the vocational rehabilitation counselors testified that Cummings' *disability* will not prevent him from achieving a similar salary elsewhere and that any difficulties he might incur are the result of his attitude and interpersonal skills. As such, there is competent evidence in the record to support the compensation court's factual determination.

[3] We are precluded from substituting our view of the facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the court. Neb. Rev. Stat. § 48-185 (Reissue 1993); *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996); *Wilson v. Larkins & Sons*, 249 Neb. 396, 543 N.W.2d 735 (1996). In addition, we note that the compensation court is not required to depend on any expert evidence to assess the degree of a claimant's disability and loss of earning capacity, but may instead rely solely on the testimony of the claimant to arrive at a conclusion. *Cords v. City of Lincoln, supra.* In light of the abundance of competent evidence in the record to support the compensation court's assessment of Cummings' loss of earning capacity at 5 percent, we cannot say that the court was clearly wrong. This assigned error is without merit.

2. Apportionment

Cummings argues that the compensation court erred in apportioning his total disability between the prior, compensated

injury and the series of new injuries. Although the compensation court's order specifically states that it "has not apportioned the impairment," the compensation court did limit Cummings' award to compensation for only the disability caused by the 1992 and 1993 injuries or the aggravation of his prior condition, rather than for the original disability caused by the prior, compensated injury. As a result, despite the compensation court's specific indication otherwise, it appears that the compensation court did, in fact, apportion Cummings' disability.

(a) Apportionment in Present Case

In support of his argument that apportionment is improper, Cummings cites the Nebraska Supreme Court's opinion in *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990), and this court's decision in *Jacob v. Columbia Ins. Group*, 2 Neb. App. 473, 511 N.W.2d 211 (1994). We do not find either case to prohibit apportioning a claimant's recovery for disability between a prior, compensated injury to the body as a whole and a subsequent compensable injury to the body as a whole.

In *Heiliger v. Walters & Heiliger Electric, Inc., supra*, the Supreme Court noted that a claimant is entitled to full compensation, notwithstanding the fact that his present disability may be the result of an aggravation of a preexisting injury or condition. The court further indicated that, on the facts of *Heiliger*, apportionment was irrelevant because there was no claim against the Second Injury Fund. *Heiliger* is distinguishable from the present case, however, because the claimant in *Heiliger* had not been compensated for the prior injury or the disability resulting therefrom. As such, *Heiliger* does not stand for the proposition that a claimant who has once received compensation for disability occasioned by a prior injury is entitled to be compensated again for the original disability when a subsequent injury exacerbates the prior disability.

[4,5] In *Jacob v. Columbia Ins. Group, supra*, this court discussed apportionment and applied apportionment to a factual situation involving injuries to separate but related members, rather than injuries to the body as a whole. We held that " '[t]o be apportionable, then, an impairment must have been indepen-

dently producing some degree of disability before the accident, and must be continuing to operate as a source of disability after the accident.' " 2 Neb. App. at 491, 511 N.W.2d at 221. In terms of this test for determining when apportionment is appropriate, the term "disability" contemplates impairment of earning capacity, not functional disability. *Id.* Additionally, we noted that the problem of apportionment may be encountered between an employer and an employee when disability from a prior injury contributes to a claimant's total disability following a subsequent injury. *Id.*

On the facts of *Jacob*, we held that it was not appropriate to apportion a claimant's disability between a prior work-related accident where the claimant lost a finger and a subsequent work-related accident where he essentially lost his entire hand. Because both injuries were injuries to members, rather than injuries to the body as a whole, the claimant did not suffer any disability in terms of loss of earning capacity, as distinguished from functional disability, from the prior injury, and the award which he received for the prior injury did not need to be deducted from the disability benefits for which he was entitled as a result of the subsequent injury. See *id.*

Applying the facts of the present case to the test established in *Jacob* for determining the appropriateness of apportionment reveals that the compensation court did not err in apportioning Cummings' disability between the prior, compensated injury and the subsequent series of injuries. Cummings' prior back injury independently produced some degree of lost earning capacity, as indicated by his prior award of benefits for a 25-percent loss of earning capacity resulting from the prior accident. Additionally, the prior disability is continuing to act as a source of lost earning capacity even after the subsequent series of accidents.

As such, because Cummings was already compensated for the prior disability, he is not entitled to receive compensation now beyond whatever additional disability can be attributed to the subsequent series of injuries or its aggravation of his prior condition. He is not entitled to be compensated again for the original 25-percent disability caused by the prior injury. The evidence in the record uniformly indicates that Cummings is

entitled to benefits for a 5-percent loss of earning capacity caused by the subsequent series of injuries and its aggravation of his prior condition.

(b) *Jacob* and Double Recovery

Our holding in the present case is consistent with the holding and the test established in *Jacob v. Columbia Ins. Group*, 2 Neb. App. 473, 511 N.W.2d 211 (1994). Nonetheless, we feel compelled to address the discussion of "double recovery," the Second Injury Fund, and the Supreme Court's opinion in *Benson v. Barnes & Barnes Trucking*, 217 Neb. 865, 354 N.W.2d 127 (1984), which discussion is found in *Jacob, supra*. In *Jacob*, this court noted that the significant point about the Second Injury Fund statute, Neb. Rev. Stat. § 48-128 (Reissue 1993), is that a claimant's benefits are not decreased because of a preexisting condition that has been compensated for. This statement was not intended to indicate that the Second Injury Fund statute contemplates that an employee is entitled to a *double recovery* for a prior, compensated injury, but, rather, to indicate that an employee is not precluded from recovering benefits for *additional* disability which is the result of an aggravation of a preexisting condition simply because he has already been compensated for the preexisting condition and the original disability.

Additionally, in *Jacob* we indicated that allocating the claimant's present disability between his preexisting condition and his subsequent condition was "prohibited." 2 Neb. App. at 488, 511 N.W.2d at 220. On the facts of *Jacob*, where there was no loss of earning capacity from the prior injury, apportionment *was* prohibited. That is not to say, however, that apportionment is necessarily prohibited in all cases.

In *Jacob*, we also discussed the Supreme Court's opinion in *Benson v. Barnes & Barnes Trucking, supra*. We noted that the Supreme Court affirmed the compensation court's dismissal of the Second Injury Fund, but remanded the case for a determination of the extent of the employer's liability. Although we recognized that double recovery was not chiefly at issue in *Benson*, we concluded that because the Supreme Court did not attempt to decrease the claimant's benefits despite the fact that he had already been compensated for a 37-percent loss of earning capacity from a prior injury, the Supreme Court was not "both-

ered" by the concept of double recovery in compensation cases. *Jacob v. Columbia Ins. Group*, 2 Neb. App. at 489, 511 N.W.2d at 220.

A closer reading of *Benson, supra*, however, indicates that the Supreme Court actually remanded the case with directions that the compensation court enter an award in favor of the claimant "consistent with th[e] opinion." 217 Neb. at 876, 354 N.W.2d at 134. We find nothing in *Benson* which indicates that a claimant is entitled to *double recovery*. Rather, we read the Supreme Court's discussion of the division of liability between the Second Injury Fund and the employer as concerning only the disability caused by the subsequent injury and the aggravation of the prior injury, rather than concerning a second compensation for the original disability itself. It does not appear that the Supreme Court was presented with the specific issue of whether the disability should have been apportioned between the prior, compensated injury to the body as a whole and the subsequent injury and aggravation of the prior injury.

Notwithstanding the fact that we now conclude that *Benson* does not indicate any approval by the Supreme Court of double recovery, we do not believe that our current reading of *Benson* undermines our previous holding in *Jacob v. Columbia Ins. Group*, 2 Neb. App. 473, 511 N.W.2d 211 (1994). The overriding factor in *Jacob* was that the prior injury did not result in any loss of earning capacity, and apportionment was therefore inappropriate. *Jacob* is not inconsistent with either *Benson v. Barnes & Barnes Trucking*, 217 Neb. 865, 354 N.W.2d 127 (1984), or our decision today, however, because *Benson* and the present case are both cases in which the prior injury was an injury to the body as a whole which *did* result in loss of earning capacity.

3. Psychological Injuries

Cummings next asserts that the compensation court was clearly wrong in not compensating him for the psychological injuries caused by his series of work-related accidents. The compensation court found that Cummings failed in his burden of proof to show by a preponderance of evidence that he suffered any psychological injury either as a result of the series of accidents or as a result of the aggravation of the prior injury.

The compensation court found that the cause of his psychological problems, if any, was not related to any work-related accident, but, rather, that the problems were the result of job conditions and job stress.

[6] Psychological injuries are compensable, under certain circumstances, in Nebraska workers' compensation cases. See, *Kraft v. Paul Reed Constr. & Supply*, 239 Neb. 257, 475 N.W.2d 513 (1991); *Sorensen v. City of Omaha*, 230 Neb. 286, 430 N.W.2d 696 (1988). However, the burden to prove that a psychological disability is the result of a work-related accident is on the claimant. *Kraft v. Paul Reed Constr. & Supply, supra.* Further, a determination of whether a particular disability was caused by a work-related accident is a question for the trier of fact, whose factual findings will be upheld unless clearly wrong. *Kerkman v. Weidner Williams Roofing Co.*, 250 Neb. 70, 547 N.W.2d 152 (1996).

In the present case, the record reveals that at least one psychiatric evaluation resulted in a conclusion that Cummings did not even suffer from any disabling psychological condition. To the extent there is some other evidence in the record to indicate that Cummings may suffer from psychological problems, we can find no evidence which establishes a causal link between any psychological disability and any of the accidents. On the record before us, we cannot say that the court was clearly wrong. This assigned error is without merit.

4. Resolution

[7] Findings of fact made by the Workers' Compensation Court after review have the same force and effect as a jury verdict and will not be set aside unless they are clearly wrong. *Kerkman v. Weidner Williams Roofing Co., supra*; *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996); *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996); *Pettit v. State*, 249 Neb. 666, 544 N.W.2d 855 (1996); *Dougherty v. Swift-Ekrich, Inc.*, 4 Neb. App. 653, 547 N.W.2d 522 (1996).

[8] A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers; (2) the judgment, order, or award was procured by

fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the judgment, order, or award; or (4) the findings of fact made by the court do not support the judgment, order, or award. *Berggren v. Grand Island Accessories, supra*; *Cords v. City of Lincoln, supra*; *Cox v. Fagen, Inc.*, 249 Neb. 677, 545 N.W.2d 80 (1996); *Pettit v. State, supra*; *Hull v. Aetna Ins. Co.*, 249 Neb. 125, 541 N.W.2d 631 (1996); *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996). Furthermore, when testing the sufficiency of the evidence in the record to support the findings of fact made by the court, the evidence must be considered in the light most favorable to the successful party. *Kerkman v. Weidner Williams Roofing Co., supra*; *Berggren v. Grand Island Accessories, supra*; *Cords v. City of Lincoln, supra*; *Pettit v. State, supra*; *Paulsen v. State, supra*; *Dougherty v. Swift-Ekrich, Inc., supra.*

As in other cases, an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law, independent of the conclusions of the lower court. *Berggren v. Grand Island Accessories, supra*; *Wilson v. Larkins & Sons*, 249 Neb. 396, 543 N.W.2d 735 (1996).

In accordance with this standard of review, we cannot say that the findings of the panel affirming the compensation court's judgment are clearly wrong. Viewing the evidence in a light most favorable to Omaha Public Schools and its insurer, we conclude that there was sufficient evidence to support the decision of the compensation court. Finally, we conclude that it was appropriate for the compensation court to apportion Cummings' disability. Cummings' assigned errors are without merit.

V. CONCLUSION

Because we find that the compensation court was not clearly wrong in its assessment of Cummings' loss of earning capacity or in denying compensation for Cummings' alleged psychological injuries, and because we find it was appropriate for the compensation court to apportion Cummings' disability between the prior, compensated accident and the new accidents, we affirm the judgment of the Workers' Compensation Court review panel affirming the order of the compensation court.

AFFIRMED.

C.J. LABENZ, APPELLEE, V. ELLEN LABENZ, APPELLANT.

575 N.W.2d 161

Filed February 17, 1998. No. A-96-982.

1. **Property Division: Alimony: Appeal and Error.** The division of property and the awarding of alimony are matters entrusted to the discretion of the trial judge and, on appeal, will be reviewed de novo on the record and will be affirmed in the absence of an abuse of the trial judge's discretion.
2. **Property Division.** Property owned by a party at the time of the marriage is not marital property.
3. ____. In *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982), the exception to the rule that property owned at the time of the marriage is nonmarital property provides that where both of the spouses have contributed to the improvement or operation of such property, it may be treated as marital property.
4. **Property Division: Evidence.** Before the exception in *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982), can be applied to the rule that property owned at the time of the marriage is nonmarital property, the party claiming the benefits of it must offer evidence of the value of the contribution upon which the claim is made.
5. **Joint Accounts: Evidence: Intent.** During the lifetime of all parties, an account belongs to the parties in proportion to the net contribution of each to the sums on deposit, unless there is clear and convincing evidence of a different intent.
6. **Joint Tenancy: Gifts: Presumptions.** Under Neb. Rev. Stat. § 30-2722(b) (Reissue 1995), the placing of nonmarital funds in joint tenancy by the spouse owning such funds would not create a presumption of a gift.
7. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. The same standard applies to the question of whether any alimony should be awarded.

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

Edward D. Hotz and Anne M. Breitkreutz, of Hotz & Weaver, for appellant.

Lawrence I. Batt and Thomas P. Kenny, of Batt & Associates, for appellee.

HANNON, IRWIN, and INBODY, Judges.

HANNON, Judge.

This is an appeal from a decree dissolving the marriage between the respondent, Ellen LaBenz, and the petitioner, C.J. LaBenz. Ellen appeals on the grounds the trial court erred (1) in

determining that an account in the parties' names jointly, which account contained the proceeds from the sale of a home owned by C.J. at the time of the marriage but lived in by the couple for several years, was primarily nonmarital property and (2) in failing to award alimony. We conclude that the joint account was not marital property and that the trial court did not abuse its discretion in other matters. We therefore affirm.

I. BACKGROUND

Ellen LaBenz and C.J. LaBenz were married on June 12, 1987, and divorced approximately 8 years later on December 29, 1995. No children were born of the marriage. C.J. graduated from medical school in 1975 and later became board certified in obstetrics and gynecology. He introduced evidence showing his net monthly income to be $7,109.05 and his monthly expenses to be $5,117. Ellen is a registered nurse and introduced evidence showing her net monthly income to be $1,765.62 and her monthly expenses to be $2,458.25.

Neither party contested the trial court's division of the marital property, with the exception of an account containing the net proceeds from the sale of a home which the parties lived in before and during their marriage. C.J. testified he purchased a residential lot in the Lake Candlewood area in 1983 and designed and constructed a home on the lot in 1984. Ellen testified she quit her employment for approximately 3 months because, although the new house was completed, someone needed to be available to let plumbers and other workers into the house. Ellen stated she spent a lot of time with the builder's wife, who is a decorator, selecting items such as tile, carpeting, brick, appliances, and mirrors for the house. Ellen testified that although she did not financially contribute to the construction of the house, she purchased groceries, cleaning supplies, towels, window treatments, dishes, and similar items. Ellen also stated that she paid no bills or house payments while living in the house.

Ellen and C.J. sold the house in June 1992, and C.J. deposited the proceeds into the "KPSP" investment account that was in both parties' names. Funds were withdrawn from this account to purchase a condominium. Additional facts regarding

the circumstances of both parties will be discussed in our analysis.

The district court entered a decree dissolving the marriage of the parties on December 29, 1995. The court refused to award alimony and ordered both parties to pay their respective attorney fees.

The court found that C.J. brought the following property to the marriage: a 1986 Mercedes Benz, farm equipment which was traded to purchase a 1994 Jeep, an IRA worth $301,555, and property worth $127,618. Ellen brought an IRA worth $7,338 to the marriage. Both parties were allowed to keep the household goods and items of personalty in their possession. Except for the condominium, the remainder of the parties' marital property consisted of various cash accounts. Apparently, the trial court intended to divide the marital property equally and ordered C.J. to pay Ellen $35,000 to equalize the division. The parties do not dispute the division of the marital property, except that Ellen maintains the account containing the proceeds from the sale of the home should have been treated as marital property. The account in question is referred to as the "KPSP account." The KPSP account contained $167,618.43, and the trial court awarded Ellen $10,000 of the account and C.J. the balance. Ellen maintains the entire account should have been treated as marital property. We have studied the evidence and the court's distribution of the marital property, but in view of the issues argued by the parties, we will avoid the unnecessary publication of the parties' personal business matters.

II. ASSIGNMENTS OF ERROR

Ellen alleges the district court erred in (1) determining which assets constituted the marital estate and failing to award her an equitable percentage of that marital estate and (2) failing to award alimony.

III. STANDARD OF REVIEW

[1] The division of property and the awarding of alimony are matters entrusted to the discretion of the trial judge and, on appeal, will be reviewed de novo on the record and will be affirmed in the absence of an abuse of the trial judge's discretion. *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995).

In a de novo review on the record, an appellate court reappraises the evidence as presented by the record and reaches independent conclusions from those of the trial court. *Id.* However, if evidence is in conflict, the appellate court may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*; *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995).

IV. ANALYSIS

1. Treatment of KPSP Account

[2] Ellen claims the court failed to equitably divide the marital estate. She focuses on the distribution of the KPSP account. This account contained approximately $167,000 from the sale of the Lake Candlewood home. Ellen received $10,000 from this account. Thus, the trial court effectively treated only $20,000 of the KPSP account as marital property and gave each party one-half of that amount. The remaining money in the account was awarded to C.J. as nonmarital property. Ellen admits the account contains the proceeds of the sale of a home C.J. owned at the time the parties were married. Ellen also recognizes the general rule that property owned by a party at the time of the marriage is not marital property. See, *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994); *Lord v. Lord*, 213 Neb. 557, 330 N. W.2d 492 (1983). Ellen bases her claim that the trial court should have treated the entire account as marital property upon two theories: (1) under the exception to the general rule recognized in *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982), and (2) upon the fact the account was held in joint tenancy.

(a) *Van Newkirk* Exception

[3] The *Van Newkirk* exception to the rule that property owned at the time of the marriage is nonmarital property provides that where both of the spouses have contributed to the improvement or operation of such property, it may be treated as marital property.

In the instant case, Ellen does not dispute that C.J. brought the Lake Candlewood home into the marriage. The basis for her claim under *Van Newkirk* is that she significantly cared for the property during the marriage. Ellen testified that she lived in the

home and that during construction she let workers into the house and spent time with a decorator selecting tile, carpeting, brick, and various other items. Ellen stated she purchased towels, dishes, curtains, groceries, cleaning supplies, and some furniture for the house. C.J. testified that Ellen lived in the house, helped keep the house clean, and made "sure the neighbor kids didn't come in and tear it up."

[4] The recent case of *Tyler v. Tyler*, 253 Neb. 209, 570 N.W.2d 317 (1997), which came down after the parties' briefs were filed but before the appeal was argued, settles any controversy on this issue. *Tyler* clearly held that before the *Van Newkirk* exception can be applied, the party claiming the benefits of it must offer evidence of the value of the contribution upon which the claim is made. The only evidence relating to the value of Ellen's contributions can be found in the following testimony: "And then after we moved in, I spent all of my savings for window treatments, but that wasn't alot — in those days it seemed like alot; it was like $5,000 maybe." Ellen was awarded at least as much as the *Tyler* case would justify. We need not decide whether that evidence is adequate, as the trial treated $20,000 of the account as marital property and C.J. did not appeal.

(b) Title to Home Being in Joint Tenancy

Ellen argues that the property became marital property, or that she gained ownership of one-half, when C.J. placed the proceeds from the sale of the home in an account in the parties' joint names and used part of the proceeds to purchase a condominium in both names. C.J. testified he did not intend to make a gift to Ellen through the KPSP account.

Ellen relies on *Bonnell v. Bonnell*, 117 Wis. 2d 241, 344 N.W.2d 123 (1984); *Atkinson v. Atkinson*, 87 Ill. 2d 174, 429 N.E.2d 465 (1981), *cert. denied* 456 U.S. 905, 102 S. Ct. 1751, 72 L. Ed. 2d 162 (1982); *Carter v. Carter*, 419 A.2d 1018 (Me. 1980); and *Ayars v. Ayars*, 50 Md. App. 93, 436 A.2d 490 (1981), for the proposition that when a spouse places separate property in joint tenancy, the entire property becomes marital property. She also relies on *Anstine v. Anstine*, 214 Neb. 808, 336 N.W.2d 552 (1983), and *Grummert v. Grummert*, 195 Neb.

148, 237 N.W.2d 126 (1975) (spouse, one of two joint grantees on deed, was held not to have established by clear and convincing evidence that grantee intended to make gift to only one spouse).

Ellen recognized that in some cases involving conveyances from one spouse to another, or where the deed is held in joint title, the Supreme Court has held the court may look behind the deed and examine the equities of the situation. See, *Tavlin v. Tavlin*, 194 Neb. 98, 230 N.W.2d 108 (1975); *Fotinos v. Fotinos*, 184 Neb. 486, 168 N.W.2d 698 (1969). At oral argument, Ellen cited *Gerard-Ley v. Ley*, 5 Neb. App. 229, 558 N.W.2d 63 (1996), in which this court found there was no evidence to rebut the presumption created by the joint title to the real estate. There is no evidence that C.J. placed the house in joint tenancy before it was sold, and all of the above cases are concerned with the effect of the title to real estate. In the instant case, we are concerned with the effect of one spouse putting cash which is nonmarital property in joint names.

[5,6] Neb. Rev. Stat. § 30-2722(b) (Reissue 1995) provides in part: "During the lifetime of all parties, an account belongs to the parties in proportion to the net contribution of each to the sums on deposit, unless there is clear and convincing evidence of a different intent." This statutory provision necessarily results in different principles being applied to determine the effect of placing deposits, as compared to real estate, in the joint names of two or more persons. Under § 30-2722(b), the placing of nonmarital funds in joint tenancy by the spouse owning such funds would not create a presumption of a gift. In the evidence, the account in question is called the "Candlewood House Proceeds Investment Account Westchester Capital Management KPSP Acct. No. 15452086." The document in evidence shows a starting balance of $175,855.64, withdrawals of $43,000 for the purchase and decoration of a "Condo," and a remaining balance of $167,618.43. Interestingly, the document shows the marital property interest in that account to be 5.83 percent of its value, or $9,772.15. The remaining balance is listed as nonmarital. (From the evidence, we are unable to learn the significance of "marital" or "nonmarital" or how the values were computed.) C.J. testified he did not intend to make a gift to Ellen by titling

the account in both names. There is no evidence that Ellen contributed any money to this account. By giving Ellen $10,000 from this account, the trial court awarded more than the evidence would support on this theory.

2. ALIMONY

The trial court did not award alimony to either party. Ellen argues she should have been awarded alimony. The Nebraska Supreme Court has stated that "in awarding alimony, a court should consider, in addition to the specific criteria listed in [Neb. Rev. Stat.] § 42-365 [(Reissue 1988)], the income and earning capacity of each party as well as the general equities of each situation." *Kelly v. Kelly*, 246 Neb. 55, 64, 516 N.W.2d 612, 617-18 (1994). Regarding payments of alimony, Neb. Rev. Stat. § 42-365 (Reissue 1993) provides in pertinent part:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other . . . as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

In this case, the parties were married for approximately 8 years, and no children were born of the marriage. The record generally indicates that Ellen brought minimal assets into the marriage, while, in addition to his other assets, C.J. possessed considerable earning ability. Ellen testified that she was a registered nurse, was currently paid $16 an hour, and had been working full time since she completed her education in 1977. C.J. has been working as a physician since his graduation from medical school in 1975. Ellen testified that after moving into the Lake Candlewood home, she stopped working for about 3 months but kept her on-call nursing status with a nearby hospital during this period. There is no evidence that Ellen interrupted her education or career for the marriage, or suffered any

economic disadvantage from the marriage, nor is there evidence that she is unable to engage in gainful employment.

[7] "The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances . . . make it appropriate." § 42-365. In determining whether alimony should be awarded, the ultimate test is one of reasonableness. *Lager v. Lager*, 232 Neb. 150, 440 N.W.2d 193 (1989); *Ritchie v. Ritchie*, 226 Neb. 623, 413 N.W.2d 635 (1987); *Baird v. Baird*, 196 Neb. 124, 241 N.W.2d 543 (1976). "[I]n reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result." *Kelly,* 246 Neb. at 65, 516 N.W.2d at 618. We think the same standard applies to the question of whether any alimony should be awarded. We cannot say that the trial court's refusal to award alimony was unreasonable or that it constituted an abuse of discretion.

V. CONCLUSION

Having fully reviewed the record, we find the trial court did not abuse its discretion in treating the proceeds of the KPSP account as primarily a premarital asset and awarding such funds to C.J. We also agree with the court's determination that neither party is entitled to receive alimony. As such, we affirm the decision of the lower court.

AFFIRMED.

IRWIN, Judge, concurring.

I agree with the result reached by the majority but write separately to express my disagreement with the majority's reasoning concerning why Ellen is not entitled to an interest in the proceeds from the sale of the home which were placed into a joint account.

The majority recognizes that this court, in *Gerard-Ley v. Ley*, 5 Neb. App. 229, 235, 558 N.W.2d 63, 67 (1996), iterated the general rule in this state that " 'when a husband and wife take title to a property as joint tenants, even though one pays all the consideration therefor, a gift is presumed to be made by the spouse furnishing the consideration to the other . . . .' " This presumption is, of course, a rebuttable presumption. *Id.* Rather

than applying the presumption in the present case and considering whether it was rebutted, however, the majority dismisses this proposition of law by stating that "[t]here is no evidence that C.J. placed the house in joint tenancy before it was sold, and all of the above cases are concerned with the effect of the title to real estate." The majority then relies upon annunciations from Neb. Rev. Stat. § 30-2722(b) (Reissue 1995) to reach the conclusion that Ellen was not entitled to an interest in the proceeds from the sale of the house on the facts of this case.

Gerard-Ley v. Ley, supra, does not suggest that there is any distinction between whether the joint title in question is a joint title to "real estate" or personalty. I believe the general rule reiterated in that case applies equally to both situations, and I believe that to hold otherwise is to suggest a difference between the two types of property with no real distinction as to why they should be treated differently. As such, I would apply the proposition from *Gerard-Ley v. Ley* to the facts of this case and hold that once C.J. placed the proceeds from the sale of his premarital residence into a joint account with Ellen, a rebuttable presumption arose that he intended to gift an equitable interest in the proceeds to her.

I concur with the ultimate result reached by the majority, however. As the majority points out, C.J. testified that he did not intend to make a gift to Ellen by titling the account in both names. I would conclude that this evidence is sufficient to rebut the presumption and would therefore conclude that Ellen is not entitled to an interest in the proceeds. To reach this conclusion, the majority relies on § 30-2722(b). I do not agree with the majority that a provision of the probate code dictates the result in this dissolution case. I would rely upon the evidence presented to rebut the *Gerard-Ley v. Ley* presumption and affirm on that basis.

IN RE ESTATE OF MILTON J. KOPECKY, DECEASED. JOHN M. KOPECKY, PERSONAL REPRESENTATIVE OF THE ESTATE OF MILTON J. KOPECKY, DECEASED, APPELLANT, V. ELIZABETH HALL KOPECKY, APPELLEE.

574 N.W.2d 549

Filed February 17, 1998. No. A-96-1185.

1. **Decedents' Estates: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code are reviewed for error on the record.
2. **Judgments: Appeal and Error.** When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Decedents' Estates: Waiver.** The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse.
4. **Legislature: Intent.** A bargain that is illegal when formed does not become legal by reason of a change in the law except where the Legislature manifests an intention to validate the bargain.
5. **Decedents' Estates: Marriage: Legislature.** Under Neb. Rev. Stat. § 30-106 (Cum. Supp. 1969), postnuptial agreements, at least to a limited extent, had been legislatively approved effective August 25, 1969.
6. **Decedents' Estates: Legislature.** A change in the manner of disposition of estates of deceased persons may be made by the Legislature at any time, and the law at the time of death determines the right and manner of disposition of estates.

Appeal from the County Court for Douglas County: EDNA R. ATKINS, Judge. Reversed and remanded with directions.

Daniel D. Koukol, Alan M. Wood, and Linda W. Rohman, of Erickson & Sederstrom, P.C., for appellant.

Michael J. Lehan, of Kelley, Lehan & Hall, P.C., for appellee.

MILLER-LERMAN, Chief Judge, and IRWIN and SIEVERS, Judges.

SIEVERS, Judge.

In this appeal, we address the validity of a postnuptial agreement executed 16 months after the parties were married but 6 years before the enactment of Neb. Rev. Stat. § 30-2316 (Reissue 1995), which provides that the rights of a surviving spouse "may be waived . . . before or after marriage, by a written contract, agreement, or waiver . . . ." The county court for Douglas County held that the postnuptial agreement at issue was invalid,

which decision allowed the surviving spouse to elect to take against the will.

FACTUAL BACKGROUND

Elizabeth Hall Kopecky and Milton J. Kopecky, both of Omaha, were married September 27, 1968. After the marriage, Elizabeth, in late 1969 or early 1970, approached an attorney, Robert Green, who maintained an office in the same building where Elizabeth worked. She asked Green to prepare an agreement between her and her husband which would allow each of them to keep and dispose of their own property. Green identified the agreement he prepared and said it was signed by both Elizabeth and Milton on January 29, 1970, and notarized on that date. The agreement was received in evidence. The recitals in the agreement include that the "parties hereto have fully informed each other of their respective financial situations, including the amount of both real and personal property owned by each of them" and that they "desire to retain their separate estate [sic], despite the fact that they are married." The agreement provided:

> The husband may dispose of any and all property, both real and personal, as he sees fit at the time of his death or otherwise, and the wife hereby agrees to accept only such portions of the husband's estate as the husband may devise to the wife by Will or Codicil, regardless of any and all acts of the legislature of the State of Nebraska, whether presently or hereinafter enacted.

There was a comparable paragraph with respect to the wife and her property.

Milton died November 28, 1995, and a petition for formal probate of his will was filed December 5 of that year. The will attached to the petition was executed May 10, 1991, and left Elizabeth the sum of $5,000. Milton left his home to his son John M. Kopecky, as well as his furniture and fixtures and all of the shares of stock owned by Milton at the time of his death in Kopecky & Yates, Inc., a Nebraska corporation. Milton left the residue of his estate, which was not inconsequential, to his son John. Milton nominated John as personal representative of the estate, and John was appointed as such. Milton and Elizabeth also held substantial property in joint tenancy.

Elizabeth filed an election pursuant to Neb. Rev. Stat. § 30-2317 (Reissue 1995) to take 50 percent of Milton's estate. As personal representative, John, citing § 30-2316, responded by alleging that the previously mentioned postnuptial agreement of January 29, 1970, barred Elizabeth from making an election to claim any part of Milton's augmented estate. In reply, Elizabeth alleged that the statute relied upon by John was not effective until January 1, 1977, that it was not retroactive, and that the agreement was void.

The county court for Douglas County held a hearing on November 14, 1996, in which Green briefly testified and the agreement of January 29, 1970, was received in evidence. Counsel for Elizabeth moved to dismiss John's response to the petition for elective share on the ground that the agreement was illegal when signed and that there was no retroactivity in the probate code for statutory changes after the execution of the agreement. The trial court found that the postnuptial agreement of January 29 was contrary to public policy and the law of Nebraska at the time it was made, and therefore, the agreement was invalid and unenforceable. The court also stated that the statute relied upon by John to uphold the agreement was not retroactive and did not validate the agreement. John, as personal representative of Milton's estate, appeals to this court pursuant to Neb. Rev. Stat. § 30-1601 (Reissue 1995).

ASSIGNMENTS OF ERROR

Restated from the brief, John assigns error to the trial court for determining that the postnuptial agreement was invalid and unenforceable. The other assignments of error merely assail the reasoning of the county court in reaching the conclusion that the postnuptial agreement was unenforceable.

STANDARD OF REVIEW

[1,2] Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995), are reviewed for error on the record. *In re Guardianship of Zyla,* 251 Neb. 163, 555 N.W.2d 768 (1996); *In re Conservatorship of Estate of Martin,* 228 Neb. 103, 421 N.W.2d 463 (1988). When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the

law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Law Offices of Ronald J. Palagi v. Dolan,* 251 Neb. 457, 558 N.W.2d 303 (1997). On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower court. *In re Guardianship of Zyla, supra.*

DISCUSSION

Statute in Effect at Death.

Older cases from the Nebraska Supreme Court, upon which Elizabeth relies, have held postnuptial contracts barring the right of inheritance invalid and unenforceable as violative of public policy and common law prohibitions. See, *Chambers v. Chambers*, 155 Neb. 160, 51 N.W.2d 310 (1952); *Focht v. Wakefield*, 145 Neb. 568, 17 N.W.2d 627 (1945); *Smith v. Johnson*, 144 Neb. 769, 14 N.W.2d 424 (1944). However, on January 29, 1970, when the postnuptial agreement was executed, Neb. Rev. Stat. § 30-106 (Cum. Supp. 1969) was in effect and provided:

> A man or a woman may also bar his or her right to inherit part or all of the lands of his or her husband or wife by a contract made in lieu thereof before marriage or after a second or subsequent marriage where one or both of the parties have children of a previous marriage, or where either spouse has been married previously and the other spouse has not been previously married. Such contract shall be in writing signed by both of the parties to such marriage and acknowledged in the manner required by law for the conveyance of real estate, or executed in conformity with the laws of the place where made.

Thus, by amending § 30-106, effective August 25, 1969, the Legislature authorized postnuptial agreements. The Legislature is deemed to be aware of existing Supreme Court precedent when it enacts legislation. *White v. State*, 248 Neb. 977, 540 N.W.2d 354 (1995). Therefore, the amendment of § 30-106, authorizing postnuptial agreements, had the effect of overruling the holdings of the Supreme Court in *Chambers*, *Focht*, and *Smith*, all of which had held postnuptial agreements void as against public policy. Elizabeth argues that the postnuptial

agreement was "invalid under the common law, violated public policy and was without the expressed authority of the legislature." Brief for appellee at 9. Clearly, this proposition is incorrect when one reviews the language of § 30-106. Thus, the state of the law in Nebraska with respect to postnuptial agreements as of January 29, 1970, the date Milton and Elizabeth signed their postnuptial agreement, was that such agreements were legal and enforceable when they related only to "lands" and when the parties' previous marital status fit within the confines of the statute.

Subsequent Legislative Changes.

[3] With respect to the further development of the law concerning postnuptial agreements in Nebraska, the Legislature adopted § 2-204 of the Uniform Probate Code in 1976, to be effective January 1, 1977. Section 2-204 of the Uniform Probate Code became § 30-2316, which provides:

> The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse.

This statute also provides that such a contract is not enforceable if the surviving spouse proves that the waiver was executed involuntarily or that it was unconscionable at the time of execution. With respect to proving a contract or agreement unconscionable, the statute provides that the surviving spouse would have to show (1) that there was not fair and reasonable disclosure of the property or financial obligations of the decedent, (2) that the surviving spouse did not voluntarily waive such disclosure, and (3) that the surviving spouse did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the decedent.

[4,5] Elizabeth argues that the Nebraska Probate Code specifically provides at § 30-2901 that the code shall become operative on January 1, 1977. From this, Elizabeth argues that there is no statutory language or legislative intent to legalize the previously invalid and unenforceable postnuptial contract

between her and Milton. Elizabeth cites *Davis v. General Motors Acceptance Corp.*, 176 Neb. 865, 127 N.W.2d 907 (1964), for the proposition that the Legislature has the power to validate contracts which were illegal when made. The *Davis* court relied on the Restatement of Contracts § 609 (1932), stating that a bargain that is illegal when formed does not become legal by reason of a change in the law except where the Legislature manifests an intention to validate the bargain. Although we acknowledge the law from *Davis*, it does not apply here, because the requirement that the agreement be illegal is not satisfied. The postnuptial agreement of January 29, 1970, was not per se "illegal," because under § 30-106, postnuptial agreements, at least to a limited extent, had been legislatively approved effective August 25, 1969, shortly before the execution of the agreement on January 29, 1970.

Section 30-106 specifies a situation involving "a second or subsequent marriage where one or both of the parties have children of a previous marriage, or where either spouse has been married previously and the other spouse has not been previously married." Whether Elizabeth and Milton were within the category of persons who could execute a postnuptial agreement on January 29, 1970, according to the dictates of § 30-106, and then have the agreement be immediately effective if one of them were to die the next day is not revealed by the record. John's brief asserts that Elizabeth and Milton were subject to § 30-106 because Milton was a widower with two children and Elizabeth had never previously been married. But these facts are not in our record. However, in this case, for reasons to become apparent, it is sufficient that the Legislature, by January 29, 1970, had authorized postnuptial agreements, albeit in limited circumstances.

Does Law in Effect at Time of Postnuptial Agreement or at Time of Milton's Death Control?

By the time of Milton's death on November 28, 1995, § 30-2316, authorizing waiver by contract of a surviving spouse's "right of election," had been in effect for close to 20 years. In *In re Estate of Peterson*, 221 Neb. 792, 381 N.W.2d 109 (1986), the husband's petition for an elective share was dismissed on the basis of an antenuptial agreement whereby the husband had waived his right to elect a statutory share. The *In*

re Estate of Peterson court held that the statute in effect when the wife died was controlling. In *In re Estate of Peterson*, the husband and wife were married July 25, 1969, and executed an antenuptial agreement 2 days before their marriage. The Supreme Court held that the county court had properly placed the burden of proof upon the husband to prove the invalidity of the antenuptial agreement. The husband also argued that § 30-106 (Reissue 1964), which was in effect at the time of the agreement, was controlling and, at worst, barred only his right to inherit real property and did not prevent him from claiming an elective share of the personal property in the wife's estate. The court observed that § 30-2316 (Reissue 1979) provided that the parties to a valid antenuptial agreement may waive the right to elect a share of both real and personal property of the deceased spouse. The court noted the argument of the wife's estate that there had been a previous judicial construction of § 30-106 which did not limit waivers under that statute to just "lands" but had extended waivers to personalty, citing *Kingsley v. Noble*, 129 Neb. 808, 263 N.W. 222 (1935), and *Andere v. Willsey*, 193 Neb. 698, 229 N.W.2d 46 (1975). However, the *In re Estate of Peterson* court found that it did not have to resolve whether an agreement under § 30-106 could waive inheritance of both real and personal property, because § 30-106 had been repealed, and that § 30-2316, the statute in effect at the time of the wife's death, was controlling.

[6] The *In re Estate of Peterson* court, citing *In re Estate of Luckey. Bailey v. Luckey,* 206 Neb. 53, 291 N.W.2d 235 (1980), reasoned that the right of inheritance is created by statute and that what the Legislature creates, it may take away. The court in *In re Estate of Peterson*, citing *In re Estate of Enyart*, 100 Neb. 337, 160 N.W. 120 (1916), *overruled on other grounds, Kingsley, supra*, also held that there is no vested interest in a statute, that a change in the manner of disposition of estates of deceased persons may be made by the Legislature at any time, and that the law at the time of death determines the right and manner of disposition of estates. In a telling and succinct phrase, the court said that the husband "[does not] have a vested right to apply 1969 inheritance laws to a 1983 estate." *In re Estate of Peterson*, 221 Neb. at 803, 381 N.W.2d at 116.

In *In re Estate of Peterson*, 221 Neb. at 802, 381 N.W.2d at 116, the antenuptial agreement provided that each party waived all claims that he or she may have acquired by reason of the marriage in the other party's property or estate under the "'present or future laws of Nebraska,'" including the right to elect against the last will and testament or codicil of the other party. The court found it significant that the parties by these terms had specifically agreed to be bound by future laws. The *In re Estate of Peterson* court recited the general rule that statutes in existence at the time of the execution of a contract become part of the contract, but the court found nothing to prevent the parties to a contract from agreeing to be bound with reference to future laws. In *In re Estate of Peterson*, 221 Neb. at 803, 381 N.W.2d at 116, the court said, "[The husband and the wife] agreed to be bound by future laws."

Although *In re Estate of Peterson*, 221 Neb. 792, 381 N.W.2d 109 (1986), involves an antenuptial agreement and this is a postnuptial agreement, that difference is not significant, because when this agreement was executed on January 29, 1970, postnuptial agreements were no longer against the public policy of Nebraska. Granted, there were limiting conditions on the circumstances under which they could be used, but those conditions were later "loosened" by the Nebraska Legislature with the enactment of the probate code effective January 1, 1977, specifically § 30-2316. Milton and Elizabeth's agreement states:

> The husband may dispose of any and all property, both real and personal, as he sees fit at the time of his death or otherwise, and the wife hereby agrees to accept only such portions of the husband's estate as the husband may devise to the wife by Will or Codicil, regardless of any and all acts of the legislature of the State of Nebraska, whether presently or hereinafter enacted.

Elizabeth's agreement to accept only what Milton provided for her in his will, regardless of what the Legislature did, was obviously to have force in the future, and as in *In re Estate of Peterson*, the validity of this agreement is controlled by the statutory provisions in effect at the time of Milton's death. Whether the "future" would be 1 day or 25 years was not in the

power of the parties to know, but their agreement would in large part control the disposition of their estates when they died. Parties may contract to bind themselves as to disposition of their property in the future and with reference to the law in effect at the time of the triggering event—one of the parties' death. See *In re Estate of Peterson, supra.* Therefore, the conclusion of the county court that the agreement was invalid and unenforceable when made and that § 30-2316 is not retroactive to "save the validity of this agreement" was incorrect as a matter of law. At the time of Milton's death, postnuptial agreements were valid and enforceable under the law of Nebraska, and it is this law which applies to the agreement made January 29, 1970.

Elizabeth's Additional Defenses.

Elizabeth asserts that if the court determines that the agreement "is not illegal," then the agreement is unenforceable because its provisions do not provide a fair and reasonable disclosure of the property and financial obligations of Milton. She contends that at the time the agreement was made, she did not have, nor could she have reasonably acquired, adequate knowledge of the property and the financial obligations of Milton and that failure to disclose such constituted fraud.

As a second "affirmative defense" she asserts estoppel in that both she and Milton had been advised the agreement was illegal and "continued the marriage and conducted their lives and affairs as if there was no contract." As a third defense, Elizabeth asserts that the agreement, if enforced, should be enforced only with respect to the property which belonged to Milton before his marriage to her.

There was no evidence adduced on any of the three affirmative defenses except brief and mostly incidental testimony from Green, the attorney whom Elizabeth approached and who had prepared the agreement. He testified that he mentioned at some point, before the agreement was entered into, that the law was changing with respect to postnuptial agreements and that it was uncertain what would be possible in the future. He testified that he questioned whether the agreement, as of January 29, 1970, was an enforceable agreement. We note in passing that Green, in giving the above testimony, concluded with the statement,

"[B]ut the idea was to prepare an agreement the best that we knew how to try to give them the right to do this." The law is that the burden of proving the invalidity of an antenuptial agreement is on the party asserting its invalidity. *In re Estate of Peterson*, 221 Neb. 792, 381 N.W.2d 109 (1986).

Consequently, the burden was Elizabeth's to prove one of her defenses so as to avoid the impact of the agreement. The county court trial record reveals that after the estate had introduced the agreement and Green's testimony, it rested. Elizabeth did not introduce evidence, but, rather, moved to dismiss the estate's reply to Elizabeth's petition for elective share on the grounds that the postnuptial agreement was illegal. After argument from counsel, the court found that the parties had entered into the agreement but incorrectly held that it was invalid and unenforceable. The county court was prepared to take evidence "regarding the elective share," but counsel for the estate asked that further proceedings be stayed until counsel for John, the personal representative, could prepare evidence regarding the assets to be included in the augmented estate or "until the appeal on the issue of whether or not the post-nuptial agreement is enforceable" was concluded. The court ruled that the proceedings would be stayed "until the appeal matter is undertaken and determined." Thus, although the burden of proof was on Elizabeth from the beginning on her "affirmative defenses," the sustaining of her motion had the effect of precluding the introduction of evidence on Elizabeth's defenses at that juncture. She is, however, entitled to now introduce evidence in support of her defenses. Therefore, we remand the matter for receipt of evidence upon Elizabeth's defenses and a determination of their validity by the trial court.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL G. THOMAS, APPELLANT.

574 N.W.2d 542

Filed February 17, 1998. No. A-97-373.

1. **Effectiveness of Counsel: Proof.** In order to state a claim of ineffective assistance of counsel as violative of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution, and thereby obtain reversal of a defendant's conviction, the defendant must show that his or her counsel's performance was deficient and that such deficient performance prejudiced the defendant—that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
2. **Effectiveness of Counsel: Records: Appeal and Error.** Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question.
3. **Appeal and Error.** An appellate court will not address a matter on direct appeal when the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing.
4. **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.
5. **Sentences: Evidence.** A sentencing judge may properly consider any type of relevant information, including his own observations of the defendant.
6. ____: ____. A sentencing court has broad discretion in the source and type of evidence that it may use in determining the kind and extent of punishment to be imposed within the limits fixed by statute.
7. ____: ____. A sentencing court in a noncapital case may consider a defendant's unadjudicated misconduct in determining an appropriate sentence.
8. **Restitution: Appeal and Error.** An order of restitution will be upheld absent an abuse of discretion.

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

Michael J. Synek for appellant.

Don Stenberg, Attorney General, and David T. Bydalek for appellee.

MILLER-LERMAN, Chief Judge, and IRWIN and SIEVERS, Judges.

IRWIN, Judge.

I. INTRODUCTION

Michael G. Thomas was convicted in the district court for Buffalo County of unlawful distribution of a controlled sub-

stance, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1995), following his plea of no contest. Thomas was sentenced to 8 to 15 years' imprisonment and ordered to pay restitution in the amount of $750. Thomas appeals his sentence, contending that his attorney provided ineffective assistance of counsel at the sentencing hearing, that his sentence of 8 to 15 years' imprisonment was excessive, and that the restitution order of $750 exceeded that permissible under Neb. Rev. Stat. § 28-427 (Reissue 1995). For the reasons stated below, we affirm.

II. FACTUAL BACKGROUND

On September 3, 1996, an information was filed charging Thomas with six drug-related crimes. Count I alleged that Thomas had unlawfully distributed methamphetamine on December 8, 1995; count II alleged that he had unlawfully distributed amphetamine on December 16, 1995; and count III alleged that he had unlawfully distributed methamphetamine on February 3, 1996. Counts IV through VI charged him with illegal possession of drugs, namely, cocaine, methamphetamine, and amphetamine.

At an arraignment held on September 25, 1996, Thomas pled not guilty to all six counts. On January 27, 1997, pursuant to a plea agreement, Thomas changed his not guilty plea to count III to a plea of no contest. Under the terms of the plea agreement, the State dismissed the remaining five counts of the information. Generally, the State provided the following factual basis for the plea: After several contacts and two controlled buys in December 1995, a confidential informant (CI), working with police, approached Thomas at his home on February 3, 1996, and purchased a quantity of methamphetamine weighing approximately 1.85 grams. The district court accepted Thomas' plea of no contest and adjudged him guilty. A presentence investigation was ordered.

A sentencing hearing was conducted February 28, 1997. Thomas addressed the court at sentencing, stating that the money he received from the CI, who was a longtime friend, on February 3, 1996, was repayment of a loan of $750 and that Thomas was simply returning the drugs to the CI at that time because the CI had given them to Thomas as collateral for the

loan. To rebut Thomas' statement, the State offered tape recordings of a telephone conversation between Thomas and the CI on January 21, 1996, and of the February 3, 1996, transaction. The State also supplied a transcription of the tape concerning the February 3 transaction.

Regarding the issue of restitution, the State offered depositions of the CI and the participating police officer to show the amounts of money expended during the investigation of the crime of which Thomas was convicted. Thereafter, Thomas testified regarding his recollection of the conversation between him and the CI on February 3, 1996. Arguments were made by the State and the defense. Thereafter, the district court entered a judgment of restitution in favor of the State and against Thomas in the amount of $750 with interest of 6.64 percent and sentenced Thomas to 8 to 15 years' imprisonment. This appeal timely followed.

III. ANALYSIS

1. Ineffective Assistance of Counsel

We first address Thomas' assigned error that his attorney provided ineffective assistance of counsel at the sentencing hearing. Thomas claims that his attorney was ineffective for failing to present evidence at the sentencing hearing regarding Thomas' life, character, and previous conduct. Thomas argues that "[p]erhaps" his attorney could have called Thomas, his employer, his father, or his girl friend to speak about him. Brief for appellant at 10. Thomas also claims that his attorney was deficient in failing to request a continuance of the sentencing hearing due to certain media coverage and in failing to refute "unfavorable subjective conclusions and assumptions about [his] respect for the law and attitude toward drugs," *id.* at 12, contained in the presentence investigation report.

[1] In order to state a claim of ineffective assistance of counsel as violative of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that his or her counsel's performance was deficient and that such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's

deficient performance, the result of the proceeding would have been different. *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997); *State v. Massey*, 252 Neb. 426, 562 N.W.2d 542 (1997). See, also, *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[2,3] Claims of ineffective assistance of counsel raised for the first time on direct appeal, as is the case here, do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. See, *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995); *State v. Dawn*, 246 Neb. 384, 519 N.W.2d 249 (1994). An appellate court will not address a matter on direct appeal when the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing. *Dawn, supra.*

The issue of ineffective assistance of counsel was not raised below. In addition, the record before this court is insufficient to adequately review the question of effectiveness of counsel. Any deficiencies of counsel or alleged prejudice to Thomas cannot be determined based on the record before us. Therefore, we do not reach Thomas' claims of ineffective assistance of counsel at sentencing on this direct appeal.

2. Excessive Sentence

[4] Next, we address whether Thomas' sentence of 8 to 15 years' incarceration is excessive. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Schultz*, 252 Neb. 746, 566 N.W.2d 739 (1997); *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997). An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Earl, supra*; *State v. Cook*, 251 Neb. 781, 559 N.W.2d 471 (1997).

Thomas was convicted of unlawful distribution of a controlled substance, a Class III felony, which carries a sentence of 1 to 20 years' imprisonment, a $25,000 fine, or both. See, Neb. Rev. Stat. § 28-105 (Reissue 1995); § 28-416(1)(a). Thomas concedes that his sentence of 8 to 15 years' imprisonment is within statutory limits.

(a) Sentencing Judge's Observations

[5] Thomas argues that his sentence constitutes an abuse of discretion because "the District Judge effectively called [him] a liar." Brief for appellant at 15. Thomas is referencing the following statement of the district court:

> [I]n all the sentencings I've had, of those individuals who have had a rather casual and nonchalant attitude about drug usage and drug sales, when they have come in for sentencing hearing, I have not heard any of those persons lie to me as blatantly as Mr. Thomas just did.

A sentencing judge may properly consider any type of relevant information, including his own observations of the defendant. *State v. Bridgmon*, 196 Neb. 714, 246 N.W.2d 57 (1976); *State v. Rapp*, 184 Neb. 156, 165 N.W.2d 715 (1969). We conclude that the above statement by the sentencing judge does not indicate prejudicial bias against Thomas. The statement indicates that, based on his own observations, the sentencing judge did not believe Thomas' explanation of the conversation and events of February 3, 1996. We conclude that the district court did not abuse its discretion in this regard.

(b) Dismissed Charges

Thomas also argues that when sentencing him, the district court improperly considered the dismissed charges, relying on the depositions offered by the State for the limited purpose of showing the amounts of money expended by law enforcement. We note that information regarding the dismissed charges is contained in the presentence investigation report. Furthermore, at the sentencing hearing, Thomas testified regarding the three transactions and provided his explanation for the same. Therefore, the issue before us is whether the district court could consider the dismissed charges, not whether it did so by referring to documents which were not received for that purpose.

[6,7] A sentencing court has broad discretion in the source and type of evidence that it may use in determining the kind and extent of punishment to be imposed within the limits fixed by statute. *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995); *State v. Hoffman*, 246 Neb. 265, 517 N.W.2d 618 (1994). The Nebraska Supreme Court has held that a sentencing court in a

noncapital case may consider a defendant's unadjudicated misconduct in determining an appropriate sentence. See, e.g., *State v. Foral*, 236 Neb. 597, 462 N.W.2d 626 (1990); *State v. Suffredini*, 224 Neb. 220, 397 N.W.2d 51 (1986); *State v. Menard*, 199 Neb. 456, 259 N.W.2d 479 (1977); *Bridgmon, supra*; *State v. Rose*, 183 Neb. 809, 164 N.W.2d 646 (1969). In *Rose*, the Supreme Court stated: "It is true that many of the arrests did not lead to a conviction of crime, but they are no less proper to be considered in arriving at the sentence to be imposed." 183 Neb. at 812, 164 N.W.2d at 649. Based on the applicable case law, we, therefore, conclude that the district court's consideration of the dismissed charges was not an abuse of discretion.

(c) Mitigating Factors

Finally, Thomas argues that the district court failed to consider mitigating factors when rendering sentence. In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997). Based upon our review of the record, we conclude that the district court did not abuse its discretion in the sentence imposed given the nature of the crime, Thomas' apparent cavalier attitude at sentencing, his prior criminal record, and other relevant circumstances.

(d) Resolution

Since the sentence imposed was within statutory limits, was not untenable, and did not deprive Thomas of a substantial right or just result, we conclude that the district court did not abuse its discretion concerning the sentence imposed.

3. Restitution

[8] Finally, we address Thomas' assigned error that the order of restitution in the amount of $750 was an abuse of discretion because it included money expended by the police in drug transactions for which Thomas was not convicted. Based on the

record, it appears that the restitution order of $750 includes $180 from the December 8, 1995, transaction (dismissed count I); $400 from the December 16, 1995, transaction (dismissed count II); and $170 from the February 3, 1996, transaction, which is the conviction involved in this appeal. Thomas argues that restitution under § 28-427 may be ordered only for law enforcement funds spent during the actual drug purchase leading to the conviction before the court. Generally, an order of restitution will be upheld absent an abuse of discretion. See, *State v. McLain*, 238 Neb. 225, 469 N.W.2d 539 (1991); *State v. Yost*, 235 Neb. 325, 455 N.W.2d 162 (1990); *State v. McMann*, 4 Neb. App. 243, 541 N.W.2d 418 (1995).

(a) Applicable Statute

Section 28-427 provides, in relevant part:

> Should any person be convicted for violation of this article [Neb. Rev. Stat. §§ 28-401 through 28-445 (Reissue 1995)], in addition to any penalty imposed by the court, the court may order that such person make restitution to any law enforcement agency for reasonable expenditures made in the purchase of any controlled substances from such person or his agent as part of the investigation leading to such conviction.

(b) Case Law

In making his argument, Thomas asks this court to find the holding in *State v. Rios*, 237 Neb. 232, 465 N.W.2d 611 (1991), controlling. In *Rios*, the defendant delivered cocaine to an undercover informant in exchange for $275 in law enforcement funds. An additional $75 of law enforcement funds was spent in arranging for the purchase. The defendant also made two subsequent sales, costing police an additional $375. The lower court ordered restitution of all of the above expenditures. The Supreme Court held that the plain and ordinary meaning of the phrase "as part of the investigation leading to such conviction" in § 28-247 does not include funds spent in sales subsequent to the one for which the defendant is convicted. The *Rios* court stated that the funds spent for the two subsequent sales "could not have been part of the investigation leading to the conviction," 237 Neb. at 234, 465 N.W.2d at 613, and that therefore,

the defendant could not be ordered to pay restitution for the costs incurred in connection with the subsequent sales. The *Rios* court further held that the $75 expended to arrange the transaction leading to the conviction at hand was a reasonably necessary expense for which restitution could be ordered. We note that the *Rios* case does not address the situation before us, where the restitution ordered includes purchase money connected with two *previous* drug transactions.

Instructive in the case before us is *State v. Holmes*, 221 Neb. 629, 379 N.W.2d 765 (1986). It appears that in *Holmes*, the defendant was convicted of one charge of delivery of cocaine. In addition to a sentence of imprisonment, restitution was ordered in the amount of $6,390. This figure represented the money spent by the Nebraska State Patrol to buy cocaine from the defendant on June 13 and 20, 1982. The *Holmes* court held that restitution of the $6,390 was proper, since it included " 'reasonable expenditures made in the purchase of any controlled substances,' " *id.* at 633, 379 N.W.2d at 768, as required by § 28-427. The *Holmes* court does not specify for which sale the defendant was convicted or how much money was spent by the State Patrol in each drug transaction. However, what is clear is that the court allowed restitution for expenditures relating to a drug sale for which the defendant was not convicted. Given the court's holding in *Rios, supra*, we assume the conviction must have been for the later offense. Therefore, *Holmes* instructs that a defendant may be ordered to pay restitution for money expended to purchase drugs in transactions other than the transaction for which he or she is convicted. However, *Rios* limits the *Holmes* holding to expenses incurred prior to or during the drug transaction for which the defendant is convicted.

(c) Statutory Language Construction

The idea that restitution can include purchase money for drug transactions occurring prior to the transaction for which the defendant is convicted is supported by the language of § 28-427. In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, and where the words of a statute are plain, direct, and unambiguous, no interpretation is necessary. *Rios, supra.* We note

that restitution ordered pursuant to § 28-427 is not considered a criminal penalty, *Holmes, supra*, and, therefore, the proposition that penal statutes must be strictly construed, *State v. Kennedy*, 251 Neb. 337, 557 N.W.2d 33 (1996), is inapplicable. Section 28-427 provides for restitution of "reasonable expenditures" in purchasing drugs as part of an "investigation leading to [a] conviction." The statute does not use more specific language to limit restitution to mean only the money actually "handed" to the drug seller to purchase the drugs in the transaction leading to the conviction. But see, N.Y. Penal Law § 60.27 (McKinney 1997) (limiting restitution in these situations to amount of funds expended in actual purchase of such controlled substance by law enforcement agency); *People v. Ten Eyck*, 146 Misc. 2d 132, 549 N.Y.S.2d 362 (1989). Further, § 28-427 provides for restitution for costs arising during the "investigation" of the offense. This language clearly contemplates that expenses incurred prior to the actual drug transaction are recoverable.

(d) Application to Present Case

We decline to apply the holding in *State v. Rios*, 237 Neb. 232, 465 N.W.2d 611 (1991), to the case before us and further restrict the application of § 28-427. Applying Nebraska case law and the plain and ordinary meaning of § 28-247 to the situation before us, we conclude that the law enforcement expenses incurred during the controlled buys by the CI from Thomas on December 8 and 16, 1995, were part of the investigation leading to Thomas' conviction for the February 3, 1996, sale. All three transactions were part of an ongoing investigation of Thomas, culminating in the February 3 transaction and Thomas' subsequent arrest. The requirements of § 28-427 were met in the present case. Therefore, we conclude that the district court did not abuse its discretion in the amount of restitution ordered.

IV. CONCLUSION

Finding no merit to the assigned errors, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ANTOINETTE M. NELSON, APPELLANT.

574 N.W.2d 770

Filed February 17, 1998. No. A-97-565.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
2. **Appeal and Error.** An appellate court has an obligation to reach an independent, correct conclusion regarding questions of law.
3. **Search Warrants: Affidavits: Probable Cause.** A search warrant, to be valid, must be supported by an affidavit establishing probable cause, or reasonable suspicion founded upon articulable facts.
4. ____: ____: ____. In evaluating probable cause for the issuance of a search warrant, the magistrate must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
5. **Search Warrants: Probable Cause: Appeal and Error.** The duty of the reviewing court is to ensure that the issuing magistrate had a substantial basis for determining that probable cause existed to issue a search warrant.
6. **Search and Seizure: Search Warrants: Presumptions: Proof.** A search pursuant to a warrant is presumed to be valid, and, if the police act pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable.
7. **Search Warrants: Affidavits.** There is nothing improper in a magistrate rendering assistance to the police in preparation of a warrant affidavit.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

F. Michael Matthews for appellant.

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

HANNON, MUES, and INBODY, Judges.

HANNON, Judge.

Antoinette M. Nelson appeals from her conviction of one count of possession of a controlled substance, cocaine, on the

grounds that the district court erred in overruling her motion to suppress. Having found no such error, we now affirm.

FACTUAL BACKGROUND

On March 22, 1996, Officer Walt Ahlstrom and Officer Tim Andersen presented a Douglas County Court judge with a two-page affidavit and application for the issuance of a search warrant. The affidavit requested the issuance of a no-knock search warrant for 2033 North 29th Avenue, Omaha, Douglas County, Nebraska, a residence where the officers believed that there was cocaine, its derivatives, or its administering instruments. The affidavit listed the grounds for the issuance of the search warrant, in relevant part, as follows:

> Within the last 48 hours of Friday, 22 March 1996, Affiant Officers ANDERSEN and AHLSTROM were contacted by a confidential reliable informant hereafter referred to as the C/I. The C/I stated that he/she has had an occasion to be inside the residence of 2033 North 29th Avenue at which time he/she observed sales of crack cocaine taking place.

According to Officer Ahlstrom, after reading the affidavit, the judge asked the officers if the confidential informant had been inside the residence within the last 48 hours. Officer Ahlstrom testified that the informant had, in fact, told him that he/she had been inside the residence within the last 48 hours, that he and Officer Andersen had overlooked including such information in the affidavit, and that they then told the judge that "the CI had been in there within the last 48 hours." The judge, by handwritten interlineation, inserted the words "within the last 48 hours" into the second sentence of the above-quoted material so it read as follows: "The C/I stated that he/she has had an occasion within the last 48 hours to be inside the residence . . . ." The judge also wrote his initials in the right margin of that particular line. We note that the record is unclear as to when the judge swore the officers to the affidavit.

Upon execution of the search warrant on March 26, 1996, officers found cocaine and related paraphernalia in the residence. Nelson was charged with one count of possession of a controlled substance, cocaine. Thereafter, she filed a motion to

suppress all evidence seized by the police on March 26, alleging that the affidavit on which the search warrant was issued was insufficient as a matter of law.

The court overruled Nelson's motion to suppress, finding that (1) the affidavit, which included the written interlineation, demonstrated probable cause for the issuance of the warrant and (2) "the administerial errors" did not permit an inference of bad faith in obtaining the warrant and did not permit the sanction of suppression of the evidence obtained. After a stipulated bench trial in which Nelson preserved her objection, the court found Nelson guilty of possession of cocaine and sentenced her to a period of 2 to 3 years' imprisonment, with credit for time served. Nelson now appeals.

ASSIGNMENT OF ERROR

Nelson alleges as the only assigned error that the court erred in overruling her motion to suppress. Though not specifically set forth in her assignment of error, Nelson essentially complains that the court erred in upholding the issuing judge's amendment of the affidavit.

STANDARD OF REVIEW

[1] A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Aguirre-Rojas*, 253 Neb. 477, 571 N.W.2d 70 (1997).

[2] An appellate court has an obligation to reach an independent, correct conclusion regarding questions of law. *State v. Robbins*, 253 Neb. 146, 570 N.W.2d 185 (1997).

ANALYSIS

[3-5] A search warrant, to be valid, must be supported by an affidavit establishing probable cause, or reasonable suspicion founded upon articulable facts. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994). In evaluating probable cause for the

issuance of a search warrant, the magistrate must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.* The duty of the reviewing court is to ensure that the issuing magistrate had a substantial basis for determining that probable cause existed. *Id.*

When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the search warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation. *Id.*

Nelson admits that "the supplementary language added by the magistrate creates the requisite probable cause . . . ." Brief for appellant at 15. However, she maintains that the issuing judge erred in adding such language because in doing so, (1) he failed to follow Neb. Rev. Stat. § 29-814.02 (Reissue 1995), governing the issuance of search warrants based on oral statements, by not using a voice recording device or stenographer, and (2) he abandoned his role as a neutral and detached magistrate.

Nelson's position is at odds with the Nebraska Supreme Court's decision in *State v. Garza*, 242 Neb. 573, 496 N.W.2d 448 (1993). In *Garza*, the judge, in reviewing an affidavit for a search warrant based on information supplied by a confidential informant, noticed that the affidavit did not state that the informant was reliable. After the judge asked the officer if the officer had received information from the informant before, the officer handwrote language into the affidavit indicating that he had. Such addition occurred before the judge signed the warrant. In determining that such action was proper, the court stated, "The issuing judge correctly recognized the inadvertent omission of the 'reliability' language and properly inquired further on the matter. The questioning did not diminish the level of proof required in the affidavit and thus did not taint the affidavit." *Id.* at 589, 496 N.W.2d at 458. The court then went on to

say that even without the handwritten language, the affidavit provided the judge with adequate evidence of the informant's veracity and basis of knowledge.

In the instant case, the issuing judge similarly recognized that critical language, concerning the time when the confidential informant witnessed sales of crack cocaine, was omitted from the officers' affidavit. After questioning the officers and being told that such language had been mistakenly omitted, the judge amended the affidavit by interlineation. The questioning and subsequent interlineation by the judge was proper under *State v. Garza, supra*, because it did not "diminish the level of proof required in the affidavit and thus did not taint the affidavit." *Id.* at 589, 496 N.W.2d at 458. Furthermore, because the statement was written into the affidavit, there was no need to comply with § 29-814.02.

[6] We note that the evidence adduced at the suppression hearing establishes that the judge swore Officer Ahlstrom (and, we presume, Officer Andersen as well) to the affidavit and that the judge signed the first page of the affidavit in the officers' presence. However, there is no evidence to establish whether the officers signed the affidavit before the judge inserted the relevant language. We therefore do not consider what the effect might be if the judge had inserted the language in the affidavit after it had been executed. A search pursuant to a warrant is presumed to be valid, and, if the police act pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable. *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994).

[7] Despite Nelson's protestations to the contrary, the judge's actions in no way suggest that he abandoned his role as a neutral and detached magistrate. Legal scholars have noted that

> there is nothing improper in a magistrate rendering assistance to the police in preparation of a warrant affidavit. Such conduct "does not detract from his neutrality. It demonstrates it. His duty is not to 'rubber stamp' conclusory allegations, but to require adequate factual details or underlying circumstances. Neither does 'detached' mean that he must remain mute, and simply accept or reject an affidavit. Due process does not require the police officer to

> keep presenting affidavits until he hits the mark or the contraband sought disappears."

2 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 4.2(d) at 451 (3d ed. 1996). We wholeheartedly agree.

CONCLUSION

Nelson's arguments are without merit. Consequently, the court's denial of her motion to suppress is affirmed.

AFFIRMED.

DOUGLAS ALLEN HARVEY, APPELLANT,
V. CYNTHIA HARVEY, APPELLEE.
575 N.W.2d 167

Filed February 24, 1998. No. A-96-841.

1. **Jurisdiction: Pleadings.** A special appearance has as its sole purpose the office of questioning the jurisdiction of the court, and one who questions jurisdiction by a special appearance should specifically point out the defect which allegedly prevents the court from acquiring jurisdiction.
2. **Pleadings: Proof.** The burden of proving the facts necessary to sustain a special appearance is on the party pleading it.
3. **Jurisdiction: Waiver.** Lack of personal jurisdiction can be waived, but lack of subject matter jurisdiction cannot be waived.
4. **Foreign Judgments: Child Support.** Neb. Rev. Stat. § 42-734(b) (Reissue 1993) provides that an obligor may contest the validity of or enforcement of an income withholding order issued in another state in the same manner as if the order had been issued by a tribunal of this state.
5. **States: Courts: Jurisdiction.** A court of one state may inquire about another state court's jurisdictional basis.
6. **Constitutional Law: States: Jurisdiction: Divorce: Collateral Attack.** A decree of divorce rendered in another state may be collaterally attacked by showing that the court was without jurisdiction, either of the subject matter of the suit or of the person of the defendant, without violating the Full Faith and Credit Clause of the federal Constitution.
7. **States: Jurisdiction: Judgments.** Where a judgment rendered in one state is challenged in another, a want of jurisdiction over either the person or the subject matter is open to inquiry.
8. **Child Support.** Neb. Rev. Stat. § 42-704 (Reissue 1993) of the Uniform Interstate Family Support Act provides that the remedies set forth therein are cumulative and do not affect the availability of remedies under other law.

9. **Constitutional Law: Courts: Jurisdiction: Statutes.** The Nebraska Court of Appeals cannot determine the constitutionality of a statute, yet when necessary to a decision in the case before it, the court does have jurisdiction to determine whether a constitutional question has been properly raised.
10. **Constitutional Law: Rules of the Supreme Court.** The Nebraska Supreme Court has insisted upon strict compliance with Neb. Ct. R. of Prac. 9E (rev. 1996) before constitutional challenges will be considered.
11. **Jurisdiction: Divorce: Child Support: Alimony.** The divisibility doctrine holds that while a state court may have jurisdiction over a marriage to cause its termination, that same court may lack personal jurisdiction to adjudicate personal matters such as support or alimony.
12. **Jurisdiction: Divorce: Judgments.** Although a court may have jurisdiction so that the termination of the marital status is entitled to full faith and credit, this recognition may be withheld from an accompanying money judgment when personal jurisdiction is lacking.
13. **Jurisdiction: Divorce: Service of Process.** A decree of divorce granted on constructive or substitute service of process may be divisible, that is entitled to full faith and credit in other jurisdictions as far as it affects the marital status, and ineffective on other issues, but a decree based on personal service of process must be recognized as valid for all purposes.
14. **Jurisdiction: Pleadings.** Before any other pleading or motion, a defendant may file a special appearance for the sole purpose of objecting to a court's assertion or exercise of personal jurisdiction over the defendant.
15. **Jurisdiction.** A defendant's participation in proceedings on any issue other than jurisdiction over the person, as well as the defendant's request for other relief, constitutes general appearance.
16. **Jurisdiction: Motions to Dismiss.** A motion to dismiss is a request which invokes the power of the court on an issue other than jurisdiction and is a general appearance.
17. **Jurisdiction: Motions for Continuance: Motions to Dismiss: Motions to Strike.** The filing of a motion to dismiss, a motion to make more definite and certain, a motion to strike or for a continuance, or any motion invoking the power of the court on any question other than jurisdiction constitutes a general appearance and confers jurisdiction over the moving party.
18. **Demurrer: Pleadings.** When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect.

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

Michael F. Pistillo, of Pistillo & Pistillo, P.C., for appellant.

Ray Simon, of Tietjen, Simon & Boyle, for appellee.

MILLER-LERMAN, Chief Judge, and IRWIN and SIEVERS, Judges.

SIEVERS, Judge.

INTRODUCTION

This appeal involves a Wisconsin divorce decree and its order for child support. The wife sought to enforce the child support order in Nebraska against the husband through wage withholding from his Nebraska employer. The husband resisted the Wisconsin child support order by filing a declaratory judgment action in the district court for Douglas County claiming that the Wisconsin court never had personal jurisdiction over him to enter a valid child support order. The wife entered a special appearance to the husband's action, which the district court sustained. At the same time, the court dismissed the husband's action. The husband appeals the dismissal of his declaratory judgment action to this court. We reverse, and remand.

BACKGROUND

To begin, the bill of exceptions in this case contains only a discussion between counsel and the Douglas County District Court regarding the right of a Nebraska court to enforce a child support order entered by a Wisconsin court. The bill of exceptions from the Wisconsin proceeding is not included in our record. Therefore, all we can consider are the pleadings filed in the Douglas County court, which have pleadings and orders from the circuit court for Oconto County, Wisconsin, attached as exhibits.

Douglas Allen Harvey and Cynthia Harvey were married in Omaha, Nebraska, in 1992, and they have two minor children. In July 1995, while the family was residing in Omaha, Cynthia and the children went to Wisconsin, ostensibly to visit Cynthia's parents.

On January 11, 1996, Cynthia filed a petition for divorce in the circuit court for Oconto County, Wisconsin. Douglas responded by filing a motion to dismiss, which is not in our record but our record does contain the ruling of the Wisconsin court on that motion. The findings and order portion of the ruling recites that a hearing was held on Douglas' motion on March 18, 1996, and the order recites that the court "heard the testimony of the petitioner and respondent [Douglas]." In a memorandum decision filed March 22, 1996, the Wisconsin court denied the motion and stated:

> Douglas Harvey is requesting that the action be dismissed. He alleges that neither party was a resident of this state for six months when the action was filed on January 11, 1996.
>
> I find to the contrary. Cynthia Harvey was a resident of Oconto County and the State of Wisconsin beginning July 8, 1995. . . . [T]here was every indication that she intended to take up residency in Oconto County even though she was afraid to tell her husband of that decision. She arrived at her parents' home in Oconto County on July 8. On July 10, she wrote to the town clerk advising of her residence and her intent to vote. On July 17 she registered her child for school and made application to join the local church. On July 19 she applied for a job.

The Wisconsin court filed its findings and order on April 4, 1996, which provided:

> Cynthia Harvey, was a resident of Oconto County and the State of Wisconsin beginning July 8, 1995.
>
> I do further find and order that jurisdiction is established for the petitioner, Cynthia Harvey, to proceed with her divorce petition filed in Oconto County, State of Wisconsin on January 9, 1996 . . . .

Thereafter, on April 25, 1996, the Wisconsin circuit court held a hearing on Cynthia's petition for divorce, and on that date, the Wisconsin court entered a temporary order for child support by which Douglas was to pay "25% [of] gross income per month, payable bi-weekly, commencing April 25, 1996." This order recited that Douglas did not appear and that counsel did not appear for him at that hearing. In the words of his brief filed in this court, Douglas "did not further submit himself to the jurisdiction of that Court in the State of Wisconsin . . . ." Brief for appellant at 5-6. A copy of the child support order was forwarded to Douglas' employer, Hill Brothers Transportation in Omaha, for withholding and transmittal of the funds to Wisconsin pursuant to Neb. Rev. Stat. § 42-734 (Reissue 1993), which provides in pertinent part:

> An income withholding order issued in another state may be sent by first-class mail to the person or entity defined as the obligor's employer under the Income Withholding

> for Child Support Act . . . without first filing a petition or comparable pleading or registering the order with a tribunal of this state.

In response to the forwarding of the Wisconsin child support order to his employer, Douglas filed a petition for declaratory judgment on May 8, 1996, in the district court for Douglas County, Nebraska. His petition alleged that the child support order had been sent by Cynthia to his employer pursuant to the Uniform Interstate Family Support Act, Neb. Rev. Stat. § 42-701 et seq. (Reissue 1993), but that the Wisconsin court "did not and does not have personal jurisdiction" over him. The petition for declaratory judgment requested that the district court declare the child support order entered in the circuit court for Oconto County, Wisconsin, to be null and void and that the court declare § 42-734, by which the child support order was sent to his employer, unconstitutional and unenforceable. Douglas also moved the Nebraska court for an order quashing the temporary order for child support because Wisconsin did not have personal jurisdiction over him and the order violated his due process rights.

On May 29, 1996, Cynthia filed a special appearance in the district court for Douglas County, Nebraska, and alleged that Douglas had filed a divorce action in Douglas County in which her special appearance was pending but that he had done so after the time allowed by § 42-708 for him to file a responsive pleading in Wisconsin. Cynthia's special appearance then alleged:

> That on April 30, 1996 the Wisconsin Court entered a temporary order for child support. Petitioner in this case [Douglas] did receive notice of said hearing but did not attend.
>
> . . . Petitioner had ample opportunity to challenge any issues related to the divorce in the Wisconsin Court, but has chosen to forum shop, on the issue of jurisdiction, having unsuccessfully challenged jurisdiction in [the] Wisconsin Court.
>
> Based upon the foregoing the Douglas County District Court does not have jurisdiction in this matter.

Section 42-708 provides in pertinent part:

> A tribunal of this state may exercise jurisdiction to establish a support order if the petition or comparable pleading is filed after a petition or comparable pleading is filed in another state only if:
>
> (1) the petition or comparable pleading in this state is filed before the expiration of the time allowed in the other state for filing a responsive pleading challenging the exercise of jurisdiction by the other state;
>
> (2) the contesting party timely challenges the exercise of jurisdiction in the other state; and
>
> (3) if relevant, this state is the home state of the child.

Douglas' motion to quash and Cynthia's special appearance came before the district court for Douglas County on May 29, 1996. No evidence was presented, and after briefing, the district court overruled Douglas' motion to quash and sustained Cynthia's special appearance. The court further found that "from an examination of the petitioner's petition [for declaratory judgment], there is no circumstance under which any amendment to said petition could overcome the jurisdictional objection raised by the respondent in her special appearance. Accordingly, the Court finds that this case should be dismissed with prejudice."

ASSIGNMENTS OF ERROR

Douglas appeals and alleges that the district court for Douglas County, Nebraska, erred (1) in concluding that it did not have jurisdiction to rule on an order of the Wisconsin court; (2) in not determining that § 42-734 violated Douglas' federal and state constitutional rights to due process; and (3) in "sustaining the special appearance of the appellee, since the appellee's purpose was to object to subject matter jurisdiction, and not personal jurisdiction as required by Neb.Rev.Stat. Sec. 25-516.01 [(Reissue 1995)]."

STANDARD OF REVIEW

When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an

appellate court to reach a conclusion independent from the decisions made by the lower courts. *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996).

ANALYSIS

Douglas' action for declaratory judgment seeks to establish that the child support order entered by the Wisconsin court is null and void because the Wisconsin court lacked personal jurisdiction over him. Cynthia's response via a special appearance was to assert that since Douglas had unsuccessfully challenged jurisdiction in the Wisconsin court, the Douglas County District Court did not have jurisdiction to declare the Wisconsin court's order void. Cynthia's special appearance was the vehicle by which the dismissal now on appeal was entered by the district court.

[1-3] Because jurisdictional challenges are made to both the Wisconsin order and the Nebraska action, we begin by recalling the purpose of a special appearance. A special appearance has as its sole purpose the office of questioning the jurisdiction of the court, and one who questions jurisdiction by a special appearance should specifically point out the defect which allegedly prevents the court from acquiring jurisdiction. *West Town Homeowners Assn. v. Schneider*, 221 Neb. 674, 380 N.W.2d 265 (1986). The burden of proving the facts necessary to sustain a special appearance is on the party pleading it. *Id.* Lack of personal jurisdiction can be waived, but lack of subject matter jurisdiction cannot be waived. *Concordia Teachers College v. Neb. Dept. of Labor*, 252 Neb. 504, 563 N.W.2d 345 (1997).

Cynthia's special appearance asserts that the Wisconsin court had jurisdiction to decree a divorce and to order child support. The special appearance addresses the merits of Douglas' claim that the Wisconsin child support order is void and cannot be enforced against him in Nebraska, rather than alleging a jurisdictional defect in the lawsuit brought by Douglas. Cynthia's special appearance does not allege that the Douglas County District Court lacks personal jurisdiction over her, nor does it allege that the district court lacks the power to take up the question of the validity or enforceability of the Wisconsin order, i.e.,

subject matter jurisdiction. See *In re Application of Burlington Northern RR. Co.*, 249 Neb. 821, 545 N.W.2d 749 (1996).

[4] Cynthia proceeded under § 42-734 of the Uniform Interstate Family Support Act to secure the child support ordered by the Wisconsin court. This section of the act allowed her to send the Wisconsin order to Douglas' employer "without first filing a petition or comparable pleading or registering the order with a tribunal of this state." Under § 42-734, and the facts of this case, Douglas' employer was to treat the income order as if it had been issued by a Nebraska court, was to provide Douglas with a copy of the order, and was required to distribute the funds as directed in the withholding order. Douglas alleges that § 42-734 and the procedures therein violate his constitutional right to due process, which we shall address in more detail shortly. Notwithstanding Douglas' assertion to the contrary, § 42-734(b) does provide that "[a]n obligor [Douglas] may contest the validity or enforcement of an income withholding order issued in another state in the same manner as if the order had been issued by a tribunal of this state." Douglas' declaratory judgment action is clearly a "contest" of the validity and the enforcement of the Wisconsin support and income withholding order within the contemplation of § 42-734(b).

[5-7] Without doubt, "[a] court of one state may inquire about another state court's jurisdictional basis." *Marriage of Daniel-Nordin*, 173 Wis. 2d 635, 647, 495 N.W.2d 318, 323 (1993). See, *Gruenewald v. Waara*, 229 Neb. 619, 428 N.W.2d 210 (1988) (holding foreign judgment can be collaterally attacked by evidence that rendering court was without jurisdiction); *Howell v. Fletcher*, 157 Neb. 196, 59 N.W.2d 359 (1953). In *Zenker v. Zenker*, 161 Neb. 200, 72 N.W.2d 809 (1955), the court held that a decree of divorce rendered in another state may be collaterally attacked by showing that the court was without jurisdiction, either of the subject matter of the suit or of the person of the defendant, without violating the Full Faith and Credit Clause of the federal Constitution. The law of this state has long been that where a judgment rendered in one state is challenged in another, a want of jurisdiction over either the person or the subject matter is open to inquiry. *Repp v. Repp*, 156 Neb. 45, 54 N.W.2d 238 (1952).

[8] Section § 42-704 of the Uniform Interstate Family Support Act provides that the remedies set forth therein are cumulative and "do not affect the availability of remedies under other law." Thus, in addition to his common-law ability to have the Nebraska courts inquire into the jurisdiction of the Wisconsin court, § 42-734(b) gives Douglas the ability to contest the validity of an income withholding order issued by another state.

Douglas' brief asserts that § 42-734, providing for the enforcement of an unregistered support order from another state, deprives him of his constitutional due process protections of notice and an opportunity for hearing because there is no provision for him "to contest the validity of an *unregistered* foreign Order, served upon his . . . employer . . . ." Brief for appellant at 10. Although Douglas' petition for declaratory judgment seeks a declaration that § 42-734 is unconstitutional and unenforceable, Douglas did not comply with Neb. Ct. R. of Prac. 9E (rev. 1996) requiring service of his brief upon the Attorney General.

[9,10] This court cannot determine the constitutionality of a statute, yet when necessary to a decision in the case before us, we do have jurisdiction to determine whether a constitutional question has been properly raised. *Bartunek v. Geo. A. Hormel & Co.*, 2 Neb. App. 598, 513 N.W.2d 545 (1994). The Nebraska Supreme Court has insisted upon strict compliance with rule 9E before constitutional challenges will be considered. *State v. Kelley*, 249 Neb. 99, 541 N.W.2d 645 (1996); *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994). We obviously do not decide any claim of unconstitutionality with respect to § 42-734. However, the temptation to write dicta is rather strong because the statute expressly provides for a challenge to the enforcement of a foreign child support order in the courts of this state. Additionally, common law provides the same opportunity because the Uniform Interstate Family Support Act does not affect the availability of other lawful remedies. See § 42-704.

Divisibility Doctrine.

[11] Part and parcel of the notion that a foreign divorce decree, or as in this case an order of support, may be collaterally attacked in this state is the doctrine of the divisibility of for-

eign divorce decrees. "The 'divisibility doctrine' holds that while a state court may have jurisdiction over the marriage to cause its termination, that same court may lack personal jurisdiction to adjudicate 'personal matters' such as support or alimony." *Tiedeman v. Tiedeman*, 195 Neb. 15, 17, 236 N.W.2d 807, 809 (1975).

[12,13] Although a court may have jurisdiction so that the termination of the marital status is entitled to full faith and credit, this recognition may be withheld from an accompanying money judgment when personal jurisdiction is lacking.

> A decree of divorce granted on constructive or substituted service of process may be divisible, that is, entitled to full faith and credit in other jurisdictions as far as it affects the marital status, and ineffective on other issues; but a decree based on personal service of process must be recognized as valid for all purposes.

27C C.J.S. *Divorce* § 787 at 465 (1986).

Even though there is no extrinsic evidence of what occurred in Wisconsin, we are free to examine the Wisconsin court orders in the record. See *Repp v. Repp*, 156 Neb. 45, 54 N.W.2d 238 (1952). It is clear that Douglas filed a motion to dismiss in Wisconsin and that he attacked Cynthia's claim of domicile in Wisconsin; the Wisconsin court recited that it heard testimony from Douglas with respect to his motion. The law in Wisconsin is that a party cannot enter an appearance, request affirmative relief from the court, and then later argue that the court was without personal jurisdiction. *Artis-Wergin v. Artis-Wergin,* 151 Wis. 2d 445, 444 N.W.2d 750 (Wis. App. 1989). More specifically, the Wisconsin Supreme Court has stated in *Lees v. ILHR Department*, 49 Wis. 2d 491, 182 N.W.2d 245 (1971), that the majority of jurisdictions hold that a party who appears to object to the court's jurisdiction of the subject matter thereby submits to the jurisdiction of the court to his person. The Wisconsin court in *Lees* went on to state, in following the majority rule, that the rule is predicated upon the theory that an objection to subject matter jurisdiction relates to the merits and to grant relief the defendant must be regularly before the court.

[14-17] Nebraska law is the same. Before any other pleading or motion, a defendant may file a special appearance for the

sole purpose of objecting to a court's assertion or exercise of personal jurisdiction over the defendant. *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989). A defendant's participation in proceedings on any issue other than jurisdiction over the person, as well as the defendant's request for other relief, constitutes general appearance. *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996). "A motion to dismiss is a request which invokes the power of the court on an issue other than jurisdiction and is a general appearance." *Eliason v. Devaney*, 228 Neb. 331, 333, 422 N.W.2d 356, 358 (1988) (holding that it has long been rule that filing of motion to dismiss, motion to make more definite and certain, motion to strike or for continuance, or any motion invoking power of court on any question other than jurisdiction constitutes general appearance and confers jurisdiction over moving party), citing *State v. Wedige*, 205 Neb. 687, 289 N.W.2d 538 (1980).

From the Nebraska pleadings, Douglas did not file a special appearance in Wisconsin. Moreover, he sought affirmative relief by objecting to Cynthia's domicile and asking that the case be dismissed. He also appeared with counsel and testified. In *Cook v. Cook*, 342 U.S. 126, 127-28, 72 S. Ct. 157, 96 L. Ed. 146 (1951), the Court said:

> If the defendant spouse appeared in the Florida proceedings and contested the issue of the wife's domicile (*Sherrer v. Sherrer*, 334 U. S. 343[, 68 S. Ct. 1087, 92 L. Ed. 1429 (1948),]) or appeared and admitted her Florida domicile (*Coe v. Coe*, 334 U. S. 378[, 68 S. Ct. 1094, 92 L. Ed. 1451 (1948),]) or was personally served in the divorce state (*Johnson v. Muelberger*, 340 U. S. 581, 587[, 71 S. Ct. 474, 95 L. Ed. 552 (1951)]), he would be barred from attacking the decree collaterally; and so would a stranger to the Florida proceedings, such as respondent, unless Florida applies a less strict rule of *res judicata* to the second husband than it does to the first.

Thus, on the record before us, Douglas' claim of lack of personal jurisdiction by the Wisconsin court seems destined for failure. See, also, *Davis v. Davis*, 305 U.S. 32, 59 S. Ct. 3, 83 L. Ed. 26 (1938) (claim that appearance was only special rejected when movant challenged plaintiff's domicile to file divorce

action in Virginia). However, we point out that we do not have an evidentiary record as to what actually happened in Wisconsin, and we acknowledge that the recitations in the Wisconsin orders about Douglas' actions in Wisconsin, i.e., the motion to dismiss and that he testified, could be proven inaccurate. But the Douglas County District Court dismissed the case upon a special appearance, finding that Douglas could not amend in any way to overcome the allegations of the special appearance. This result and the trial court's reasoning are flawed because by alleging that Wisconsin lacked personal jurisdiction over him, Douglas alleged sufficient facts in his declaratory judgment action to contest the validity of the Wisconsin support order. Under the divisibility doctrine, even if Cynthia were domiciled in Wisconsin, the child support order is still subject to examination by a Nebraska court.

[18] Thus, the holding of the district court that there is nothing more Douglas could allege that could possibly overcome Cynthia's allegation that the Wisconsin court had jurisdiction is fundamentally unsound in the context of a special appearance and given the potential that the divisibility doctrine might apply. Douglas has already alleged what he needs to allege, i.e., a lack of personal jurisdiction. Cynthia, although designating her pleading as a special appearance, does not allege anything in that special appearance, as she is required to do, which would show either a lack of personal jurisdiction over her or a lack of subject matter jurisdiction in the Douglas County District Court. Subject matter jurisdiction is apparent, as she has brought the Wisconsin order to Nebraska for enforcement, and as outlined earlier, the Nebraska courts have the right to inquire into the validity of the underlying out-of-state order. Whether the facts will bear out Douglas' allegations is another matter for another day. But the district court treated Cynthia's special appearance like a demurrer. (When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect. *Giese v. Stice*, 252 Neb. 913, 567 N.W.2d 156 (1997).) Rather than ruling on Cynthia's special appearance as though it was a demurrer, the court should have overruled her special appearance and simply let the case pro-

ceed to the next step. Moreover, Douglas' action for declaratory judgment should not have been dismissed, at least not in the course of ruling upon Cynthia's special appearance.

CONCLUSION

We reverse the sustaining of the special appearance, reverse the dismissal of the lawsuit, and remand the cause to the district court for Douglas County for further proceedings.

REVERSED AND REMANDED.

BERNICE ACKERMAN, APPELLANT, V. METROPOLITAN COMMUNITY COLLEGE AREA, DOING BUSINESS AS METROPOLITAN COMMUNITY COLLEGE, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, AND THE BOARD OF GOVERNORS OF METROPOLITAN COMMUNITY COLLEGE AREA, APPELLEES.

SHARON TRUSSELL, APPELLANT, V. METROPOLITAN COMMUNITY COLLEGE AREA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, AND THE BOARD OF GOVERNORS OF METROPOLITAN COMMUNITY COLLEGE AREA, APPELLEES.

TAMMIE R. PHILLIPS, APPELLANT, V. METROPOLITAN COMMUNITY COLLEGE AREA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, AND THE BOARD OF GOVERNORS OF METROPOLITAN COMMUNITY COLLEGE AREA, APPELLEES.

575 N.W.2d 181

Filed February 24, 1998. Nos. A-96-1010, A-96-1061, A-96-1062.

1. **Schools and School Districts: Termination of Employment: Teacher Contracts: Evidence: Appeal and Error.** The standard of review in a proceeding in error from an order of a school board terminating the contract of a tenured teacher is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision.
2. **Schools and School Districts: Evidence.** The evidence is considered sufficient as a matter of law if the school board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.
3. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
4. **Termination of Employment: Property: Due Process: Notice.** As a prerequisite to terminating the employment of an employee with a property right in continued employment, the employer must provide notice and an opportunity for a hearing appropriate to the nature of the case.

5. ____: ____: ____: ____. Before termination of employment, an employee with a property right in continued employment must be given oral or written notice of the basis for the termination, an explanation of the employer's evidence, and an opportunity to present his or her side of the story. All process that is due such an employee is provided by a pretermination hearing at which the employee has an opportunity to respond, coupled with posttermination procedures for review.
6. **Schools and School Districts: Due Process: Hearsay.** Although strict adherence to the rules of evidence cannot be demanded or even expected at a hearing before a school board, the basic principles of due process demand that hearsay statements of students be given little, if any, weight.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Affirmed.

M.H. Weinberg, of Weinberg & Weinberg, P.C., for appellant Ackerman.

Mark D. McGuire, of McGuire and Norby, for appellants Trussell and Phillips.

Robert T. Cannella, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., for appellees.

MILLER-LERMAN, Chief Judge, and IRWIN and SIEVERS, Judges.

IRWIN, Judge.

I. INTRODUCTION

Bernice Ackerman, Sharon Trussell, and Tammie R. Phillips (referred to herein collectively as "the plaintiffs") each filed a petition in error in the district court for Douglas County to obtain review of orders of the board of governors of Metropolitan Community College Area (Board) terminating their employment as a result of a reduction in force. Following the district court's affirmance of the orders of the Board, the plaintiffs timely appealed to this court.

In the hearing before the Board, the proposed terminations of employment of the plaintiffs were heard together. Pursuant to a stipulation of all parties, the error proceedings were consolidated in the district court. On appeal, each plaintiff docketed her appeal separately. However, Trussell and Phillips filed their briefs jointly. We note that each case involves the same general factual background and that many of the errors assigned in the Trussell and Phillips brief are also assigned in the Ackerman

brief. In order to prevent duplicitive opinions, we consider together the assigned errors of the plaintiffs and refer to these appeals as the instant "case."

II. BACKGROUND

The plaintiffs had been employed with Metropolitan Community College (College) as teachers in the office skills and technology (OST) program for 13 years or more. In letters dated December 14, 1995, nine OST faculty members, including the plaintiffs, were individually informed that due to declining student enrollment in the OST program, the interim vice president of educational affairs was recommending to the College president that the OST program be reorganized and that the reorganization could result in a reduction in force from nine full-time faculty to six full-time faculty.

In a resolution dated December 19, 1995, the Board decided to reduce the full-time faculty for the OST program from nine to six, to be effective at the end of the spring quarter of the 1995-96 academic year. The Board requested that the president present recommendations at the January Board meeting regarding which faculty contracts should not be renewed as a result of the reduction in force. This presentation was to be in accordance with the Board's reduction in force policy as set forth in a procedures memorandum entitled "Implementation Process Pertaining to Reduction in Force Policy for Full-Time Employees Covered in Negotiated Statement of Policy" (RIF policy).

The RIF policy outlines the procedure to be followed when a reduction in force is required. The RIF policy was adopted pursuant to Neb. Rev. Stat. § 85-1530 (Reissue 1994). Generally, the results from the two most recent faculty evaluations for each of the relevant staff in the area affected by the reduction in force are tallied to find the midpoint for the evaluated staff. Each staff member whose evaluation result is below the midpoint is a candidate for the reduction in force. Each staff member below the midpoint is then given a score in the categories of level of placement, diversity, and length of service. The staff members receiving the lowest points are those recommended to be discharged for reduction in force purposes. The relevant sections

of the policy and statutes will be set forth and discussed in the analysis below.

In the present case, the division chair, the interim vice president of educational affairs, and the director of human resources applied the reduction in force provisions of the RIF policy to the OST faculty. Linda Wild, the division chair, compiled the results of the 1993-94 and 1994-95 evaluations of the OST faculty to determine a midpoint. The four OST faculty members below the midpoint were the three plaintiffs and Lana Flaming. Each of the four was next given a score based on level of placement, diversity, and length of full-time service. Because the plaintiffs were the three teachers with the lowest scores, it was recommended to the Board that the plaintiffs be the three OST faculty discharged due to the reduction in force.

By hand-delivered letters dated February 7, 1996, the plaintiffs were notified by the Board that the president had recommended that their contracts not be renewed for the 1996-97 academic year due to the reduction in force. The letter informed them that they had 5 days within which to request a hearing of the Board. Each of the plaintiffs requested such a hearing. The hearing was held February 20 and continued into the early morning hours of February 21. The College and the plaintiffs presented evidence. At the conclusion of the hearing, the Board adopted resolutions ordering the reduction in force of the plaintiffs at the expiration of their employment contracts on May 24.

Each plaintiff subsequently filed a petition in error in the district court for Douglas County. The district court affirmed the Board's decision, finding that the Board had acted within its jurisdiction, that there was "sufficient evidence" before the Board to uphold the discharge of the plaintiffs, and that the plaintiffs had not been denied due process. These appeals timely followed.

III. ASSIGNMENTS OF ERROR

In her brief, Ackerman assigns 12 errors, which we have consolidated for discussion to the following 7 errors: Ackerman asserts that the RIF policy should have applied to part-time employees as well as full-time employees and that the policy should have included copies of the relevant evaluation forms

used in assessing which teachers would be terminated. Ackerman also alleges that the Board failed to comply with the RIF policy's provisions concerning the timing of her hearing. Ackerman further alleges that the Board failed to consider the proper evaluations in assessing the determination to terminate her employment, that the various teachers considered for termination were not scored properly under the RIF policy, and that there was no causal connection between the change of circumstances necessitating a reduction in force and her personally. Finally, Ackerman asserts that she was denied due process during the hearing before the Board and that the Board improperly received an exhibit into evidence.

In their brief, Trussell and Phillips assign five errors. They assert that the RIF policy should have been applied to part-time employees and that the policy is required to contain copies of the evaluations used in the reduction in force process. They also assert that the Board erred in not using the proper evaluations according to the RIF policy. Finally, they assert that they were denied due process and that the Board erred in improperly receiving an exhibit into evidence.

IV. ANALYSIS

1. Standard of Review

[1,2] The standard of review in a proceeding in error from an order of a school board terminating the contract of a tenured teacher is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision. *Boss v. Fillmore Cty. Sch. Dist. No. 19*, 251 Neb. 669, 559 N.W.2d 448 (1997). The evidence is considered sufficient as a matter of law if the school board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it. *Id.* Stated another way, the evidence is considered sufficient as a matter of law, or is "'"substantial"'" or constitutes "'"some competent evidence,"'" as those terms have been used in prior articulations of the standard of review in these cases, "if a judge could not, were the trial to a jury, direct a verdict." *Id.* at 676, 559 N.W.2d at 453 (quoting *Eshom v. Board of Ed. of Sch. Dist. No. 54*, 219 Neb. 467, 364 N.W.2d 7 (1985)).

2. RIF POLICY'S COMPLIANCE WITH STATUTE

The plaintiffs have raised several issues on appeal which bring into question whether the policy is in compliance with Neb. Rev. Stat. § 85-1501 et seq. (Reissue 1994 & Cum. Supp. 1996). These issues include whether or not the statutes require the Board's RIF policy to apply to part-time employees as well as full-time employees, whether the statutes require the policy to include actual copies of any evaluations to be used in assessing which employments to terminate, and whether the policy's provisions concerning the appropriate timing of a hearing requested by an employee who has been given notice that his or her employment may be terminated comply with the statutes. Because our interpretation of the requirements of the statutory sections at issue is a question of law, we reach our conclusion in that respect independent of the trial court's decision. *Cox v. York Cty. Sch. Dist. No. 083*, 252 Neb. 12, 560 N.W.2d 138 (1997).

(a) Application to Part-Time Employees

The plaintiffs have all asserted on appeal that the Board and the district court erred by not finding that the RIF policy must apply to part-time employees as well as full-time employees. There is no dispute by any of the parties that the RIF policy at issue applies only to full-time employees. The policy, entitled "Implementation Process Pertaining to Reduction in Force Policy for *Full-Time Employees* Covered in Negotiated Statement of Policy," begins with the phrase "[w]henever it becomes necessary to reduce the number of regular *full-time professional staff*." (Emphasis supplied.) The question raised by the plaintiffs, then, is simply whether a policy pertaining only to full-time employees is permissible under § 85-1501 et seq., or whether it must include part-time employees as well.

We note that Nebraska is, generally, considered to be an at-will employment state. See *Hoschler v. Kozlik*, 3 Neb. App. 677, 529 N.W.2d 822 (1995) (in tortious interference with business relationship case, court infers at-will employment absent allegations of contract to alter at-will status). A person's at-will status may, however, be modified pursuant to statute or contractual obligations placed on the parties to the employment relationship. See *Blair v. Physicians Mut. Ins. Co.*, 242 Neb. 652, 496

N.W.2d 483 (1993) (exceptions to termination at will exist where constitutional, statutory, or contractual rights require termination for good cause only). In the present case, the plaintiffs were all employed pursuant to employment contracts with the College.

The relevant statutes for consideration of whether the RIF policy was required to be applicable to part-time employees as well as full-time employees are §§ 85-1528 through 85-1530, primarily § 85-1530. Section 85-1530 provides as follows:

> Each board shall adopt a reduction-in-force policy *covering employees subject to such statutory provisions* to carry out the intent of sections 85-1530 to 85-1533. No such policy shall allow the reduction of a *permanent or tenured employee* while a *probationary employee* is retained to render a service which such *permanent* employee is qualified by reason of certification and endorsement to perform . . . .

(Emphasis supplied.)

[3] We note that the foregoing language does not appear to have been interpreted yet in this state and that the emphasized terms are not defined within the statutes. In construing a statute, we 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. *Nickel v. Saline Cty. Sch. Dist. No. 163*, 251 Neb. 762, 559 N.W.2d 480 (1997). In so doing, we must look to the statute's purpose and give the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Id.*

Section 85-1530, which is the relevant statute directing a community college board to establish a RIF policy, makes no mention of part-time employees. Section 85-1530 speaks only in terms of permanent, tenured, and probationary employees. Additionally, when the statutes are all read together, it is apparent that § 85-1528, which dictates the notice which must be given to an employee before his or her employment may be terminated, is intended to apply to full-time employees. The statute speaks in terms of contracts "for the ensuing year," provides for automatic renewal of annual contracts, and requires

notice of impending termination of employment to be given to the employee at least 90 days prior to the close of a contract period of any ensuing reduction in force.

According to the record, part-time employees are hired by the College on a quarterly basis. There is nothing in the record to suggest that part-time employees enjoy the statutory advantages of having automatic contract renewals, and, indeed, because they are hired on a quarterly basis, if § 85-1528 is intended to apply to them, the Board would be required to provide notice of impending termination 90 days prior to the start of the quarter, which in many cases would be prior to actually hiring part-time employees. As such, there is nothing in the plain language of § 85-1528 which suggests that part-time employees are intended to be covered by the reduction in force provisions.

Testimony presented before the Board indicated that it is infeasible to operate a community college program without utilizing a certain number of part-time teachers because of the various scheduling considerations inherent in community college programs; that is, the College offers several sections of various courses at several campuses across the city, often at the same time as one another. Additionally, the College often utilizes part-time teachers in order to get more qualified individuals, who may have other full-time careers, to teach certain courses.

Finally, we note that the Legislature has in other areas provided statutory means for part-time employees to earn job protection enjoyed by full-time employees. For example, in Neb. Rev. Stat. § 79-825 (Reissue 1996), the Legislature provides the means for part-time certificated school teachers to be considered permanent certificated teachers for reduction in force considerations. No such section appears with respect to employees of the community colleges.

Reading the statutes together, it is apparent from the plain language of the statutes that the Legislature contemplated providing statutory protection to permanent, full-time community college employees when faced with a reduction in force situation. Nothing in the statutes speaks in terms of part-time employees, and the statutes do not appear to intend such inclusion. As such, the plaintiffs' allegations that the RIF policy should apply to part-time employees as well is without merit.

We note that Ackerman specifically assigned various errors concerning the RIF policy and its reassignment provisions, which provide for reassignment only to other available full-time employment and provide for reassignment of part-time employees within the same teaching discipline to create more full-time positions. Because we have concluded that the statutes do not require application of the RIF policy to part-time employees, we need not discuss further those assigned errors from Ackerman's brief.

(b) Inclusion of Forms in Policy

The plaintiffs have all asserted on appeal that the Board and the district court erred in not finding that § 85-1530 requires any evaluation forms utilized in a RIF policy to be attached to the policy. Section 85-1530 provides, in relevant part, that "[i]f employee evaluation is to be included as a criterion to be used for reduction in force, specific criteria, *such as* frequency of evaluation, evaluation forms, and number and length of classroom observations shall be included as part of the reduction-in-force policy." (Emphasis supplied.) The plaintiffs seek to have us impose a literal meaning to this statute, so that the failure of the Board to physically attach copies of the evaluation forms to be used would prove fatal to the RIF policy.

Section 6 of the Board's RIF policy provides as follows:

> In the event that a reduction of permanent full-time employees is necessary, the following criteria and formula shall be applied to determine the order of reduction within the Affected Area:
>
> . . . .
>
> E) Specific criteria used to evaluate full-time teaching faculty include evaluation procedures generally in use by the College, including an annual evaluation at or respecting a time established by the College; teaching faculty evaluation forms currently in use by the College as from time to time amended; classroom visitations which shall be held no less frequently than once per year and for a duration of at least forty-five minutes for each visitation; and evaluation conferences between the full-time teaching faculty member and his/her supervisor. Evaluation forms

in use at date of adoption of this policy include supervisory evaluation forms and student evaluation forms.

Section 85-1530 requires that a RIF policy include specific criteria to be used if evaluations are part of the criteria for determining whose employment to terminate during a reduction in force. The statute then provides several examples of what types of specific criteria could be included in the policy to comply with the statute. We conclude that the RIF policy in the present case complied with the requirements of the statute and that the policy in the present case did include specific criteria, such as the frequency of evaluations, the number and length of classroom observations to be considered, and which evaluation forms would be utilized. Although the actual forms were not physically attached to the RIF policy, the policy informs employees as to which forms will be utilized.

As noted above, the RIF policy indicates that evaluation forms will be used in assessing the order of reduction in force. The RIF policy identifies the applicable evaluation forms as being the "teaching faculty evaluation forms currently in use by the College as from time to time amended," as opposed to any type of evaluation forms designed specifically for use in a reduction in force. Additionally, the RIF policy defines the term "evaluation forms" to "include supervisory evaluation forms and student evaluation forms." As such, the RIF policy fairly informs the teachers as to which evaluation forms may be used in achieving a *necessary reduction in force*.

We note that the plaintiffs do not contend that they were unaware of what evaluation forms would actually be used, but, rather, contend that the Board should have physically attached copies of the forms to the RIF policy. In fact, the plaintiffs received copies of the completed evaluation forms for all nine teachers in the OST program prior to the hearing. We do not read the statute as requiring such action by the Board as attaching potentially lengthy evaluation forms to the RIF policy, which would potentially require the Board to adopt an entirely new policy every time the evaluation forms are amended.

The record in the present case indicates that the Board's policy set out with some detail the specific criteria to be used during a reduction in force. Contra *Trolson v. Board of Ed. of Sch.*

Dist. of Blair, 229 Neb. 37, 424 N.W.2d 881 (1988) (record failed to indicate that reduction in force factors were utilized in accordance with board's policy). On the record before us, the plaintiffs could not seriously contend, nor do they attempt to, that they were not aware of what evaluation forms would be used. The plaintiffs' allegations in this regard are without merit.

(c) Ten-Day Period for Hearing

Ackerman alone assigns and argues that the Board violated the 10-day rule set forth in the RIF policy when proceeding to hear the matter on February 20, 1996. The RIF policy provides:

> If the request for hearing is received by the Board at least ten (10) days prior to the next regular Board meeting, then the hearing shall be scheduled to be held at or prior to such meeting, and if not, then at or prior to the next following Board meeting.

There is no dispute that this provision of the RIF policy was not complied with. It appears that Ackerman's request for hearing was received by the Board less than 10 days prior to the February 20 hearing.

The above provision in the RIF policy plainly conflicts with the statutory provision regarding the timing of a reduction in force hearing. Section 85-1528 provides that "[u]pon receipt of such request [for a hearing regarding the proposed termination of an employee's contract], the board shall order the hearing to be held *within* ten days . . . ." (Emphasis supplied.) It is clear from a reading of the statute that its purpose is to require a timely hearing. Based on the language of the RIF policy, it appears that the policy is concerned with administrative convenience in that the proposed termination of a contract be considered during a regularly scheduled board meeting.

The RIF policy provision in this regard cannot be upheld, as it violates the letter and spirit of § 85-1528. If both the RIF policy provision and statute were to remain in effect, an employee would be able to manipulate the timing of a reduction in force hearing by requiring the Board to comply either with the policy or with the statute, whichever best suits the employee's purposes. We note that the RIF policy provides for a mechanism to resolve conflicts between the policy and the applicable statutes.

Although this mechanism was not utilized in the present case, it indicates that in case of a conflict, the statutes are controlling.

We note that Ackerman objected at the hearing on the basis that the Board had not complied with the RIF policy's 10-day rule but did not request a continuance. There is nothing in the record to suggest that Ackerman was not prepared to proceed or that Ackerman was unable to respond to the College's evidence regarding the proposed reduction in force. In fact, the record shows that Ackerman was prepared to challenge the proposed reduction in force by showing that the College had not complied with specific provisions of the RIF policy. Furthermore, it is clear from the record that the Board complied with the statutory requirement that the reduction in force hearing be held within 10 days of the employee's request for the same. For these reasons, we conclude that on these facts this assignment is without merit.

3. Board's Compliance With Policy

The plaintiffs all assert that the Board failed to comply with the RIF policy. In particular, the plaintiffs all challenge whether the proper evaluation forms were used to determine the midpoint. In addition, Ackerman challenges whether the College properly scored the faculty members who fell below the midpoint and whether the College sufficiently proved a causal connection between the need for the reduction in force and her circumstances.

(a) Use of Correct Evaluations

The plaintiffs have all asserted that the College failed to comply with the RIF policy provision that requires the two most recent evaluations be considered for the policy procedures. The plaintiffs argue that the College improperly considered evaluations for the academic years of 1993-94 and 1994-95. They contend that the College should have considered the evaluations for the academic years of 1994-95 and 1995-96.

Regarding the evaluations to be used when determining the midpoint, the RIF policy provides: "In determining [the] midpoint of evaluations, if all staff in the particular Affected Area have been evaluated therein for two (2) years or more, then the

average of the two (2) most recent annual evaluations shall be used."

The record before us shows that the evaluations for the academic years of 1993-94 and 1994-95 were the most current completed evaluations. Wild, the division chair, testified that the two most current evaluations in her file were for the academic years of 1993-94 and 1994-95. Jan Pieper, the director of human resources, testified without contradiction that at the time the reduction in force procedures were applied to the OST faculty, the 1995-96 evaluation process was still in progress and had not yet been completed.

We conclude that the College did not err in utilizing the evaluations for the academic years of 1993-94 and 1994-95 in determining the midpoint of evaluations for reduction in force purposes. We note that Ackerman specifically assigned an error regarding the evaluation forms used for the 1995-96 academic year. As the College did not use, nor did it err in failing to use, the 1995-96 evaluations in making the reduction in force determination, we need not address further Ackerman's assigned error in this regard.

(b) Scoring of Faculty Members Below Midpoint

Ackerman alone makes a claim that the College did not follow its RIF policy in crediting points to the four faculty members whose evaluations fell below the midpoint. Ackerman argues that she should have received four points, rather than the three points given by the College, in the "diversity" category. She argues that she could have taught a computer class called MCT 103 (which is in another discipline) and that she had previously taught a bookkeeping class at the College in 1976. The record shows that if Ackerman would have received four points in this category, her total score would have been the same as Flaming's score. Flaming was the faculty member below the midpoint who was not discharged.

The Nebraska Supreme Court has stated that a school board has "broad discretion in determining what factors to include in its reduction in force policy as well as how to weight those factors." *Nickel v. Saline Cty. Sch. Dist. No. 163*, 251 Neb. 762, 771, 559 N.W.2d 480, 486 (1997).

According to the RIF policy, faculty members below the midpoint of evaluations are given a score based on the following categories: level of placement, diversity, and length of full-time service. The RIF policy provides that the diversity points should be given based on the "*ability* of staff members to teach" courses both within their discipline and outside their discipline. (Emphasis supplied.) In the diversity category, up to three points are awarded based on the percentage of course work the teacher can teach within his or her discipline and a fourth point is awarded if the teacher is able to teach 100 percent of the course work *within* his or her discipline and, in addition, courses *outside* his or her discipline.

The record shows that Wild was responsible for scoring the plaintiffs and the fourth faculty member who was below the midpoint in the applicable categories. Wild testified that she gave each of the four faculty members three points for diversity, "in a sense of fairness," indicating that each was given credit for being able to teach 100 percent of the course work within her discipline, and that she gave Flaming the fourth point because Flaming had actually been teaching the MCT 103 course. Wild testified that she awarded the fourth point based on whether the particular teacher had "demonstrated" an ability to teach courses outside her discipline.

We conclude that awarding the fourth diversity point based on whether a teacher has demonstrated an ability to teach courses outside his or her discipline is a reasonable method for the evenhanded application of this point. We further conclude that the College did not abuse its discretion by failing to give Ackerman the fourth diversity point. Ackerman acknowledged that she had never taught the MCT 103 course. Her opinion that she could teach the course was, according to her testimony, based on the fact that she had taken the course. Regarding the bookkeeping course Ackerman had previously taught more than 20 years ago, there was no testimony that the bookkeeping course presently includes the same curriculum as it did in 1976 or that Ackerman continued her education in this area so that she would still be competent to teach the course.

The College awarded the diversity points in an evenhanded manner based on present demonstrated teaching ability. See

Nickel, supra (providing that evenhanded consideration of affected teachers' present involvement was reasonable). We conclude that this assigned error is without merit.

(c) Connection to Change of Circumstances

Ackerman alone also contends that the College erroneously applied the RIF policy to her because there was no causal connection between the reason for the reduction in force and her particular circumstances. Ackerman argues that since the reason for the reduction in force in the OST program was a declining student enrollment, the fact that she had a full course load should have exempted her from the reduction in force.

In this regard, the policy provides: "If such reduction in force is to affect only a specific Affected Area, any such circumstances must specifically relate to the staff members to be reduced." According to the record before us, the circumstances surrounding the need for a reduction in force of OST full-time faculty included a declining student enrollment in the OST program. The evidence showed that the OST teachers' employment contracts provided that each was to carry 18 credit hours per quarter. As a result, the College *assigned* each teacher 18 hours each quarter. Therefore, the fact that Ackerman had a "full" course load does not mean that the present circumstances did not specifically relate to her. In addition, it is apparent that the decline in enrollment specifically affected the OST department, meaning that it specifically related to those faculty teaching in the department. We conclude that there was sufficient evidence there was a causal connection between the reduction in force and Ackerman's circumstances and that this assigned error is without merit.

4. Due Process

The plaintiffs all assert that the hearing before the Board did not comport with due process requirements. The plaintiffs assert that procedural due process was not afforded to them during the hearing and that the Board erroneously admitted an exhibit into evidence which, as noted below, is an issue which we review in teacher termination hearings in the context of due process.

(a) Due Process Generally

Among the plaintiffs' due process arguments, the plaintiffs assert that the court failed to find that the Board erred by placing on the plaintiffs the burden of proving comparability of observations of other teachers, including OST teachers. We are unable to discern exactly what due process violation the plaintiffs believe occurred in this case, although it appears that they are asserting that the Board somehow impermissibly shifted the burden of proof to them during the hearing by allowing a compilation exhibit, exhibit 11, which will be discussed in more detail below, into evidence without requiring the College to also offer into evidence the underlying teacher evaluations, which results are compiled on exhibit 11.

[4,5] As a prerequisite to terminating the employment of an employee with a property right in continued employment, the employer must provide notice and an opportunity for a hearing appropriate to the nature of the case. *Unland v. City of Lincoln*, 247 Neb. 837, 530 N.W.2d 624 (1995). Before termination of employment, an employee with a property right in continued employment must be given oral or written notice of the basis for the termination, an explanation of the employer's evidence, and an opportunity to present his or her side of the story. *Id.* See, also, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). All process that is due such an employee is provided by a pretermination hearing at which the employee has an opportunity to respond, coupled with posttermination procedures for review. *Id.*; *Unland, supra.*

In the present case, the plaintiffs do not specifically challenge any of these principles. No dispute concerning the notice provided is present in the record below or in the briefs on appeal. It appears as if the plaintiffs are somehow alleging that they were not afforded an adequate opportunity to present their side of the story because of some improper shifting of the burden of proof.

Our review of the record indicates that the Board hearing officer, at the outset of the hearing, indicated that the burden of proof would be on the College throughout the proceedings. A review of the proceedings indicates that such remained the case

throughout the hearing, and the burden was never shifted to the employees. Although there may have been evidence which would have been favorable to these employees in arguing that their employment was being improperly selected for termination, requiring them to produce such evidence does not effect an improper shifting of the burden of proof. Rather, it reflects the reality that once the College succeeded in demonstrating that there was a reasonable need for a reduction in force, that the RIF policy was followed, and that the policy reasonably resulted in these plaintiffs' employment being selected for termination, then the College had satisfied its burden of proof. The plaintiffs were then allowed to present any evidence on their own behalf.

The plaintiffs received sufficient notice, and they were afforded a hearing. At the hearing, the plaintiffs had the opportunity to question witnesses, to challenge the testimony and evidence presented by those witnesses, to call witnesses on their own behalf, to present evidence on their own behalf, and to argue their case to the Board. The record before us does not support an allegation that the plaintiffs' due process rights were infringed, and their assertions in this regard are without merit.

(b) Admission of Exhibit 11

On appeal, the plaintiffs all contend that the Board erroneously received exhibit 11 without adequate foundation. Exhibit 11 is a summary of the process by which the College determined which three OST faculty members were to be the subjects in the reduction in force. It contains a compilation of the results of the evaluations used to rank the OST faculty members and a ranking of the four faculty members who fell below the midpoint based on their scores in the categories of level of placement, diversity, and length of full-time service. We note that the underlying evaluations were not offered by either the plaintiffs or the College or admitted into evidence.

[6] Within the context of the review of a school board hearing regarding the termination of employment of a teacher for just cause, the Nebraska Supreme Court stated: "Although strict adherence to the rules of evidence cannot be demanded or even expected at a hearing before a school board . . . the basic prin-

ciples of due process demand that hearsay statements of students be given little, if any, weight." *Hollingsworth v. Board of Education*, 208 Neb. 350, 360, 303 N.W.2d 506, 512 (1981). Therefore, it appears that due process principles rather than the rules of evidence apply at hearings such as the one on review here. As discussed above, due process at such hearings requires that the teacher be provided with an opportunity to present his or her side of the story. See, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985); *Unland v. City of Lincoln*, 247 Neb. 837, 530 N.W.2d 624 (1995).

In the case before us, the plaintiffs' objections at the hearing concerned "foundation" for the exhibit. The plaintiffs apparently contended below that foundation was lacking regarding the data compiled from the evaluations. However, the record before us shows that Wild testified regarding the manner in which the evaluations were completed. Furthermore, the record shows that the plaintiffs were provided copies of the evaluations prior to the hearing and had an opportunity at the hearing to challenge the accuracy of the data on the exhibit or offer any evidence they wished to concerning the evaluations. In fact, the plaintiffs successfully demonstrated the inaccuracy of one figure on the exhibit during the hearing. Because the plaintiffs were provided adequate notice, discovery, and an opportunity to challenge the exhibit, we conclude that there was adequate foundation for the admission of this exhibit to comport with due process. See *Hollingsworth, supra*. See, generally, Neb. Rev. Stat. § 27-1006 (Reissue 1995) (providing that summaries may be used to present contents of voluminous documents which cannot be conveniently examined in court so long as underlying documents are made available to other parties).

V. CONCLUSION

The record in the present case indicates that the Board acted within its jurisdiction and that there was sufficient competent evidence as a matter of law to support the Board's decision. Finding no merit to any of the plaintiffs' assignments of error, we affirm.

AFFIRMED.

IN RE INTEREST OF LAURA O. AND JOSHUA O., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. CARL O., APPELLANT.

574 N.W.2d 776

Filed February 24, 1998. No. A-97-548.

1. **Parental Rights: 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 trial court's findings.
2. **Jurisdiction: Appeal and Error.** It not only is within the power but is the duty of an appellate court to determine on its own motion whether it has jurisdiction over the matter before it.
3. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
4. **Juvenile Courts: Parental Rights: Appeal and Error.** A juvenile review panel shall review a disposition of a court when the court makes an order directing the implementation of a plan different from the plan prepared by the Department of Health and Human Services concerning the care, placement, or services to be provided to the juvenile and the department or any other party believes that the court's order is not in the best interests of the juvenile.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH G. CRNKOVICH, Judge. Appeal dismissed.

Phillip G. Wright, of Quinn & Wright, for appellant.

James S. Jansen, Douglas County Attorney, and Timothy K. Dolan for appellee.

MILLER-LERMAN, Chief Judge, and IRWIN and SIEVERS, Judges.

MILLER-LERMAN, Chief Judge.

Carl O. appeals an April 21, 1997, dispositional order of the Douglas County Separate Juvenile Court denying him visitation with his two minor children, Laura O. and Joshua O. The court had previously adjudicated the children to be within the court's jurisdiction pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1996) based on, inter alia, an admission by Carl that the children lacked proper parental care because of his use of alcohol and controlled substances. At the disposition hearing of April 14, 1997, the Nebraska Department of Health and Human Services (DHHS) proposed a plan of reunification in which, inter alia, Carl would be allowed supervised visitation with the

children. The court generally adopted the plan, except that it ordered that no visitation occur. From that ruling, Carl appeals. For the reasons recited below, we dismiss the appeal.

BACKGROUND

Carl is the father of two children, Laura and Joshua, who were 8 and 7 years of age, respectively, at the time of the dispositional order. Although married to the children's mother, Mary Ann O., Carl was separated from her and was living apart from the children and Mary Ann in May 1996 when an amended petition for adjudication was filed in the juvenile court. The amended petition alleged that Laura and Joshua lacked proper parental care by reason of the faults and habits of Carl and Mary Ann, including Carl's and Mary Ann's alcohol and controlled substance abuse. Separate counsel represented Carl and Mary Ann at all phases of the juvenile court proceedings. Claims pertaining to Mary Ann are not at issue in this appeal.

Carl admitted that the children lacked proper parental care as alleged in the amended petition, and he did not contest the court's assumption of jurisdiction over the children. The court ordered the children to be placed in the custody of DHHS (at that time, the Nebraska Department of Social Services), which placed the children together in the care of a foster family. In its temporary order of May 14, 1996, the juvenile court ordered that Carl could have weekly supervised visitation with the children.

During their placement in foster care, both of the children received psychological counseling. Further, Laura underwent corrective surgery on her feet relating to Friedreich's ataxia, a serious type of muscular dystrophy with which Laura is afflicted to such an extent that she must use a motorized cart for ambulation at school.

On January 3, 1997, the guardian ad litem moved the court for an order terminating Carl's visitation with Joshua and Laura. In his motion, the guardian ad litem cited reports by the visitation specialist that during the visits Carl acted disruptively and inappropriately, including whispering to the children that he could take them from foster care at will. The guardian ad litem alleged that the children were apprehensive and fearful as a result of Carl's behavior. The guardian ad litem withdrew his

motion upon Carl's admission that because of his behavior, Joshua and Laura lacked proper parental care, and upon Carl's agreement to abide by the rules of visitation.

In an interim report on the children's status filed with the juvenile court on March 14, 1997, the guardian ad litem stated that "[t]he children have expressed their fear of Carl and they do not especially care for these visitations. However they are torn between their love and duty towards their father and the fear they have of him."

At the disposition hearing of April 14, 1997, DHHS caseworker Josephine Glass testified generally that both Laura and Joshua continually expressed great anxiety regarding the visits and, in some instances, refused to participate in them. According to Glass, both children said they feared their father and requested that at least one and preferably two additional persons (at least one of whom was male) be present during the visits to prevent physical harm from Carl. The evidence also shows that Carl whispered to the children so that the attending visitation supervisor could not hear his comments. According to Glass, Laura and Joshua were agitated by Carl's visits. Their feelings were not soothed by gifts, which Carl left for the children on the doorstep of the foster family's home despite being directed by Glass not to do so.

As noted above, the DHHS case plan for the children presented to the juvenile court provided for supervised visitation by Carl, although not without reservation. In contrast, Carl testified that he did not believe that his children feared him, urging that unsupervised visitation was appropriate and implying that such visitation was in the children's best interests. Further, notwithstanding his prior admissions that Laura and Joshua lacked proper parental care because of his behavior, Carl asserted at the hearing that his past actions, such as pawning the motorized cart upon which Laura depended for ambulation at school due to her muscular dystrophy, were not inappropriate.

In its dispositional order of April 21, 1997, the juvenile court generally adopted the plan proposed by DHHS; however, it ruled that Carl should be precluded from visitation with Laura and Joshua. For the sake of completeness, we note that the juvenile court also stated that Carl could later petition that court for

amendment of the visitation order during or before the scheduled periodic juvenile court review hearing. Carl appeals from the order precluding visitation but otherwise adopting the plan proposed by DHHS.

ASSIGNMENTS OF ERROR

Carl claims that the juvenile court abused its discretion in denying him visitation with his children and that the juvenile court was without jurisdiction to enter the order.

STANDARD OF REVIEW

[1-3] Juvenile cases 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 re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). It not only is within the power but is the duty of an appellate court to determine on its own motion whether it has jurisdiction over the matter before it. *Trew v. Trew*, 252 Neb. 555, 567 N.W.2d 284 (1997). Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997).

ANALYSIS

It is axiomatic that the issue of parental visitation rights is included within the Nebraska Juvenile Code and is subject to judicial determination. "The rule that custody and visitation of minor children are to be determined on the basis of their best interests 'clearly envisions an independent inquiry by the court.' " *In re Interest of Teela H.*, 3 Neb. App. 604, 610, 529 N.W.2d 134, 138 (1995). Recognizing the importance of prompt review when there is a dispute regarding a plan of care for children under the court's juvenile jurisdiction, the Nebraska Unicameral in 1989 enacted legislation to create juvenile review panels to hear, on an expedited basis, appeals by DHHS (at that time, the Nebraska Department of Social Services) and other parties who disagree with court orders which deviate from the case plans recommended by DHHS. See Neb. Rev. Stat. §§ 43-287.01 through 43-287.06 (Reissue 1993 & Cum. Supp. 1996).

[4] Section 43-287.03 provides:

> A juvenile review panel shall review a disposition of a court when the court makes an order directing the implementation of a plan different from the plan prepared by the Department of Health and Human Services concerning the care, placement, or services to be provided to the juvenile and the department or any other party believes that the court's order is not in the best interests of the juvenile.

It is well established in Nebraska jurisprudence that §§ 43-287.01 through 43-287.06 provide the exclusive means of review for juvenile court dispositional orders within the ambit of the expedited appeal process defined within those statutes. *In re Interest of Jeffrey R.*, 251 Neb. 250, 557 N.W.2d 220 (1996). To determine if a matter falls within the expedited juvenile review panel process, a two-part analysis applies. First, the contested dispositional order must implement a different plan for the juvenile than the plan proposed by DHHS. Second, the appealing party must have a belief that the court-ordered plan is not in the best interests of the juvenile. See *In re Interest of Jeffrey R.*, *supra*.

In the instant case, the substance of Carl's appeal meets the two-part conjunctive requirements under the statutes and cases, and his appeal was, therefore, subject to the expedited review by a review panel. First, the record shows that the juvenile court did, in fact, enter a dispositional order which differed from the case plan recommended by DHHS regarding visitation, which disposition concerns the care, placement, or services to be provided to the juveniles. Second, it is Carl's belief, as expressed in his appeal to this court, that the plan ordered by the juvenile court denying Carl visitation with his children is not in the best interests of the children.

A review of the literature shows that prior Nebraska decisions interpreting the mandatory and exclusive nature of the juvenile review panel process have involved appeals by DHHS or its predecessor, the Nebraska Department of Social Services. See, *In re Interest of Jeffrey R.*, *supra*; *In re Interest of Alex T. et al.*, 248 Neb. 899, 540 N.W.2d 310 (1995); *In re Interest of M.J.B.*, 242 Neb. 671, 496 N.W.2d 495 (1993); *In re Interest of William H.*, 3 Neb. App. 869, 533 N.W.2d 670 (1995); *In re Interest of Kelly*

D., 3 Neb. App. 251, 526 N.W.2d 439 (1994); and *In re Interest of A.K.*, 2 Neb. App. 662, 513 N.W.2d 42 (1994).

Our review of the language of §§ 43-287.01 through 43-287.06 shows that the procedures, protections, and remedies provided therein apply to both DHHS and "any other party." The statutes refer to the rights of DHHS and "any other party" equally and uniformly for purposes of an appeal to a juvenile review panel. See, e.g., § 43-287.01 ("[i]t is the intent to allow such review only when . . . the department or any other party believes such court-ordered plan not to be in the best interests of the juvenile"); § 43-287.03 ("[a] juvenile review panel shall review a disposition of a court when the court makes an order . . . and the department or any other party believes that the court's order is not in the best interests of the juvenile"); § 43-287.04 ("[i]f the Department of Health and Human Services or any other party desires to have a disposition described in section 43-287.03 reviewed, the department or other party shall have ten days after disposition by the court to file a request for review by a juvenile review panel"); and § 43-287.06 ("[t]he Department of Health and Human Services or any other party may appeal from any final order or judgment entered by the juvenile review panel").

In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997).

The terms of §§ 43-287.01 through 43-287.06 are plain, direct, and unambiguous. These provisions make no relevant distinction between DHHS and "any other party" pertaining to appeals to a juvenile review panel. Given the clarity and directness of these statutory provisions and the general rule that courts will not search for hidden or tenuous meaning in unambiguous statutory language, it logically follows, and we so hold, that parties other than DHHS who appeal from a juvenile court dispositional order which deviates from the case plan recommended by DHHS are subject to the same juvenile review panel procedures and protections as DHHS.

In connection with his claim that the juvenile court adopted a plan that differed from that proposed by DHHS and that such ruling and plan so adopted are not in the best interests of Laura and Joshua, Carl, like DHHS and any other party to the juvenile court proceedings below, must present his appeal to a juvenile review panel as the exclusive forum to review a juvenile court's dispositional order which differs from a case plan recommended by DHHS concerning the care, placement, or services to be provided to a juvenile. We, therefore, conclude that this court has no jurisdiction to consider Carl's appeal of the juvenile court order which deviated from the DHHS plan and denied him visitation with Laura and Joshua.

CONCLUSION

This court is without jurisdiction to consider Carl's appeal. The proper and exclusive forum for Carl's appeal from the juvenile court dispositional order which deviates from the case plan recommended by DHHS is a juvenile review panel, pursuant to §§ 43-287.01 through 43-287.06. Therefore, this appeal is dismissed.

APPEAL DISMISSED.

IN RE INTEREST OF MICHAEL M., ALLEGED TO BE A MENTALLY ILL DANGEROUS PERSON. MICHAEL M., APPELLANT, V. MENTAL HEALTH BOARD OF THE SECOND JUDICIAL DISTRICT, APPELLEE.

574 N.W.2d 774

Filed February 24, 1998. No. A-97-648.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Statutes.** In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed as modified, and remanded with directions.

Thomas J. Garvey, Sarpy County Public Defender, and Gregory A. Pivovar for appellant.

No appearance for appellee.

HANNON, MUES, and INBODY, Judges.

INBODY, Judge.

INTRODUCTION

Michael M. appeals the district court's denial of his motion to seal the records of the appeal of his mental health commitment. For the reasons set forth herein, we affirm as modified, and remand with directions.

STATEMENT OF FACTS

On July 25, 1994, a mental health petition was filed by the Sarpy County Attorney's office against Michael M. After a hearing on August 4, the Mental Health Board of the Second Judicial District found Michael to be a mentally ill and dangerous person and confined him to the Norfolk Regional Center for treatment and continuing evaluation. Michael appealed that order to the Sarpy County District Court, which affirmed the decision of the board of mental health by written order filed on February 23, 1995.

On May 7, 1997, Michael filed a motion to seal the records of his appeal to the Sarpy County District Court. The motion referenced an attached affidavit and supporting materials and alleged that irreparable harm would occur if Michael's motion to seal was not granted. However, these documents were not offered into evidence at the hearing on Michael's motion to seal and therefore cannot be considered by this court. See *Leu v. Swenson*, 174 Neb. 591, 119 N.W.2d 68 (1962) (it is insufficient to attach affidavit to motion which is made part of transcript, and affidavits appearing in transcript cannot be considered by appellate court).

Following a hearing on Michael's motion to seal, at which time no evidence was adduced, the district court denied Michael's motion to seal. Michael then timely appealed the court's order to this court.

ASSIGNMENT OF ERROR

Michael's sole assigned error is that the district court erred in denying his motion to seal the records of his mental health appeal to the Sarpy County District Court.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *PLPSO v. Papillion/LaVista School Dist.*, 252 Neb. 308, 562 N.W.2d 335 (1997).

[2] In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *County of Seward v. Andelt*, 251 Neb. 713, 559 N.W.2d 465 (1997); *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997).

DISCUSSION

Michael's sole claim on appeal is that the district court erroneously denied his motion to seal the records of his mental health appeal. He contends that the confidentiality of mental health proceedings extends to appellate records of mental health proceedings.

The Nebraska Mental Health Commitment Act contains numerous references to the confidentiality of mental health proceedings and mental health records. One of the declared public policy purposes of the Nebraska Mental Health Commitment Act is that "all personal records required by the act shall be confidential except as otherwise specifically provided." Neb. Rev. Stat. § 83-1001 (Cum. Supp. 1996). Mental health board hearings are closed to the public except at the request of the subject. Neb. Rev. Stat. § 83-1055 (Reissue 1994). Further, the Nebraska Mental Health Commitment Act specifically sets forth the persons entitled to the records kept on a subject of a mental health petition. In Neb. Rev. Stat. § 83-1068 (Cum. Supp. 1996), the act provides in part:

> (1) All records kept on any subject of a petition shall remain confidential except as may be provided otherwise

> by law. Such records shall be accessible to (a) the subject except as provided in subsection (2) of this section, (b) the subject's counsel, (c) the subject's guardian if the subject is legally incompetent, (d) the mental health board having jurisdiction over the subject, (e) persons authorized by an order of a judge or court, (f) persons authorized by written permission of the subject, or (g) the Nebraska State Patrol or the Department of Public Institutions pursuant to section 69-2409.01.

Additionally, the Nebraska Mental Health Commitment Act provides for a criminal penalty for any person who willfully breaches the confidentiality of records as required by § 83-1068, in addition to any civil liability which may be incurred by such acts. Neb. Rev. Stat. § 83-1069 (Reissue 1994).

The subject of a mental health petition (or the county attorney) has the statutory right to appeal the mental health board's decision to the district court, which reviews the case de novo on the record. Neb. Rev. Stat. § 83-1043 (Reissue 1994). See *In re Interest of Rasmussen*, 236 Neb. 572, 462 N.W.2d 621 (1990) (district court's review of appeal from mental health board is de novo on record). The final judgment of the court shall be certified to and become a part of the records of the mental health board. § 83-1043.

We agree with Michael that the confidentiality of mental health proceedings should not be breached just because the subject elects to avail himself or herself of the statutory right to appeal the board of mental health's decision to the district court. The fact that the subject of a mental health petition takes advantage of his or her statutory right to appeal to the district court does not change the nature of the case, nor does it change the statutory requirements that the records on the subject of a mental health petition are to remain confidential. We do not comment on the confidentiality of cases once they are appealed to the Nebraska Court of Appeals, but we do note that, pursuant to § 83-1043, "[a] final order of the district court may be appealed to the Court of Appeals in accordance with the procedure in criminal cases."

However, Michael's motion did not request that his records remain confidential. He requested that the records be sealed. We

find no authority within the Nebraska Mental Health Commitment Act which would authorize that the records be sealed. Therefore, the district court correctly denied his motion to seal, and we must affirm the district court's decision.

However, we agree with Michael that records of mental health proceedings which are appealed to the district court are to remain confidential. From our review of the transcript, it appears that this case was originally filed with the clerk of the district court as MH 94-43, which would be part of the Mental Health Board of the Second Judicial District records and be confidential subject to the exceptions enunciated in § 83-1068. However, when the case was appealed to the district court on September 1, 1994, it was renumbered and may have been recorded on the district court's appearance docket and general index or other places available to the general public. If this took place, the records would no longer be confidential. Therefore, we remand this cause to the Sarpy County District Court with directions, if applicable, to remove any information concerning this matter from the Sarpy County District Court's appearance docket and general index and any other places that would violate the requirement of confidentiality. The entire file and all references thereto shall remain a part of the records of the Mental Health Board of the Second Judicial District and shall remain confidential subject to the exceptions enunciated in § 83-1068.

AFFIRMED AS MODIFIED, AND REMANDED WITH DIRECTIONS.

JAMES K. HAMMELMAN, APPELLEE, V. DREESEN ENTERPRISES, INC., AND FARM BUREAU INSURANCE CO., ITS WORKERS' COMPENSATION CARRIER, APPELLANTS.

575 N.W.2d 176

Filed February 24, 1998. No. A-97-750.

1. **Workers' Compensation: Appeal and Error.** Findings of fact made by a Workers' Compensation Court after review have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous.
2. **Workers' Compensation: Proof.** To recover compensation benefits, an injured worker is required to prove by competent medical testimony a causal connection between the alleged injury, the employment, and the disability.

3. **Workers' Compensation: Appeal and Error.** Causation in a workers' compensation case is a factual issue to be determined by the trier of fact, whose findings will not be set aside unless clearly erroneous.
4. ____: ____. When the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court.
5. **Workers' Compensation: Expert Witnesses.** The Workers' Compensation Court determines which, if any, of the expert witnesses to believe.
6. ____: ____. The sufficiency of an expert's opinion is to be judged in the context of the expert's entire statement.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Michael K. High, of Keating, O'Gara, Davis & Nedved, P.C., for appellants.

K. Kristen Newcomb and Jeffry D. Patterson, of Healey & Wieland Law Firm, for appellee.

HANNON, MUES, and INBODY, Judges.

HANNON, Judge.

Dreesen Enterprises, Inc., and Farm Bureau Insurance Co., its workers' compensation carrier, appeal from a decision of the Workers' Compensation Court review panel affirming the trial court's finding that James K. Hammelman's sinusitis was caused by his work-related accident. Dreesen and Farm Bureau argue there is insufficient evidence to support Hammelman's medical expert's opinion that Hammelman's chronic sinusitis was caused by a work-related accident in which he was involved. We conclude there is evidence which, if believed, is a sufficient foundation for the expert's opinion. We therefore affirm.

FACTS

On July 14, 1993, Hammelman was employed as a mechanic for Dreesen. While at work, Hammelman was struck in the face by a compressed coil spring as he installed a pair of struts on an automobile. Five of Hammelman's teeth were knocked out, and his upper jawbone was shattered. Two lacerations near Hammelman's eyebrow and left temple were cleaned and sutured by the emergency room doctor.

Hammelman testified that the emergency room doctor told him that his nose was broken, but "they [the doctor] did not do anything about it . . . he [the doctor] said it was nothing he would worry about." Hammelman also testified that after the accident, he had blood on his face above his left eye and he also had a nosebleed. Hammelman stated he had to pinch his nose to stop the bleeding.

The emergency room report described Hammelman's injuries, but made no mention of a broken nose. The report stated, "There is a lot of blood around the mouth but there is no blood in the nose. The nose is nontender." An x ray showed that the sinuses were clear at the time of the accident.

On July 13, 1994, approximately 1 year after the accident, Hammelman contacted Dr. Michael Rapp, an ear, nose, and throat surgeon, for sinus problems and nasal congestion. Hammelman testified he began having sinus problems after the accident, but he initially attributed this to swelling from the accident and later, to his dental surgery. Hammelman stated he has continually been congested from the time of the accident and now also suffers from headaches. Hammelman testified he had no sinus problems before the accident, with the exception of an occasional cold that would last up to a week. Hammelman also stated he had no previous problems with allergies, asthma, or hay fever.

In September 1994, Rapp ordered a computerized axial tomography (CAT) scan, which indicated that Hammelman was suffering from chronic sinusitis which was affecting the sinuses between his eyes. Rapp ordered additional CAT scans in January and March 1995. Rapp testified that all three consecutive scans showed that Hammelman suffered from chronic sinusitis, but the last two indicated the condition had improved. Rapp prescribed antibiotics and steroids to relieve Hammelman's symptoms. Rapp testified that Hammelman would use an antibiotic, improve, and then relapse. As a result, Rapp recommended endoscopic surgery.

During Rapp's deposition, the following exchange occurred regarding the causation of Hammelman's sinusitis:

> Q. . . . And can you explain why you believe that the injury was the basis for the cause, I guess, the cause of his chronic sinusitis?

A. Because of the time of the onset of his symptoms which occurred after the trauma.

Q. Okay.

A. He has stated each time I have ever asked him, and I really quizzed him hard in the beginning, he unequivocally stated that his symptoms came on after the trauma.

Rapp stated that he relies on the histories given by his patients unless he receives evidence or documents to the contrary.

Rapp was then asked: "[D]o you have an opinion within a reasonable degree of medical certainty whether the chronic sinusitis was caused by the accident of July 13th of '93?" Rapp responded: "Due to his history I feel that it [chronic sinusitis] is caused by the trauma [from the accident when he was hit with the spring]."

Dr. F. Edward Stivers, another ear, nose, and throat specialist, testified that Hammelman's sinusitis was not a result of the accident on July 14, 1993. Stivers opined that Hammelman probably suffered from sinusitis before his injury, but began to focus on his symptoms only after the injury occurred.

On August 15, 1996, Hammelman filed a petition with the Workers' Compensation Court alleging he had sustained a work-related injury and generally praying for workers' compensation benefits.

The Workers' Compensation Court found that Hammelman did not miss enough work to receive temporary total disability and that he could not receive permanent partial disability. Dreesen and Farm Bureau were ordered to continue to provide and pay the medical, hospital, and therapy bills as reasonably necessary due to the accident and injury. In addition, the order stated that future medical expenses included periodic cleaning, maintenance, and replacement of Hammelman's dental appliance as recommended by the treating oral surgeon or dentist. The court failed to specifically address the causation of Hammelman's sinusitis.

Dreesen and Farm Bureau appealed to the review panel, contending the trial court erred in failing to find whether the sinusitis and resulting medical expenses were caused by the injuries that occurred on July 14, 1993. The review panel affirmed the lower court's decision and stated: "Although the award of the

trial court is not as detailed as one would hope, the award is sufficiently clear that the trial court found the expenses for treatment . . . were related to the sinusitis which was caused by the July 14, 1993, accident." The review panel also stated that the record contained sufficient evidence to sustain a finding that the sinusitis and resultant medical treatment were related to the accident and injury of July 14.

ASSIGNMENT OF ERROR

Dreesen and Farm Bureau allege the review panel erred in finding there was sufficient evidence in the record to sustain a finding that Hammelman's sinusitis and the resultant medical treatment were causally connected to his injury of July 14, 1993.

STANDARD OF REVIEW

A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the judgment, order, or award; or (4) the findings of fact by the compensation court do not support the order or award. Neb. Rev. Stat. § 48-185 (Reissue 1993); *Kerkman v. Weidner Williams Roofing Co.*, 250 Neb. 70, 547 N.W.2d 152 (1996); *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996). In determining whether to affirm, modify, reverse, or set aside the judgment of the review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing. See *Pearson v. Lincoln Telephone Co.*, 2 Neb. App. 703, 513 N.W.2d 361 (1994).

[1] Findings of fact made by a Workers' Compensation Court after review have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous. *Kerkman, supra.* However, as in other cases, an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Berggren, supra.*

ANALYSIS

[2,3] To recover compensation benefits, an injured worker is required to prove by competent medical testimony a causal con-

nection between the alleged injury, the employment, and the disability. *Winn v. Geo. A. Hormel & Co.*, 252 Neb. 29, 560 N.W.2d 143 (1997). Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability. *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991); *Osborne v. Buck's Moving & Storage*, 232 Neb. 752, 441 N.W.2d 906 (1989). See, also, *Winn, supra*. Causation is a factual issue to be determined by the trier of fact, whose findings will not be set aside unless clearly erroneous. *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 558 N.W.2d 564 (1997).

[4,5] The trial judge chose to accept Rapp's opinion, rather than Stivers' opinion, regarding causation. When the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court. *Kerkman, supra; Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996). The Workers' Compensation Court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Kerkman, supra; Toombs v. Driver Mgmt., Inc.*, 248 Neb. 1016, 540 N.W.2d 592 (1995). The Nebraska Supreme Court has stated that the Workers' Compensation Court determines which, if any, of the expert witnesses to believe. *Surratt v. Watts Trucking*, 249 Neb. 35, 541 N.W.2d 41 (1995).

Dreesen and Farm Bureau contend that the trial court erred in finding sufficient evidence to support the determination that Hammelman's sinusitis was causally related to his July 14, 1993, injury. Specifically, Dreesen and Farm Bureau state that "[a]fter reviewing . . . Dr. Schlickmeier's radiology report, Dr. Rapp changed his opinion from one which was probable or certain to one which was possible." Brief for appellants at 9. This conclusion is based on the following testimony from Rapp: During his deposition, Rapp stated that blood in the sinuses can cause sinusitis. Rapp was then asked if his opinion regarding the causation of Hammelman's sinusitis would change after learning that a CAT scan taken the day of the accident showed no blood in the sinuses:

> Q. . . . And the fact that there wasn't any blood showing on that date of Dr. Schlickmeier's exam . . . doesn't change

your opinion, though, Dr. Rapp, that — the fact that that doesn't show any blood in his —

A. No, I still feel it's *possible*, and I still predicate that upon the history of the patient.

. . . .

Q. And but what — is it from the trauma, though, that causes it [the sinusitis] then? I guess that's what I want to be clear on.

A. If his septum was deviated at the time of the trauma, if there was any kind of displacement, it's all if, if, if. You guys are saying gee, what was it from the trauma that caused it. I can't tell you that. I don't know.

(Emphasis supplied.)

The crux of Dreesen and Farm Bureau's argument is that Rapp's opinion is without foundation because Rapp initially hypothesized that Hammelman's sinusitis was caused by the blood throughout his nose after the accident. Rapp was later informed that a CAT scan taken the day of the accident showed no blood in the sinuses. Even if Rapp's opinion is interpreted to mean he could not say with a reasonable degree of medical certainty that Hammelman's sinus problem was caused by the accident unless blood was in his nose immediately after the accident, we still think his opinion stands because there is evidence, if believed, which establishes that blood was present in Hammelman's nose after the accident. First, the medical history Hammelman gave to Rapp is good evidence of the fact he had blood in his nose, even if the Nebraska rules of evidence apply. See Neb. Rev. Stat. § 27-803(3) (Reissue 1995). Upon redirect examination, Rapp reaffirmed his opinion in spite of the conflicting evidence and stated, "I still predicate that [the presence of blood] upon the history of the patient." We believe that both Rapp and the trial court were entitled to believe this evidence. Second, Hammelman testified at trial that immediately after the accident he had a nosebleed and that he had to pinch his nose to stop it.

We recognize that the medical record prepared after the injury noted that "[t]here is a lot of blood around the mouth but there is no blood in the nose," and this impeaches the evidence. The evidence is also impeached by Hammelman's answer in a

patient questionnaire when he answered "No" to the query regarding "bleeding from the nose." Hammelman's evidence about the nosebleed is also contradicted to a degree by other observations of medical personnel at the time of treatment. However, none of this evidence is entitled to be believed as a matter of law. A dispute of fact is for the trial judge to resolve, and apparently he resolved it in Hammelman's favor. In so doing, the judge determined that Rapp's opinion has an adequate foundation.

When Rapp was confronted with a report from an examination showing no blood in Hammelman's nose and asked to explain his opinion in light thereof, Rapp finally stated, "My initial hypothesis was that it would have been blood but I don't know what it was that's caused this chronic sinusitis. All I can tell you is before the trauma it wasn't there." Dreesen and Farm Bureau argue that Rapp abandoned his opinion on causation by this statement. We believe that a more correct reading of Rapp's testimony is that if it is posited that Hammelman did not have a nosebleed at the time of the accident, Rapp did not know the cause of the sinusitis, but he did not relent on his opinion of causation because he accepted his patient's medical history as true.

[6] The sufficiency of an expert's opinion is to be judged in the context of the expert's entire statement. *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996); *Bernhardt v. County of Scotts Bluff*, 240 Neb. 423, 482 N.W.2d 262 (1992); *Morton v. Hunt Transp.*, 240 Neb. 63, 480 N.W.2d 217 (1992); *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991). A reading of Rapp's deposition in its entirety establishes that Rapp, at all times, believed that Hammelman's sinusitis was caused by his accident on July 14, 1993. Dreesen and Farm Bureau take the above-cited passages from Rapp's deposition out of context. Dreesen and Farm Bureau focus on the fact that Rapp was unable to identify the exact element of the injury or trauma which caused the sinusitis if Hammelman did not have a nosebleed after the accident. The trial court was not clearly erroneous in finding a causal connection between Hammelman's sinusitis and the injury of July 14, 1993, and thus, we affirm the review panel's affirmance of that decision.

AFFIRMED.

PHIL A. ANANIA, APPELLANT AND CROSS-APPELLEE, V. LINDA M. ANANIA, APPELLEE AND CROSS-APPELLANT.

576 N.W.2d 830

Filed March 3, 1998. No. A-96-894.

1. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Partnerships: Words and Phrases.** A partnership is an association of persons organized as a separate entity to carry on a business for profit.
4. **Property.** Voluntary payments for the benefit of another without a request cannot be recovered at law or ordinarily in equity, subject to the exceptions of mistake of law, coercion, or subsequent ratification by the party benefitted.
5. **Property: Claims.** The fact of a meretricious relationship does not bar claims to the property acquired during the period of such relationship where the claim is based on general principles of law without respect to a marital status.
6. **Joint Tenancy.** Joint tenants are seized of the whole estate and have an undivided share of the whole estate.
7. **Joint Tenancy: Presumptions.** The shares of interests of joint tenants are presumed equal.
8. **Trial: Expert Witnesses.** Triers of fact are not required to take opinions of experts as binding upon them.
9. ____: ____. The determination of the weight that should be given expert testimony is uniquely within the province of the fact finder.
10. **Partition: Joint Tenancy.** Joint tenancy may be terminated or severed by any act which destroys one or more of its unities and may also be severed by the act of joint tenants in destroying unity of possession, as by partition.
11. ____: ____. One common owner of property may partition the property as provided by Neb. Rev. Stat. §§ 25-2170 through 25-21,111 (Reissue 1995).
12. **Attorney Fees.** It is the practice in this state to allow recovery of attorney fees only in such cases as are provided for by statute or where the uniform course of procedure has been to allow recovery of fees.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed as modified.

Steven J. Lefler, of Lefler & Franklin Law Office, for appellant.

James T. Boler, of Moore, Boler & McDermott, P.C., for appellee.

HANNON, MUES, and INBODY, Judges.

HANNON, Judge.

Phil A. Anania and Linda M. Anania lived in a meretricious relationship for many years after their marriage was dissolved and, while doing so, bought a home in which they and their children lived. After the children went away to college, Phil brought this action seeking to have the court compel Linda to vacate the home and to quitclaim any interest she might have in that home to him. Linda counterclaimed, praying for an order determining her interest in the home and requiring Phil to pay her the value of that interest. The trial court determined that the value of Linda's interest was $21,036.66 and that she should have a lien in that amount, plus interest. The court ordered that if Phil did not satisfy Linda's lien in full by a certain date, the property was to be listed and sold.

Phil appealed, alleging that the trial court erred in finding that Linda had an interest in the home, in determining the fair market value of the home, and in failing to give him credit for the downpayment he made. We conclude that the parties were incorrect in trying the case as a marriage dissolution action, that the case must be tried on the basis of real estate law, and that, after a de novo review, the trial court did not abuse its discretion. We therefore affirm. However, we do modify that part of the order which requires the home to be listed and sold if Phil does not satisfy Linda's lien to provide that Linda shall have a judgment lien in the amount of $21,036.66, plus interest, which may be enforced as a judgment as provided by law.

PLEADINGS

In his petition, Phil alleged that after the parties had been divorced, they continued to live together to provide a "stable family home for the minor children"; that he purchased a home in which the parties and the children lived; that both parties purchased furniture, household goods, and vehicles; and that both parties incurred debts. He further alleged that the children had become emancipated and that he desired to become physically separated from Linda, to remain in the home which he purchased, to have Linda removed from the home, to have Linda be

held responsible for her own debts, and to have Linda sign a quitclaim deed transferring her interest in the property to him. He additionally alleged that Linda had taken "certain personal items," which he desired to be returned to him. However, Phil did not describe or identify those items.

Phil prayed for an order compelling Linda to vacate the home, to sign a quitclaim deed transferring her interest in the property to him, and to take her physical possessions with her when she vacated the home. He also prayed for an order requiring both parties to be responsible for their own debts and for "temporary and restraining orders preventing [Linda] from transferring, encumbering, hypothecating, concealing, destroying or otherwise disposing of any real and personal property."

In her answer, Linda admitted that they had formerly been married but otherwise denied the allegations. Linda also filed a counterclaim alleging that the parties had divorced on August 3, 1983; that they continued to reside in their home until June 8, 1990, when they sold it; that on June 19, 1990, they acquired the home now in dispute; that pursuant to an "agreement" between them, the new home was to "take the place of the prior family residence"; that she paid for improvements and repairs to the home; and that she supplied a substantial number of hours of labor painting and refurbishing the home. She also alleged that since June 1990, pursuant to the parties' agreement, she has paid for food, furnishings, the majority of the costs of tuition and clothing for their children, and all other family expenses other than mortgage payments and utilities. Linda prayed for an order determining the value of the home and "other assets of the parties," determining each party's interest in the property, and requiring Phil to pay her the value of her interest in such property. Phil generally denied each of Linda's allegations.

SUMMARY OF RELEVANT EVIDENCE

The parties married in 1975 and divorced in 1983. In the divorce decree, Linda was awarded physical possession of the parties' twin children, date of birth February 29, 1976, and Phil was ordered to pay child support. After the divorce, the parties continued to live together as though married. In 1984, the court modified the decree by awarding the parties joint custody,

with possession in Linda. The modification order also provided that child support payments were to stop and that the parties were "jointly responsible for all of the financial needs" of the children.

The record reveals that both parties had separate jobs and incomes. They kept their money, automobiles, and all property separate, except for the home and perhaps its furnishings. They do not agree on what expenses each of them had agreed to pay or, in fact, did pay toward the support of the children and the household. Phil testified that they agreed that she would buy the family's groceries and other incidentals and that he would make all other major payments, including house mortgage payments, utilities, and "most of the large cash purchases." Phil stated that they had agreed that she would buy anything under $75 and that he would buy anything over $100. Linda testified that although Phil paid the house payments and utilities, she paid for other home improvements, maintenance, expenses for the children, clothing, and food. There is no testimony establishing that either party ever demanded reimbursement for any expenses he or she paid. However, the record does establish that the parties gave each other gifts and maintained the appearance of still being married before their children, family, friends, and business associates.

After the divorce, the parties continued to live in the marital home until 1990, when they sold it and equally divided the equity of approximately $15,000. The parties then bought and moved into the home which is the subject of this action. It is clear that both parties regarded the new home as a desirable improvement in the family's living arrangement. The parties agreed on its purchase, and the home was conveyed to them as joint tenants with rights of survivorship. The evidence does not establish the cost of the new home with the clarity that such facts are usually established; however, it was, according to Phil, approximately $149,300. Phil paid the $46,175.22 needed as a downpayment and for closing costs. The balance of the purchase price was financed by a mortgage on the home, which both of them signed. The evidence does not show the amount of that mortgage, but it would necessarily have been approxi-

mately $103,000. Phil also paid all of the monthly mortgage payments and the insurance premiums on the home.

Phil testified that when they were

> in front of a realtor signing agreements [to purchase the home] I said to [Linda] I would really like to enter the same type of agreement that Rose and I and Tom and I had. And, in fact, the fact I'm putting down $50,000 now for this, and for any reason we try to sell this place, I'd like my $50,000 back. And if there's any equities left, then we'll split it. And she said, fine. It wouldn't be any problem.

On the other hand, Linda testified that she and Phil never discussed what would happen upon the sale of the property.

Linda testified that the home was an older one which they recognized needed refurbishing and decorating to their tastes and that she agreed to supply the money or labor to do so. Linda's evidence shows that shortly after the home was purchased, she spent $2,955.20 for floor refinishing, approximately $1,290 for floor coverings, $1,650 for exterior painting, $1,954 for window coverings and blinds, $675.99 for landscaping, and $6,848 for the installation of an outdoor spa. She testified that she did a great deal of the work, such as painting, removal of wallpaper, and landscaping herself.

Phil testified that he also generally improved the real estate and made major repairs, but he did not identify such improvements or repairs. In July 1991, Phil added on to the house, which increased the size of the living room. This addition cost $10,860, and he paid for it by placing a second mortgage on the home. The evidence shows that on August 7, 1991, the parties borrowed $13,170.52 at 12.29-percent interest, which was payable in 96 installments of $215.50, commencing on September 2, 1991, to finance this addition. Phil further testified that approximately 3 years before trial, he refinanced the mortgage to pay for the addition and to obtain a more favorable interest rate on the mortgages. He testified that he alone signed the 1993 mortgage, but the record shows neither the amount nor the terms of the mortgage. The evidence does, however, establish that as of February 29, 1996, the unpaid principal of the mortgage was $117,389.44, and the accrued interest was $1,407.23. Including a facsimile fee of $20, the unpaid balance was

$118,816.67, which was accruing interest at an annual rate of 7.5 percent.

In August 1994, the parties' twins left home for college. The following January, Phil's attorney mailed Linda a letter requesting that she leave the home. Phil filed this action on January 27, 1995, and Linda left the home in April 1995.

At trial, Phil opined that the home's market value was $149,000. He agreed that he was asking the court to "affirm the original agreement," that is, after he gets his $46,000 downpayment back, they split any equity "50/50." However, he maintained that after the $46,175.22 and the $118,816.67 mortgage were deducted from the fair market value, there was no remaining equity in the property. Phil further maintained that he should be credited for the possessions that Linda took from inside the home if the court found that Linda had some equity in the property. Linda opined that the home was worth $185,000. Daniel L. Wilder, a professional real estate appraiser, appraised the home at $163,000, and Patrick Morrissey, also a professional real estate appraiser, appraised it at $175,000.

Both parties also introduced summaries of the expenditures they claimed to have made to support the household and the children since 1990, as well as before. Under the pleadings, such evidence is of doubtful relevance, and under the law as we understand it, and as set forth below, such evidence is clearly irrelevant. Therefore, we shall not summarize the voluminous and detailed expenditures each party claims to have made to support the household, to maintain the home, and to support each other and their children. Additionally, Phil introduced evidence of his property which he claims Linda either converted or damaged. Such claims would sound in tort for conversion. Under the pleadings, this evidence is also irrelevant, and therefore, it too is not summarized.

TRIAL COURT'S DECISION

After a long trial, the trial court made numerous specific findings about the history of the parties' relationship. The court found that the home "was titled jointly" and was worth $173,000. Apparently, to dispose of the voluminous evidence which we referred to above and did not summarize, the court

found that the parties had "operated as general partners of a partnership in the operation of the family type residence. All of the contributions made by each, whether in cash or in kind, were treated by the partners, as equal inputs, and they are equal share owners."

The court also found the following values:

Value of home	$173,000.00
Mortgage payout	118,816.67
Net value	$ 54,183.33
Assumed 7 percent sales commission	12,110.00
Net value to parties	$ 42,073.33

The court, recognizing that Phil wanted the house and that Linda did not, ordered that (1) Phil be declared the sole owner of the property; (2) Phil's ownership was subject to Linda's lien of $21,036.66, accruing interest at 8.5 percent per annum as of April 1, 1995; (3) Phil shall satisfy Linda's lien in full on or before April 1, 1997; and (4) if Phil fails to pay Linda's lien in full by April 1, 1997, the property shall be listed and sold, with the proceeds being used to satisfy Linda's lien.

ASSIGNMENTS OF ERROR

Phil alleges the trial court erred in (1) determining the value of the real estate, (2) failing to give him credit for the down-payment on the real estate, (3) determining that the parties were equal shareholders in the real estate, and (4) awarding Linda a lien of $21,036.66. Linda cross-appealed, but the only error she assigned was the trial court's failure to award her attorney fees.

STANDARD OF REVIEW

[1] In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Bauermeister v. McReynolds*, 253 Neb. 554, 571 N.W.2d 79 (1997).

[2] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Fales v. Books*, 253 Neb. 491, 570 N.W.2d 841 (1997).

ANALYSIS

[3] We disagree with the trial court's determination that the parties' arrangement was a partnership. As defined by statute, a partnership "is an association of persons organized as a separate entity to carry on a business for profit . . . ." Neb. Rev. Stat. § 67-306(1) (Reissue 1996). That clearly is not the case here.

The parties' evidence and arguments demonstrate that they base their respective positions on marriage dissolution principles. In his brief, Phil recognizes that dissolution of marriage cases are not directly on point. However, such cases are the only ones he cites in support of his position. The cases cited by Linda in support of the trial court's decision are also dissolution of marriage cases.

It is self-evident that no judge can study a history of a family's household expenses and its activities and subsequently determine which party got the best of the arrangement and which party is therefore indebted to the other and to what extent. Even a divorce court does not pretend to engage in such an exercise.

[4] In the instant case, the parties' payments were made either pursuant to their individual understandings of their "agreement" or as voluntary contributions to the household. Payments made pursuant to the agreement merely satisfied the agreement, and thus reimbursement by way of a greater claim to the house cannot now be sought. Moreover, voluntary payments for the benefit of another without a request cannot be recovered at law or ordinarily in equity, subject to the exceptions of mistake of law, coercion, or subsequent ratification by the party benefitted. 42 C.J.S. *Implied Contracts* § 8 (1991). Both parties attempted to build a case by showing that they had contributed more to the living arrangement than the other and arguing that they should therefore be given a greater interest in the real estate in which they both held title. Except for some general principles gleaned from marriage dissolution case law, neither party produced any authority to support such a theory.

[5] Our analysis of this case must begin with a recognition that the parties were not married. However, that does not necessarily bar either party's claims. The rule is as follows:

> "[T]he fact of a meretricious relationship does not bar claims to the property acquired during the period of such

> relationship, where the claim is based on general principles of law without respect to a marital status; the fact that the parties have engaged in an illicit relationship does not bar either party from asserting against the other such property claims as would be otherwise enforceable."

Abramson v. Abramson, 161 Neb. 782, 792, 74 N.W.2d 919, 927 (1956). See, also, *Ropken v. Ropken*, 169 Neb. 352, 99 N.W.2d 480 (1959). We now analyze the record under general principles of property law.

Failure to Give Credit for Downpayment.

[6,7] Before addressing Phil's argument, it is necessary to determine ownership of the home. The home was conveyed to the parties as joint tenants with rights of survivorship. The deed in no way indicated the property was deeded to the parties other than equally. Joint tenants are seized of the whole estate and have an undivided share of the whole estate. *Jindra v. Clayton*, 247 Neb. 597, 529 N.W.2d 523 (1995). The shares of interests of joint tenants are presumed equal. *Id.* There is no evidence to rebut the presumption that Phil intended that the property be other than in joint tenancy with rights of survivorship, because Phil testified that he had it so conveyed so that Linda and the twins would have a home if he died. Phil's testimony that Linda had agreed to reimburse him for the downpayment he supplied upon sale clearly establishes that Phil and Linda had equal interests in the home. That is not to say that Phil's claim is invalid or ineffective but only that his testimony established that the property was owned as joint tenants. Furthermore, at trial, Phil testified that after he recovered his downpayment, the equity should be split equally. Clearly, the parties owned the property as joint tenants.

If Phil's version of the facts are accepted, then when the parties bought the home, Linda agreed that when they sold the home, Phil would receive the $46,175.22 that he supplied for the downpayment and that the balance of their equity would be split equally. This agreement, if made, would not have given Phil a greater than 50-percent interest in the home, but, rather, it would have given him a promise that when the home was sold, he would get his downpayment back. The house has yet to

be sold, so he would not be entitled to his money back. Linda denies that any such agreement was made. The trial court did not make a specific finding on this factual dispute, but a finding that the agreement did not exist probably inheres in its general finding that the parties' contributions were equal.

We observe that Phil's petition conflicts with his testimony that the parties purchased the home with his money under an agreement that he would be repaid when the house was sold. In his petition, Phil sought complete ownership of the home and did not seek to have the agreement enforced. In addition, immediately after the home was purchased, Linda spent several thousand dollars and a great deal of personal effort improving the home. If Phil had extracted a promise from Linda to recover his investment in the home, one would expect Linda to have demanded the same protection for her investment, especially when the evidence shows that the parties expected Linda to commence the improvements immediately after the purchase of the home. Upon both the findings made by the trial court and our own findings, we determine that at the time the home was purchased, the parties did not agree that Phil would be reimbursed for the downpayment when the home was sold. We therefore conclude the trial court did not err in failing to give Phil credit for the downpayment.

Determination That Parties Had Equal Share in Home.

Phil bases his argument that the trial court erred in determining that the parties were equal shareholders of the real estate upon the fact that (1) he made the downpayment, (2) he paid more of the household expenses than Linda, and (3) he contributed $22,519.08 for improvements, including between $10,860 and $13,170.52 for an addition. The first two have been rejected above. Except for the addition, the evidence of the improvements made by Phil is sketchy and not well supported. The addition was financed by a second mortgage, which upon refinancing found its way into the $118,000 mortgage balance that the trial court subtracted from the value of the home to arrive at the value of Linda's interest. In effect, Linda is therefore paying for one-half of the addition. The evidence additionally shows that Linda also made improvements on the property.

However, except for the spa, the only evidence on the improvements are their costs. Moreover, there is no evidence showing the amount by which any of the claimed improvements, other than the spa, enhanced the value of the home. The real estate appraisers did testify that the spa increased the value of the property by $500 or $1,000. But the court did not separately address this issue, and neither party argues error in connection therewith.

We realize that it is possible for cotenants of real estate to base claims against other cotenants of the same property upon theories other than those we have discussed. See, e.g., 48A C.J.S. *Joint Tenancy* § 25a (1981); *Giles v. Sheridan*, 179 Neb. 257, 137 N.W.2d 828 (1965). However, neither party pled facts which would justify additional relief under other principles of law, nor have they argued any such matters in this court. Instead, the parties chose to litigate the equities between them as though the court was dissolving their marriage. Accordingly, we have not considered possible claims under other theories.

Determination of Value of Real Estate.

The trial court determined the real estate to have a fair market value of $173,000, despite the fact that one expert appraiser opined its value to be $163,000 and another $175,000. Both experts were well qualified with excellent credentials. Phil argues the trial court should have split the difference. We are of the opinion that while the true value of property in litigation can be halfway between the values found by appraisers, all too frequently splitting the difference between values arrived at by experts represents an abandonment of responsibility by the fact finder. It is similar to a jury rendering a quotient verdict or a judge using a coin to determine a difficult fact question.

Phil also argues that the $175,000 value represents a value based on square footage which includes the addition he placed on the house. An excerpt from Phil's brief reads: "It is apparent that he is getting penalized two time[s]: (1) because of his dollars, he paid for an addition that increased the square footage which increased the equity; (2) he doesn't have returned to him his money which increased the square footage." Brief for appellant at 9. This argument is premised on a misunderstanding of

the record and the court's order. The record shows the additional cost of $10,860, which was financed by a second mortgage on the home and which was included in the new mortgage when the old mortgages were refinanced in 1993. The mortgage balance of $118,816.67 is more than sufficient to include the balance of the original mortgage and the $10,860 paid for the addition. These figures show that Linda effectively paid for one-half of the addition and that the addition was properly included when the home was valued.

In our de novo review of the facts, we observe that two well-qualified experts thoroughly investigated the facts bearing on the value of the home. They obtained information on sales of houses they thought to be comparable and other relevant information in the usual way. They disagreed on which comparables to use, how to handle them, and their significance. But the work of both appraisers was reasonable, and their opinions were well supported.

[8,9] Triers of fact are not required to take opinions of experts as binding upon them. *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996). The determination of the weight that should be given expert testimony is uniquely within the province of the fact finder. *Id.*

We are in the same position as the Nebraska Supreme Court was in the case of *Shald v. Shald*, 216 Neb. 897, 346 N.W.2d 406 (1984), where the parties' three appraisers differed on the value of certain real estate. The trial court used a figure between the high and the low figure. The Supreme Court, deferring to the trial court's discretion, could not say that the trial court had erred in the value it placed on the real estate. Neither can we do so in the case at hand.

General Considerations.

In his petition, Phil alleged only that he "purchased" the home and that he desired to become physically separated from Linda and to remain in the home. Apparently, on the strength of these allegations, Phil asked the court to require Linda to quitclaim the home to him. Neither the allegations in the petition nor the evidence could justify Phil's requested relief. On the other hand, Linda prayed for a determination of each party's

interest and for an order requiring Phil to pay her the value of her interest. The trial court essentially granted her requested relief. We are therefore concerned about whether or not the court had the authority to issue such an order. Specifically, we are concerned with whether or not a court can, in cases other than marital dissolution cases, order one coowner to pay another coowner for his/her share of the property without requiring a sale of the property.

[10,11] The property was held in joint tenancy. Joint tenancy may be terminated or severed by any act which destroys one or more of its unities and may also be severed by the act of joint tenants in destroying unity of possession, as by partition. *Yunghans v. O'Toole*, 199 Neb. 317, 258 N.W.2d 810 (1977). One common owner of property may partition the property as provided by Neb. Rev. Stat. §§ 25-2170 through 25-21,111 (Reissue 1995), but that procedure contemplates that the real estate may be divided, if possible, or otherwise sold in a judicial sale. Neither party sought partition by sale or in kind. Instead, the parties and the trial court referred to this action as a quiet title action. Neb. Rev. Stat. § 25-21,112 (Reissue 1995), which provides for quiet title actions by persons claiming title against persons who claim or apparently have an adverse estate or interest, is of no relevance here.

Some guidance is, however, provided by *Lynch v. Lynch*, 18 Neb. 586, 26 N.W. 390 (1886), where the Nebraska Supreme Court affirmed an order in a partition action, attaching an interest of one coowner that was too small to be divided to the interest of another coowner and ordering the latter owner to pay cash for the determined value of the small interest. The court found that a division could not be made "without great prejudice" to the owner of the small interest and that because the owner of the other interest did not object to the attachment, the consideration for the property was "properly made a lien on the portion of the lot assigned to him." *Id.* at 592, 26 N.W. at 393.

In the case at hand, Linda received the relief that she sought, and Phil, with the exception that he was ordered to pay Linda the value of her interest, also received what he asked for, the house. While Phil does assign as errors the trial court's determinations that Linda had an interest and the value of her inter-

est, he does not specifically object to the manner in which the court ordered him to compensate Linda for her share of the house. It is clear that if the court was to find that Linda had an interest, Phil did not want the house sold in partition. Therefore, on the basis of the *Lynch* case and the fact that both parties have essentially consented to the procedure by which their respective interests in the home were to be split, we conclude that the trial court could properly require Phil to pay Linda's interest.

However, in addition, the court's order provided that if Phil did not pay the lien by April 1, 1997, the property would be listed and sold. We realize that this procedure is followed in some dissolution cases; however, we can find no statute or case law which authorizes a court to require real estate to be listed and sold as a means of enforcing a lien. We believe our statutes, Neb. Rev. Stat. ch. 25, art. 15 (Reissue 1995), provide the correct procedure for the enforcement of a lien against property, and in this case there is no reason why that procedure should not be followed. We therefore modify the order appealed from to provide that Linda shall have a judgment lien in the amount of $21,036.66, plus interest at 8.5 percent per annum from April 1, 1995, which lien may be enforced as a judgment lien against the real estate. If it is not paid within 60 days of the spreading of the mandate from this court, the lien may be executed as provided by law.

Linda's Demand for Attorney Fees.

[12] Linda argues that the trial court erred in not awarding her attorney fees. She bases this claim on the premise that this case is actually a continuation of the parties' 1983 dissolution action. This clearly is not a continuation of that case, and it is also clearly not a dissolution case. In *Abramson v. Abramson*, 161 Neb. 782, 74 N.W.2d 919 (1956), the petitioner sought a divorce on the basis that the parties were married by a common-law union in Iowa, but the Supreme Court found that they had not been married in Iowa and that therefore they were not married. In *Abramson,* one of the parties sought attorney fees, and the court stated the usual rule, that is, that it is the practice in this state to allow recovery of attorney fees only in such cases as are provided for by statute or where the uniform course of

procedure has been to allow recovery of fees. The court thus denied the application for fees.

This case started as a quiet title action and ended as a somewhat unusual partition action. While attorney fees are frequently allowed in partition actions under § 25-21,108, the attorney fee authorized by that statute is for the plaintiff's attorney and then only when the partition is amicable. We can find no uniform practice that would allow an award of attorney fees in this case. Linda is therefore not entitled to such fees. We conclude that the trial court's decision should be affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. DAVID WYATT, APPELLANT.

575 N.W.2d 411

Filed March 3, 1998. No. A-97-128.

1. **Motions to Suppress: Probable Cause: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress, an appellate court reviews the ultimate determination of probable cause de novo and reviews the findings of fact made by the trial court for clear error, giving due weight to the inferences drawn from those facts by the trial court.
2. **Search Warrants: Probable Cause: Appeal and Error.** While a determination of probable cause to issue a warrant must be reviewed de novo on appeal, an appellate court must afford great deference to a magistrate's determination.
3. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit as a basis for finding probable cause to issue a search warrant, under the "totality of the circumstances" rule established by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), the question is whether under the totality of the circumstances, the issuing magistrate had a substantial basis for finding that an affidavit established probable cause.
4. **Search Warrants: Affidavits.** When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation.
5. ____: ____. The reliability of an informant may be established by showing that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.

6. ____: ____. A showing of reliability is not needed to establish the veracity of information in an affidavit in support of the issuance of a search warrant when the information comes from an average citizen rather than a confidential informant who is usually involved in criminal activity.
7. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** A magistrate's determination of probable cause should be paid great deference by reviewing courts. After-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review.
8. **Search Warrants: Affidavits: Probable Cause.** In evaluating probable cause for the issuance of a search warrant, a magistrate must make a practical, commonsense decision whether given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of the person supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
9. **Evidence: Search Warrants: Police Officers and Sheriffs.** Under the good faith exception established in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), evidence obtained by officers acting in reasonable reliance on a search warrant that was issued by a neutral and detached magistrate but later found to be invalid is nonetheless admissible.
10. **Search Warrants: Affidavits: Probable Cause: Police Officers and Sheriffs.** The test for reasonable reliance on a search warrant is whether an affidavit would create disagreement among thoughtful and competent judges as to the existence of probable cause; the test is an objective standard of reasonableness which requires officers to have a reasonable knowledge of what the law prohibits.
11. **Controlled Substances: Words and Phrases.** Neb. Rev. Stat. § 28-401(15) (Reissue 1995) defines manufacture as the production, preparation, propagation, compounding, or processing of a controlled substance, except that manufacture shall not include the preparation or compounding of a controlled substance by an individual for his or her own use.
12. **Controlled Substances: Proof.** It shall not be necessary for the state to negate any exemption or exception set forth in Neb. Rev. Stat. ch. 28, art. 4 (Reissue 1995), in any complaint, information, indictment or other pleading or in any trial, hearing, or other proceeding under the provisions of this article, and the burden of proof of any such exemption or exception shall be upon the person claiming its benefit.
13. ____: ____. A defendant bears the burden of proving that his or her activity falls within the personal use exemption defined in Neb. Rev. Stat. § 28-401(15) (Reissue 1995).
14. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of the appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and a verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

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

Russel L. Jones, of Clough, Dawson & Piccolo, for appellant.

Don Stenberg, Attorney General, and Jennifer S. Liliedahl for appellee.

MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges.

MUES, Judge.

INTRODUCTION

David Wyatt was convicted in a bench trial of manufacturing marijuana and was sentenced to 60 days' probation. He appeals his conviction, alleging that the district court improperly denied his motion to suppress and that there was insufficient evidence to convict him.

FACTS

On October 3, 1995, the North Platte Police Department received a report from Vicki Colonna-Valdivia that she had seen a glass bong full of water and a cellophane wrapper with marijuana in it on top of the refrigerator in the residence of David Wyatt. Colonna-Valdivia explained that she was Wyatt's landlord and had attempted to evict him on two occasions in August and September. She told Investigator Matt Phillips that Wyatt was supposed to be out of the residence by October 1 and that on October 3, she went to the residence to check to see if he had vacated it. This is when she saw the bong and marijuana. She also stated that she had observed large amounts of vehicular traffic coming and going from Wyatt's residence at all hours of the day and night and that this traffic would generally stop for only 5 to 10 minutes before leaving.

Based upon the above-mentioned information set forth in an affidavit by the police department, a search warrant was issued by a Lincoln County judge. The police executed the warrant at Wyatt's residence at 2:24 p.m. on October 3, 1995. No one answered when the police officers knocked on the door, so they entered the residence through a door on the east side of the residence which was open when they arrived.

Based upon the evidence seized, the State subsequently charged Wyatt with manufacturing a controlled substance, to wit, marijuana. Wyatt filed a motion to suppress "[a]ny and all evidence acquired as a result of the search" of his residence,

alleging that there was insufficient probable cause to issue the warrant. The trial court overruled the motion after a suppression hearing, finding that under *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996), Colonna-Valdivia was a citizen informant and, thus, that she and the information she supplied were sufficiently reliable to establish probable cause for the warrant to be issued.

At a bench trial, Wyatt made a continuing objection to the evidence seized because of the alleged illegality of the search warrant. It was stipulated that Colonna-Valdivia was unavailable to testify, but that if she was called, she would testify to the statements contained in the search warrant and would identify Wyatt as her tenant. Phillips testified that the information contained in the search warrant was what was told to him in the morning of October 3, 1995, and that he obtained a search warrant to search Wyatt's residence at 1001 West 19th, North Platte, Nebraska, based upon that information. Phillips testified that he then served the warrant on Wyatt's residence in the afternoon of October 3. He and other officers knocked on the front door, and when nobody answered, they entered the residence through a side door which was open. Once inside, he found a glass bong, Zig-Zag papers, postage scales, brass filters, roach clips, a stone "tooter," two brass pipes, other drug paraphernalia, and .4 grams of marijuana including seeds in a cellophane wrapper on top of the refrigerator. He also discovered the healthy, immature marijuana plant pictured in exhibit 2 growing in a 5-gallon bucket in the washroom.

Nebraska State Patrol forensic drug chemist Victor Sterup testified that he analyzed the materials found on the refrigerator and in the growing plant found in the washroom and that both were indeed marijuana but did not appear to come from the same plant.

The trial court found Wyatt guilty, and he timely appealed to the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Wyatt's assignments of error are that the district court erred in (1) overruling his motion to suppress and (2) convicting him upon insufficient evidence.

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress, an appellate court reviews the ultimate determination of probable cause de novo and reviews the findings of fact made by the trial court for clear error, giving due weight to the inferences drawn from those facts by the trial court. *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997); *State v. Kinney*, 6 Neb. App. 102, 572 N.W.2d 383 (1997).

[2] While a determination of probable cause to issue a warrant must be reviewed de novo on appeal, we must continue to afford great deference to the magistrate's determination; the question is whether under the totality of the circumstances brought to the attention of the magistrate and by interpreting the affidavit in a commonsense and not a hypertechnical manner, the magistrate had a substantial basis for finding the existence of a fair probability that evidence of a crime or contraband would be found. *State v. Valdez*, 5 Neb. App. 506, 562 N.W.2d 64 (1997). See, also, *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996).

DISCUSSION

Motion to Suppress.

Wyatt argues that the affidavit was insufficient to provide probable cause to issue the search warrant because Colonna-Valdivia was not a citizen informant and therefore, that the validity of her information cannot be presumed. He argues that she acted with the ulterior motive of removing her tenant rather than to help police enforce the law. The trial court held that Colonna-Valdivia was a citizen informant notwithstanding the fact that she was Wyatt's landlord and was in the process of evicting him.

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

basis' " for finding that the affidavit established probable cause. *Id.* at 489, 544 N.W.2d at 88.

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

Phillips' affidavit stated that on October 3, 1995, Colonna-Valdivia reported to him that she had observed a glass bong and marijuana on Wyatt's refrigerator when she entered the residence as a landlord to check if Wyatt had complied with her second eviction notice. It also stated that she lived next door to Wyatt and had observed large amounts of vehicular traffic at all hours of the day and night that would stop only 5 to 10 minutes. This information demonstrated the basis of her knowledge of Wyatt's alleged criminal activity.

[5] Wyatt's contention is that the affidavit did not meet the second prong of the test, in other words, that it did not establish Colonna-Valdivia's credibility. The reliability of an informant may be established by showing that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given. *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992); *Valdez, supra.*

Wyatt argues that there is no information in the affidavit which supports the trial court's finding that Colonna-Valdivia is reliable. We agree that there is no information concerning past information she may have given, that she did not make a statement against her penal interest, and that there was no independent police investigation to establish her reliability. However, the trial court found Colonna-Valdivia to be a citizen informant and found that her reliability could be presumed.

> " ' "When considering the sufficiency of probable cause based on information supplied by an informant, it is important to distinguish the police tipster, who acts for money, leniency, or some other selfish purpose, from the citizen informer, whose only motive is to help law officers in the suppression of crime.
>
> . . . .
>
> " ' "In the latter the rule of prior reliability is considerably relaxed for several reasons. In the first place the citizen informer rarely had any earlier experience in reporting suspected criminal activity. Furthermore, unlike the professional informant, he is without motive to exaggerate, falsify or distort the facts to serve his own ends." ' "

State v. Detweiler, 249 Neb. 485, 491-92, 544 N.W.2d 83, 89 (1996), quoting *State v. Blakely*, 227 Neb. 816, 420 N.W.2d 300 (1988).

[6] It is generally agreed that a showing of reliability is not needed to establish the veracity of information when the information comes from an average citizen rather than a confidential informant who is usually involved in criminal activity. 2 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment, § 3.4(a) (3d ed. 1996). " '[A]n untested citizen informant who has personally observed the commission of a crime is presumptively reliable.' " *Detweiler*, 249 Neb. at 492, 544 N.W.2d at 89.

[7] The affidavit clearly set out that Colonna-Valdivia was Wyatt's landlord, that she had tried to evict him on two occasions, and that she had entered the residence to see if he had complied with the second eviction notice. The trial court's finding that Colonna-Valdivia was properly viewed as a citizen informant, which was based in part on the trial court's determination that the neutral and detached magistrate's decision to issue the warrant must be given deference, was made despite the landlord-tenant dispute reflected in the affidavit supporting the issuance of the warrant. "A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.' " *Illinois v. Gates*, 462 U.S. 213, 236, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Accord *State v. Swift*, 251 Neb. 204, 556 N.W.2d 243 (1996). After-the-fact scrutiny by courts of the

sufficiency of an affidavit should not take the form of de novo review. *Detweiler, supra.*

In *Detweiler, supra*, the defendants were convicted of manufacturing a controlled substance and possession with intent to deliver a controlled substance. A confidential informant had given photographs and information about the defendants' growing operation which were subsequently used to obtain a search warrant. In holding that the evidence seized was properly admitted despite the motion to suppress, the Nebraska Supreme Court held that " '[a]n untested citizen informant who has personally observed the commission of a crime is presumptively reliable.' " *Id.* at 492, 544 N.W.2d at 89. It defined citizen informant as " ' "a citizen who purports to . . . have been the witness of a crime who is motivated by good citizenship and acts openly in aid of law enforcement," ' " and held that "[r]eliability may appear by the very nature of the circumstances under which the incriminating information became known." *Id.*

The State argues that Colonna-Valdivia, as a landlord, was simply a citizen informant. Wyatt argues that the affidavit disclosed Colonna-Valdivia was a disgruntled landlord frustrated by her failed efforts to evict a tenant and motivated to share incriminating information, not by good citizenship, but by the personal benefit of having Wyatt immediately removed from the residence. He argues that such affidavit shows a reason to exaggerate, falsify, or distort the facts to serve her own ends; that she did not provide this information solely to help law enforcement officers suppress crime; and thus, that the reliability of the information could not be presumed but must have been separately established. To some extent, we agree that the affidavit discloses that Colonna-Valdivia may not perfectly fit the model of a typical citizen informant motivated purely by good citizenship, given her apparent landlord-tenant dispute with Wyatt.

However, notwithstanding the fact that Colonna-Valdivia's trustworthiness was tarnished by potential personal motives, that possible deficiency was compensated for by her candid disclosure of the dispute and her description in explicit detail of Wyatt, where he lived, what she had observed, and where she observed it. See *Gates, supra* (holding that deficiency in one element in the "totality of the circumstances" analysis may be

compensated for by strong showing of another). The affidavit reveals that Colonna-Valdivia entered Wyatt's residence for the legitimate purpose of checking on her property and to determine if Wyatt had complied with her eviction notice. While inside the residence, she observed a small package of marijuana on top of the refrigerator along with a glass bong. She did not check the remainder of the residence. Her concern over contraband observed in the course of checking to see if Wyatt had vacated the premises seems reasonable, especially in connection with her observation of large amounts of vehicular traffic coming and going from Wyatt's residence at all hours of the day and night. The relationship between Colonna-Valdivia and Wyatt, as set forth in detail in the affidavit, does not destroy her reliability as a citizen and property owner concerned over criminal activity on her property.

[8] In evaluating probable cause for the issuance of a search warrant, the magistrate must make a practical, commonsense decision whether given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of the person supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996). The issuing judge, knowing of the relationship between Colonna-Valdivia and Wyatt, obviously determined that the information furnished was reliable. From our review, applying the standard set forth in *State v. Valdez*, 5 Neb. App. 506, 562 N.W.2d 64 (1997), we conclude that the totality of the circumstances as shown in the affidavit furnished the issuing judge with a substantial basis for finding the existence of a fair probability that evidence of a crime or contraband would be found in the residence of Wyatt. Thus, the issuance of the warrant was proper, and the trial court did not err in refusing to suppress the evidence obtained pursuant to it.

[9,10] However, even if Colonna-Valdivia's affidavit failed to establish probable cause, under the good faith exception established in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), evidence obtained by officers acting in reasonable reliance on a search warrant that was issued by a

neutral and detached magistrate but later found to be invalid is nonetheless admissible. *State v. Reeder*, 249 Neb. 207, 543 N.W.2d 429 (1996), citing *Leon, supra*. The test for reasonable reliance on a search warrant is whether the affidavit would create disagreement among thoughtful and competent judges as to the existence of probable cause. The test for reasonable reliance on a search warrant is an objective standard of reasonableness which requires officers to have a reasonable knowledge of what the law prohibits. *Id.* We find that it was reasonable for the police to rely on the search warrant. The affidavit on its face reflects that Colonna-Valdivia is an "average citizen" and not a confidential informant, see 2 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment, § 3.4(a) (3d ed. 1996). In applying the *Leon* exception, the standard is whether the officers had a good faith belief that the affidavit furnished probable cause, including that the person providing the information was reliable. See *Reeder, supra*. The affidavit provided detailed facts demonstrating the basis of Colonna-Valdivia's knowledge of the criminal activity and fully disclosed the nature of her relationship with Wyatt. The officers obtained a warrant from a neutral and detached magistrate. Thus, we conclude that Phillips and the other officers reasonably relied on the warrant and that the evidence seized pursuant to such reliance is therefore admissible. This assignment of error is without merit.

Insufficient Evidence.

[11] Neb. Rev. Stat. § 28-416 (Reissue 1995) states in pertinent part: "Except as authorized by the Uniform Controlled Substances Act, it shall be unlawful for any person knowingly or intentionally: (a) To manufacture, distribute, deliver, dispense, or possess with intent to manufacture, distribute, deliver, or dispense a controlled substance . . . ." Neb. Rev. Stat. § 28-401(15) (Reissue 1995) defines manufacture as "the production, preparation, propagation, compounding, or processing of a controlled substance . . . *except that manufacture shall not include the preparation or compounding of a controlled substance by an individual for his or her own use* . . . ." (Emphasis supplied.) Production is defined to include "the manufacture,

planting, cultivation, or harvesting of a controlled substance." § 28-401(22).

Wyatt argues that there was insufficient evidence to sustain his conviction for manufacturing a controlled substance, to wit, marijuana, because his activity falls into the statutorily mandated personal use exception. He argues that the State did not prove beyond a reasonable doubt that he violated the manufacture element of the statute because there was no evidence that the marijuana found in his residence was for anything other than personal use.

[12,13] The State argues that it was Wyatt's burden to prove that he falls within the personal use exemption.

> It shall not be necessary for the state to negate any exemption or exception set forth in this article in any complaint, information, indictment or other pleading or in any trial, hearing, or other proceeding under the provisions of this article, and the burden of proof of any such exemption or exception shall be upon the person claiming its benefit.

Neb. Rev. Stat. § 28-432(1) (Reissue 1995). This statute was interpreted in *State v. Taylor*, 221 Neb. 114, 375 N.W.2d 610 (1985).

In *Taylor*, the defendant was found guilty of delivering marijuana in violation of § 28-416. He appealed to the Nebraska Supreme Court, assigning as error the trial court's failure to instruct the jury that the State had the burden of proving that his actions were not statutorily excepted acts. The court, citing *State v. Fries*, 214 Neb. 874, 337 N.W.2d 398 (1983), held that the State did not bear the burden of proof on the issue of statutory exemptions. See *Taylor, supra*. We acknowledge that the court was interpreting the "except as authorized" phrase of § 28-416, rather than the "except that manufacture shall not include the preparation or compounding of a controlled substance by an individual for his or her own use" language of § 28-401(15), but we fail to see how these exceptions are distinguishable from each other. The specific personal use exemption defined in § 28-401 would seem to fall under the general "except as authorized" language of § 28-416. We conclude, based on *Taylor, supra*, that the burden was on Wyatt to prove he fell within this exemption.

The evidence shows that Colonna-Valdivia observed heavy traffic coming and going from Wyatt's residence at all hours of the day and night and that such traffic would generally stay for only 5 to 10 minutes. When the officers searched the residence, they found a healthy marijuana plant growing in a 5-gallon bucket in Wyatt's washroom, marijuana including seeds, and paraphernalia. The marijuana seeds came from a different marijuana plant than the one found growing in Wyatt's washroom. Wyatt did not offer any evidence to show that he was preparing or compounding the marijuana for his own personal use. While the quantity of marijuana found might support such an inference, we cannot say that such a conclusion is compelled as a matter of law.

[14] In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of the appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and a verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Wilson*, 4 Neb. App. 489, 546 N.W.2d 323 (1996). Viewing the evidence in favor of the State, as we must, we find that there is sufficient evidence that Wyatt was producing marijuana by planting or cultivating it for other than his personal use.

Wyatt's conviction for manufacturing marijuana is affirmed.

AFFIRMED.

KRISTY LEE FARNSWORTH, APPELLEE, V.
JEFFREY D. FARNSWORTH, APPELLANT.
576 N.W.2d 476

Filed March 3, 1998. No. A-97-159.

1. **Child Custody: Proof.** The custodial parent has the burden of proving to the court that there is a legitimate reason for leaving the state and that it is in a minor child's best interests to continue to live with that parent, before a court will permit the removal of the child from the jurisdiction.
2. **Child Custody.** The paramount question is whether the move is in the best interests of the child.

3. ____. Factors to be considered in determining whether removal of a child from the jurisdiction is in a child's best interests include (1) the likelihood of enhancing the general quality of life for both the custodial parent and the child, (2) the motives of the custodial parent in seeking the move, (3) the motives of the noncustodial parent in resisting the move, (4) the visitation rights of the noncustodial parent, and (5) whether realistic and reasonable visitation schedules can be reached if the move is allowed.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed in part, affirmed in part as modified, and in part reversed and remanded for further proceedings.

Matthew Stuart Higgins, of Cohen, Vacanti & Higgins, for appellant.

Charles O. Forrest, of Schmid, Mooney & Frederick, P.C., for appellee.

MILLER-LERMAN, Chief Judge, and HANNON and IRWIN, Judges.

IRWIN, Judge.

I. INTRODUCTION

Jeffrey D. Farnsworth (Jeff) appeals a January 13, 1997, order of the district court for Douglas County modifying a decree that dissolved his marriage to Kristy Lee Farnsworth. In the January 13 order, the district court allowed Kristy to relocate to Denver, Colorado, with the parties' only child, Casey Jay, born August 21, 1991. The district court also increased Jeff's child support obligation to $525 per month in accordance with the current Nebraska Child Support Guidelines and ordered increased visitation rights for Jeff. Regarding travel expenses, the parties were ordered to split them for the extended summer, Christmas, and Easter break or spring vacation visits and Jeff was ordered to pay the expenses for all other visitations.

The overriding issue in this appeal is whether a divorced mother who has custody of her son, now 6 years of age, has shown that she has a legitimate reason that is in the son's best interests to move him more than 500 miles from his father, who, by everyone's account, spends approximately one-half of the

year exercising visitation with his son. On the record presented in this case, we conclude that the mother has not proved a legitimate reason for leaving the state and that the trial court abused its discretion in allowing her to do so.

II. FACTUAL BACKGROUND

Pursuant to the original divorce decree entered May 31, 1995, Kristy was awarded custody of Casey subject to Jeff's visitation rights, which included visitation of 1 week commencing on Monday of the second full week of each month, visitation every other weekend from Friday at 6 p.m. through Sunday at 6 p.m., and 6 weeks' extended summer visitation. At the time of the decree, both Kristy and Jeff resided in Nebraska. Jeff was ordered to pay child support of $250 per month. Jeff's support was cut in half for the extended summer vacation.

On July 11, 1996, Kristy filed an application to modify the decree to increase the amount of Jeff's child support in conformity with the current Nebraska Child Support Guidelines. Jeff filed an answer opposing Kristy's application. Jeff also filed a cross-application for modification, seeking an order awarding him and Kristy joint custody of Casey or, in the alternative, specific, increased, and extended visitation with Casey. He also requested that the court prohibit Kristy from leaving the local area with Casey. Thereafter, on October 16, Kristy filed a motion to remove Casey from Nebraska to Denver. Pursuant to the parties' stipulation, Jeff had "extended visitation" with Casey during the pendency of Kristy's removal motion, from November 1 through 25.

A hearing was held on the pending matters on December 13, 1996. The parties stipulated that Kristy is a fit and proper person to have custody of Casey. Jeff withdrew the portion of his cross-application requesting joint custody of Casey. Both Kristy and Jeff testified at the hearing.

During presentation of her case, Kristy testified that she made $24,500 per year at Cari Rental in Omaha. Her job dealt with corporate furniture leasing. She stated that because her career advancement possibilities with Cari Rental were limited due to the size of the company, she began to look for another job. She restricted her search to other *corporate* furniture-

leasing jobs, refusing to consider *office* furniture-leasing jobs because she enjoyed corporate leasing. (The precise distinction between these two types of job is unclear from the record.) Kristy testified about her search for a job in Omaha and said, "I think I looked in the want ads every Sunday; kept my ears open, kept my eyes open. Just looked. I didn't submit a resume or anything like that but I was always aware." On cross-examination, she testified that she never contacted any employment agencies and never sent out any letters of inquiry to prospective employers in Omaha.

Kristy testified that she "put some feelers out" in the Denver area and obtained employment with Cort Furniture Rental, a corporate furniture-rental company. The trial testimony reveals that she accepted a position with Cort prior to the modification hearing. Her starting salary was $24,000 a year "plus commission." She testified that Cort offers better career opportunities. She had also rented a two-bedroom condominium in a Denver suburb prior to the modification hearing. In a candid response during cross-examination, she responded yes to a question eliciting that she was "basically banking on being allowed [by the court] to move to Denver."

Kristy testified that she had begun looking for a job in Denver because she has both family and friends in Denver, including her best friend, her boyfriend of 9 months, and three first cousins. Kristy testified that in comparison, she has few friends in Omaha, and that her family does not live in Omaha, although her parents live approximately 2½ hours away from Omaha. Kristy acknowledged that Casey does have family in Omaha, including his grandparents, one uncle, one aunt, and two cousins. Kristy further testified that she "always wanted to live [in Denver]." This was contradicted by Jeff's testimony. He testified that he had job offers, prior to the parties' estrangement, from businesses in Denver and Dallas; however, Kristy desired to stay in Omaha to "be close to her parents." The parties did not move.

Kristy also testified that there are several parks in the area near the condominium as well as lots of outdoor activities, which Casey enjoys, including skiing, hiking, canoeing, and kayaking, and an amusement park.

Jeff testified that he was opposed to Kristy's application to remove Casey to Colorado because his visitation with his son would be inhibited. He testified that he had never missed any scheduled visitation and corroborated that he spent time with his son throughout the year equal to approximately one-half of all the days in the year. Jeff does not want his son to leave. He stated at the modification hearing, "I want to be a part of my son's life. I want him to be a part of my family's life. I hate to miss out on him starting little league, him starting school, being at the parent-teacher conferences; basically, seeing my son grow up." Jeff's past visitation history bears witness to this statement.

Jeff also testified that Kristy had told him that he had "no rights" and "no say" and that she "gave [him] all the rights [he] had regarding [his son]." Kristy had been asked about this earlier in cross-examination. She had responded, "I don't recall. I — in what — I don't believe I did. I don't think I did." A follow-up question was asked: "Could that be something that you would have said, you have no rights, you have what you're going to get, something to that effect?" Her answer was "No, I don't — please —." A recess was then taken. A tape recording was produced that showed that in fact this disturbing remark was made by Kristy in a phone conversation with Jeff.

Jeff also offered the testimony of Gerry Phaneuf, the director of career services at Creighton University. Phaneuf testified that his experience in the career services field included employment at Creighton University, the University of Nebraska-Lincoln, and Texas Tech University in Lubbock, Texas. His responsibilities have included organizing workshops specifically for women searching for employment. His contacts are not limited to employers searching for persons with college educations. Counsel for Kristy stipulated that Phaneuf is an expert in the area of employment opportunities in Nebraska.

Phaneuf was apparently allowed to be present in the courtroom when Kristy testified regarding her employment and educational history, as well as when she testified that there were no other places in Omaha that could offer her career opportunities similar to those present in Denver. Phaneuf testified as follows

concerning his opinion about Kristy's assertions that similar opportunities are not available in Omaha:

> A. In regards to the very specific job title that she has, probably not. I am not — I can't say as of today what sort of specific opportunities are available in the very precise area she was mentioning. But in terms of the type of industry that she is in, there certainly are, in my opinion, far more opportunities that would be very closely related to what she is currently doing.
>
> Q. And, for example, how would the employment opportunities that you have in mind differ from the specific one that she told the Court about in Denver?
>
> A. It could be perhaps the type of product or the — maybe a list of a retail type organization, perhaps a business-to-business organization. It could be a Sheppards Business Interiors or any number of organizations that deal with leasing products and business equipment in Omaha as many, many companies who do that.
>
> Q. Given your experience and education, given the talent and the education that [Kristy] has told the Court about and the things that she does at her new job, are there places in Omaha where she could get a similar employment at a similar pay scale?
>
> A. In my opinion, there would be plenty of opportunities for her, yes.
>
> Q. To your knowledge are there any other places in Omaha that have corporate furniture leasing?
>
> A. Almost any business — professional business environment such as Sheppards or Raders or All Makes, those kinds of organizations have leasing programs, yes, sales and leasing.
>
> . . . .
>
> Q. . . . Did you hear [Kristy] say her base salary would be exactly $25,000 with the hopes of commission of approximately five to six thousand dollars? Regarding the base salary, does that sort of job, do you believe, exist in the Omaha area?
>
> A. Yes, I do.

> Q. Okay. How about that commission range, five to six thousand dollars in the first year of work? Would that exist?
>
> . . . .
>
> [A.] The answer is yes.

Phaneuf also testified that the cost of living is higher in Denver than in Omaha.

After hearing the evidence, the district court entered an order granting Kristy leave to remove Casey from Nebraska to Denver, increasing Jeff's support obligation to $525 per month, expanding Jeff's visitation, and ordering that certain travel expenses be equally shared by the parties. Jeff moved that the court reconsider its order. After his motion was denied, Jeff timely appealed to this court.

III. ASSIGNMENTS OF ERROR

On appeal, Jeff contends that the district court abused its discretion and erred in (1) granting Kristy's application to remove Casey from Nebraska to Denver and (2) failing to find that Jeff's support obligation should be decreased by the reasonable visitation expenses Jeff will incur by driving to Denver to visit Casey.

IV. ANALYSIS

1. Governing Principles

[1,2] The governing propositions of law for this type of case are as follows: The custodial parent has the burden of proving to the court that there is a legitimate reason for leaving the state and that it is in the minor child's best interests to continue to live with that parent, before a court will permit the removal of a child from the jurisdiction. *Harder v. Harder*, 246 Neb. 945, 524 N.W.2d 325 (1994). The paramount question is whether the move is in the best interests of the child. See *id.* See, also, *Evenson v. Evenson*, 248 Neb. 719, 538 N.W.2d 746 (1995).

2. Kristy's Reasons for Move

Kristy's justifications for changing her and Casey's home from Omaha to Denver may be summarized as follows: (1) to obtain employment which pays approximately the same salary as her job in Omaha; (2) because her boyfriend of 9 months

lives in Denver; (3) to give her son the benefit of more outdoor activities, an amusement park, and professional sporting events; and (4) because of a nationally ranked school district in the Denver area.

(a) Career Opportunities

As indicated above, a custodial parent must first prove to the court there is a legitimate reason for leaving the state. *Harder, supra.* The record does not establish that Kristy's career opportunities in Denver serve as a legitimate reason for this move. The new job Kristy has secured in Denver has no guarantees of paying her more than the amount she received at Cari Rental in Omaha. While she may indeed have been correct in concluding that the career opportunities at Cari Rental were limited, the expert testimony offered by Phaneuf established that opportunities exist in the Omaha area for a person with her skills. Her insistence on wanting to remain in the *corporate* furniture-leasing business borders on capricious. It is obvious from her own testimony that her search for other employment in Omaha was limited at best. We conclude that Kristy did not sufficiently prove that her employment opportunity in Denver was a legitimate reason for her to leave the state.

(b) Other Reasons for Move

We also conclude that the fact that Kristy's boyfriend of 9 months lives in the Denver area is not a legitimate reason to move the child. This is not a situation, for example, where the custodial parent has remarried and the custodial spouse has had to move because of the new spouse's employment, as in *Harder, supra.* See, *Vanderzee v. Vanderzee*, 221 Neb. 738, 380 N.W.2d 310 (1986); *Gottschall v. Gottschall*, 210 Neb. 679, 316 N.W.2d 610 (1982); *Friedenbach v. Friedenbach*, 204 Neb. 586, 284 N.W.2d 285 (1979) (affirming removal order where custodial parent has remarried and new spouse is employed in another state).

Kristy's assertion that outdoor activities, an amusement park, and professional sporting events in the Denver area serve as a legitimate reason to move fails as well. Given the record before us, were we to conclude otherwise, it would seem that any custodial parent who desires to leave the state merely has to con-

tend that Nebraska really does not offer "the good life." While proximity to the mountains and a large metropolitan city may well be a setting desired by many, it is not sufficient reason to move this son 500 miles away from his father.

Finally, while Kristy testified regarding the schools in the Denver area, no evidence was offered that showed Omaha area public schools are inadequate or that Denver schools are so superior that a move is necessitated by such. The mother failed to carry her burden of establishing a legitimate reason necessitating the removal of this child from his father.

3. Best Interests

[3] We also conclude that a move to Denver with his mother is not in this child's best interests. As indicated above, the best interests of the child are the paramount question in cases such as the one before us. See *Harder v. Harder*, 246 Neb. 945, 524 N.W.2d 325 (1994). While the Nebraska Supreme Court has not explicitly set forth factors to be considered in removal cases, the following are consistent with Nebraska case law. Factors to be considered in determining whether removal is in a child's best interests should be (1) the likelihood of enhancing the general quality of life for both the custodial parent and the child, (2) the motives of the custodial parent in seeking the move, (3) the motives of the noncustodial parent in resisting the move, (4) the visitation rights of the noncustodial parent, and (5) whether realistic and reasonable visitation schedules can be reached if the move is allowed. See, generally, *Tropea v. Tropea,* 87 N.Y.2d 727, 665 N.E.2d 145, 642 N.Y.S.2d 575 (1996); *Jones v. Jones*, 110 Nev. 1253, 885 P.2d 563 (1994); *In re Marriage of Herkert*, 245 Ill. App. 3d 1068, 615 N.E.2d 833, 186 Ill. Dec. 29 (1993); *Yannas v. Frondistou-Yannas*, 395 Mass. 704, 481 N.E.2d 1153 (1985); *Cooper v. Cooper*, 99 N.J. 42, 491 A.2d 606 (1984), *modified, Holder v. Polanski*, 111 N.J. 344, 544 A.2d 852 (1988).

As discussed above, Kristy has failed to demonstrate that moving to Denver provides an opportunity for an enhanced quality of life because of her alleged employment opportunity. With regard to Kristy's motives for this move, she testified that she "always wanted to live [in Denver]."

Jeff testified in great detail regarding his relationship with Casey and the effect the proposed move would have on this relationship. Clearly, Jeff does not want his son to leave. His past visitation history demonstrates that he treasures his relationship with his son. Jeff spent time with his son throughout the year equal to approximately one-half of all the days in the year. He testified to his reasons for desiring that his son stay in Omaha, as recounted above.

Kristy's remarks that Jeff has "no rights" and "no say" and that she "gave [him] all the rights [he] had regarding [his son]" are disturbing. Such remarks are certainly not indicative of the kind of attitude necessary to foster a long-distance relationship between Casey and Jeff.

It is axiomatic that consideration of the visitation rights of the noncustodial father and whether a realistic and reasonable visitation schedule can be reached if the move is allowed is vital in these cases. The "problem" in this case is that we have a noncustodial parent who spends one-half of the year with his child. Obviously this is going to be impacted when the child moves over 500 miles away. The court's order permitting Kristy to move Casey to Denver deprives Jeff of frequent and continuing contact with his child. The consequence of the trial court's ruling is that Jeff's parenting participation is significantly altered. For him to see Casey during the week is for all practical purposes unrealistic and impossible. The number of weekends that he will be able to see Casey is reduced considerably. Sometimes these consequences are the unalterable effects of divorce. They are not the most desirable effects or the effects that would be achieved in a perfect world. Rather, such disruptive consequences in the lives of parents and the lives of children are just not avoidable. This is not one of those cases.

A reasonable visitation schedule is one that will nurture a child's relationship with the noncustodial parent. When a parent has diligently exercised his visitation rights, a court should not interfere with them by permitting removal of the child for capricious, unconvincing, or deficient reasons. The Nebraska Legislature has indicated its agreement with these principles by the passage in 1993 of Neb. Rev. Stat. § 43-2901 et seq. (Reissue 1993 & Cum. Supp. 1994), the Parenting Act.

In the case before us, we have a father who has exercised his visitation rights without fail and clearly cherishes his attachment to his child. We are not confronted here with the more difficult issue trial judges are called upon to weigh—where a move is demonstrated as necessary due to legitimate reasons and the trial court must resolve whether the benefit to the child in going with the moving parent outweighs the loss or diminution of contact with the nonmoving parent. In this case, we are confronted with a move which has not been demonstrated as necessary or as due to any legitimate reason, and the benefit to the child in going with his mother is outweighed by the loss of contact with his father.

V. CONCLUSION

Therefore, we reverse that portion of the district court's modification order that allowed Casey's removal to Colorado and that portion of the order that changed the visitation schedule. The order is modified to the extent that we order the prior visitation schedule to be reinstated. We affirm that part of the order as regards child support. We remand the cause for further proceedings consistent with this opinion.

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

MILLER-LERMAN, Chief Judge, dissenting in part.

I respectfully dissent with respect to that portion of the majority's opinion which reverses the trial court's order granting the motion to remove which permitted Kristy to move to Denver with Casey.

The Nebraska Supreme Court has repeatedly stated that an award of custody to a parent should not be interpreted as a sentence of immobilization. *Vanderzee v. Vanderzee*, 221 Neb. 738, 380 N.W.2d 310 (1986). The fact of a denial of visitation rights by removal to another jurisdiction is a fact to be considered in determining the best interests of a child. *Id.* However, neither community ties nor a reduction in visitation necessarily mandates prohibiting a custodial parent from relocating for a legitimate reason. *Harder v. Harder*, 246 Neb. 945, 524 N.W.2d 325 (1994). The Nebraska Supreme Court has found that job-related

changes are legitimate reasons where there is a "reasonable expectation of improvement in the career or occupation of the custodial parent," *Gerber v. Gerber*, 225 Neb. 611, 619, 407 N.W.2d 497, 503 (1987), where the custodial parent's new job included a small increase in salary and increased potential for salary advancement, *Jafari v. Jafari*, 204 Neb. 622, 284 N.W.2d 554 (1979), and where the custodial parent's new spouse would earn a base salary of $24,000 plus commissions, *Harder, supra.* Based on Nebraska jurisprudence, which we are bound to apply, I would conclude that the district court properly granted Kristy's motion to remove.

BROWNING FERRIS INDUSTRIES OF NEBRASKA, INC., APPELLEE, V. THE EATING ESTABLISHMENT - 90TH & FORT, INC., DOING BUSINESS AS RUNZA, APPELLANT.

575 N.W. 2d 885

Filed March 10, 1998. No. A-96-1331.

1. **Breach of Contract: Damages: Appeal and Error.** A suit for damages arising from breach of contract presents an action at law. In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
2. **Judgments: Appeal and Error.** An appellate court reaches independent conclusions on questions of law.
3. **Contracts: Damages: Penalties and Forfeitures.** The question of whether a sum mentioned in a contract is to be considered as liquidated damages or as a penalty is a question of law, dependent on the construction of the contract by the court.
4. **Breach of Contract: Damages: Stipulations.** A stipulated sum is for liquidated damages only (1) where the damages which the parties might reasonably anticipate are difficult to ascertain because of the indefiniteness or uncertainty of the damages and (2) where the amount stipulated either is a reasonable estimate of the damages which would probably be caused by breach of contract or is reasonably proportionate to the damages which have actually been caused by the breach. The reasonableness of the stipulated damages can be judged as of the time the contract was formed.
5. **Breach of Contract: Damages: Penalties and Forfeitures.** If a liquidated damages clause provides for more compensation than the damages caused by breach of contract, a penalty for the breach is being imposed.
6. **Breach of Contract: Damages.** There exists a general duty to mitigate damages from breach of contract, and a party failing to mitigate damages is generally precluded from recovering those damages which could have been avoided had that party fulfilled its duty to mitigate.

7. **Contracts: Damages.** A valid liquidated damage clause in a contract contemplates the innocent party's inability to identify and mitigate its damages.

Appeal from the District Court for Douglas County, RICHARD J. SPETHMAN, Judge, on appeal thereto from the County Court for Douglas County, LAWRENCE BARRETT, Judge. Judgment of District Court reversed, and cause remanded with directions to dismiss.

Carl J. Sjulin and Timothy L. Moll, of Rembolt Ludtke & Berger, for appellant.

Benjamin M. Belmont, of Lustgarten & Roberts, P.C., for appellee.

MILLER-LERMAN, Chief Judge, and SIEVERS and INBODY, Judges.

SIEVERS, Judge.

This appeal addresses the question of the enforceability of a contractual provision for liquidated damages. The district court for Douglas County affirmed the Douglas County Court's ruling that The Eating Establishment — 90th & Fort, Inc., doing business as Runza (Eating Establishment), breached its contract with Browning Ferris Industries of Nebraska, Inc. (BFI), and was liable for liquidated damages in the amount of $1,074, plus costs.

FACTUAL BACKGROUND

Although the trial, the district court appeal, and the briefs filed herein raise issues about the authority of the manager of Eating Establishment to bind it to the written contract with BFI, we do not summarize the evidence on that subject because it is not germane to our decision.

The evidence from the county court trial shows that Eating Establishment is a Runza franchisee affiliated with Runza National, Inc. (Runza), and owns and operates a Runza restaurant at 90th and Fort Streets in Omaha, Nebraska. Craig Dietz was the manager at the 90th and Fort location in 1990. BFI is a waste disposal service doing business in Omaha. Dawn Busenbark, a sales representative for BFI, testified that in

September 1990, Dietz contacted BFI regarding the collection of garbage at the 90th and Fort location. Dietz and Busenbark talked about the service BFI would provide, negotiated the price, and then negotiated the contract. This contract, signed on September 27, 1990, was a 1-year contract, automatically renewable for 1-year terms, unless a party gave 60 days' written notice of termination. The contract also contained a liquidated damages provision, which stated in part:

> In the event Customer terminates this Agreement prior to the expiration of its term, Customer agrees to pay BFI as liquidated damages an amount equal to the sum of Customer's monthly billings for the most recent six (6) months, or, if Customer has not been serviced for six (6) months, Customer's average monthly billings for the months serviced or if none, the billing projected by BFI for the first month, multiplied by six (6). Customer acknowledges that the foregoing liquidated damages are reasonable in light of the anticipated loss to BFI caused by the termination and are not imposed as a penalty.

Jeff Fishbaugh, a district sales manager for BFI, testified that in December 1994, BFI received notification from Runza that Runza wanted to terminate the agreement with BFI. Fishbaugh testified that a letter was sent to Runza's counsel to inform him that the agreement did not terminate until September 27, 1995, and that if Runza terminated the agreement, it would be in breach of the contract. Nonetheless, Runza chose to terminate the agreement, and BFI removed its container from the 90th and Fort location on January 8, 1995. Fishbaugh testified that Eating Establishment has paid for all the services that BFI actually provided and that the damages BFI sought in this action were for the termination of the agreement, not for payment of any services provided. Fishbaugh also testified that the reason for the liquidated damages portion in the contract was that "[t]he profits on each contract are difficult to ascertain. We have certain costs that are fixed and spread over a number of customers. Every time that number of customers changes, it affects the profits of the other adjacent customers." Fishbaugh testified that once the container was removed from the 90th and Fort location, it possibly was immediately sent to another location

but that that was uncertain because the containers were not tracked individually by serial number.

In an order dated December 26, 1995, the county court found "generally for the plaintiff and against the defendant in the amount of $1,074.00 plus costs." The county court did not make specific factual findings. Eating Establishment appealed this decision to the district court, and the district court found:

> There was sufficient evidence in the record to indicate that even if Craig Dietz did not in fact have authority to sign the agreement, the agreement was certainly ratified by the Defendant by allowing it to remain in force for four years and in paying all billings submitted by the Plaintiff to the Defendant for said service.
>
> In addition, the liquidated damage clause is clearly set out in the agreement, and based on the testimony in the Bill of Exceptions, the Court finds that it was a valid and legitimate liquidated damage clause and did not constitute a penalty.

ASSIGNMENTS OF ERROR

Eating Establishment appeals to this court and argues that BFI offered no competent evidence that Dietz had the authority to sign the written agreement on behalf of Eating Establishment or that Eating Establishment ratified the agreement. Eating Establishment also argues that the liquidated damages provision in the written agreement constitutes an unenforceable penalty.

STANDARD OF REVIEW

[1,2] A suit for damages arising from breach of contract presents an action at law. In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Bachman v. Easy Parking of America*, 252 Neb. 325, 562 N.W.2d 369 (1997). An appellate court reaches independent conclusions on questions of law. *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997).

ANALYSIS

[3] Although it is the final assignment of error, we will discuss the issue of the enforceability of the liquidated damages

provision because it is the dispositive issue. Eating Establishment argues that the liquidated damages portion of the contract constitutes an unenforceable penalty. Generally, the question of whether a sum mentioned in a contract is to be considered as liquidated damages or as a penalty is a question of law, dependent on the construction of the contract by the court. *Abel Constr. Co. v. School Dist. of Seward*, 188 Neb. 166, 195 N.W.2d 744 (1972).

[4] In *Growney v. C M H Real Estate Co.*, 195 Neb. 398, 401, 238 N.W.2d 240, 242-43 (1976), the Supreme Court described liquidated damages as follows:

> "The question of whether a stipulated sum is for a penalty or for liquidated damages is answered by the application of one or more aspects of the following rule: a stipulated sum is for liquidated damages only (1) where the damages which the parties might reasonably anticipate are difficult to ascertain because of their indefiniteness or uncertainty and (2) where the amount stipulated is either a reasonable estimate of the damages which would probably be caused by a breach *or* is reasonably proportionate to the damages which have actually been caused by the breach."

The reasonableness of the stipulated damages can be judged as of the time the contract was formed. *Id.*

[5] In *Yant Construction Co. v. Village of Campbell*, 123 Neb. 360, 243 N.W. 77 (1932), the Supreme Court held that the liquidated damages portion of a construction contract was an unenforceable penalty. The liquidated damages clause provided that the city could withhold $200 per month for each month's delay in completing the work. The court noted that "[t]here is no evidence in the record to show what damage, if any, the defendant sustained by reason of the mere delay in completing the work within the time specified." *Id.* at 365, 243 N.W. at 79. In determining that the liquidated damages provision in *Yant Construction Co.* was an improper penalty, the court quoted *Gillilan v. Rollins*, 41 Neb. 540, 59 N.W. 893 (1894):

> "When parties to a contract stipulate that in case of a violation thereof the party making default shall pay to the other a stipulated sum, the courts will take the sum so fixed as the innocent party's measure of damages only

> when it appears that to do so will no more than compensate his losses.
>
> "But in such case if the taking as the measure of damages the sum fixed in the contract to be paid for its breach will more than compensate the innocent party, the court will regard such sum as a penalty.
>
> "It is not the policy of the law to punish a party for violating his contract, but to compel him to make good to others the losses they have sustained by his default."

123 Neb. at 366, 243 N.W. at 79. The court found that the liquidated damages provision was a penalty because the damages sustained by delay would not be difficult to ascertain, that the purpose of the liquidated damages clause was purportedly to "reimburse" the city for actual loss, and that the sum of $200 was in excess of reimbursement.

Initially, the record shows that Eating Establishment was able to establish on cross-examination that the actual damages would not be overly difficult to ascertain with some precision if BFI desired to do so. Fishbaugh testified that BFI was a sophisticated competitor in the disposal industry, with over 3,000 accounts in Nebraska, and had a full staff of accountants. Fishbaugh acknowledged that the company could probably determine what the profit was on an average contract.

Additionally, counsel for Eating Establishment elicited testimony from Fishbaugh indicating to us that the liquidated amount in the contract was not reasonable. For instance, Fishbaugh agreed with opposing counsel's statement that "there's no real relationship between the damages that you suffer based on the amount left [on the contract at the time of breach] and the amount you seek in this liquidated damages provision." This obviously is true because a breach with 1 month left generates the same damages as a breach with 11 months left. In each instance, it is the sum of the most recent 6 months' billings for garbage removal. Fishbaugh conceded that if the contract had continued between BFI and Eating Establishment, BFI would have incurred costs in servicing the contract. That BFI's contractual damage provision is a gross revenue amount when its actual damages would be the loss of net profit after payment of the costs associated with collection

of the garbage makes the liquidated damages provision immediately suspect. Thus, for obvious reasons, the damage provision is excessive because it provides more compensation for BFI than any losses it has suffered. Moreover, Fishbaugh admitted that the company did not know for sure if the container was immediately utilized on a new contract after leaving the 90th and Fort location. As a result, there was no proof that BFI had sustained damages in any amount. Finally, Fishbaugh acknowledged that it was possible the container subsequently generated revenue at a higher rate than it would have under the contract with Eating Establishment.

[6] The straightforward nature of the collection business—place a container at a business, periodically empty it into a garbage truck, and haul it away in exchange for a fee—seems to readily lend itself to mitigation of damages by placing the container at another location. "[I]n Nebraska there exists a general duty to mitigate damages and . . . a party failing to mitigate damages is generally precluded from recovering those damages which could have been avoided had that party fulfilled its duty to mitigate." *Harmon Cable Communications v. Scope Cable Television*, 237 Neb. 871, 889-90, 468 N.W.2d 350, 363 (1991). We suggest that if the circumstances of a contract and its breach lend themselves to mitigation of damages, it is difficult to sustain a liquidated damage clause.

[7] However, we acknowledge that liquidated damages and mitigation of damages are antithetic doctrines. See *Lake Ridge Academy v. Carney*, 66 Ohio St. 3d 376, 613 N.E.2d 183 (1993) (holding as matter of law that when liquidated damage clause is valid, there is no duty to mitigate damages). But we do not believe a contracting party can negate the general duty to mitigate damages by merely inserting a liquidated damages provision in a contract. The Ohio Supreme Court in *Lake Ridge Academy* said that a valid liquidated damage clause contemplates the innocent party's inability to identify and mitigate its damages, relying on *Wassenaar v. Panos*, 111 Wis. 2d 518, 331 N.W.2d 357 (1983). The predicates for a valid liquidated damage contract are (1) that the actual damages be difficult to ascertain and (2) that the contractually specified damages are a reasonable estimate of the actual damages. *Growney v. C M H Real*

Estate Co., 195 Neb. 398, 238 N.W.2d 240 (1976). When the predicates are not present, the normal rules of damages apply, including the duty to mitigate damages. It is apparent that BFI had no incentive to place the container in another location or even keep track of whether it did because the contractual damage provision gives BFI a far better deal: another 6 months' worth of billings, without any overhead costs, regardless of how much time was left on the contract. See *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1291 (7th Cir. 1985) (holding that liquidated damage clause designed to give plaintiff "full damages . . . and more" from breach even if it made no effort to find substitute use for equipment was "just one more piece of evidence that it is a penalty clause rather than a liquidated-damages clause"). This rationale is equally applicable here. BFI's failure to keep track of whether and when the container is again put to use after it is removed from a location precludes BFI from knowing whether it has actually been damaged. However, the evidence reveals this to be the "avoidance of knowledge," perhaps to shore up the claim for liquidated damages, rather than a situation where actual damages are truly difficult to ascertain. In the final analysis, BFI's failure to know this information precludes us from finding that the contractual provision is a reasonable estimate of BFI's actual damages. In fact, the evidence is compelling that the provision allows for recovery of more than BFI could ever suffer in damages.

In short, there are multiple reasons why we find that the liquidated damages provision in the written contract between BFI and Eating Establishment is a penalty rather than liquidated damages. As such, it is unenforceable.

CONCLUSION

BFI sought only liquidated damages. Having found that the liquidated damages provision is unenforceable as a penalty and because there was no evidence of actual damages, we need not address whether Dietz had authority to bind Eating Establishment to the contract. The judgment is reversed, and the cause is remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL MEEHAN, APPELLANT.

576 N.W. 2d 483

Filed March 10, 1998. No. A-97-361.

1. **Criminal Law: Entrapment: Words and Phrases.** Entrapment is the governmental inducement of one to commit a crime not contemplated by the individual, in order to prosecute that individual for the commission of the criminal offense.
2. **Criminal Law: Entrapment.** Entrapment occurs when the criminal intent or design originates with governmental officials who implant in the mind of an innocent person the disposition to commit a criminal offense and who induce criminal conduct in order to prosecute the criminal offense induced.
3. **Criminal Law: Entrapment: Intent.** Under the "origin of intent" test to determine whether a defendant was entrapped, the defendant was entrapped if (1) the government induced the defendant to commit the offense charged and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense on any propitious opportunity.
4. ____: ____: ____. The ultimate focus of the "origin of intent" test to determine whether a defendant was entrapped is whether the defendant was predisposed to commit the crime.
5. **Entrapment: Evidence: Proof.** Entrapment is an affirmative defense, and thus the burden of going forward with evidence of governmental inducement is on the defendant.
6. ____: ____: ____. Once the defendant satisfies his or her burden of producing sufficient evidence to raise an entrapment defense, the ultimate burden of proof is on the State to prove beyond a reasonable doubt that the defendant was not entrapped.
7. **Entrapment: Intent: Controlled Substances.** Under the "origin of intent" test to determine whether a defendant was entrapped, ready access to illicit drugs is a legitimate factor to consider on the question of predisposition to deal in such substances.
8. **Entrapment: Intent: Evidence.** A familiarity with and demonstrable orientation to a relevant illicit activity constitutes relevant evidence of predisposition under the "origin of intent" test to determine whether a defendant was entrapped.
9. **Perjury.** To be guilty of subornation of perjury, an individual must persuade, procure, or suborn another person to commit perjury.
10. **Perjury: Words and Phrases.** Perjury is a false statement made under oath in an official proceeding.
11. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
12. **Testimony: Words and Phrases.** The official proceedings specified in Neb. Rev. Stat. § 28-916.01(7) (Reissue 1995) are proceedings heard before any legislative, judicial, administrative, or other governmental agency or before an official authorized to take evidence under oath in connection with any such proceeding.
13. **Sentences: Evidence.** A sentencing court has broad discretion in the source and type of evidence that it may use in determining the kind and extent of punishment to be imposed within the limits fixed by statute.
14. ____: ____. A sentencing court in noncapital cases may consider a defendant's nonadjudicated misconduct in determining an appropriate sentence.

15. **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.

Appeal from the District Court for York County: JOHN C. WHITEHEAD and MICHAEL OWENS, Judges. Affirmed in part, and in part reversed and vacated.

Richard K. Watts, of Mills, Watts & Nicolas, for appellant.

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

MILLER-LERMAN, Chief Judge, and IRWIN and SIEVERS, Judges.

MILLER-LERMAN, Chief Judge.

Following a bench trial, Michael Meehan appeals from his convictions and sentences imposed by the district court for York County. For the reasons recited below, we affirm Meehan's convictions for delivery of a controlled substance, bribery of a witness, and tampering with a witness. We reverse his conviction for subornation of perjury. We affirm Meehan's sentences, as modified.

PROCEDURAL BACKGROUND

On June 5, 1996, Meehan was charged by information with the following: count I, delivery of a controlled substance, in violation of Neb. Rev. Stat. § 28-416 (Reissue 1995), a Class III felony; count II, conspiracy to deliver a controlled substance, in violation of Neb. Rev. Stat. § 28-202 (Reissue 1995) and § 28-416, a Class III felony; count III, bribery of a witness, in violation of Neb. Rev. Stat. § 28-918 (Reissue 1995), a Class IV felony; count IV, tampering with a witness, in violation of Neb. Rev. Stat. § 28-919 (Reissue 1995), a Class IV felony; count V, subornation of perjury, in violation of Neb. Rev. Stat. § 28-915 (Reissue 1995), a Class III felony; and count VI, theft by deception in an amount of more than $200 but less than $500, in violation of Neb. Rev. Stat. § 28-512 (Reissue 1995), a Class I misdemeanor. Meehan pled not guilty to the charges.

On August 21, 1996, Meehan moved for an order electing separate trials on various counts. Ultimately, two bench trials were had in this case: one trial, held September 11 and 12,

1996, on counts I and II; and one trial, held on February 5 and 6, 1997, on counts III through V. Meehan was convicted of counts I, III, IV, and V and appeals his convictions and sentences therefrom. Counts II and VI were dismissed and are not the subject of this appeal.

FACTUAL BACKGROUND

Delivery of Controlled Substance.

Carla Schreiber has been employed as a narcotics officer with the Nebraska State Patrol since July 1994, working with various undercover operations in rural areas in Nebraska. Prior to meeting Meehan, Schreiber had received information from local law enforcement officers regarding Meehan's involvement with drugs. Schreiber testified that she first met Meehan on October 18, 1994, when she went to Meehan's residence in Waco, Nebraska, with a confidential informant, Terry Edmunds, to purchase methamphetamine. No sale of methamphetamine took place at this time.

Schreiber next met with Meehan at his residence on October 24, 1994, and asked him about the possibility of "finding me some stuff." Schreiber testified that Meehan asked her if, when she talked about "stuff," she was referring to crank. When Schreiber stated that that was correct, Meehan indicated that he was "supposed to get an eight ball but only got two grams. That he also thought he had a quarter coming." Schreiber explained that an "eight ball" was an eighth of an ounce of methamphetamine and a "quarter" is a quarter of a gram of methamphetamine. Schreiber stated that these were terms commonly referred to by persons involved in drug trafficking. Schreiber did not obtain drugs from Meehan at this time.

Schreiber again met with Meehan at his residence on November 4, 1994, at which time Meehan told Schreiber that he thought he could get her something. Schreiber could not recall who first brought up the subject of drugs at this meeting.

On the evening of November 9, 1994, Schreiber stopped by Meehan's residence but discovered that he was not home. Because Schreiber was aware that Meehan frequented Hunter's Lounge, she went there to see if she might find Meehan. Meehan eventually arrived at the lounge and approached

Schreiber, who was at the bar. Schreiber testified that during their conversation Meehan stated that he had gotten a quarter the previous night and then spoke of also getting an eight ball, of which there were a few grams left. Meehan also told Schreiber that he might be receiving some methamphetamine later that evening from some people in York, Nebraska. Schreiber testified that they discussed fronting money for narcotics and talked about a "residence [sic]" in McCool Junction, Nebraska, being a supplier of cocaine. Schreiber said that Meehan talked about being uncomfortable dealing with anyone that he had not known for 10 years, a statement which Schreiber described as having been made during a conversation about delivering methamphetamine to her or to other individuals. She said that Meehan asked about going through Edmunds if Meehan felt uncomfortable about delivering to Schreiber. Schreiber said that the two conversed for about 2 hours, during which time she brought up the subject of Meehan's obtaining methamphetamine once or twice. Schreiber acknowledged that she told Meehan that she was working on her house and needed "motivation." Schreiber stated that Meehan may have brought up the subject of obtaining the drug numerous times during their conversation.

Later that evening, after the two had left the lounge, Schreiber arrived at Meehan's home. Schreiber testified that Meehan opened the door and said, "I got two lines together, I scraped some bags," and indicated that Schreiber should follow him up the stairs. Schreiber explained that "two lines" referred to two lines of methamphetamine and that "scraped some bags" meant that Meehan had scraped the residue from bags that had contained methamphetamine in the past. Schreiber stated that there were two lines of an off-white powdery substance on a granite-type block located upstairs in Meehan's house. Meehan suggested that Schreiber "snort" one line, and then he left to find some paper in which Schreiber could take home the other line. Schreiber testified that when Meehan left the room, she brushed one line onto the floor and that after Meehan returned with some paper, she brushed the other line into it, folded it up, and placed it in her pocket. Eventually, this substance was sent to the Nebraska State Patrol Criminalistics Laboratory and was

determined to be methamphetamine. Schreiber testified that a number of people smoked marijuana at Meehan's house on the night she obtained the methamphetamine.

At trial, Meehan moved to dismiss count I, asserting the defense of entrapment. The trial court overruled Meehan's motion.

Subornation of Perjury.

On June 23, 1995, Dan Klimek and Dan Bartling, drug investigators with the Nebraska State Patrol, went to Meehan's house in Waco to serve a search warrant. Meehan was home at the time, as was Lee Smith, who was staying with Meehan. Smith was arrested after the officers found a white, powdery substance in a container in her purse. In a desk located in a bedroom, officers found, among other things, a spoon with a white, powdery substance on it and two boxes of plastic baggies. Meehan and Smith were both arrested for and charged with possession of a controlled substance. It later became a subject of dispute as to whether the powdery substance on the spoon, later determined to be methamphetamine, belonged to Meehan or to Smith.

Schreiber testified that she spoke with Meehan on October 19, 1995. She stated that the impression she received from her conversation with Meehan was that Meehan's then-lawyer and Smith's lawyer had come up with a scheme whereby, with Meehan's cooperation, they would attempt to get evidence related to Smith suppressed and, in turn, Smith would testify at Meehan's trial that the drugs in Meehan's house were all hers.

Gary Harre testified that Smith came to live with him after she posted bond following her arrest. Harre stated that Meehan told Harre that Meehan wanted to speak with Smith about her taking responsibility for all the drugs found at Meehan's residence.

Smith testified that she was jailed for approximately 30 days following her arrest before she was released on bail. She said that she stayed with Harre for several weeks and was then rearrested for violation of her bond. Smith stated that Meehan visited her while she was in jail and that he attempted to persuade her to say that all the drugs were hers. Smith testified that before she returned to jail, she visited with Meehan's lawyer, who explained to her that if evidence in her case was sup-

pressed, the charges against her would be dropped, and that if she later testified in Meehan's trial that the drugs were hers, no further charges could be brought against her because double jeopardy would have attached.

Smith testified that on October 18, 1995, her court-appointed attorney visited her in jail and told her that Meehan's attorney was at the jail with a court reporter. According to Smith, her lawyer told her that Meehan's lawyer had guaranteed that if she made a statement that the drugs were hers, she would be bonded out of jail within the hour. Smith's statement, made before a court reporter/general notary public, is part of the record in this case. The statement is 32 pages long. It is in the form of questions and answers posed by the lawyers and answered by Smith. There is no case caption on the statement or other indication linking it to any particular adjudicative event. In the statement, Smith swore to tell the truth; however, the statement is not signed by Smith. In the statement, Smith states, inter alia, that the methamphetamine found on the spoon in Meehan's house was hers.

Smith testified at trial that she was released from jail about one-half hour after giving her statement to Meehan's lawyer. She further testified that her statement that all the methamphetamine was hers was not true but that she had said it to get out of jail. Smith stated that in February 1996, she disclosed the scheme to Charles Campbell, the York County Attorney, during a meeting she had with Campbell regarding another case.

Meehan's mother, Charlene Meehan, testified that she did not know Smith but that Meehan's lawyer told Charlene and her husband that they should post a $2,000 bond for Smith. Charlene said that the lawyer told her and her husband that he planned to take a sworn statement from Smith the following day. Charlene testified that the lawyer told them he would call them when he had the statement and that he, in fact, did so. Charlene stated that, on the lawyer's advice, they arranged for a third individual to actually post the bond with their money because the lawyer said that "it would look better this way."

At the time of trial, Meehan was represented by a different lawyer than the lawyer to whom reference is made above and who was allegedly involved in the purported scheme. Meehan's

first lawyer testified that there was no connection between the posting of Smith's bond and her statement given shortly beforehand. The lawyer denied being part of a plan to influence Smith's testimony by posting her bond.

Also testifying at trial was the lawyer who defended Smith at the suppression hearing in the separate case against her. This lawyer stated that he could not recall meeting with Smith at the jail shortly before she gave her statement. However, he acknowledged that his signature appeared on the jail log of visitors for that day, and he testified he was present when Smith's statement was taken. The lawyer admitted that he knew that Meehan's lawyer wanted to obtain Smith's statement before a court reporter and that he knew that the statement to be made by his client would be very damaging to her. Smith's lawyer denied telling Smith that Meehan's lawyer said that she would be bonded out of jail that day if she made the statement.

In connection with finding Meehan guilty of counts III through V, the court stated, in part, that it was convinced that there was a scheme or plan pertaining to Smith's testimony and that, while the court was convinced that Meehan did not devise the plan, he was a willing and active participant in it.

Sentencing.

At the sentencing hearing, Meehan noted that the presentence investigation report contained a synopsis of a statement given to the Lincoln Police Department by Bob Radar, an acquaintance of Meehan. Meehan objected to that part of the report being included in the presentence investigation report because he was not familiar with anyone named in the report, because the report was not the basis for any charge ever filed, and because he had not had the opportunity to confront Radar.

Meehan was sentenced as follows: on count I, not less than 2 nor more than 4 years' imprisonment; on count III, not less than 4 nor more than 5 years' imprisonment; on count IV, not less than 4 nor more than 5 years' imprisonment; on count V, not less than 6 nor more than 8 years' imprisonment. The sentences imposed in counts III, IV, and V are to be served concurrently with one another but consecutively to the sentence in count I. Meehan appeals.

ASSIGNMENTS OF ERROR

Meehan claims that the trial court (1) erred in failing to find as a matter of law that the State failed to prove beyond a reasonable doubt that Meehan was predisposed to violate the law before the government induced him to do so; (2) erred in failing to find as a matter of law that the State failed to prove beyond a reasonable doubt that Meehan persuaded, procured, or suborned another person to make a false statement under oath or equivalent affirmation in an official proceeding; (3) abused its discretion in refusing to strike an interview from Meehan's presentence investigation report and in considering the interview in connection with his sentencing; and (4) abused its discretion by imposing excessive sentences.

STANDARD OF REVIEW

On questions of law, an appellate court has an obligation to reach independent conclusions irrespective of the decision made by the court below. *State v. Vidales*, 6 Neb. App. 163, 571 N.W.2d 117 (1997).

ANALYSIS

Entrapment.

With regard to count I, delivery of a controlled substance, Meehan argues that the trial court erred in not finding that he was entrapped by the government to break the law. Meehan asserts that there is no evidence presented by Schreiber or Edmunds that Meehan had a predisposition to deliver illegal drugs prior to Meehan's first contact with Schreiber and Edmunds on October 18, 1994.

[1,2] In Nebraska jurisprudence, entrapment is " 'the governmental inducement of one to commit a crime not contemplated by the individual, in order to prosecute that individual for the commission of the criminal offense.' " *State v. Connely*, 243 Neb. 319, 330, 499 N.W.2d 65, 73 (1993), quoting *State v. Stahl*, 240 Neb. 501, 482 N.W.2d 829 (1992). Entrapment occurs when the criminal intent or design originates with governmental officials who implant in the mind of an innocent person the disposition to commit a criminal offense and who induce criminal conduct in order to prosecute the criminal offense induced. *State v. Connely, supra.*

[3,4] Nebraska has adopted the "origin of intent" test to determine whether a defendant was entrapped. Under this test, the defendant has been entrapped if (1) the government induced the defendant to commit the offense charged and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense on any propitious opportunity. *State v. Connely, supra*; *State v. Stahl, supra.* The ultimate focus of the "origin of intent" test is whether the defendant was predisposed to commit the crime. *State v. Connely, supra*; *State v. Stahl, supra.*

[5,6] Entrapment is an affirmative defense, and thus the burden of going forward with evidence of governmental inducement is on the defendant. *State v. Connely, supra*; *State v. Stahl, supra.* Once the defendant satisfies his or her burden of producing sufficient evidence to raise an entrapment defense, the ultimate burden of proof is on the State to prove beyond a reasonable doubt that the defendant was not entrapped. *State v. Connely, supra*; *State v. Stahl, supra.*

In the present case, Meehan argues that in the course of Schreiber's contacts with him on October 18 and 24 and November 4, 1994, there is no evidence that Meehan expressed a willingness to deliver drugs to Schreiber or to Edmunds, and he notes that, in fact, no drugs were delivered in the course of those contacts. On November 9, Schreiber searched for Meehan, located him, and asked him one or two times whether he could obtain methamphetamine for her. Meehan asserts that he scraped an extremely small amount of methamphetamine for Schreiber only after her repeated attempts to obtain the drug from him.

[7,8] The Nebraska Supreme Court has, on several occasions, considered what type of evidence is relevant to demonstrate the predisposition of the defendant. That court has noted that a defendant's readiness and willingness to enter into the illegal transaction when asked to may be used to show predisposition. *State v. Parks*, 212 Neb. 635, 324 N.W.2d 673 (1982). The court has further noted that " 'ready access to illicit drugs is a legitimate factor . . . to consider on the question of predisposition.' " *State v. Connely*, 243 Neb. at 332, 499 N.W.2d at 74. " '[A] familiarity with and demonstrable orientation to the relevant

activity also constitutes relevant evidence of predisposition.' " *Id.* In *Connely*, the defendant's knowledge of drug sale practices and command of the vernacular for the particular drug deal involved was also considered evidence of predisposition.

In the present case, each of the above factors noted in *Parks* and *Connely* was present. There is evidence in the record that Meehan was ready and willing to enter into a drug transaction. He repeatedly assured Schreiber that he could obtain methamphetamine for her. Meehan spoke of drug contacts he had in York and of his knowledge of drug activity in the area, and he stated at one point that he had expected to get an eight ball but got only 2 grams. Schreiber observed people smoking marijuana at Meehan's house.

Meehan was clearly familiar with the traffic in methamphetamine and demonstrated familiarity with the drug sale practices and prices of the drug in the community. Meehan spoke in the vernacular of the drug trade. Based, inter alia, on the foregoing, there was adequate evidence upon which the district court could conclude that Meehan was predisposed to commit the crime for which he was charged and was not entrapped. Meehan's assignment of error is without merit.

Subornation of Perjury.

Meehan asserts that under the statutory language of § 28-915, he did not commit the offense of subornation of perjury. Meehan's argument is that (1) because the statement given by Smith to Meehan's attorney on October 18, 1995, was not made in an official proceeding, it was not perjury and, therefore, Meehan did not suborn perjury and (2) because Smith retracted the falsification, Smith's statement was not perjury and, therefore, Meehan did not suborn perjury.

Section 28-915, pertaining to perjury and subornation of perjury, provides:

> (1) A person is guilty of perjury, a Class III felony, if in any official proceeding he or she makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he or she does not believe it to be true.

> (2) A person is guilty of subornation of perjury, a Class III felony, if he or she persuades, procures, or suborns any other person to commit perjury.
>
> . . . .
>
> (5) No person shall be guilty of an offense under this section if he or she retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding.

Neb. Rev. Stat. § 28-916.01(7) (Reissue 1995) defines an "official proceeding" as "a proceeding heard or which may be heard before any legislative, judicial, administrative, or other governmental agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or deposition in connection with any such proceeding."

The record shows without dispute that Smith's statement was made at the York County jail in the presence of her attorney, Meehan's attorney, and the court reporter/general notary public. It is also undisputed that no representative of the State attended or was notified that such a meeting was to take place. The statement itself does not bear a case caption or other title linking it to an adjudicative forum. Following our review of the record, we conclude as a matter of law that Smith's statement was not made in a "proceeding" as that term is used in §§ 28-915 and 28-916.01(7), much less an "official proceeding."

[9,10] To be guilty of subornation of perjury, an individual must persuade, procure, or suborn another person to commit perjury. § 28-915(2). Perjury is a false statement made under oath in an official proceeding. § 28-915(1). An "official proceeding" is "a proceeding . . . heard before any legislative, judicial, administrative, or other governmental agency or official authorized to take evidence under oath . . . in connection with any such proceeding." § 28-916.01(7).

[11] Under a plain reading of the foregoing statutes taken together, it is clear that for a statement to amount to perjury it must be false, made under oath, and made before any legislative, judicial, administrative, or other governmental agency or

made before an official authorized to take evidence under oath "in connection with any such proceeding" as specified in § 28-916.01(7). Statutory language is to be given its plain and ordinary meaning. *State v. Brown*, 5 Neb. App. 889, 567 N.W.2d 307 (1997).

[12] The proceedings specified in § 28-916.01(7) are listed as proceedings "heard before any legislative, judicial, administrative, or other governmental agency" or before an "official authorized to take evidence under oath . . . in connection with any such proceeding." The statement given by Smith was clearly not made before any legislative, judicial, administrative, or other governmental agency. The statement given by Smith at the jail, although sworn to before an individual authorized to record evidence and regardless of whether or not false or material, was not made in "any such proceeding" as enumerated in § 28-916.01(7). In sum, the episode at the jail was not a proceeding as contemplated by § 28-916.01(7), and, therefore, the statement was not perjury under § 28-915(1).

As noted above, Nebraska's perjury statute defines as an element of the crime that the statement in question must be given in an "official proceeding," which is defined in § 28-916.01(7). See, also, *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986). As a clearly defined element of the offense, the meaning of the term "official proceeding" must be strictly construed. See *State v. Brown, supra.*

On the record before us, we find that Smith's statement did not occur within an "official proceeding" or in connection with a proceeding authorized by the Nebraska rules of civil discovery or criminal procedure. Smith's statement was given in the York County jail in the presence of her counsel and Meehan's counsel. No law enforcement officials were present, nor was there counsel for the State. There is no indication in the record of advance notice of the taking of the statement, and no cross-examination of Smith occurred.

Other courts examining the "official proceeding" requirement of perjury statutes have strictly construed it. See *State v. Adkins*, 553 So. 2d 294 (Fla. App. 1989) (false, notarized statements in connection with motor vehicle title application were not given in "official proceedings"). See, also, *Sevin v. State*,

478 So. 2d 521 (Fla. App. 1985); *McCoy v. State*, 338 So. 2d 52 (Fla. App. 1976); and *Commonwealth v. Dawson*, 399 Mass. 465, 504 N.E.2d 1056 (1987) (all holding that false sworn statements in law enforcement investigations were not given in official proceedings).

It has been held that the "official proceeding" requirement must be affirmatively proven as an element of perjury.

> This construction of the statute [regarding official proceedings] is consistent with the realization that notaries public not only swear persons in connection with official proceedings but also notarize many sworn statements—affidavits, agreements, and the like—which are frequently not related to a pending legislative, judicial, administrative, or other government agency proceeding.

Nessmith v. State, 472 So. 2d 1248, 1253 (Fla. App. 1985). The Florida court continued: " '[A] proceeding is not made official by the formality with which it is conducted; instead, *its officiality depends on its purpose and the authority from which it derives.*' " (Emphasis in original.) *Id.* at 1254.

We note that a different Nebraska statute, Neb. Rev. Stat. § 28-915.01 (Reissue 1995), defines the crime of making false statements under oath in circumstances other than official proceedings, sometimes referred to as "false swearing." It is also possible that one might be charged with *attempted* subornation of perjury. See *State v. Cooley*, 217 Neb. 90, 348 N.W.2d 433 (1984). However, in the instant case, Meehan was charged with subornation of perjury, and that was the charge tried and submitted to the jury. We will not consider possible crimes which were not adjudicated in the trial court. See *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994).

For the sake of completeness, we note that a number of state statutes have liberalized, or even eliminated, the requirement that the false material sworn statements must be made in an official proceeding to amount to perjury. See, e.g., *Gargan v. State*, 805 P.2d 998, 999 (Alaska App. 1991) (referring to "AS 11.56.200(a) and AS 11.31.110(a)"), *cert. denied* 501 U.S. 1209, 111 S. Ct. 2808, 115 L. Ed. 2d 981.

Finally, with reference to the Nebraska perjury statute, in *State v. Douglas*, 222 Neb. 833, 842-43, 388 N.W.2d 801, 807

(1986), the Nebraska Supreme Court ruled that in addition to the requirement that perjury can occur only in an "official proceeding," perjury can only happen "in a circumstance where a specific statute explicitly requires an oath to be administered."

Nebraska law empowers notaries public to administer oaths for truthfulness, Neb. Rev. Stat. § 64-201 et seq. (Reissue 1996). Nebraska law neither encourages nor prohibits any person from making a voluntary statement on any subject he or she chooses, at any time, and no authority could be found which mandates that a notary public administer an oath for truthfulness in connection with notarization when a voluntary statement is made, such as Smith's statements. Smith's statements were voluntary. She was not subpoenaed for deposition or other official testimony, see, e.g., Neb. Rev. Stat. §§ 25-1227 and 29-1901 (Reissue 1995), nor did Smith make the statement at the request of, or in the presence of, an authorized officer pursuant to subpoena, see, e.g., Neb. Rev. Stat. § 87-303.03 (Reissue 1994).

We find the Nebraska Supreme Court's analysis in *Douglas* helpful and controlling. In *Douglas*, after making false statements in testimony to members of a legislative committee, the former State Attorney General was convicted of perjury. In reversing Douglas' conviction for perjury, the Nebraska Supreme Court scrutinized the terms of § 28-915 and its legislative history. The court found that the Nebraska Legislature rejected the broader terms of the Model Penal Code and, instead, adopted the present Nebraska statutory imperative that an oath for truthfulness must be *required* from the defendant in order for an oath's violation to constitute an element of the crime of perjury. *State v. Douglas, supra.* Although Douglas took an oath for truthfulness before he testified, the oath was not mandatory; therefore, there was no perjury.

Similarly, we find that Smith's voluntary statement, like the statement at issue in *Douglas*, did not satisfy the statutory elements for perjury because there was no requirement that Smith take an oath for truthfulness prior to making her statement. We further note that there is no indication in the statement that Smith's statement was necessarily recorded for use as substantive evidence in an official proceeding. See, e.g., *State v. Jacobson*, 74 Wash. App. 715, 876 P.2d 916 (1994); *People v.*

Chaussee, 847 P.2d 156 (Colo. App. 1992), *modified* 880 P.2d 749 (Colo. 1994).

Because we conclude that the meeting which took place at the jail was not a proceeding, nor was the statement made in connection with any such proceeding as contemplated by the statutes governing perjury, nor was an oath required under the circumstances, Smith's statement cannot be construed as perjury, and Meehan, in turn, cannot have suborned perjury. Accordingly, we reverse Meehan's conviction and sentence on count V, subornation of perjury.

Radar's Statement and Meehan's Sentences.

[13,14] Meehan objects to the inclusion of a statement by Radar, an acquaintance of Meehan, in Meehan's presentence investigation report. The report generally dealt with Radar's contact with Meehan prior to the instant case. A sentencing court has broad discretion in the source and type of evidence that it may use in determining the kind and extent of punishment to be imposed within the limits fixed by statute. *State v. Schmidt*, 5 Neb. App. 653, 562 N.W.2d 859 (1997). It has specifically been held that a sentencing court in noncapital cases may consider a defendant's nonadjudicated misconduct in determining an appropriate sentence. *Id.* In any event, the record does not reflect that Meehan was prejudiced by the inclusion of Radar's statement. Meehan's assignment of error regarding Radar's statement is without merit.

Meehan was convicted of two Class III felonies, counts I and V, for which the penalty as to each is a maximum of 20 years' imprisonment, a $25,000 fine, or both, and a minimum of 1 year's imprisonment. See Neb. Rev. Stat. § 28-105 (Reissue 1995). Counts III and IV are Class IV felonies, for which the penalty is a maximum of 5 years' imprisonment, a $10,000 fine, or both. *Id.* Meehan was sentenced to 2 to 4 years' imprisonment on count I. Consecutive to count I, Meehan was sentenced to 4 to 5 years' imprisonment on count III, 4 to 5 years' imprisonment on count IV, and 6 to 8 years' imprisonment on count V, to be served concurrently with each other. Because Meehan's conviction for count V is reversed, his sentence on that charge is vacated.

[15] The sentences are all within statutory limits. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Aguirre-Rojas*, 253 Neb. 477, 571 N.W.2d 70 (1997).

In sentencing Meehan, the trial judge focused on Meehan's prior criminal record and noted that Meehan's course of conduct dealt with the use and abuse of drugs and making drugs available to other people. Given the extent and history of Meehan's involvement as a supplier of controlled substances, not repeated here, the trial judge's comments and the sentences were appropriate. The sentence on count V is vacated. With regard to the remaining counts, the sentences imposed were within the statutory limits, and we find no abuse of discretion.

CONCLUSION

Meehan's conviction for count V is reversed, and his sentence as to count V is vacated. We affirm Meehan's convictions and sentences as to the remaining counts.

AFFIRMED IN PART, AND IN PART REVERSED AND VACATED.

Case reheard, *State v. Meehan*, 7 Neb. App. 639, 585 N.W.2d 459 (1998).

RODNEY UNDERWOOD, APPELLANT AND CROSS-APPELLEE, V. EILERS MACHINE & WELDING, INC., AND FEDERATED MUTUAL INSURANCE COMPANY, APPELLEES AND CROSS-APPELLANTS.

575 N.W.2d 878

Filed March 10, 1998. No. A-97-670.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question not involving a factual dispute is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the inferior courts.
2. **Workers' Compensation: Appeal and Error.** In a workers' compensation case, the findings of fact by the trial judge have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
3. **Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support findings of fact, the evidence must be considered in the light most favorable to the successful party.
4. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Workers' Compensation Court will not be modified, reversed, or set aside if there is sufficient competent evidence in the record to warrant the making of the order, judgment, or award.

5. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing.
6. **Jurisdiction: Appeal and Error.** An appellate court has not only the power but the duty to determine whether it has jurisdiction over the matter before it.
7. **Workers' Compensation.** A workers' compensation case is a special proceeding for purposes of Neb. Rev. Stat. § 25-1902 (Reissue 1995).
8. **Final Orders: Words and Phrases: Appeal and Error.** A substantial right is an essential legal right, not a mere technical right. A substantial right is affected if the order appealed from affects the subject matter of the litigation, such as diminishing a claim or defense that was available prior to the order.
9. **Final Orders.** Whether an order is final and appealable does not depend upon whether that order completely disposes of the action.
10. **Workers' Compensation: Words and Phrases.** Earning power 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.
11. **Workers' Compensation.** The determination of loss of earning power is a question of fact.
12. ____. There is no numerical formula for determining a worker's earning power following a whole-body injury, nor is such synonymous with either wages or loss of physical functions.
13. **Workers' Compensation: Expert Witnesses.** The compensation court need not depend on expert testimony to determine the extent of disability, but instead may rely upon the claimant's own testimony.
14. **Workers' Compensation.** The mere 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.
15. ____. Determining whether a disability is limited to a scheduled member or is a whole-body injury, for purposes of Neb. Rev. Stat. § 48-121 (Reissue 1993), is a question of fact.
16. **Workers' Compensation: Appeal and Error.** The review panel and appellate court are precluded from substituting their views of the facts so long as there is evidence in the record supporting the factual conclusions of the trial court.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

T.J. Hallinan, of Cobb & Hallinan, P.C., for appellant.

Todd R. McWha, of Murphy, Pederson, Waite & McWha, for appellees.

HANNON, MUES, and INBODY, Judges.

INBODY, Judge.

This is an appeal and cross-appeal of a workers' compensation case in which the Workers' Compensation Court review panel affirmed in part the decision by the trial judge and remanded the cause in part for clarification. For the reasons set forth herein, we affirm the judgment of the review panel in its entirety.

STATEMENT OF FACTS

On or about July 9, 1990, Rodney Underwood fell from the back of a moving pickup truck and sustained a serious head injury. At that time, Underwood was in the course and scope of his employment as a punch-press and shear-machine operator with Eilers Machine & Welding, Inc. (Eilers Machine), located in Lexington, Nebraska. Underwood was transported to Bryan Memorial Hospital in Lincoln, Nebraska, where he underwent a craniotomy to remove an epidural hematoma. On July 24, Underwood was transferred to the Madonna Rehabilitation Hospital for rehabilitation. On July 31, Underwood was readmitted to Bryan for treatment of thrombophlebitis (blood clots) that had developed in his left leg and returned to Madonna on August 7. While at Madonna, Underwood received extensive rehabilitation therapy, which involved relearning and reestablishing such basic skills as communication, personal hygiene, and walking.

Underwood was released from Madonna on October 12, 1990. He returned to work as a full-time employee for Eilers Machine in July 1991 and has remained in that status for all times relevant.

Underwood has had three brain seizures since the accident, which are uncontrovertedly related to the original accident. The seizures, however, are currently controlled through medication. The last seizure occurred on May 28, 1994, when Underwood did not take his medication. Underwood also has recurring venous system problems in his left leg, relating to the thrombophlebitis and resulting in an ongoing ulcerous condition near his left ankle, also uncontrovertedly related to the accident.

On January 20, 1992, Dr. Gene Montgomery of Madonna assigned Underwood a 10-percent whole-body impairment. On

August 18, 1995, Underwood brought the instant action, alleging he was totally and permanently disabled as a result of the July 9, 1990, accident.

FINDINGS AND HOLDINGS OF COURTS BELOW

Trial Court.

The trial court awarded Underwood a 20-percent loss of earning capacity as a result of his head injury. The trial court further concluded that the symptomology of Underwood's left leg was limited to that member, rather than his body as a whole, and awarded him a 15-percent permanent partial disability for the injury to "his left lower extremity."

Review Panel.

The review panel affirmed the award of a 20-percent loss of earning capacity for the head injury and further affirmed the finding that the leg injury was not a whole-body injury. However, the review panel remanded the matter to the trial court to clarify whether the 15-percent permanent partial disability award was for Underwood's left leg or left foot. Underwood appealed from the review panel decision before any further action was taken by the trial court.

ASSIGNMENTS OF ERROR

Underwood makes three assignments of error. He first asserts the trial court erred in finding that he suffered only a 20-percent loss of earning capacity as a result of his job-related injury. Underwood's second assignment of error is that the trial court erred in failing to find the venous system condition in his left leg to be a whole-body impairment instead of a scheduled injury to a member. Finally, Underwood asserts that if the trial judge was correct in finding the venous system condition in his left leg to be a scheduled injury, the review panel erred in remanding the question of whether the 15-percent permanent partial disability was limited to his foot or encompassed his entire leg.

Eilers Machine, in its cross-appeal, argues that Underwood experienced no loss of earning capacity and that, accordingly, the court erred in finding a 20-percent loss of earning capacity.

STANDARD OF REVIEW

[1] A jurisdictional question not involving a factual dispute is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the inferior courts. *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996).

[2,3] In a workers' compensation case, the findings of fact by the trial judge have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996). In testing the sufficiency of the evidence to support findings of fact, the evidence must be considered in the light most favorable to the successful party. *Id.*

[4] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), a judgment, order, or award of the Workers' Compensation Court will not be modified, reversed, or set aside if there is sufficient competent evidence in the record to warrant the making of the order, judgment, or award. *Snipes v. Sperry Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997).

[5] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing. *Winn v. Geo. A. Hormel & Co.*, 252 Neb. 29, 560 N.W.2d 143 (1997).

ANALYSIS

Jurisdiction.

[6] An appellate court has not only the power but the duty to determine whether it has jurisdiction over the matter before it. *State v. Wieczorek*, 252 Neb. 705, 565 N.W.2d 481 (1997). Accordingly, we must first determine whether this court has jurisdiction to hear this appeal of a judgment of the Workers' Compensation Court, after review, when that judgment involves both an order of affirmance and a remand for clarification. As previously stated, the review panel affirmed both the trial court's award of a 20-percent loss of earning capacity for the head injury and the trial court's finding that the leg injury was not a whole-body injury. However, the review panel remanded the matter for clarification as to whether the 15-percent perma-

nent partial disability award was for Underwood's left leg or left foot.

[7,8] Neb. Rev. Stat. § 25-1902 (Reissue 1995) provides for three types of appealable final orders: (1) an order affecting a substantial right which 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 upon summary application in an action after a judgment is rendered. A workers' compensation case is a "special proceeding" for purposes of § 25-1902. *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995); *Pearson v. Lincoln Telephone Co.*, 2 Neb. App. 703, 513 N.W.2d 361 (1994). The issue thus becomes whether the review panel's decision affected a substantial right of Underwood. A "substantial right" is an essential legal right, not a mere technical right. A substantial right is affected if the order appealed from affects the subject matter of the litigation, such as diminishing a claim or defense that was available prior to the order. *Currie v. Chief School Bus Serv.*, 250 Neb. 872, 553 N.W.2d 469 (1996). We conclude that an order affirming a determination of loss of earning capacity is an order affecting a substantial right. Compare *Hull, supra* (order vacating judgment in favor of claimant and dismissing one party was appealable final order, notwithstanding remand), and *Pearson, supra* (order vacating dismissal and remanding for trial is final and appealable order).

[9] Because this case involves an order affecting a substantial right after a special proceeding, this court has jurisdiction, even though a part of the order appealed from involves a remand for clarification. See *Jarrett v. Eichler*, 244 Neb. 310, 313, 506 N.W.2d 682, 685 (1993) ("[w]hether an order is final and appealable does not depend upon whether that order completely disposes of the action"). We recognize that such a result has the potential for fragmenting the appellate process in some cases, but it is nonetheless mandated under the present state of the law. Moreover, in this and other workers' compensation cases, prompt resolution is consistent both with the general principles of judicial economy and with the "beneficent purposes" of the Nebraska Workers' Compensation Act. Since we have jurisdiction, we will proceed to review the assignments of error.

Loss of Earning Capacity.

Both parties challenge the trial court's determination that Underwood suffered a 20-percent loss of earning capacity. Underwood argues that his lost earning capacity is in the 60- to 90-percent range, while Eilers Machine argues that Underwood lost no earning capacity. Their positions are opposite sides of the same coin and will accordingly be resolved concurrently.

[10,11] Neb. Rev. Stat. § 48-121(2) (Reissue 1993) provides an award for diminished "earning power" of an injured employee, but the statute does not expressly define earning power. As explained in *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 546, 288 N.W.2d 482, 485 (1980):

> " 'Earning power[']. . . . 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 workman to earn wages in the employment in which he is engaged or for which he is fitted. . . ."

The determination of loss of earning power is a question of fact. See, *Sidel, supra*; *Haney v. Aaron Ferer & Sons*, 3 Neb. App. 14, 521 N.W.2d 77 (1994).

[12,13] There is no numerical formula for determining a worker's earning power following a whole-body injury, nor is such synonymous with either wages or loss of physical functions. *Thom v. Lutheran Medical Center*, 226 Neb. 737, 414 N.W.2d 810 (1987). Moreover, the compensation court need not depend on expert testimony to determine the extent of disability, but instead may rely upon the claimant's own testimony. *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996); *Haney, supra.*

In this case, Underwood presented expert testimony purporting to establish that his lost earning capacity was between 60 and 90 percent, and Eilers Machine presented expert testimony purporting to establish that Underwood had lost no earning capacity. The trial court, faced with sharply conflicting expert testimony, rejected both, as it is entitled to do. See, e.g., *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 660, 558 N.W.2d 564, 571 (1997) ("[i]t is the role of the compensation court as the trier of fact to determine which, if any, of the expert witnesses to believe"). The trial court concluded that it was

> not inclined to agree . . . that the plaintiff's loss of earning capacity is in the neighborhood of 60 per cent to 90 per cent . . . . However, that is not to say that the Court therefore is in agreement that the plaintiff's accident and injury has resulted in absolutely no loss of earning capacity . . . . The Court is certain that the plaintiff suffers from a permanent impairment . . . that manifests itself in his employment . . . .

After reviewing the evidence, the trial court concluded that Underwood had suffered a 20-percent loss of earning capacity.

The issue on appeal, accordingly, is whether the trial judge's assessment of a 20-percent loss of earning capacity is supported by Underwood's testimony and other evidence in the record. In portions of his deposition read into the record, Underwood testified that he is not limited in the performance of his job duties, can sit and walk without hindrance, has no hearing or vision problems, and had no current pain within the previous year that affected his performance. These aspects of Underwood's testimony are supported by other factors in the record: Underwood returned to full-time work at Eilers Machine, in the same position, in 1991 and has remained there since. His pre-injury wage was $6.25 per hour; in 1993 his wage raised to $6.75 per hour and in 1994 to $7 per hour, and his wage at the time of the June 17, 1996, compensation court hearing was $7.50 per hour. Brian Eilers, president and owner of Eilers Machine, testified that Underwood's raises were merit raises, not automatic increases. "'If, after injury, an employee receives the same or higher wages than before the injury, *it is indicative, although not conclusive*, of the fact that his earning power has not been impaired.'" (Emphasis supplied.) *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 546, 288 N.W.2d 482, 485 (1980). That evidence is arguably sufficient to support Eilers Machine's expert's opinion that there was no lost earning capacity.

[14] However, as the *Sidel* court recognized, the mere fact that an employee is still employed and still paid the same or better does not, of itself, mean he has not experienced some loss of earning capacity. See, also, *Schmid v. Nebraska Intergov. Risk Mgt. Assn.*, 239 Neb. 412, 416, 476 N.W.2d 243, 246 (1991) ("'"the mere fact that after the injury the employee receives, or

is offered, his former wages, or a larger sum, does not necessarily preclude recovery of compensation under the various workmen's compensation statutes"'"). There is credible evidence in the record, including Underwood's testimony, supporting the trial court's conclusion that Underwood has suffered some physical impairment. For the rest of his life, he must take medicine to prevent seizures and must wear a compression stocking to prevent complications from his thrombophlebitis, both requirements arising from a compensable injury. There is also evidence that Underwood is somewhat slower and less productive in his work, and less capable of obtaining other work in the open labor market.

In view of this record and the applicable standard of review, we conclude that the Nebraska Workers' Compensation Court, as the sole judge of a witness' credibility and the weight to be given a witness' testimony, was not clearly erroneous in concluding that Underwood had suffered a 20-percent loss of earning capacity. We therefore affirm that portion of the award.

Venous System Condition in Left Lower Extremity.

[15] Underwood next asserts the trial court erred in concluding that the venous system condition in his left leg and the ulcerous condition of his left ankle should be deemed injuries to a scheduled member rather than impairment to his body as a whole. Determining whether a disability is limited to a scheduled member or is a whole-body injury, for purposes of § 48-121, is a question of fact. See *Nordby v. Gould, Inc.*, 213 Neb. 372, 329 N.W.2d 118 (1983).

There was sufficient evidence in the record to support the trial court's conclusion that "the plaintiff's leg symptomology is limited to his leg rather than his body as a whole." Specifically, the trial court chose to accept the opinion of Dr. Patrick Judson, a medical expert for Eilers Machine, which expressly concluded that this condition was limited to the left lower extremity and was not a whole-body injury. Because the trial court is free to accept or reject an opinion of an expert witness, see *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 558 N.W.2d 564 (1997), and in light of the applicable standard of review, we cannot say this portion of the decision is clearly erroneous. Accordingly, it will not be disturbed.

Remand on Issue of Extent of Impairment of Left Lower Extremity.

Finally, Underwood asserts the review panel erred in remanding the matter for clarification of "an internal inconsistency" as to whether the impairment to the left lower extremity, if properly deemed a scheduled injury, was to the left foot or the left leg.

[16] A remand was clearly within the review panel's statutory authority. Neb. Rev. Stat. § 48-179 (Reissue 1993) provides the review panel with the authority to "affirm, modify, reverse, or remand" a trial court's decision. Moreover, because both the review panel and this court are precluded from substituting their views of the facts so long as there is evidence in the record supporting the factual conclusions of the trial court, see *Larson v. Hometown Communications, Inc.*, 3 Neb. App. 367, 526 N.W.2d 691 (1995), it would have been error for the review panel to make a factual finding as to the extent and nature of the impairment. The remand was accordingly an appropriate and proper exercise of the powers accorded the review panel.

CONCLUSION

For the reasons set forth above, both the appeal by Underwood and the cross-appeal by Eilers Machine must fail. The findings and holdings of the Workers' Compensation Court review panel are accordingly affirmed in their entirety.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES OSCHE, APPELLANT.
576 N.W. 2d 204

Filed March 10, 1998. No. A-97-683.

1. **Rules of Evidence: Jurors: Verdicts.** Neb. Rev. Stat. § 27-606 (Reissue 1995) provides that upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear

upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

2. **Motions for New Trial: Jury Misconduct: Appeal and Error.** A motion for new trial on the basis of jury misconduct is addressed to the discretion of the trial court, and a ruling on the motion will not be disturbed on appeal absent an abuse of that discretion.
3. **Jury Misconduct: Proof.** A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial.
4. **Juror Misconduct: Proof: Presumptions.** Proof of mere indiscretion in the conduct of a juror is not sufficient to avoid a verdict unless the proof establishes that his conduct was of such character that prejudice may be presumed.
5. ____: ____: ____. In a criminal case, misconduct involving an improper communication between a nonjuror and a juror gives rise to a rebuttable presumption of prejudice which the State has the burden to overcome.
6. **Juror Misconduct: Trial.** The determination as to whether juror misconduct is prejudicial so as to deny a defendant a fair trial is a question for the trial court, which is to be resolved upon the basis of an independent evaluation of all the circumstances in the case.

Appeal from the District Court for Box Butte County: BRIAN SILVERMAN, Judge. Affirmed.

Dave B. Eubanks, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellant.

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

MILLER-LERMAN, Chief Judge, and SIEVERS and INBODY, Judges.

SIEVERS, Judge.

INTRODUCTION

This opinion addresses the issue of whether a defendant should be granted a new trial when a juror professes to a nonjuror, during a morning recess and before submission of the case to the jury, that the defendant is " 'guilty as hell.' "

BACKGROUND

James Osche was charged by information in the district court for Box Butte County, Nebraska, on three counts of theft of

movable property pursuant to Neb. Rev. Stat. §§ 28-511 and 28-518 (Reissue 1995). The first count, designated as a Class III felony in the information, alleged that on or about July 31, 1994, Osche stole cash in the amount of $2,145.56 from "Friends of the Museum." The second count, designated as a Class IV felony, alleged that on or about November 16, 1995, Osche stole cash in the amount of $750 from Alliance Parks. The third count, designated as a Class II misdemeanor, alleged that on or about January 26, 1996, Osche stole cash in the amount of $130 from Alliance Parks. Specific facts about the crimes are not important to the issues raised on appeal.

A jury trial commenced on April 28, 1997, and continued to April 29. On April 30, the jury found Osche guilty of counts one and three, but he was acquitted of count two, the Class IV felony charge. Osche filed his motion for new trial on May 9, alleging, among other things, misconduct of the jury. More specifically, Osche argued that one of the jurors, Bill Shores, "disregarded the Court's admonition and, during the middle of the trial, expressed his opinion of the outcome [of] the case and spoke to a person not on the jury about the case." The affidavit of Thomas G. Dieriex, designated as "exhibit A," was incorporated in the motion for new trial by reference. Dieriex's affidavit states, in pertinent part:

> The Affiant was at the Box Butte County Court House on Tuesday, April 29, 1997 . . . .
>
> . . . On April 29, 1997, the trial of State of Nebraska versus Jim Osche was in progress. During the morning break of that trial, the Affiant had contact with, one of the jurors on the Osche case, Bill Shores . . . . Affiant has known Mr. Shores for approximately three years. During this break from the Osche trial, Shores stated to Affiant, "He is guilty as hell" referring to Jim Osche. The Affiant responded by saying, "How can you say that? You haven't heard all of the evidence." Mr. Shores then went on to talk about Mr. Osche's demeanor and physical appearance while on the witness stand.
>
> . . . .
>
> . . . It was clear to the Affiant that Mr. Shores had formed an opinion about the Defendant's guilt before the end of the case . . . .

[1] In a motion in limine dated June 2, 1997, the State requested that the court prohibit Dieriex from testifying in support of Osche's motion for new trial. The State argued that because Osche was attacking the validity of the jury verdict by alleging juror misconduct, Neb. Rev. Stat. § 27-606 (Reissue 1995) was controlling. Section 27-606 provides in part:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

The State argued in its motion in limine that § 27-606 barred Osche from presenting the affidavit of Dieriex. The State argued that Osche did not allege that extraneous prejudicial information was improperly brought to the jury's attention or that any outside influence was improperly brought to bear upon any juror, the two things a juror may testify about under § 27-606.

A hearing was held on Osche's motion for new trial on June 5, 1997. The court sustained the State's motion in limine but noted that "the court can always reverse its decision in regard to the Motion in Limine and receive the information that comes before me on the offer of proof . . . ." The court proceeded to receive the testimony of Dieriex (substantially as detailed in exhibit A) as an offer of proof. At this same hearing, the court heard testimony from Theresa Parker, the jury foreperson. She testified that Shores "would vote yes or no but he wouldn't — he never added anything to what was being discussed and he didn't take part in the discussions."

On June 24, 1997, the court found that there had been juror misconduct based on the comment Shores had made to Dieriex but that no improper information had gone to the jury and the

evidence did not warrant a new trial. In making this decision, the court stated: "[T]he Motion in Limine is overruled for the record and the court considered the defendant's offer of proof." The State did not cross-appeal the trial court's overruling of the motion in limine.

Osche was sentenced to a term of probation for a period of 3 years with respect to count one, the Class III felony. As part of his probation, Osche was ordered to make restitution in the amount of $2,145.56, payable in 1 year; to complete 200 hours of community service; and to pay a $1,000 fine. With regard to count three, the Class II misdemeanor, Osche was ordered to pay a fine of $500 and to make restitution of $130. Osche then appealed to this court.

ASSIGNMENT OF ERROR

Osche assigns error to the district court for overruling his motion for new trial.

STANDARD OF REVIEW

[2] A motion for new trial on the basis of jury misconduct is addressed to the discretion of the trial court, and a ruling on the motion will not be disturbed on appeal absent an abuse of that discretion. See *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993).

ANALYSIS

[3] Osche's appeal claims that the district court should have granted him a new trial on the basis of jury misconduct. A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial. *State v. Anderson*, 252 Neb. 675, 564 N.W.2d 581 (1997).

[4,5] Proof of mere indiscretion in the conduct of a juror is not sufficient to avoid a verdict unless the proof establishes that his conduct was of such character that prejudice may be presumed. *Ellis v. Far-Mar-Co*, 215 Neb. 736, 340 N.W.2d 423 (1983). In a criminal case, misconduct involving an improper communication between a nonjuror and a juror gives rise to a rebuttable presumption of prejudice which the State has the bur-

den to overcome. *State v. McDonald*, 230 Neb. 85, 430 N.W.2d 282 (1988).

There is undisputed evidence that contrary to the trial judge's repeated admonitions to the jurors not to discuss the case with anyone and not to determine the guilt or innocence of the defendant before submission of the case, Shores said that Osche was " 'guilty as hell' " to a nonjuror during a recess. Based on this evidence, the trial court found that juror misconduct had occurred and we agree. Thus, we see the question as whether the presumption of prejudice from the improper communication has been overcome. The district court found, in effect, that the presumption had been overcome by finding that Osche was not prejudiced by the communication:

> I think it's very clear that no improper information went to that jury. One of the jurors made a comment in regard to what his thoughts might have been at that time but there's absolutely no evidence whatsoever that any improper evidence was before this jury at the time they considered their verdict.
>
> I'm sure that when jurors sit and listen to a trial, they may make up their mind or have an idea of what they want to do at anytime during the trial before it's submitted to them but with the admonition of the court they're to go in and consider the evidence and make their decision, and I just don't think that the evidence submitted warrants granting a new trial . . . .

While jurors are instructed to withhold their final judgment until the case has been submitted for a decision, the production of evidence is designed to produce a response from each juror. The response sought is the mental conclusion that the evidence tends to show guilt or innocence. To believe that the evidential presentation, including seeing witnesses actually testifying and being cross-examined, makes no impact and that jurors form no opinion about a defendant's guilt or innocence until after formal submission of the case is simply unrealistic. Human nature is otherwise; we typically respond to information when it is presented. As evidence is produced in a criminal trial, the juror forms impressions which are later used in reaching a final decision. These impressions may be altered or confirmed based on

the evidence, the arguments of counsel, and the instructions to the jury; however, the impressions exist throughout the entire trial. See *Trimble v. State*, 118 Neb. 267, 274, 224 N.W. 274, 276 (1929) (rejecting claim for new trial when juror announced, "'I had my mind made up before the trial was ended'"). Unfortunately, Shores was unable to control his urge to share his opinion of Osche with someone. But he did not share it with any other juror, and thus, the jury pool was not poisoned by Shores' lack of discretion.

In *State v. LaFera*, 42 N.J. 97, 108, 199 A.2d 630, 636 (1964), the trial court granted the defendant a new trial based on the fact that one of the jurors had reached a final verdict of guilt, "'prior to the completion of the case, prior to the argument of counsel, and prior to the charge of the Court.'" The Supreme Court of New Jersey was "troubled by that thesis" and reversed, stating:

> A man inevitably reacts to what he hears as he hears it. He cannot avoid current impressions however much he wills to resist them. And although he may think those impressions are final, he cannot really know that they will endure. We may assume that many jurors begin the deliberations with strong convictions as to how the case should go, and then yield them to persuasion in the jury room. We instruct jurors to refrain from premature discussion in the hope that they will enter upon their deliberations with a maximum capacity to consider the views of others, but we cannot say a juror is guilty of misconduct because he reaches a conclusion before ideally he should.

Id. at 108-09, 199 A.2d at 636-37.

[6] The Supreme Court of New Jersey set forth that when finding the presence of misconduct, "cases turn, not upon the proposition that a juror misbehaves if he reaches a premature conviction, but rather upon the circumstances in which he disclosed it." *Id.* at 109, 199 A.2d at 637. Nebraska law is similar. The determination as to whether juror misconduct is prejudicial so as to deny a defendant a fair trial is a question for the trial court, which is to be resolved upon the basis of an independent evaluation of all the circumstances in the case. *State v. Steinmark*, 201 Neb. 200, 266 N.W.2d 751 (1978).

The record reveals that at the start of the proceedings, the jurors were instructed not to make up their minds and not to discuss the case with anyone until the issues were submitted to them. Every time the jurors left the courtroom, the trial court repeated these admonishments. The court's final instructions to the jurors directed them to approach the task of determining the facts with an open mind and to "not hesitate to reexamine your own views and to change your mind if you are persuaded that you should." Although Shores clearly ignored the trial court's warning not to discuss the case with anyone, we cannot conclude that Shores had finally made up his mind prior to submission. In the latter regard, the evidence shows that if Shores thought Osche was " 'guilty as hell' " when he improperly spoke with Dieriex, at the least, he had not reached a final decision as to all counts at that time because he voted to acquit on count two. That vote is inconsistent with the allegation that Shores had decided the entire case on the morning of April 29, 1997, when he spoke to a nonjuror. Moreover, in judging whether prejudice to Osche occurred, we bear in mind that he was a silent juror—at least in the jury room. The testimony of the jury foreperson reveals that no members of the jury were informed of Shores' belief that Osche was " 'guilty as hell' " and that he was unusually quiet throughout deliberations, as he simply voted "yes or no." Based on the facts of this case, we are of the opinion that it was not an abuse of discretion to deny Osche a new trial because, although there was clearly an improper communication, the record shows that the presumption of prejudice to Osche has been overcome by the evidence in the record.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARVEL JONES, APPELLANT.
577 N.W.2d 302

Filed March 17, 1998. No. A-97-486.

1. **Rules of the Supreme Court: Records: Appeal and Error.** A document entitled "bill of exceptions," but which is not prepared in accordance with the rules of practice and procedure, is not such a bill, and the filing of an improperly prepared document in the nature of a bill of exceptions may result in a case being treated as if no bill had been filed.

2. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), is a rule of inclusion, rather than exclusion, and it permits the use of relevant bad acts for all purposes except to prove the character of a person in order to show that the person acted in conformity with that character.
3. **Rules of Evidence: Other Acts: Appeal and Error.** An appellate court reviews the admission of other acts under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), by considering (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.
4. ____: ____: ____. Because the exercise of judicial discretion is implicit in Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), and Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and the trial court's decision will not be reversed absent an abuse of that discretion.
5. **Sexual Assault: Evidence: Other Acts.** Sexual crimes are of a nature that evidence of other similar sexual conduct has independent relevance, and such evidence may be admissible against a defendant irrespective of whether that conduct involved the complaining witness or third parties.
6. **Rules of Evidence: Jury Instructions.** When the evidence offered has qualified under the first two prongs of the test for admission under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), i.e., relevance and proper purpose, the determination of whether the evidence is unfairly prejudicial depends upon whether the trial court properly instructed the jury on the limited purpose of the admission of the evidence.
7. **Trial: Evidence: Motions to Suppress: Appeal and Error.** In order to preserve a question concerning the admissibility of evidence for review on appeal, it is necessary to object at trial to the admission of evidence even though it was earlier considered at a hearing on a motion to suppress, which motion was overruled.
8. **Rules of Evidence: Witnesses.** Pursuant to Neb. Evid. R. 612, Neb. Rev. Stat. § 27-612 (Reissue 1995), if a witness uses a writing to refresh his memory for the purpose of testifying, an adverse party is entitled to have it produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.
9. ____: ____. Neb. Evid. R. 612, Neb. Rev. Stat. § 27-612 (Reissue 1995), is limited to those writings which may fairly be said in fact to have an impact upon the testimony of the witness.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch for appellant.

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

HANNON, IRWIN, and MUES, Judges.

MUES, Judge.

INTRODUCTION

Marvel Jones appeals his conviction for first degree sexual assault, second offense.

CAUTION

[1] We once again caution that a document entitled "bill of exceptions," but which is not prepared in accordance with our rules, is not such a bill and that the filing of an improperly prepared document in the nature of a bill of exceptions may result in a case's being treated as if no bill had been filed. *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991). Neb. Ct. R. of Prac. 5B(6)c (rev. 1996) in pertinent part provides: "The full name of each witness and whether the examination is direct, cross, or further examination shall be stated at the top of each page [of the bill of exceptions] of the witness' testimony."

Our review of the bill of exceptions in the present case has been made unnecessarily complicated because this rule has not been followed. Our review was even further complicated by the facts that the court held several hearings on motions during the course of the trial and that the index does not reflect this. See rule 5B(6)a. The fact that we have taken the time to review this bill of exceptions should not be taken as an indication that we will ignore such violations in the future.

BACKGROUND

On the evening of August 20, 1996, Christine D., 13 years of age, was visiting two friends, Crystal L., also 13, and Tami F., 15 years of age. Crystal and Tami are sisters and lived with their mother, Janice L. Later in the evening, another friend, Michael T., 14 years of age, joined them.

Jones, age 38, was friends with Janice and occasionally stayed at the house. Earlier that evening, Jones called and spoke with Janice, and she informed Jones not to come to the house. Either Crystal or Tami subsequently spoke with Jones and invited him to come over. Christine, Crystal, Tami, and Michael met Jones outside the house sometime around midnight. The group then "snuck . . . in the back door" and went downstairs to

Crystal's bedroom because Michael and Jones were not supposed to be in the house. The group was "hanging out" for awhile, listening to music. Later, they heard someone coming down the stairs, so Michael and Jones crawled under Crystal's bed.

Michael testified that while under the bed, Jones suggested that he would give Michael an ounce [of marijuana] if Michael would let Jones feel his penis. Without responding to Jones' comment, Michael crawled out from underneath the bed and hid behind a chair. Shortly thereafter, Christine came into the room and crawled under the bed with Jones. Jones asked her to move closer, and she complied. Jones then put his hand down Christine's pants and put his finger in her vagina.

Michael testified that he could see Jones rubbing his hand "over Christine's boxers on her crotch." Michael moved from behind the chair and went and told Crystal, who was in Tami's room, what had happened. Michael then went back to Crystal's room and lifted the bedspread and looked under the bed. Christine seemed startled and got out from underneath the bed.

Crystal testified that after hearing what happened to Christine, she went into her room, crawled underneath the bed, and asked Jones what had happened. She said that Jones initially denied anything happened but subsequently admitted that he had put his finger in Christine's vagina. Jones then said he loved Crystal and kissed her on the lips. Crystal then crawled out from underneath the bed and returned to Tami's room.

Tami testified that a week prior to this incident, she was in her room sleeping and awoke to find that someone was touching her in her vaginal area. Tami could see it was Jones. Jones then put his finger in her vagina. Tami pretended she was still asleep and rolled over. After she rolled over, Jones left her alone.

On August 23, 1996, police officer Timothy Carmichael went to interview Jones regarding the incident. When asked about the events of August 20, Jones denied being at Janice's residence on that date and denied ever having sexual contact with any of the girls. Jones agreed to take a polygraph examination.

The polygraph was administered on August 30, 1996, by police officer Jeffrey Howard. Prior to administering the exam-

ination, Howard explained Jones' *Miranda* rights to him and Jones signed a *Miranda* warning and waiver form. After administering the test, Howard conducted a "post-test interview." During the interview, Jones admitted that he had put his finger in Christine's vagina. Howard then placed Jones under arrest for first degree sexual assault.

A jury trial was held February 25 through 28 and March 3, 1997. Jones testified at trial and admitted that he was in the residence and in the basement but denied that he had been under the bed or touched the children. The jury found Jones guilty of first degree sexual assault, second offense. The district court sentenced Jones to 25 to 40 years' imprisonment, with credit for time served. Jones timely appeals.

ASSIGNMENTS OF ERROR

Restated, Jones alleges the trial court erred in (1) admitting evidence of other crimes, (2) failing to disclose complete copies of reports used by witnesses to refresh their recollection, (3) admitting Jones' confession, and (4) finding there was sufficient evidence to sustain the conviction.

STANDARD OF REVIEW

Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact; 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. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997). See *State v. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997).

Because the exercise of judicial discretion is implicit in Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), and Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and the trial court's decision will not be reversed absent an abuse of that discretion. *State v. Freeman, supra.*

A party waives the right to assert on appeal prejudicial error concerning the admission of evidence received without objection. *State v. Buechler*, 253 Neb. 727, 572 N.W.2d 65 (1998).

DISCUSSION

Prior Bad Acts.

Prior to trial, pursuant to rule 404(2), the State filed notice that it intended to use evidence of other crimes, wrongs, or acts. After trial commenced, the court held a hearing to determine the admissibility of evidence of Jones' misconduct toward Crystal, Michael, and Tami. At the hearing, testimony was adduced as set forth above. The trial court determined that the events did happen as described by Michael, Crystal, and Tami and that the evidence was relevant for proof of motive, opportunity, plan, knowledge, or identity.

[2-4] Rule 404(2) is a rule of inclusion, rather than exclusion, and it permits the use of relevant bad acts for all purposes except to prove the character of a person in order to show that the person acted in conformity with that character. *State v. Carter,* 246 Neb. 953, 524 N.W.2d 763 (1994). An appellate court reviews the admission of other acts under rule 404(2) by considering (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted. *State v. Freeman, supra.* Because the exercise of judicial discretion is implicit in rule 401, it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rules 404(2) and 403, and the trial court's decision will not be reversed absent an abuse of that discretion. *State v. Freeman, supra.* Judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition. *State v. Carter, supra.*

[5] Sexual crimes are of a nature that evidence of other similar sexual conduct has independent relevance, and such evidence may be admissible against a defendant irrespective of

whether that conduct involved the complaining witness or third parties. *State v. Freeman, supra.* Evidence of repeated incidents may be especially relevant in proving sexual crimes committed against persons otherwise defenseless due to age—either the very young or the elderly. Without proof by other acts of a defendant, except in cases of the fortuitous presence of an eyewitness, those crimes would likely go unpunished. *State v. Carter, supra.*

Tami testified that less than a week before the incident in question happened, she awoke during the middle of the night to find Jones putting his finger in her vagina. After Tami rolled over and pretended to be asleep, Jones left her alone. Although in the present case Christine was not asleep, the incidents otherwise have enough similarities to show identity and motive. See *State v. Carter, supra.* In regard to the testimony of Michael and Crystal, both incidents occurred in close temporal proximity to the assault upon Christine. Jones had initially denied being in the house at the time in question, let alone underneath the bed. The trial court properly concluded that this evidence was admissible for the purpose of showing proof of motive, opportunity, plan, knowledge, or identity.

[6] When the evidence offered has qualified under the first two prongs of the test for admission under rule 404(2), i.e., relevance and proper purpose, the determination of whether the evidence is unfairly prejudicial depends upon whether the trial court properly instructed the jury on the limited purpose of the admission of the evidence. *State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997).

After Michael finished testifying, the court instructed the jury:

> Ladies and gentlemen of the jury, I intended to give you a limiting instruction before [Michael] testified and I neglected to do so. So, this instruction pertains to his testimony, and is in regard to [Michael's] testimony regarding anything that may have occurred between him and Mr. Jones.
>
> You are instructed that evidence of other crimes, wrongs or acts, other than those charged in the information, are not admissible to prove the character of a person

> in order to show that he or she acted in conformity therewith. Such evidence, however, may be admissible for other purposes; such as proof of motive, opportunity, preparation, plan, knowledge or identity.
>
> It is for these limited purposes that the Court allows evidence of other crimes, wrongs or acts not charged in the information. You must consider that evidence only for these limited purposes and for no other purposes. This same limiting instruction is called to your attention regarding the testimony of the next witness [Crystal].

The court gave a similar instruction during the testimony of Tami. We conclude that the evidence was not unfairly prejudicial and that the trial court did not abuse its discretion by admitting this evidence.

Confession.

Prior to trial, Jones filed a request for a *Jackson v. Denno* hearing to determine the admissibility of Jones' statements to Howard. See *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). Jones did not allege that his statement was involuntary and did not file a motion to suppress. At trial, outside the presence of the jury, a hearing was held to determine whether Jones' statement was voluntary. After hearing testimony, the trial court concluded that Jones' statement was made freely, voluntarily, and knowingly. Trial then resumed.

[7] When Howard, the officer who administered the polygraph, subsequently testified as to the statements made by Jones, Jones' counsel made no objection. In order to preserve a question concerning the admissibility of evidence for review on appeal, it is necessary to object at trial to the admission of evidence even though it was earlier considered at a hearing on a motion to suppress, which motion was overruled. See *State v. Cody*, 236 Neb. 69, 74, 459 N.W.2d 195, 199 (1990) (Nebraska Supreme Court observed, "We see no reason why the same rule should not apply where there has been a previous ruling on the voluntariness of the statement in a *Jackson v. Denno* hearing but no objection to the evidence in the trial itself"). Thus, Jones failed to preserve this error because no objection was made at trial.

Police Report.

Police officer John Carter testified that on the evening of August 21, 1996, he went to Tami and Crystal's house in response to a reported sexual assault. Carter testified that he arrived at the residence at approximately 6:07 p.m. and had contact with Tami, Janice, Crystal, and Christine. Carter offered no additional testimony regarding the events of that evening. On cross-examination, Carter was asked if he had prepared a report as part of his investigation. Carter replied that he had. Carter was then asked if he had reviewed that report prior to testifying. Carter replied that he had. Carter was then asked if part of the reason he reviewed his report was to "get fresh dates and addresses and whatever details [he] thought [he] might want to refresh." Carter acknowledged that was true.

Jones' counsel then informed the court that pursuant to Neb. Evid. R. 612, Neb. Rev. Stat. § 27-612 (Reissue 1995), he wanted access to the full report. The State's attorney claimed, in essence, that the report contained matters unrelated to Carter's testimony. The jury was given a temporary recess, and the court reviewed Carter's police report. Jones disingenuously states that the "trial court reviewed the report and ordered no disclosures." Brief for appellant at 15. In truth, after reviewing the document, the court concluded that Jones was only entitled to the first page of the report which gave the names and addresses of the persons contacted, the date, a brief synopsis of what was alleged to have occurred, and a sentence that the victims were transported to Lincoln General Hospital to be examined by Dr. Stacy Goodrich.

[8] Rule 612 provides:

> If a witness uses a writing to refresh his memory for the purpose of testifying, either before or while testifying, an adverse party is entitled to have it produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. *If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto.* Any portion

> withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the judge shall make any order justice requires.

(Emphasis supplied.)

Jones does not contend that the failure of the trial court to allow him access to the entire document hindered his cross-examination of Carter. He did not attempt to introduce any of the portion of the report provided to him and related to Carter's testimony. Rather, he argues that had he been given access to the entire document, it "could have provided fruitful cross examination information directly affecting the credibility of Christine." Brief for appellant at 15. Even if that was true, that is not the scope of the inquiry under rule 612.

[9] Under the comment to the Proposed Nebraska Rules of Evidence, rule 612 (1973), the committee states at 104:

> The purpose of the phrase "for the purpose of testifying" is to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness.

Carter's testimony was limited to dates, time, place, names of persons he had contact with, and his response to a sexual assault call. Our review of the entire report shows that the trial court allowed Jones to have a copy of those portions which were related to this testimony. We fail to see how rule 612 could be read to grant Jones more. Thus, the court did not err in limiting Jones' access to the full report.

To the extent that Jones' brief contains suggestions of violations of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), Jones did not assign this as error. To be considered by an appellate court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred. *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996).

Jones' sole reference to this topic is his contention that

> Carter could have provided fruitful cross examination information directly affecting the credibility of Christine . . . . She apparently told the officer things about the conversation under the bed, including her being asked by Mr. Jones if she would have sex with a friend of his in exchange for money, which were not disclosed to the defense. . . .
>
> The prosecution chose to hide the entire report without providing any information from it to the defense.

Brief for appellant at 15.

> [The] suppression of material evidence favorable to an accused violates due process. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In addressing materiality, we must evaluate the omitted evidence in the context of the entire record. *United States v. Agurs, supra.* If the evidence creates a reasonable doubt of guilt that otherwise did not exist, then a constitutional error has been committed. *State v. Atwater*, 245 Neb. 746, 515 N.W.2d 431 (1994).

State v. Thompson, 246 Neb. 752, 754, 523 N.W.2d 246, 248 (1994).

We fail to see how this undisclosed evidence could have done anything but bolster the State's case. We conclude that this omitted evidence does not create a reasonable doubt of guilt that otherwise did not exist. See *id.*

Sufficiency of Evidence.

Jones' final argument is that there was insufficient evidence to sustain his conviction for first degree sexual assault.

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. Beethe*, 249 Neb. 743, 545 N.W.2d 108 (1996).

Jones argues that without his confession and the testimony of Michael, Crystal, and Tami, there is insufficient evidence to sustain the conviction. While that might be true, we have determined that such evidence was properly admitted. It established, inter alia, that Jones, age 38, rubbed the outside of Christine's boxer shorts "on her crotch" and inserted his finger in Christine's vagina and that she was 13 years of age at the time. Neb. Rev. Stat. § 28-319 (Reissue 1995) provides, inter alia, "(1) Any person who subjects another person to sexual penetration . . . (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."

CONCLUSION

The evidence of other bad acts was properly admitted for the limited purpose of proving motive, opportunity, and identity. Jones waived any objections to the admission of statements he made to Howard because Jones did not object to the same when it was offered into evidence. Jones was given the full benefit of rule 612, and finally, viewing the properly admitted evidence in a light most favorable to the State, we find that it was sufficient to convict Jones.

AFFIRMED.

IN RE INTEREST OF TORREY B., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. TORREY B., APPELLEE, AND NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, INTERESTED PARTY, APPELLANT.

577 N.W.2d 310

Filed March 17, 1998. Nos. A-97-523, A-97-524, A-97-682.

1. **Appeal and Error.** In the absence of plain error, an appellate court considers only claimed errors which are both assigned and discussed.
2. **Appeal and Error: Words and Phrases.** Plain error is error plainly evident from the record and not complained of at trial.
3. **Juvenile Courts: Judgments: Appeal and Error.** In reviewing questions of law, an appellate court in proceedings under the Nebraska Juvenile Code reaches a conclusion independent of the lower court's ruling.
4. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an

appellate court to reach a conclusion independent from the decisions made by the lower courts.

5. **Appeal and Error: Words and Phrases.** Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
6. **Juvenile Courts: Probation and Parole.** Neb. Rev. Stat. § 43-286 (Cum. Supp. 1996) provides the dispositions available to a juvenile court for a juvenile described in Neb. Rev. Stat. § 43-247(1) (Reissue 1993). They are as follows: (1) Place the juvenile on probation, subject to the supervision of a probation officer; (2) permit the juvenile to remain in his or her own home, subject to the supervision of the probation officer; (3) cause the juvenile to be placed in a suitable family home or institution, subject to the supervision of the probation officer; or (4) commit such juvenile to the Office of Juvenile Services.
7. ____: ____. Neb. Rev. Stat. § 43-286 (Cum. Supp. 1996) does not allow a juvenile court to place a juvenile on probation or exercise any of its other options under subsections (1) and (2), and at the same time continue the dispositional hearing.
8. ____: ____. Neb. Rev. Stat. § 43-286(4) (Cum. Supp. 1996) outlines the procedures which must be followed when a court revokes probation, revokes supervision, or otherwise changes a juvenile's disposition.
9. ____: ____. Under Neb. Rev. Stat. § 43-286 (Cum. Supp. 1996), a juvenile court may not change a disposition unless a juvenile has violated a term of probation or supervision or the juvenile has violated an order of the court and the procedures established in subsection (4) have been satisfied.
10. **Juvenile Courts: Waiver.** A juvenile may not waive his or her right to be advised of his or her rights.
11. **Juvenile Courts: Appeal and Error.** The failure of a juvenile court to recite a factual basis in an adjudication hearing constitutes plain error that results in damage to the integrity, reputation, and fairness of the judicial process.
12. **Juvenile Courts: Jurisdiction.** If the pleadings and evidence at an adjudication hearing do not justify a juvenile court's acquiring jurisdiction of a child, then the juvenile court has no jurisdiction.

Appeal from the County Court for Dodge County: DANIEL J. BECKWITH, Judge. Judgment in No. A-97-523 reversed. Judgment in No. A-97-524 reversed, and cause remanded with directions to dismiss. Appeal in No. A-97-682 dismissed.

Don Stenberg, Attorney General, Royce N. Harper, and Sam Kaplan, Special Assistant Attorney General, for appellant.

No appearance for appellees.

HANNON, SIEVERS, and INBODY, Judges.

HANNON, Judge.

This opinion covers three appeals by the Nebraska Department of Health and Human Services (Department) involving the adjudication and disposition of one juvenile, Torrey B. All three appeals were perfected before our opinion *In re Interest of David C., ante* p. 198, 572 N.W.2d 392 (1997), was released, wherein we held that a juvenile court's jurisdiction over an adjudicated minor continues after the juvenile is committed to a youth rehabilitation and treatment center (YRTC) and that the juvenile court does not have jurisdiction over the Office of Juvenile Services (OJS), which is part of the Department, in placing, managing, or discharging the committed juvenile. To the extent that the issues previously decided in *In re Interest of David C., supra*, are raised by these appeals, they need not be reconsidered in this opinion.

In *In re Interest of David C., supra*, we found plain error in the juvenile court's failure to adequately advise the juvenile of his right to counsel in a probation revocation proceeding, and therefore we were obligated to overturn the juvenile court's order finding that the juvenile had violated the terms of his probation. In this case, we again find plain error: this time, in the juvenile court's failure to advise the juvenile of his right to counsel and additionally in the juvenile court's revocation of the juvenile's probation in contravention of statutory procedure. More significantly, on the basis of plain error, we find that the juvenile court's adjudication proceeding in one case was so inadequate as to not give the juvenile court jurisdiction.

I. CASE AND APPEAL NUMBERS

For clarity's sake, we now briefly explain the procedural background. Briefly summarized, the three appeals before this court arise from two different juvenile court cases, cases Nos. 4126, which originated in Douglas County, and 4100, which originated in Dodge County. In both cases, the juvenile was charged with several counts of criminal mischief. The predisposition report, which was not included in the three bills of exceptions, reveals that the charges stemmed from the events of December 1, 1996, when the juvenile and a friend allegedly went around eastern Nebraska shooting windows out of vehi-

cles. Cases Nos. A-97-523 and A-97-524 are appeals by the Department from an April 17, 1997, dispositional order in cases Nos. 4126 and 4100, respectively. Case No. A-97-682 is an appeal by the Department from a June 23 order in case No. 4126.

II. PROCEDURAL BACKGROUND

1. Case No. 4126

On December 3, 1996, a deputy Douglas County Attorney filed a petition in the separate juvenile court of Douglas County, alleging that on December 1, the juvenile had committed 23 counts of intentionally or recklessly causing damage of more than $100 but less than $300 to the personal property of others, in violation of Neb. Rev. Stat. § 28-519 (Reissue 1995) (criminal mischief). The petition also charged the juvenile with one count of possession of marijuana weighing 1 ounce or less and with one count of possession of drug paraphernalia. On February 18, 1997, the juvenile, with counsel and after an adequate advisement of his rights, admitted to eight of the criminal mischief charges. The State dismissed the remaining charges. The court found the juvenile to be a child as described in Neb. Rev. Stat. § 43-247(1) and (2) (Cum. Supp. 1996), although we observe that the allegations to which the juvenile admitted were misdemeanors only and thus that the juvenile should have been adjudicated under only § 43-247(1). Having found that the juvenile and his parents resided in Dodge County, the court then ordered the matter be transferred to Dodge County Court, sitting as a juvenile court, for dispositional and all other proceedings.

2. Case No. 4100

Case No. 4100 originated by petition filed December 26, 1996, in the Dodge County Juvenile Court. The petition alleged five more violations of § 28-519, all occurring in Dodge County on December 1. On January 29, 1997, the juvenile admitted the allegations. The court found that he was a juvenile as described in § 43-247(1) and placed him on "indefinite probation" with placement in his parents' home. The accompanying order of probation provided that "the court has placed you on probation . . . for a period of **indefinite** from **01-29-97** to **indefinite** after a hearing in which more drastic action might have been taken."

Such accompanying order provided 14 conditions of the juvenile's probation. The adjudication order reveals that the matter was then continued until March 5.

3. Proceedings Under Both Cases Nos. 4126 and 4100

The court's journal of the March 5, 1997, hearing contains both case numbers and orders an evaluation of the juvenile at the YRTC-Geneva. It also sets the matter for further hearing on April 9.

The order of the April 9, 1997, hearing, filed April 17, also contains both case numbers and is almost identical to the order rendered by the same juvenile court in *In re Interest of David C., ante* p. 198, 572 N.W.2d 392 (1997). Basically, it (1) committed the juvenile to the YRTC-Kearney (in case No. 4100 but not case No. 4126), (2) announced that in both cases it was retaining the power to make further dispositions upon the juvenile's completion of treatment at the YRTC, and (3) directed OJS as it did in *In re Interest of David C., supra.* This order, which was captioned "Case # 4100/4126," is the subject of the appeals in A-97-523 (case No. 4126) and A-97-524 (case No. 4100).

4. Action After Appeal

On June 6, 1997, the court filed a notice informing the juvenile and his parents that they were to appear before the court on June 16 for a hearing. The notice was captioned "Case # 4100/4126." The Department then filed a special appearance and a motion to appoint counsel for the juvenile in case No. 4126. (We note that both documents filed by the Department were originally captioned "Case # 4100/4126," but that the number "4100" was later crossed out.)

The bill of exceptions from the June 16, 1997, hearing reveals that the deputy county attorney, the juvenile, the juvenile's parents, the probation officer, and counsel for OJS were all present. No evidence was adduced at that hearing. However, the judge made clear that in case No. 4100, he had committed the juvenile to the YRTC, the juvenile had subsequently been paroled by the YRTC, and the court was taking no further action in that case.

With regard to case No. 4126, the court stated that it had not placed the juvenile at the YRTC and further that the juvenile was being placed on probation on a temporary basis, to be reviewed at a later time. The judge asked the probation officer, "[S]ince this is an on-going disposition regarding [the juvenile] I would ask that you submit a proposed probation plan that would mesh with the — the arrangements and recommendations from YRTC, Kearney."

The resulting order, filed June 23, 1997, was captioned "Case # 4126" and provided for temporary placement of the juvenile with his parents, subject to review and modification by the probation office. It also provided that "[t]he juvenile shall remain on an on-going disposition reviewable from time to time by the Court. Supervision shall continue the District #16 Probation Office and the Office of Juvenile Services, Juvenile Parole Division." The order ends as follows: "Any change in placement of the juvenile by the Nebraska Health and Human Services, Office of Juvenile Services or the District #16 Probation Office must be reported to the Court immediately. This matter is continued for further disposition to **June 25, 1997 at 11:15 a.m.**"

Also filed on June 23, 1997, was a probation order signed by the judge, the juvenile, and the juvenile's father on June 16. It is essentially identical to the one filed on February 7 in case No. 4100. The Department's appeal from "a judgment and order of the County Court of June 16, 1997," constitutes case No. A-97-682.

III. ASSIGNMENTS OF ERROR

In case No. A-97-524 (appeal in case No. 4100), the Department contends that the trial court erred in its order of April 17, 1997, by (1) requiring the juvenile to return to juvenile court for further disposition after being released on parole from the YRTC-Kearney, (2) professing to retain jurisdiction of the matter subject to the juvenile's completing treatment at the YRTC-Kearney, (3) requiring OJS to submit a treatment and placement plan to the court prior to releasing the juvenile from the YRTC and requiring OJS to share information with the local probation office, (4) requiring OJS to notify the court prior to the juvenile's release from the YRTC, (5) requiring the juvenile

to return to court after he was released on parole from the YRTC, and (6) requiring OJS to submit monthly progress reports to the court.

Similar assignments of error were all considered and ruled upon in *In re Interest of David C., ante* p. 198, 572 N.W.2d 392 (1997), wherein we held that a juvenile court does not have the power to order OJS to submit a treatment and placement plan prior to a juvenile's release, to notify the court before parole, to report changes in placement to the court, or to submit monthly progress reports. Those holdings would require the reversal of the orders appealed from in cases Nos. A-97-523 and A-97-524. However, in this case, we find more egregious plain error in several of the court's actions which requires more directions than merely to set aside the orders appealed from.

[1,2] In cases Nos. A-97-523 and A-97-682 (appeals in case No. 4126), which were combined for briefing, the assignments of error are identical to those in case No. A-97-524. The assignments of error in case No. A-97-523 are identical to those in case No. A-97-524. However, in case No. A-97-524, there is no assignment of error which concerns the Department's argument, found in the discussion in its brief, that the juvenile court did not have jurisdiction to enter the order of "June 25, 1997." Brief for appellant in case No. A-97-524 at 12. In the absence of plain error, an appellate court considers only claimed errors which are both assigned and discussed. *Billups v. Troia*, 253 Neb. 295, 570 N.W.2d 706 (1997). Moreover, to the extent that such arguments were made in the juvenile court, they cannot be considered by this court as plain error. Plain error is error plainly evident from the record and not complained of at trial. *In re Estate of Morse*, 248 Neb. 896, 540 N.W.2d 131 (1995). We also observe that the journal of the action of June 16 was filed on June 23 and further that such journal refers to further disposition on June 25, 1997, at 11:15 a.m. However, we can find no order or journal entry which shows any action taking place on June 25. Thus, to the extent that the Department's argument concerns judicial action taking place on June 25, we do not consider it.

IV. STANDARD OF REVIEW

[3] In reviewing questions of law, an appellate court in proceedings under the Nebraska Juvenile Code reaches a conclu-

sion independent of the lower court's ruling. *In re Interest of Tabatha R.*, 252 Neb. 687, 564 N.W.2d 598 (1997).

[4] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997); *In re Interest of Jeffrey R.*, 251 Neb. 250, 557 N.W.2d 220 (1996).

[5] Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Miller v. Brunswick*, 253 Neb. 141, 571 N.W.2d 245 (1997).

V. ANALYSIS

1. Case No. A-97-524 (Appeal in Case No. 4100)

(a) Failure to Follow Statutory Procedure in Revoking Probation

In *In re Interest of David C., ante* p. 198, 572 N.W.2d 392 (1997), we set aside the entire order purporting to place the juvenile with OJS at the YRTC because we found that at a previous dispositional hearing, the court had revoked the juvenile's probation without advising him of his right to counsel. In the instant case, we find a similar violation in the consecutive disposition orders.

The transcript reveals that the juvenile's adjudication hearing was held on January 29, 1997. The resulting order, filed January 31, and probation order reveal that the juvenile was adjudicated under § 43-247(1) and placed on indefinite probation, beginning January 29. Subsequently, on April 9, as reflected in an order filed April 17, the court, in the absence of any motion, other pleading, or notice that the State claimed the juvenile had violated the terms of his probation, committed the juvenile to OJS for placement at the YRTC-Kearney. The juvenile court apparently assumed that by putting a provision in the original dispositional order (filed January 31) continuing the matter, it

could change the order without pleadings, notice, or evidence. Such was clearly plain error.

[6,7] Neb. Rev. Stat. § 43-286 (Cum. Supp. 1996) provides the dispositions available to a juvenile court for a juvenile described in § 43-247(1). They are as follows: (1) Place the juvenile on probation, subject to the supervision of a probation officer; (2) permit the juvenile to remain in his or her own home, subject to the supervision of the probation officer; (3) cause the juvenile to be placed in a suitable family home or institution, subject to the supervision of the probation officer; or (4) except as provided in Neb. Rev. Stat. § 43-287 (Cum. Supp. 1996), commit such juvenile to OJS. § 43-286(1) and (2). We note that these options are provided for in the alternative. Although the statute does provide for participation of the probation officer in more than one of the available alternatives and although the court may continue the dispositional portion of the hearing from time to time upon such terms and conditions as the court may prescribe, see § 43-286(1), the statute controlling disposition in juvenile cases does not provide for a combination of the imposition of probation and the continuance of the dispositional hearing. Judging by the orders the court below entered, it appears the juvenile court judge was of the opinion that all of the available dispositions were possible when disposition was continued and further that the disposition could be changed at any time. We think the juvenile court judge was wrong. We therefore hold that § 43-286 does not allow the juvenile court to place a juvenile on probation or exercise any of its other options under subsections (1) and (2), and at the same time continue the dispositional hearing.

[8] Section 43-286(4) does, however, give a juvenile court the power to change the juvenile's disposition:

> When a juvenile is placed on probation or under the supervision of the court for conduct under subdivision (1), (2), (3)(b), or (4) of section 43-247 and it is alleged that the juvenile has violated a term of probation or supervision or that the juvenile has violated an order of the court, a motion to revoke probation or supervision or to change the disposition may be filed and proceedings held as follows:

> (a) The motion shall set forth specific factual allegations of the alleged violations and a copy of such motion shall be served on all persons required to be served by sections 43-262 to 43-267;
>
> (b) The juvenile shall be entitled to a hearing before the court to determine the validity of the allegations set forth . . . .
>
> (c) The hearing shall be conducted in an informal manner . . . .
>
> (d) The juvenile shall be given a preliminary hearing in all cases when the juvenile is confined, detained, or otherwise significantly deprived of his or her liberty as a result of his or her alleged violation of probation. . . .
>
> (e) If the juvenile is found by the court to have violated the terms of his or her probation, the court may modify the terms and conditions of the probation order, extend the period of probation, or enter any order of disposition that could have been made at the time the original order of probation was entered or, in the case of the juvenile adjudicated to be within the definitions of subdivision (3)(b) of section 43-247, the court, after considering the dispositions available, may in addition commit such juvenile to the Office of Juvenile Services . . . and
>
> (f) In cases when the court revokes probation, it shall enter a written statement as to the evidence relied on and the reasons for revocation.

Subsection (4) of § 43-286 outlines the procedures which must be followed when a court revokes probation, revokes supervision, or otherwise changes the juvenile's disposition. See *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994). Subsection (4)(f) describes more particularly the procedures which must be followed when a court revokes probation. See *id.*

[9] Under § 43-286, a juvenile court may not change a disposition unless the juvenile has violated a term of probation or supervision or the juvenile has violated an order of the court and the procedures established in subsection (4) have been satisfied. In other words, the original dispositional order cannot be changed at the whim of the juvenile court judge, but only as provided in subsection (4). We therefore conclude that in case

No. 4100, the order of April 17, 1997, committing the juvenile to OJS constitutes plain error, as it had the effect of revoking the juvenile's probation without following the applicable statutory procedure. Were it not for even more controlling plain error, we would reverse that order for such reason.

(b) Right to Counsel

We further observe that at the April 9, 1997, hearing, which had the effect of revoking the juvenile's probation, the juvenile was not provided an attorney, nor was he properly advised of his rights to one. See, § 43-286(4)(b); Neb. Rev. Stat. § 43-272(1) (Reissue 1993); *In re Interest of David C., ante* p. 198, 572 N.W.2d 392 (1997). Again, were it not for even more controlling plain error, we would reverse that order for the above-specified reason.

(c) Lack of Jurisdiction

In the petition in case No. 4100, the charges alleged against the juvenile contained merely the words of the statute and not any facts which would allow the juvenile, or anyone else for that matter, to differentiate one charge from another. Attached to the petition was a document entitled "Some Important Rights." One of those rights was listed as follows: "You have the right to be represented by a lawyer, if you are unable to afford a lawyer, the Court will determine your eligibility for court-appointed counsel at no expense to you."

In passing, we point out that this advisement is wrong. The correct rule, as set forth by the U.S. Supreme Court, is that

> the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.

In re Gault, 387 U.S. 1, 41, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

In compliance with that dictate, § 43-272 provides in part:

> When any juvenile shall be brought without counsel before a juvenile court, the court shall advise such juvenile and his or her parent or guardian of their right to retain counsel and shall inquire of such juvenile and his or her parent or guardian as to whether they desire to retain counsel.

Moreover, Neb. Rev. Stat. § 43-279(1) (Reissue 1993) lists the rights of which the court must inform the parties when a petition alleges a juvenile to be within the provisions of § 43-247(1), (2), (3)(b), or (4) and the juvenile or his or her parent, guardian, or custodian appears with or without counsel. The court shall inform the parties:

> (a) Of the nature of the proceedings and the possible consequences or dispositions . . . that may apply to the juvenile's case following an adjudication of jurisdiction;
>
> (b) Of such juvenile's right to counsel . . . .
>
> (c) Of the privilege against self-incrimination . . . .
>
> (d) Of the right to confront anyone who testifies against the juvenile and to cross-examine any persons who appear against the juvenile;
>
> (e) Of the right of the juvenile to testify and to compel other witnesses to attend and testify in his or her own behalf;
>
> (f) Of the right of the juvenile to a speedy adjudication hearing; and
>
> (g) Of the right to appeal and have a transcript for such purpose.
>
> After giving such warnings and admonitions, the court may accept an in-court admission by the juvenile of all or any part of the allegations in the petition if the court has determined from examination of the juvenile and those present that such admission is intelligently, voluntarily, and understandingly made and with an affirmative waiver of rights and that a factual basis for such admission exists.

§ 43-279(1).

[10] In the instant case, the record demonstrates that the juvenile court did not follow the clear dictates of § 43-279(1). It is axiomatic that a juvenile may not waive his or her right to be advised of his or her rights. Although the bills of exceptions

do not include any hearings until April 9, 1997, the adjudication order of January 29, 1997, which was filed on January 31, reveals that the juvenile was present with his father and that the following occurred:

> Upon waiver of the reading of the petition and rights in open Court, the Court inquired as to understanding by all parties as to the content of the petition, rights and possible consequences if the allegations are admitted. The juvenile waived his right to counsel. The juvenile admitted the allegations.

The court then proceeded to make conclusions, but not findings of fact, about the juvenile's conduct which supported the adjudication. The order does not refer to a factual basis having been given or obtained and does not contain a finding that the juvenile's admission was intelligently, voluntarily, and understandingly made, both of which are prerequisites to the acceptance of an in-court admission. See, § 43-279(1); *In re Interest of A.M.H.*, 233 Neb. 610, 477 N.W.2d 40 (1989).

[11] Neb. Rev. Stat. § 43-279.01(1) and (2) (Reissue 1993) generally requires the same advisement of rights and procedure. We explained the application of such law in *In re Interest of Amanda H.*, 4 Neb. App. 293, 305-06, 542 N.W.2d 79, 88 (1996), where we stated:

> With regard to the failure of a trial court to find a factual basis, the [Nebraska] Supreme Court has held that the failure of a juvenile court to recite a factual basis in an adjudication hearing constitutes plain error that results in damage to the integrity, reputation, and fairness of the judicial process. *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992). In *In re Interest of D.M.B.*, the Supreme Court went on to conclude that the failure of the juvenile court to recite a factual basis for the adjudication at an adjudication hearing caused the juvenile court to lack jurisdiction to later terminate parental rights. We think that in the case at hand it was plain error for the trial court to claim jurisdiction of [the juvenile] because it failed to recite the factual basis for jurisdiction and that therefore the father's motion for termination of jurisdiction should have been granted.

[12] Similarly, in *In re Interest of N.M. and J.M.*, 240 Neb. 690, 484 N.W.2d 77 (1992), the juvenile court adjudicated the child as a juvenile under § 43-247(3)(a) despite the fact that there were no factual allegations, no evidence at the adjudication hearing, and no findings concerning the actions of either parent as to the child. In holding that the juvenile court had no jurisdiction over the juvenile, the court quoted *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992), for the following proposition:

> "If the pleadings and evidence at the adjudication hearing do not justify a juvenile court acquiring jurisdiction of a child, then the juvenile court has no jurisdiction, i.e., no power, to order a parent to comply with a rehabilitation plan, nor does the juvenile court have any power over the parent or child at the disposition hearing unless jurisdiction is alleged and proven by new facts at a new adjudication-disposition hearing."

In re Interest of N.M. and J.M., 240 Neb. at 694, 484 N.W.2d at 80. We note that the court decided this issue despite the fact that jurisdiction had not been raised by the parents.

Pursuant to the foregoing authorities, we conclude that it was plain error for the juvenile court to exercise jurisdiction over the juvenile by the adjudication order that was entered in case No. 4100. The petition was insufficient, there was no evidence adduced, and the juvenile admitted only to conclusions of law. Moreover, the juvenile court failed to recite the factual basis for its exercise of jurisdiction. Therefore, we must reverse the order of the juvenile court and remand the cause with directions to dismiss case No. 4100. See *In re Interest of Amanda H., supra.*

2. Cases Nos. A-97-523 and A-97-682 (Appeals in Case No. 4126)

In case No. A-97-523, the order of April 17, 1997, which purports to control OJS in case No. 4126, is contrary to our holdings in *In re Interest of David C., ante* p. 198, 572 N.W.2d 392 (1997), and must therefore be reversed. However, since that order committed the juvenile to the YRTC only in case No. 4100, the court may still exercise jurisdiction in entertaining dispositional proceedings in case No. 4126. Case No. A-97-682

is meritless and is also rendered moot by our opinion. Therefore it must be dismissed.

VI. CONCLUSION

In case No. A-97-524, which comprises the appeal in case No. 4100 from the April 17, 1997, order, we direct the juvenile court to dismiss the proceedings without prejudice to any new proceedings if the facts at the time of the filing of new proceedings justify such proceedings. In case No. A-97-523, which comprises the appeal in case No. 4126 from the April 17, 1997, order, we reverse. And in case No. A-97-682, which is a subsequent appeal in case No. 4126, we dismiss the cause as moot.

JUDGMENT IN NO. A-97-523 REVERSED.
JUDGMENT IN NO. A-97-524 REVERSED, AND CAUSE REMANDED WITH DIRECTIONS TO DISMISS.
APPEAL IN NO. A-97-682 DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. TRENT D. ERB, APPELLANT.
576 N.W.2d 839

Filed March 17, 1998. No. A-97-527.

1. **Sentences.** In the event of a discrepancy between an oral pronouncement of sentence and the written order of the sentence, the oral pronouncement controls.
2. **Courts: Judgments: Records.** Although ordinarily, the record of a lower court imparts absolute verity, where there is a conflict between the record of a judgment and the verbatim record of the proceedings in open court, the latter prevails.
3. **Trial: Records: Evidence: Pleas: Presumptions.** Where there is a trial on the merits and the record shows that a finding of guilt is based on the evidence adduced thereon, should the trial court subsequently make an incorrect written notation that guilt was based on a plea of guilty, the presumption will be made that a plea of not guilty was entered prior to or at trial.
4. **Jurisdiction.** Subject matter jurisdiction cannot be conferred upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.
5. **Jurisdiction: Appeal and Error.** If the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.
6. **Jurisdiction: Judgments: Final Orders: Appeal and Error.** Even though an extrajudicial act of a lower court cannot vest an appellate court with jurisdiction to review the merits of an appeal, the appellate court has jurisdiction and, moreover, the duty

to determine whether the lower court had the power, that is, the subject matter jurisdiction, to enter the judgment or other final order sought to be reviewed.

7. **Appeal and Error: Time.** Denial of a motion to discharge is an appealable order from which an appeal must be taken within 30 days.
8. **Jurisdiction: Appeal and Error.** A district court lacks jurisdiction on an appeal of an order which is not timely filed.
9. ____: ____. Where the district court lacks jurisdiction, an appellate court acquires no jurisdiction.

Appeal from the District Court for Hall County, JAMES LIVINGSTON, Judge, on appeal thereto from the County Court for Hall County, PHILIP M. MARTIN, JR., Judge. Appeal dismissed.

Jerry J. Fogarty, Deputy Hall County Public Defender, for appellant.

Don Stenberg, Attorney General, and David T. Bydalek for appellee.

MILLER-LERMAN, Chief Judge, and SIEVERS and INBODY, Judges.

MILLER-LERMAN, Chief Judge.

Trent D. Erb appeals from, and assigns as his sole error, the denial of his motion to discharge based on speedy trial grounds entered by the Hall County Court as affirmed by the Hall County District Court. Erb also argues in his reply brief several issues not assigned as error. For the reasons recited below, we dismiss the cause for lack of jurisdiction.

BACKGROUND

On November 14, 1995, a complaint was filed against Erb in Hall County Court alleging three counts: driving during suspension, second offense, in violation of Neb. Rev. Stat. § 60-4,108 (Reissue 1993), a misdemeanor; driving under the influence of alcohol, in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1993), a misdemeanor; and escape, in violation of Neb. Rev. Stat. § 28-912(1) (Reissue 1995), a felony. Following a stipulation of the parties to transfer the case to district court, Erb was bound over to district court on January 26, 1996. An information alleging the same three counts was filed in district court on February 1. Although Erb did not appear for arraignment on February 6, his counsel was present and asked for a continuance to file a plea in abatement, which request was

granted. On February 28, Erb did not appear and his counsel again asked for a continuance.

On March 22, 1996, Erb filed a plea in abatement. The plea in abatement was sustained as to the escape charge on March 27. The balance of the case was remanded to the county court.

On April 11, 1996, Erb pled not guilty in county court and requested a jury trial. On June 11, in a joint motion, the State and Erb sought another continuance, which was granted. Trial was reset for the week of August 12.

On August 9, 1996, Erb filed a motion for discharge under Neb. Rev. Stat. § 29-1208 (Reissue 1995) for the reason that he had not been brought to trial before the running of the 6-month period provided for in the statute.

In a letter to counsel filed October 15, 1996, the county court overruled the motion to discharge. The State was directed to prepare an order. In a journal entry dated October 29, the county court overruled Erb's motion for discharge. This journal entry is signed by the county court judge and bears the seal of the county court for Hall County. However, there is no file stamp on this journal entry.

By written pleading, Erb waived his right to a jury trial on February 6, 1997. This waiver was signed by both Erb and his counsel. On February 11, count II, driving under the influence, was dismissed. The basis for dismissal is not apparent.

On February 14, 1997, a bench trial was conducted in county court at which James A. Glad, a Grand Island police officer, testified generally that on the evening of November 11, 1995, he observed a vehicle operated without taillights and that Erb was the driver. Erb was found guilty of driving during suspension, first offense. Evidently, the State agreed to forgo enhancement. Following the finding of guilt, the county court orally pronounced sentence. Erb was sentenced to 21 days in jail and 6 months' probation.

For the sake of completeness, we note that the written order pertaining to the trial proceedings incorrectly states that Erb pled guilty but correctly recites the sentence. The mittimus also correctly states the sentence.

[1-3] The bill of exceptions from county court, which is part of the record on appeal from district court to this court, amply

shows that a bench trial was conducted, evidence was received, and a finding of guilt was made by the county court based on evidence which was beyond a reasonable doubt. The record thus clearly shows that the case proceeded on the basis of a not guilty plea, and the discrepancy on the written notation to the contrary is of no legal consequence. It is well settled that in the event of a discrepancy between an oral pronouncement of sentence and the written order of the sentence, the oral pronouncement controls. *State v. Temple*, 230 Neb. 624, 432 N.W.2d 818 (1988) (holding that although ordinarily, record of lower court imparts absolute verity, where there is conflict between record of judgment and verbatim record of proceedings in open court, latter prevails). We logically extend this principle and hold that where there is a trial on the merits and the record shows that a finding of guilt is based on the evidence adduced thereon, should the trial court subsequently make an incorrect written notation that guilt was based on a plea of guilty, the presumption will be made that a plea of not guilty was entered prior to or at trial. See, e.g., *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985).

On February 14, 1997, Erb filed a notice of his intention to appeal to district court. Erb assigned as his sole error on appeal to the district court the denial by the county court of his motion to discharge.

In a written journal entry, filed April 14, 1997, the district court affirmed the decision of the county court denying Erb's motion for discharge. In this order, the district court recited the procedural history recited above and concluded, inter alia, that "[i]n adding up the time against the six month speedy trial rule the Defendant was tried within the six month period when the time taken which is tolled [due] to Defendant's own tactics." Erb filed a notice of appeal to this court on May 13.

ASSIGNMENT OF ERROR

As his sole assignment of error to this court, Erb claims that the Hall County District Court erred in affirming the Hall County Court's overruling of his motion to discharge for want of a speedy trial. For the sake of completeness, we note that in his reply brief, Erb attempts to raise additional issues, which we

do not reach because of our holding below that this court lacks jurisdiction to consider the sole properly assigned error.

STANDARD OF REVIEW

[4,5] Subject matter jurisdiction cannot be conferred upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties. *Anderson v. HMO Nebraska*, 244 Neb. 237, 505 N.W.2d 700 (1993). If the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction. *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995).

[6] Even though an extrajudicial act of a lower court cannot vest the appellate court with jurisdiction to review the merits of the appeal, the appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power, that is, the subject matter jurisdiction, to enter the judgment or other final order sought to be reviewed. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994).

ANALYSIS

In the instant case, the sole assignment of error presented to the district court sitting as an intermediate appellate court was that the county court's ruling denying Erb's motion to discharge was incorrect. Erb's appeal to the district court was not timely filed.

[7-9] The denial of a motion to discharge is an appealable order from which an appeal must be taken within 30 days. *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997). In the instant case, the trial court denied the motion to discharge in October 1996, and Erb did not file his notice of appeal therefrom until February 1997. The appeal of this order to the district court was not timely, and therefore, the district court lacked jurisdiction. See *id.* Where the district court lacks jurisdiction, this court acquires no jurisdiction. *Id.* Erb's appeal must be dismissed.

CONCLUSION

Erb's appeal to the district court of the county court's denial of his motion to discharge was untimely, and the district court lacked jurisdiction to hear the appeal. Where the court from

which an appeal is made to this court lacks jurisdiction, this court acquires no jurisdiction and the cause must be dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. CHERI L. STOTT, APPELLANT.
576 N.W.2d 843

Filed March 17, 1998. No. A-97-641.

1. **Courts: Appeal and Error.** Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.
2. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court.
3. **Right to Counsel: Sentences: Waiver.** Absent a knowing and intelligent waiver of the right to counsel, no person can be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless the person is represented by counsel at trial.
4. **Right to Counsel: Misdemeanors: Sentences.** Where no sentence of imprisonment is imposed, a defendant charged with a misdemeanor has no constitutional right to counsel.
5. **Right to Counsel: Sentences.** If a judge does not advise a defendant of his or her right to counsel, the judge cannot impose imprisonment as part of the sentence.
6. ____: ____. The denial of the assistance of counsel precludes the imposition of a jail sentence.

Appeal from the District Court for Lancaster County, BERNARD J. MCGINN, Judge, on appeal thereto from the County Court for Lancaster County, GALE POKORNY, Judge. Judgment of District Court affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch for appellant.

Norman Langemach, Jr., Lincoln City Prosecutor, for appellee.

HANNON, IRWIN, and MUES, Judges.

HANNON, Judge.

After a bench trial in county court, Cheri L. Stott was convicted of violation of a Lincoln city ordinance and sentenced, in part, to imprisonment. Having found a violation of Stott's right to counsel, the district court affirmed Stott's conviction but

reversed her sentence and remanded the matter with direction to modify Stott's sentence by deleting the provisions relating to imprisonment. Because the proper remedy for a violation of the right to counsel, in cases other than felonies, is to affirm the conviction but reverse or vacate the sentence, we now affirm the judgment of the district court.

BACKGROUND

Stott was charged with disturbing the peace and quiet of other persons, in violation of Lincoln Mun. Code § 9.20.050 (1992), as a result of a physical confrontation with three others near an elementary school. Stott pled not guilty and at trial proceeded pro se. Although not requested in the praecipe, the bill of exceptions from the arraignment is included in the record on appeal, and the bill of exceptions reveals that the trial judge did not advise Stott of her right to counsel if she was indigent.

The county court found Stott guilty of the charged offense. In an order of probation dated November 22, 1996, the court sentenced Stott to probation for 1 year, subject to several conditions. Included in these conditions were that she pay court costs of $24, a witness fee of $20, and an assessment fee of $10. Stott was also ordered to satisfactorily complete an anger control class and to serve 24 hours in jail beginning immediately. Finally, the court ordered that Stott "[s]hall serve 14 days in the Lancaster County Jail beginning 11/1/97 at 3:30 p.m.; however, such condition may be waived provided defendant is in full compliance with all terms of this probation o[r]der." The transcript reveals that Stott served 24 hours in jail and was released on November 23, 1996.

On appeal, the district court found that the record failed to show that Stott had been advised of her right to counsel and that she had waived that right. The district court thus affirmed the conviction but reversed the sentence and remanded the matter to the county court with directions to delete the aforementioned two provisions imposing jail time. Stott again appeals.

ASSIGNMENTS OF ERROR

Stott contends that the county court committed federal and state constitutional error in (1) permitting the trial court to proceed without defense counsel, where a jail sentence was later

imposed; (2) imposing a jail sentence after conducting a trial without defense counsel; and (3) permitting the sentencing to proceed without defense counsel, where a jail sentence was imposed. Stott also maintains that the district court committed federal and state constitutional error in affirming her conviction.

STANDARD OF REVIEW

[1] Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. *State v. McCurry*, 5 Neb. App. 526, 561 N.W.2d 244 (1997); Neb. Rev. Stat. § 25-2733 (Reissue 1995).

[2] Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court. *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998).

ANALYSIS

[3] In *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), the U.S. Supreme Court held that the 6th Amendment right to counsel was applicable to the states through the 14th Amendment. Subsequently, in *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972), the Court held that absent a knowing and intelligent waiver of the right to counsel, no person can be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless the person is represented by counsel at trial. See, also, *State v. Green*, 238 Neb. 492, 471 N.W.2d 413 (1991); Neb. Rev. Stat. § 29-3902 (Reissue 1995) (statutory right to be advised of right to counsel if indigent for felony defendants and misdemeanants who may be punished by imprisonment). In doing so, the Court stated:

> Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.

Argersinger v. Hamlin, 407 U.S. at 40.

[4] *Argersinger v. Hamlin, supra*, was followed by *Scott v. Illinois*, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979), wherein the Court affirmed a defendant's uncounseled misdemeanor conviction in which no imprisonment had been imposed. The Court essentially held that where no sentence of imprisonment is imposed, a defendant charged with a misdemeanor has no constitutional right to counsel. See *Nichols v. United States*, 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994). The *Scott* Court explained: "[W]e believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." 440 U.S. at 373. More recently, in *Nichols*, the Court overruled its prior decision to the contrary in *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980), and held that an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.

[5] The effect of the aforementioned Supreme Court decisions is that if a judge does not advise a defendant of his or her right to counsel, the judge cannot impose imprisonment as part of the sentence. This has been held to include suspended sentences. See, e.g., *U.S. v. Reilley*, 948 F.2d 648 (10th Cir. 1991); *United States v. White*, 529 F.2d 1390 (8th Cir. 1976). As a result, if a court does not advise a defendant of his or her right to counsel, it cannot sentence the defendant to anything which includes the possibility of jail.

In the instant case, the ordinance under which Stott was charged is not in the bill of exceptions. However, because Stott does not claim that her jail sentence was outside the penalties authorized by the ordinance, we treat the offense as one punishable by imprisonment and therefore as one which requires the appointment of a public defender if she is indigent, as defined in Neb. Rev. Stat. § 29-3901(3) (Reissue 1995). *State v. Richter*, 221 Neb. 487, 378 N.W.2d 175 (1985).

The parties do not dispute that the county court's action in sentencing Stott to jail, despite not having been informed of and

waiving her right to counsel at trial, violated her Sixth Amendment right to counsel. The question that remains is, What is the remedy for such a violation? Stott naturally argues that such a violation requires a reversal of her entire conviction, while the State maintains that the violation mandates a reversal of only that portion of the sentence imposing imprisonment.

[6] In *United States v. White, supra*, the trial court found that the defendant had committed a petty offense and sentenced him to a $50 fine and 90 days' imprisonment but suspended execution of the prison term. Because the defendant had not clearly waived his right to counsel, the Eighth Circuit vacated the suspended sentence but upheld the conviction and fine. In doing so, the court quoted *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972), for the proposition that the denial of the assistance of counsel precludes the imposition of a jail sentence.

Other circuits have agreed with this outcome. See, *U.S. v. Ortega*, 94 F.3d 764 (2d Cir. 1996) (where court held that appropriate remedy for *Scott* violation is vacation of invalid portion of sentence and not reversal of conviction itself); *U.S. v. Moskovits*, 86 F.3d 1303 (3d Cir. 1996) (deprivation of Sixth Amendment right requires only that sentence be vacated and cause be remanded for resentencing), *cert. denied* 519 U.S. 1120, 117 S. Ct. 968, 136 L. Ed. 2d 853 (1997); *U.S. v. Reilley, supra* (in holding that constitutionally suspended sentence of imprisonment could not be imposed on defendant who had been denied counsel, court struck portion of defendant's sentence suspending imprisonment but affirmed that part of sentence imposing fine). However, at least one circuit has indicated that the entire conviction must be reversed. See *U.S. v. Eckford*, 910 F.2d 216 (5th Cir. 1990). But see *Williams v. City of Phenix City*, 659 So. 2d 1004 (Ala. App. 1995).

In *State v. Richter, supra*, the defendant was convicted of violation of a municipal ordinance and sentenced to 6 months' imprisonment despite that at trial (1) he had asserted his indigency by telling the court that it would take him a while to save up money for an attorney and (2) he had requested, and been denied, court-appointed counsel. Because the trial court's inquiry into the defendant's financial condition under what is

now § 29-3902 was found to be deficient, the Nebraska Supreme Court remanded the cause to the trial court for consideration of the proper factors. The court concluded that if the trial court found that the defendant had been indigent at the time of trial, it should grant a new trial on the ground that a public defender should have been appointed as counsel for him. However, if the court found that the defendant had not been indigent, then its judgment of conviction and sentence was to stand affirmed.

In *Richter*, because the defendant had asserted his indigency, he was entitled to a "reasonable inquiry" to determine whether his "financial condition" mandated appointment of a public defender. See § 29-3902. Thus, it was necessary for the cause to be remanded for such a determination. In contrast, Stott never asserted indigency and therefore was not entitled to a public defender at that time. Thus, there is no need to remand her cause for a determination of indigency under § 29-3902. However, it remains true that the county court, by sentencing her to jail without the benefit of counsel, violated Stott's constitutional right to counsel.

It is clear that had the county court refrained from imposing a jail sentence there would have been no constitutional violation because, under *Scott v. Illinois*, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979), the defendant would not have had a constitutional right to counsel. We do not think that such an error requires a reversal of the entire conviction merely because the court made an error in sentencing. Following the Eighth Circuit's decision in *United States v. White*, 529 F.2d 1390 (8th Cir. 1976), and what appears to be a majority of other federal circuits, we conclude that the county court's action does not require a reversal of Stott's conviction, just the conditions imposing imprisonment.

CONCLUSION

The judgment of the district court, reversing the sentencing and remanding the matter to the county court with direction to modify the order of probation by deleting the jail sentences, is affirmed.

AFFIRMED.

IN RE INTEREST OF JUAN L., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JUAN L., APPELLEE, AND NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, INTERESTED PARTY, APPELLANT.

577 N.W.2d 319

Filed March 17, 1998. No. A-97-697.

1. **Juvenile Courts: Judgments: Appeal and Error.** In reviewing questions of law arising in proceedings under the Nebraska Juvenile Code, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts.
3. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
4. **Appeal and Error.** Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.
5. ____. 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.
6. **Juvenile Courts: Jurisdiction.** A juvenile court retains jurisdiction of a juvenile after he or she is committed to a youth rehabilitation and treatment center.
7. ____: ____. A juvenile court does not have the authority to order the Office of Juvenile Services in its supervision of a juvenile.
8. **Due Process.** Procedural due process includes notice to the person whose right is affected by the proceeding, that is, timely notice reasonably calculated to inform the person concerning the subject and issues involved in 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 hearing before an impartial decisionmaker.
9. **Juvenile Courts: Jurisdiction: Due Process.** In exercising its jurisdiction, a juvenile court cannot modify a disposition order without, at least, a motion, appropriate notice, and a hearing satisfying the requirements of due process.
10. **Juvenile Courts: Jurisdiction.** Under Neb. Rev. Stat. § 43-247 (Reissue 1993 & Cum. Supp. 1996), a juvenile court, in addition to lacking the authority to order the Nebraska Department of Health and Human Services to supervise a juvenile's probation, also lacks the authority to order the department to supervise a juvenile's house arrest or to oversee a juvenile's payment of restitution.

Appeal from the County Court for Colfax County: GERALD E. ROUSE, Judge. Reversed and vacated.

Don Stenberg, Attorney General, Royce N. Harper, and Beth Tallon, Special Assistant Attorney General, for appellant.

Richard T. Seckman, Colfax County Attorney, for appellee State.

HANNON, IRWIN, and MUES, Judges.

HANNON, Judge.

On the basis of four separate petitions, Juan L. was adjudicated as a juvenile under Neb. Rev. Stat. § 43-247(1) and (2) (Reissue 1993 & Cum. Supp. 1996) by the Colfax County Court, sitting as a juvenile court. In a dispositional order, which was common to all four adjudications and dated April 17, 1997, the juvenile court committed Juan to the Youth Rehabilitation and Treatment Center (YRTC) in Kearney, Nebraska, a facility now operated by the Office of Juvenile Services (OJS), which has recently been made a part of the newly created Nebraska Department of Health and Human Services (Department). See, Neb. Rev. Stat. § 43-286(2) (Cum. Supp. 1996); Neb. Rev. Stat. § 83-465 (Reissue 1994); Neb. Rev. Stat. § 83-472 (Cum. Supp. 1996); 1996 Neb. Laws, L.B. 1044. See, also, *In re Interest of David C., ante* p. 198, 572 N.W.2d 392 (1997).

On May 29, 1997, probably upon notification of Juan's expected release from the YRTC, the juvenile court ordered the county sheriff to transport Juan, on his release date, from the YRTC to a detention facility and then to the juvenile court for further hearing. In an order filed June 13, the juvenile court stated that it would continue to exercise jurisdiction over Juan and ordered that Juan's placement would continue with OJS, which would provide parole services, oversee Juan's restitution payments, provide monitoring for house arrest when Juan was not working, and otherwise monitor Juan's compliance with the conditions of his parole order. The order also provided that OJS would have 5 days to place Juan on electric monitoring. The Department now appeals from the May 29 and June 13 orders.

On the basis of *In re Interest of David C., supra*, we conclude that the orders are void insofar as they attempt to order OJS in its management of Juan while he was committed to the YRTC or to order OJS to continue to supervise Juan in any capacity

after OJS discharged him from the YRTC. In addition, on the basis of plain error, we set aside both orders because they were issued without adequate notice or hearing.

BACKGROUND

The record reveals that Juan was adjudicated a juvenile, as defined in § 43-247, at various times. In case No. JV96-102, the petition alleged that on October 5, 1996, Juan was found in possession or physical control of alcoholic liquor and in violation of curfew. Pursuant to his in-court admissions, Juan was found to be a juvenile as defined in § 43-247(1).

In case No. JV96-117, Juan was charged with violating curfew on November 1, 1996. The transcript does not contain a petition, but, rather, a "State of Nebraska Uniform Citation and Complaint," charging Juan with violation of a municipal ordinance. On November 21, pursuant to Juan's in-court admissions, he was found to be "a child as described in 43-247."

In case No. JV96-119, the petition alleged that on October 20, 1996, Juan had assaulted another and was therefore a minor as defined in § 43-247(1). On November 21, Juan admitted all of the allegations contained in the petition, and the court found him to be a juvenile as described in § 43-247 and ordered the probation officer to prepare a predisposition report.

The journal entries of the above-described adjudication proceedings show that regular procedure was followed in all three cases, with the exception of case No. JV96-117. In that case, no petition was filed, and the citation did not contain the allegations which are necessary to invoke the jurisdiction of the juvenile court. See Neb. Rev. Stat. § 43-274 (Reissue 1993). The adjudication would obviously be void unless the praecipe for transcript was not followed and the petition was not included in the transcript by mistake. However, because the original order of commitment and the subsequent orders appealed from also relate to three other properly adjudicated cases, the invalidity of the adjudication of case No. JV96-117 does not appear to have prejudiced anyone.

In case No. JV97-9, a petition filed on January 22, 1997, alleged that Juan was a child as described in § 43-247(1) and (2). This petition alleged in detail that between October 18 and

November 29, 1996, Juan had committed 12 different offenses, including theft, burglary, and damage to property. In summary, the petition alleged that on several occasions, Juan had broken into vehicles or business buildings and taken property from them.

The record contains a journal entry, dated February 6, 1997, in all four cases. The journal entry reflects that after Juan was advised of his rights, he requested counsel. The court granted his request and suspended the adjudication hearing in case No. JV97-9 and the temporary disposition in the other three cases until March 6. This journal entry was filed on March 24 and has not been appealed.

At a hearing on March 13, 1997, in which Juan was represented by counsel, Juan admitted all the allegations of the petition in case No. JV97-9. The court found that Juan was a juvenile as alleged in the petition and ordered Juan to be placed under house arrest with a monitor, with the condition that if he violated the house arrest, he would be delivered to the Wayne Detention Center by the Colfax County Sheriff. The court scheduled disposition in all four cases for April 17.

On April 17, 1997, a dispositional hearing was held in all four cases. Counsel for Juan was present. As reflected in a journal entry filed April 22, the court committed Juan to the YRTC-Kearney, with the recommendation that the YRTC keep Juan in its custody for at least 6 months. The court also ordered Juan and his parents to pay restitution in the amount of $3,389.07 and to pay court costs. Lastly, the court ordered the YRTC to give the court 20 days' notice prior to releasing Juan from its facility. The Department did not appeal from this order.

A journal entry filed and dated May 29, 1997, reflects the following:

> [T]his matter comes before the County Court of Colfax County, Nebraska upon its own Motion after receiving notice from the Youth Rehabilitation and Treatment Center in Kearney, Nebraska, that [Juan] is to be released from their facility on June 2nd, 1997.
>
> The Court hereby finds that it is in the best interest of [Juan] to appear before this Court for further hearing and hereby orders the Sheriff of Colfax County, or any duly

> authorized agent to transport . . . Juan . . . from the Youth Rehabilitation and Treatment Center to the Wayne Detention Facility in Wayne, Nebraska, on June 2nd, 1997. The Sheriff of Colfax County shall then transport the juvenile to the Colfax County Court on June 5th, 1997, for further hearing before this Court at 10:00 a.m.

A journal entry filed June 13, 1997, reflects that on June 5 a hearing was held on the four cases for purposes of further disposition. The relevant portion of that order is as follows:

> The Court does state that it will continue its jurisdiction over this juvenile until the juvenile reaches the age of majority, or until further order of this Court terminating jurisdiction. The Court DOES ORDER AND ADJUDGE that placement shall be continuing with the Office of Juvenile Services, who shall provide parole services to the juvenile and oversee his restitution payments previously ordered in this case. Said Office of Juvenile Services shall also provide a monitor for the house arrest when the juvenile is not working or otherwise complying with his conditions of his parole order. The Office of Juvenile Services shall have five days from this date to place the juvenile on electric monitoring and shall so notify the court.

The Department timely appeals from the latter two orders for all four cases.

ASSIGNMENTS OF ERROR

The Department contends that the court erred in (1) concluding, contrary to the provisions of § 83-472, that it had continuing jurisdiction over Juan after it had committed him to the YRTC; (2) professing to retain jurisdiction of the matter subject to Juan's release from the YRTC; (3) ordering the sheriff to transport Juan, upon his release from the YRTC, to the Wayne Detention Center and then to the court for further disposition; and (4) stating that it would continue jurisdiction over Juan until he reached the age of majority or until the court terminated jurisdiction. The Department also contends that the court's actions violated Nebraska's separation of powers clause, Neb. Const. art. II, § 1, and the Double Jeopardy Clause, U.S. Const. amend. V and Neb. Const. art. I, § 12.

STANDARD OF REVIEW

[1] In reviewing questions of law arising in proceedings under the Nebraska Juvenile Code, an appellate court reaches a conclusion independent of the lower court's ruling. *In re Interest of Kayle C. & Kylee C.*, 253 Neb. 685, 574 N.W.2d 473 (1998).

[2,3] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997); *In re Interest of Jeffrey R.*, 251 Neb. 250, 557 N.W.2d 220 (1996). In addition, statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *In re Interest of Jeffrey R., supra.*

[4,5] Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *In re Interest of D.W.*, 249 Neb. 133, 542 N.W.2d 407 (1996). 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. *In re Interest of D.W., supra.*

ANALYSIS

Continuing Jurisdiction of Juvenile Court.

Section 43-247 provides, in relevant part, that "the juvenile court's jurisdiction over any individual adjudged to be within the provisions of this section shall continue until the individual reaches the age of majority or the court otherwise discharges the individual from its jurisdiction."

[6] The Department makes the same argument that it did in *In re Interest of David C., ante* p. 198, 572 N.W.2d 392 (1997), that a juvenile's commitment to OJS, pursuant to § 83-472, amounts to a discharge under § 43-247 and therefore divests the court of jurisdiction over the juvenile. We rejected that argument, holding that a juvenile court retains jurisdiction of a juvenile after he or she is committed to a YRTC. *In re Interest of David C., supra.* As a result, the court in this case was correct in concluding that its jurisdiction shall continue until Juan

reaches the age of majority or until it otherwise discharges Juan from its custody. The Department's first, second, and fourth assignments of error are therefore without merit.

Juvenile Court's Jurisdiction Over OJS.

It is clear that the juvenile court was of the opinion that it had continuing jurisdiction over Juan until either he reached the age of majority or the court otherwise discharged Juan from the court's jurisdiction. In its June 13, 1997, journal entry, the juvenile court ordered that placement of Juan should continue with OJS. The court then proceeded to dictate requirements to OJS, namely that it provide parole services to Juan; oversee the payment of restitution; provide a monitor for Juan's house arrest; and within 5 days, place Juan on electric monitoring and notify the court. It would seem profitable to examine the nature of the court's jurisdiction and whether or not it can be exercised in the manner the juvenile court sought to do so in this case.

Neb. Rev. Stat. § 43-295 (Reissue 1993) provides, except in the case of adoption:

> [T]he jurisdiction of the court shall continue over any juvenile brought before the court or committed under the Nebraska Juvenile Code and the court shall have power to order a change in the custody or care of any such juvenile if at any time it is made to appear to the court that it would be for the best interests of the juvenile to make such change.

[7] In *In re Interest of David C., supra*, we held that a juvenile court does not have the authority to order OJS in its supervision of a juvenile. We stated that there is an "important distinction between a juvenile court's continuing to exercise jurisdiction over a juvenile and a juvenile court's directing OJS in its management of a juvenile that has been committed to OJS." *Id.* at 211, 572 N.W.2d at 400. The first is permissible under the statutes, specifically §§ 43-247 and 43-295; the second is not. "This is not to say that a juvenile court may exercise such jurisdiction at the whim of the judge, but only after a proposed change is brought before the court with appropriate pleadings, notice, and a hearing with evidence which justifies a change in placement." *In re Interest of David C., ante* at 210, 572 N.W.2d at 400.

Moreover, in *In re Interest of L.D. et al.*, 224 Neb. 249, 262, 398 N.W.2d 91, 100 (1986) (juvenile court had no power under § 43-295 to review evidentiary basis of its order which became final as adjudication of subject matter jurisdiction under § 43-247), the Nebraska Supreme Court stated:

> It is true that § 43-295 does allow a juvenile court to alter its previous order concerning "custody or care" of a juvenile. Section 43-295 is a statutory analog to Neb. Rev. Stat. § 42-351(1) (Reissue 1984) authorizing a district court's continuing jurisdiction involving "the custody and support of minor children" affected by proceedings for dissolution of a marriage. Cf. *Nimmer v. Nimmer*, 203 Neb. 503, 505, 279 N.W.2d 156, 158 (1979): "The decree of a District Court in an action for the dissolution of a marriage, insofar as minor children are concerned, is never final in the sense it cannot be changed. . . ."

The present basis for the district court's jurisdiction is in line with Neb. Rev. Stat. § 42-364(1) (Cum. Supp. 1996), which, concerning custody and visitation, provides in part: "Subsequent changes may be made by the court after hearing on such notice as prescribed by the court." This sentence has been interpreted by the Nebraska Supreme Court and this court to mean that the trial court has no authority to act without providing the parties with notice and an opportunity to be heard. *Francis v. Francis*, 195 Neb. 417, 238 N.W.2d 468 (1976); *Miller v. Miller*, 153 Neb. 890, 46 N.W.2d 618 (1951); *Eisenmann v. Eisenmann*, 1 Neb. App. 138, 488 N.W.2d 587 (1992). A judgment is void if a party is denied an opportunity to be heard. *Id.*

In a very old case, *Laurie v. State*, 108 Neb. 239, 246, 188 N.W. 110, 113 (1922), the Nebraska Supreme Court recognized that after a commitment order, if the juvenile changed so that in the opinion of the judge the commitment order should be changed or modified, the court could do so "to the end that the object and purpose of the act be carried out and [the juvenile's] reformation brought about in some other way and place."

The present statutory procedure for modification of disposition orders is found in § 43-286(4) and generally provides as follows:

> When a juvenile is placed on probation or under the supervision of the court for conduct under subdivision (1), (2), (3)(b), or (4) of section 43-247 and it is alleged that the juvenile has violated a term of probation or supervision or that the juvenile has violated an order of the court, a motion to revoke probation or supervision or to change the disposition may be filed and proceeding held . . . .

That statute then goes on to provide a procedure for an informal evidentiary hearing. See, generally, *In re Interest of Torrey B., ante* p. 658, 577 N.W.2d 310 (1998). We notice that this statute does not provide for a further disposition when the juvenile has been committed to OJS, but only when the juvenile has been placed on probation or under supervision of the court.

On the basis of double jeopardy, the Department argues that the court cannot further dispose of a juvenile after the juvenile has been committed to OJS. As discussed below, because the Department, and not Juan, appealed, we need not consider that question. In other words, we are not considering specifically how the juvenile court can exercise its continuing jurisdiction.

As in *In re Interest of David C., ante* p. 198, 572 N.W.2d 392 (1997), the case of *Brown v. Doeschot*, 185 Neb. 293, 175 N.W.2d 280 (1970), provides guidance. In *Brown v. Doeschot*, a juvenile was committed to the Boys' Training School at Kearney (now YRTC-Kearney). After being advised that the Omaha Home for Boys would accept the juvenile, the court suspended the prior commitment. Later, the probation officer, on behalf of the State, filed a motion to review placement, alleging that the juvenile had absented himself from the home on three occasions. After notice and a hearing, the court ordered that the juvenile remain in the Omaha Home for Boys. After approximately 1½ months, the State filed another motion to review placement based on similar allegations, and after a hearing, the court terminated the responsibility of the Omaha Home for Boys and recommitted the juvenile to the Boys' Training School. The juvenile appealed from the latter order.

The juvenile court's action was upheld on appeal. The *Brown v. Doeschot* court recognized that the juvenile court had continuing jurisdiction, pursuant to the language now found in § 43-295, and broad discretion as to the disposition of a juve-

nile found to be delinquent. The court further recognized that the interests of both the juvenile and society should be considered in making such a decision. The court also noted the initial commitment to the Boys' Training School but did not discuss whether that order might prevent a second commitment.

We think that the procedure followed in *Brown v. Doeschot* is an example of the correct procedure to modify a disposition order; one which was sorely lacking in the instant case. The record reveals that on May 29, 1997, the court, after being notified of Juan's impending release from the YRTC on June 2, entered an order, on its own motion, directing the sheriff to pick up Juan from the YRTC on June 2 and transport him to the Wayne Detention Center and then on June 5 to transport him to court for further hearing. The effect of the court's order was that it committed a juvenile to a detention center for the sole reason that he was to be released from the YRTC. We point out that at least theoretically, it is possible that Juan has reformed enough to no longer require further detention in an institution far from his home. Because he was being released from the YRTC, he should, at least, be entitled to that presumption. We would be naive in the extreme if we did not deduct from this and other cases that the real basis of this litigation is a difference in opinion between the juvenile court judges involved and the management of the YRTC.

From a due process standpoint, the order of June 13, 1997, is more disturbing. The effect of the order was to subject a juvenile to electronic monitoring for an unspecified time under unspecified "parole." Yet, there is no petition containing any allegations, and the order of May 29, 1997, merely set the time for the hearing. What is even more worrisome, however, is that the bill of exceptions does not contain any evidence, stipulations, or documents. At the hearing, the judge stated that Juan was being paroled. After statements by counsel, the judge asked Juan what kind of plan he had for restitution, and Juan essentially replied that he wanted to find a job. The judge then proceeded to state the terms of the order the county attorney was to draw. The judge announced his opinion of OJS' power to discharge Juan and of his power to continue to exercise jurisdiction over Juan. The judge ended the hearing with warning Juan as to

the consequences if any more graffiti was found in town. The judge also told Juan that the county attorney had told him that if Juan committed another felony, he would be prosecuted in adult court. In short, we think anyone reading the record would realize the judge was also acting as an investigator, a prosecutor, a social worker, and an administrator. In doing so, the judge abandoned his primary responsibility. No one could read the record in this case and have any hope that Juan's fate was determined upon known evidence which Juan or his attorney had a reasonable chance to dispute.

We have been presented with two nearly identical presentence investigation reports that are approximately 200 pages in length. They are shown to have been filed on April 15, 1997, but we have no indication of any on-the-record proceeding in connection with the matter. Of course, the presentence investigation reports would relate to the disposition which resulted in Juan's commitment to the YRTC, but they contain no information about Juan's conduct after the commitment.

[8] Procedural due process includes notice to the person whose right is affected by the proceeding, that is, timely notice reasonably calculated to inform the person concerning the subject and issues involved in 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 hearing before an impartial decisionmaker. *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994); *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992). We conclude that it was plain error for the juvenile court to enter the May 29 and June 13, 1997, orders because such due process was not followed.

These proceedings seriously concern us. It appears as though Juan is in need of serious management. We understand how a juvenile court judge might be concerned that a juvenile with Juan's history could be restored to his home after only approximately 6 weeks in a YRTC. We further understand the juvenile court's frustration. However, neither we nor the juvenile court have the knowledge or power to manage OJS. Our concern is

with the fact that in its zeal to impose its own notions of the proper management of Juan over those selected by OJS, the juvenile court overlooked several critical procedures mandated by statute and fundamental principles of due process.

[9] We hold that in exercising its jurisdiction, a juvenile court cannot modify a disposition order without, at least, a motion, appropriate notice, and a hearing satisfying the requirements of due process. See, generally, *In re Interest of David C., ante* p. 198, 572 N.W.2d 392 (1997). As a result, the orders are void and must be vacated.

In the instant case, even if procedural due process requirements had been satisfied, the order of June 13, 1997, would still have to be reversed. Section 43-286 provides in part as follows:

> When any juvenile is adjudicated to be a juvenile described in subdivision (1), (2), (3)(b), or (4) of section 43-247:
>
> (1) The court may continue the dispositional portion of the hearing, from time to time upon such terms and conditions as the court may prescribe, including an order of restitution of any property stolen or damaged when the same is in the interest of the juvenile's reformation or rehabilitation, and, subject to the further order of the court, may:
>
> (a) Place the juvenile on probation subject to the supervision of a probation officer;
>
> (b) Permit the juvenile to remain in his or her own home, subject to the supervision of the probation officer; or
>
> (c) Cause the juvenile to be placed in a suitable family home or institution, subject to the supervision of the probation officer. If the court has committed the juvenile to the care and custody of the Department of Health and Human Services, the department shall pay the costs of the suitable family home or institution which are not otherwise paid by the juvenile's parents.

[10] This court has held that a juvenile court does not have the statutory authority under this section to order the Department of Social Services to supervise a juvenile's probation. *In re Interest of Robin C.*, 3 Neb. App. 936, 535 N.W.2d

831 (1995). However, 1996 Neb. Laws, L.B. 1044, transferred the Department of Social Services to the Department. See, Neb. Rev. Stat. § 81-3006 (Cum. Supp. 1996); *In re Interest of David C., supra*. It naturally follows under § 43-247 that the juvenile court, in addition to lacking the authority to order the Department to supervise a juvenile's probation, also lacks the authority to order the Department to supervise a juvenile's house arrest or to oversee a juvenile's payment of restitution.

Separation of Powers and Double Jeopardy.

As in *In re Interest of David C., supra*, the Department contends that the juvenile court's actions violated both the Double Jeopardy Clause and the separation of powers clause. However, neither constitutional argument was presented to, considered by, or ruled upon by the juvenile court, and moreover, the double jeopardy claim would be Juan's, not the Department's. See, *State v. Criffield*, 241 Neb. 738, 490 N.W.2d 226 (1992); *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987); *State v. Carter*, 205 Neb. 407, 288 N.W.2d 35 (1980); *In re Interest of David C., supra*. And to the extent the Department's arguments concern the constitutionality of statutes, this court has no jurisdiction to make such determinations. See Neb. Rev. Stat. § 24-1106 (Reissue 1995). Thus, these issues are not properly before us. See *In re Interest of David C., supra*.

CONCLUSION

We declare that the orders are void insofar as they purport to direct OJS in its management of juveniles committed to a YRTC or require OJS to supervise probation, house arrest, or the payment of restitution. In addition, on the basis of plain error, we set aside the orders of May 29 and June 13, 1997, without prejudice to the juvenile court's entertaining further proceedings concerning Juan in the exercise of its jurisdiction.

REVERSED AND VACATED.

AMISUB (SAINT JOSEPH HOSPITAL), INC., APPELLEE, V. ALLIED PROPERTY AND CASUALTY INSURANCE COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, AND CHRISTOPHER J. TINLEY, THIRD-PARTY DEFENDANT, APPELLEE.

576 N.W.2d 493

Filed March 24, 1998. No. A-96-618.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Health Care Providers: Liens.** Under Neb. Rev. Stat. § 52-401 (Reissue 1993), a hospital lien attaches upon admission of a patient to the hospital for treatment.
4. **Health Care Providers: Liens: Attachments: Notice.** A hospital's lien is enforceable as against an injured party upon attachment, regardless of whether the hospital complies with the notice provisions enumerated in Neb. Rev. Stat. § 52-401 (Reissue 1993).
5. **Health Care Providers: Liens: Tort-feasors.** Perfection is required if a hospital seeks to enforce a lien against third parties, such as a tort-feasor.
6. **Health Care Providers: Liens: Insurance: Tort-feasors.** Upon perfection of a lien by a hospital, a duty arises on the part of the tort-feasor's insurer not to impair the hospital's rights under that lien.
7. **Health Care Providers: Liens: Insurance: Liability.** If an insurer settles directly with an injured party despite the existence of a perfected hospital lien, it has breached the duty not to impair the hospital's rights under that lien and is liable directly to the hospital.
8. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
9. **Health Care Providers: Liens.** A lien that has been perfected under the law of the state where a hospital service was rendered constitutes a valid lien upon any award, judgment, or settlement, regardless of where the event which caused the injury occurred or of the residence of the injured party or the party causing the injury.
10. **Summary Judgment: Pleadings.** When a plaintiff is entitled to a summary judgment on the issues pled in a petition, the only affirmative defenses that can prevent such a summary judgment are those which are pled by the defendant.
11. **Summary Judgment.** Summary judgment is proper when, based upon the pleadings, the evidence in the record discloses that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.
12. **Pleadings.** The purpose of pleadings is to frame the issues upon which a cause is to be tried, and the issues in a given case will be limited to those which are pled.

13. ____. An answer shall contain a statement of any new matter constituting a defense, counterclaim, or setoff, in ordinary and concise language, and without repetition.
14. **Summary Judgment: Pleadings.** Upon a motion for summary judgment, a defendant cannot have the benefit of a possible affirmative defense that is not pled in the answer.
15. **Actions: Jurisdiction.** When the same cause of action, involving the same parties, is pending in courts of different and sovereign jurisdictions, the actions may proceed independently of each other.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed in part, and in part reversed.

David D. Ernst and Michael C. Pallesen, of Gaines, Mullen, Pansing & Hogan, for appellant.

Neil B. Danberg, Jr., and Michael S. Degan, of Kennedy, Holland, DeLacy & Svoboda, for appellee AMISUB.

Michael G. Reilly, of Reilly, Petersen, & Hannan, P.L.C., for appellee Tinley.

HANNON, IRWIN, and MUES, Judges.

HANNON, Judge.

In this case, AMISUB (Saint Joseph Hospital), Inc., the operator of Saint Joseph Hospital in Omaha, Nebraska, seeks to enforce a hospital lien it claimed for treatment rendered to Kelly E. Lynam. Lynam was injured in Montgomery County, Iowa, in a collision involving an automobile driven by Dorothy Ann Askey. Both Lynam and Askey are residents of Iowa. Immediately after the collision, Lynam was taken to Saint Joseph Hospital for treatment. AMISUB perfected a hospital lien under Neb. Rev. Stat. § 52-401 (Reissue 1993). Later, Allied Property and Casualty Insurance Company, Askey's liability carrier, paid Lynam the limit of Askey's policy, $25,000, to settle Lynam's claim. AMISUB then brought an action against Allied to enforce its hospital lien. In its answer, Allied alleged that Iowa law controlled and that AMISUB did not have a lien under that law.

Allied also filed a third-party petition against Christopher J. Tinley, Lynam's attorney in the settlement, on the basis that Tinley was liable to Allied under the terms of the settlement agreement. The trial court granted AMISUB's motion for sum-

mary judgment against Allied for the limits of Askey's policy on the basis that Nebraska law, and not Iowa law, controlled. Allied now appeals, arguing that the trial court erred in applying Nebraska law and, in addition, that regardless of which law applied, there were issues of fact which prevented summary judgment. Specifically, Allied points to evidence which shows the possibility that the Iowa Department of Human Services (IDHS) also had a lien against the same funds. Allied also contends that the attorney fees Lynam paid to Tinley to accomplish the settlement should have been deducted from Lynam's recovery and that these are factual questions which prevent summary judgment. We conclude that Nebraska law does apply, that AMISUB is entitled to enforce its lien, and that because Allied did not plead the issues concerning the IDHS' lien or the attorney fees, they were not issues which could properly be considered on a motion for summary judgment. We therefore affirm the court's order sustaining AMISUB's motion for summary judgment.

The trial court also granted Tinley's motion for summary judgment and dismissed Allied's third-party petition because the evidence established that Tinley had filed suit against Allied in Iowa. Allied appeals from this order as well. We conclude that because the pendency of the same action in a court of a different or sovereign jurisdiction does not bar the present action, the judgment of the district court, sustaining Tinley's motion, must be reversed.

BACKGROUND

Most of the allegations of AMISUB's petition are admitted by Allied's answer. In addition to the corporate organization of the parties, AMISUB alleged that on or about June 2, 1992, Lynam was involved in a motor vehicle collision with Askey at or near Montgomery County, Iowa; that, at the time of the collision, Askey was insured by Allied under a liability insurance policy; that on that same day, Lynam was transported to Saint Joseph Hospital by helicopter, where he sought and received treatment for the injuries received in the collision; that he was discharged from the hospital on June 15; that on September 1, Lynam commenced a lawsuit against Askey in the district court

for Montgomery County, Iowa, to recover for his injuries; that on April 8, 1993 (though the evidence reveals that it actually occurred on April 8, 1994), Lynam and Askey entered into a settlement agreement discharging all claims arising out of the collision; that Lynam dismissed his lawsuit on April 11, 1993 (we assume, due to the above-noted error, that such actually occurred on April 11, 1994); and that Allied paid funds on behalf of Askey to Lynam and Tinley pursuant to the terms of the settlement agreement. By its answer, Allied admitted these allegations.

In addition, AMISUB alleged, and Allied denied, that the reasonable costs of the hospital services, including the helicopter services, rendered to Lynam were $70,551.63; that on September 17, 1992, pursuant to § 52-401, AMISUB notified Lynam in writing that it claimed a lien in the amount of $70,641.83 against any recovery in connection with the injuries sustained from the collision; that on September 22, AMISUB notified Allied of its intent to perfect and enforce a hospital lien in the amount of $70,641.83 against any moneys obtained by Lynam; and that on or about March 3, 1993, AMISUB filed a hospital lien in the district court for Montgomery County, Iowa, in the case pending there. A copy of the notices given to Lynam and Allied and also filed with the Iowa court were attached to AMISUB's petition. Also denied were AMISUB's allegations that Allied had failed and refused to honor AMISUB's hospital lien; that Allied had refused to pay any funds in satisfaction of AMISUB's hospital lien; and that AMISUB is still due $70,551.63.

Besides the admissions and denials referred to in its answer, Allied alleged that chapter 582 of the Code of Iowa, concerning Iowa hospital liens, Iowa Code Ann. §§ 582.1 through 582.4 (West 1992), controlled the outcome of the case and that AMISUB had failed to comply with § 582.2 of that code. These allegations are denied in AMISUB's reply.

On February 7, 1996, Allied filed a third-party petition against Tinley, alleging that in April 1994 it had made a settlement payment to Lynam and Tinley in settlement of Lynam's claim against Askey and that as part of the settlement agreement Lynam and Tinley had agreed to satisfy any claims of AMISUB

relating to Lynam's medical treatment. Allied further alleged that as a result of Tinley's failure to satisfy AMISUB's lien, AMISUB had filed suit against Allied, causing it to incur legal expenses in defending the action. Allied alleged that if AMISUB prevailed in its suit, Allied was entitled to reimbursement from Tinley. Allied prayed for judgment against Tinley in the amount of any judgment entered against Allied, together with costs and attorney fees.

In his answer, Tinley admitted all of the allegations of Allied's third-party petition except (1) that he had agreed to satisfy any claims or liens of AMISUB and (2) that as a result of his failure to satisfy AMISUB's lien, Allied had incurred costs, attorney fees, or liability to AMISUB.

Both AMISUB and Tinley moved for summary judgment. Tinley based his motion on the fact that before Allied had made him a third-party defendant he had filed a petition for declaratory judgment against both Allied and AMISUB in Iowa. On April 17, 1996, a hearing was held on both motions.

The evidence offered at the summary judgment hearing consisted of five exhibits. The first was the deposition of Tinley concerning his personal and professional relationships in Omaha. We are unable to find any relevant information in that exhibit. The second was the affidavit of Greg Barry, patient accounts manager at Saint Joseph Hospital. That document established that the cost of services that Lynam had incurred at Saint Joseph Hospital was as alleged in AMISUB's petition and that such costs were fair, reasonable, and still unpaid. It further established that AMISUB had sent individual notices of its lien to Lynam, Tinley, and the Iowa court where Lynam had filed suit against Askey. Copies of these notices were attached to Barry's affidavit.

The third exhibit was entitled "Release of Claims" and was signed by Lynam and "approved and agreed to" by Tinley. The document, dated April 8, 1994, generally purported to be a release of all of Lynam's claims against Askey arising from the collision. The document states a consideration of $31,000 plus court costs. It also contains covenants by Lynam, and possibly by Tinley. Such covenants will be set forth in detail later in this opinion when the issues applicable to them are discussed.

Exhibit 4 was Tinley's affidavit. In that affidavit, Tinley stated that the policy limits on the Allied policy covering Askey were $25,000 and that this amount was paid to Lynam in settlement of his claim. Tinley also stated that as a result of medical expenses incurred by Lynam arising out of the June 2, 1992, collision, the IDHS, "under Title XIX," had paid medical providers direct payments in excess of $20,000. Tinley opined that pursuant to Iowa Code Ann. § 249A.6 (West Supp. 1989), the IDHS had a lien against all monetary claims Lynam had against third parties.

Tinley further stated that Lynam and Askey were residents of Montgomery County, Iowa; that Lynam's cause of action filed against Askey was filed in that county; and that, pursuant to Iowa law, only an Iowa hospital could enforce an Iowa lien in the State of Iowa. Tinley attached copies of what he regarded as the applicable Iowa law.

Later, by agreement of the parties, the court received exhibit 5, entitled "Motion for Separate Adjudication of Law Points Pursuant to Iowa Rule of Civil Procedure 105." The document reveals that it was filed by Tinley in his suit against Allied and AMISUB in Pottawattamie County, Iowa, on April 18, 1996. Attached to the document is part of Tinley's petition for declaratory judgment.

TRIAL COURT'S ORDER

In an order dated and filed on May 16, 1996, the court found that Nebraska law governed issues relating to the attachment and perfection of hospital liens for hospital services rendered by a Nebraska hospital. The court also found that there was no genuine issue of material fact, that AMISUB had perfected its lien pursuant to § 52-401, and that Allied had impaired that lien. The court thus granted AMISUB's motion for summary judgment against Allied in the amount of $25,000 and taxable costs.

The court further found that because Tinley had instituted proceedings in Iowa involving the same issues prior to being named as a third-party defendant, Allied's petition should be dismissed pending resolution of the Iowa litigation. The court thus granted Tinley's motion for summary judgment of dismissal.

ASSIGNMENTS OF ERROR

Allied appealed from the granting of summary judgment both in favor of AMISUB and in favor of Tinley. It contends that the court erred (1) in applying Nebraska law, (2) in sustaining AMISUB's motion for summary judgment, and (3) in sustaining Tinley's motion for summary judgment.

STANDARD OF REVIEW

[1] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Chelberg v. Guitars & Cadillacs*, 253 Neb. 830, 572 N.W.2d 356 (1998).

[2] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Johnson v. School Dist. of Millard*, 253 Neb. 634, 573 N.W.2d 116 (1998).

ANALYSIS

Applicable Hospital Lien Laws.

Nebraska's hospital lien law is codified at § 52-401. Although § 52-401 was amended in 1995 by L.B. 172, effective September 9, 1995, see § 52-401 (Supp. 1995), the provisions applicable to the instant case are those contained in § 52-401 (Reissue 1993), which provides:

> Whenever any person shall employ a physician, nurse, or *hospital* to perform professional service or services of any nature, *in the treatment of or in connection with an injury*, and such injured person shall claim damages from the party causing the injury, such physician, nurse, or hospital, as the case may be, *shall have a lien upon any sum awarded the injured person in judgment or obtained by settlement or compromise* on the amount due for the reasonable value of services necessarily performed . . . . In order to prosecute such lien, it shall be necessary for such physician, nurse, or hospital to *serve a written notice upon the person or corporation from whom damages are claimed* that such physician, nurse, or hospital claims a

> lien for such services and stating therein the amount due and the nature of such services, *except that whenever an action is pending in court for the recovery of such damages, it shall be sufficient to file the notice of such lien in the pending action.*

(Emphasis supplied.)

[3] Under § 52-401, the hospital lien attaches upon admission of the patient to the hospital for treatment. *West Neb. Gen. Hosp. v. Farmers Ins. Exch.*, 239 Neb. 281, 475 N.W.2d 901 (1991). The Nebraska Supreme Court has compared the hospital lien statute to the attorney lien statute, Neb. Rev. Stat. § 7-108 (Reissue 1997), wherein the notice requirement is designed to prevent a bona fide settlement of the controversy by the litigants and payment by the debtor to the creditor in ignorance of the attorney's rights. *West Neb. Gen. Hosp. v. Farmers Ins. Exch., supra.*

[4-7] The hospital's lien is enforceable as against the injured party upon attachment, regardless of whether the hospital complies with the statute's notice provisions. *Id.* Perfection, on the other hand, is required if the hospital seeks to enforce the lien against third parties, such as the tort-feasor. *Id.* Any settlement reached is not between the injured party and the insurer, but between the injured party and the tort-feasor. *Id.* The fact that the insurer writes the check is the result of an independent contractual arrangement and does not alter this basic structure. *Id.* Because the hospital lien statute creates a lien against the proceeds of a settlement, regardless of where the tort-feasor gets the money to pay that settlement, the tort-feasor is generally the party against which the hospital must assert its lien. *Id.* However, upon perfection of a lien by a hospital, a duty arises on the part of the tort-feasor's insurer not to impair the hospital's rights under that lien. *Id.* If such an insurer settles directly with the injured party despite the existence of a perfected hospital lien, it has breached that duty and is liable directly to the hospital. *Id.* For a general discussion of hospital lien statutes, see Annot., 16 A.L.R.5th 262 (1993).

Iowa's hospital lien statutes are quite similar to Nebraska's and appear to have the same net effect. See Iowa Code §§ 582.1 through 582.4. However, the Iowa law, specifically § 582.1,

provides for liens to those entities "maintaining a hospital in the state." In order for such lien to be effective, the hospital must file written notice of the claim, containing specified information, with the clerk of the district court of the county where the hospital is located. § 582.2. The hospital must also send a copy of the notice to the party alleged to be liable to the injured party and to that party's insurance carrier. *Id.* The Iowa statutes require the clerk of the district court to keep a hospital lien docket, see § 582.4, and provide for the enforcement of the lien against the party owing the injured party in the event the injured party is paid without satisfaction of the lien. § 582.3.

Also attached to Tinley's affidavit are photocopies of the 1994 version of §§ 249A.5 through 249A.12 of the Iowa Code, which are statutes that generally allow the State of Iowa to recover medical assistance benefits that it paid to or on behalf of its citizen(s), from the party or parties liable to the person receiving the assistance. At the time of the accident, the effective statutes were Iowa Code Ann. §§ 249A.5 through 249A.12 (West 1985 & Supp. 1989). The most significant of those statutes is § 249A.6, which provided:

> 1. When payment is made by the department for medical care or expenses through the medical assistance program on behalf of a recipient, the department is subrogated, to the extent of those payments, to all monetary claims which the recipient may have against third parties. A compromise, including but not limited to a settlement, waiver or release, of a claim to which the department is subrogated under this section does not defeat the department's right of recovery except pursuant to the written agreement of the director or the director's designee or except as provided in this section. A settlement, award, or judgment structured in any manner not to include medical expenses or an action brought by a recipient or on behalf of a recipient which fails to state a claim for recovery of medical expenses does not defeat the department's right of subrogation if there is any recovery on the recipient's claim unless the claim for recovery of medical expenses is barred by an applicable statute of limitations, or the legal representative of the medical assistance recipient does not

> represent the person or persons who have legal standing to bring the claim for recovery of medical expenses. In such situations, the legal representative shall notify the department of the situation; the department may then notify the person or persons having legal standing to bring the claim of the right to proceed with the claim against the third-party tort-feasor. Should the person or persons elect not to proceed, the department may then proceed in a separate action with a claim to recover its subrogation interest.
>
> . . . .
>
> 3. The subrogation rights of the department are valid and binding on an attorney, insurer, or other third party only upon notice by the department or unless the insurer or third party has actual notice that the recipient is receiving medical assistance from the department . . . .

We understand that pursuant to this section the IDHS would hold any lien upon Lynam's monetary claim against Askey that the State of Iowa might be entitled to.

Choice of Law.

Allied argues that summary judgment should not have been granted to AMISUB because (1) Iowa law controls and AMISUB is not entitled to a lien under Iowa law because it does not operate a hospital in Iowa, as well as other reasons, and (2) the possible lien of the IDHS and the attorney fees and costs Lynam paid to Tinley to collect the settlement, which would decrease the amount AMISUB would be entitled to recover, both create issues of fact. For purposes of this opinion, we assume that if Iowa law applies, AMISUB cannot prevail.

[8] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Chelberg v. Guitars & Cadillacs*, 253 Neb. 830, 572 N.W.2d 356 (1998).

The controlling question in this case is whether Nebraska law is effective to give AMISUB a hospital lien in view of the several real or imagined connections with Iowa. Allied contends that the salient facts controlling the outcome of this issue are that Lynam and Askey were residents of the State of Iowa, that

the collision occurred in Iowa, that Lynam filed his action against Askey in Iowa, and that the release was executed in Iowa. Allied ignores the facts that Lynam was treated by AMISUB while he was in Nebraska, that AMISUB is a Nebraska corporation, and that Allied is licensed to transact business in Nebraska.

It is undisputed that Lynam, an injured person, employed AMISUB, a Nebraska hospital, to render professional services for the injuries he received in the June 2, 1992, collision. It is further undisputed that Lynam had a claim against the person causing the injury, Askey, and that AMISUB gave the required notice of its lien to Askey and to Allied, as well as to the Iowa court where Lynam's suit was pending. If Nebraska law does then apply, it is clear that AMISUB had a lien on the proceeds of the settlement.

A similar situation arose in *Travelers Indem. Co. of Illinois v. Moore*, 642 F. Supp. 1119 (C.D. Ill. 1986). In *Moore*, the victim was injured in an explosion in Illinois and, after initial treatment in Illinois, was transferred to the burn unit of the Washington Hospital Center in the District of Columbia. The victim eventually died, and the Washington hospital filed a hospital lien pursuant to the District of Columbia Code. Suit was filed in Illinois federal court, and the issue presented to the court was whether it should enforce the hospital's lien, which arose under the District of Columbia law, against the proceeds of an Illinois wrongful-death claim.

The *Moore* court, relying on Illinois law, applied the Restatement (Second) of Conflict of Laws § 188 at 575 (1971), which concerns conflict of laws in contract actions, to determine which law to apply, as follows:

> (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 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 domicile, 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.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

Under the Restatement, *supra*, § 6(2) at 10, when there is no statutory directive of its own state on choice of law, the court considers

(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.

The *Moore* court applied the Restatement, *supra*, § 188, because it found that the lien arose from an implied contract between the hospital and the party receiving its medical services. Since that contract was performed in the District of Columbia, the court found that, under subsection (2), factors (a) through (d) weighed in favor of the application of the District of Columbia law to the question of the enforceability of the lien. The court also noted that factor (e) pointed to both Illinois and the District of Columbia. The court concluded that

> because the statutory framework of both states is similar and the results under each statute are precisely identical, the policy arguments raised by the parties do no more than weigh equally in favor of application of either state's law.

> It is this Court's view that the other factors articulated by § 188 and § 6 weigh in favor of applying D.C. law to the issue of the enforcement of the hospital's lien.

642 F. Supp. at 1127.

We agree with the *Moore* court that the rendering of hospital services creates an implied contract between the hospital and the person being given medical care. It is this contract and not, as Allied contends, the release that is to be analyzed under the Restatement, *supra*, § 188. We now apply this same analysis, noting that § 188 was adopted by the Nebraska Supreme Court in *Powell v. American Charter Fed. Sav. & Loan Assn.*, 245 Neb. 551, 514 N.W.2d 326 (1994).

[9] As in *Moore*, factors (a) through (d) weigh in favor of the application of Nebraska law because the hospital services upon which the lien is based were performed in Nebraska and factor (e) suggests either state. We conclude that the Restatement, *supra*, § 188, has the effect of providing that a lien that has been perfected under the law of the state where the hospital service was rendered constitutes a valid lien upon any award, judgment, or settlement, regardless of where the event which caused the injury occurred or of the residence of the injured party or the party causing the injury. Because the laws of both states are similar and because Nebraska has the most significant relationship to the formation of the contract, we conclude that the district court did not err in applying Nebraska law.

It is clear that AMISUB had a cause of action against Lynam, which it had the right to enforce in Nebraska. AMISUB's lien attached when AMISUB rendered services to Lynam and became perfected before Allied paid the $25,000 to Lynam. The fact that Lynam left Nebraska before AMISUB perfected its lien is irrelevant.

Allied also argues that Nebraska's hospital lien law does not have extraterritorial effect. However, Allied supplies no authority to support its assertion. In the above holding, we are concluding that the Nebraska lien law effected the right, that is, Lynam's cause of action against Askey, when he was present in Nebraska. It seems obvious that any state may effect the rights of a person present in that state and that the state of residence, or the state where a person's cause of action arises, cannot insu-

late that person from the effect of reasonable laws of the state in which a person is located when the legal right is effected. The facts are that Iowa, and we suspect practically every state, has a hospital lien law to protect its hospitals and that such laws are reasonable, necessary, and desirable.

Genuine Issues of Material Fact?

Allied argues that AMISUB would not be entitled to summary judgment in the face of the IDHS' lien and in the face of a deduction for the attorney fees that Lynam paid to Tinley to collect the settlement from Allied and Askey. In our discussion, we assume, without deciding, that if the issues were properly pled and proved, they either would have prevented summary judgment, unless AMISUB offered evidence sufficient to establish that Allied's claims were ineffective, or would have, at least, required judgment in a lesser amount. We now combine these issues for discussion because the outcome on both issues is controlled by the same legal principle, that is, that Allied failed to plead either defense in its answer.

In its answer, Allied admitted certain facts and denied others and, as affirmative defenses, alleged that the Iowa hospital lien law, chapter 582 of the Iowa Code, controlled; that AMISUB failed to comply with Iowa Code § 582.2 regarding hospital liens; and that the petition did not state a cause of action. These defenses raised the legal issue discussed above, namely, which state's law controlled, as distinct from the affirmative defenses Allied now raises on appeal. We observe that there are no allegations regarding the Iowa law on the IDHS' liens or any other applicable law and no allegations of any facts which, if true, would give the IDHS a lien under Iowa law. While Nebraska courts take judicial notice of the law of sister states pursuant to the Uniform Judicial Notice of Foreign Law Act, see Neb. Rev. Stat. §§ 25-12,101 to 25-12,107 (Reissue 1995), this act does not remove the necessity of pleading and presenting the common law or statutes of other jurisdictions, *Scott v. Scott*, 153 Neb. 906, 46 N.W.2d 627 (1951).

The applicable Iowa statute was presented by Tinley's affidavit, though we note that both the trial court and this court could have taken judicial notice of the statute had it been pled.

However, as discussed above, Allied did not plead any facts which would have given the IDHS a lien. Such facts as are required by the Iowa statute to give the IDHS a lien would naturally be necessary to state a defense: facts such as that the IDHS paid for or provided medical services to Lynam for the injuries he received in the collision and that Allied filed a notice of lien with the clerk of the district court for Montgomery County, Iowa, and with Lynam's attorney before the settlement, as well as other facts which are required under Iowa law to perfect the lien. Allied also did not plead any fact concerning attorney fees and costs paid by Lynam to Tinley in obtaining the settlement. The effect of the failure to plead these issues is dispositive.

When we inquired of Allied's counsel at oral argument about the significance of the lack of pleadings on this issue, he stated that it was of no effect because it is well known that a motion for summary judgment is not intended to be a substitute for a motion to dismiss, a demurrer, or a motion for judgment on the pleadings. See *Regnev, Inc. v. Shasta Beverages*, 215 Neb. 230, 337 N.W.2d 783 (1983). Summary judgment is improper when the challenge involves the sufficiency of a petition to state a cause of action. *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626 (1993). Perhaps such cases as cited above would be authority if we were considering the sufficiency of a pled affirmative defense, but they are not authority where the issue is whether upon a motion for summary judgment the defendant may have the benefit of a possible defense that was not pled.

[10-12] As discussed below, the cases we find hold that when the plaintiff is entitled to a summary judgment on the issues pled in the petition, the only affirmative defenses that can prevent such a summary judgment are those which are pled by the defendant. The general approach is that "[s]ummary judgement is proper when, based upon the pleadings, the evidence in the record discloses that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Moore v. Hartford Fire Ins. Co.*, 240 Neb. 195, 198, 481 N.W.2d 196, 199 (1992). On the issue before us, the significance of that statement is the phrase "based upon the pleadings." The purpose of pleadings is to frame the issues upon which a cause is to be

tried, and the issues in a given case will be limited to those which are pled. *Buffalo County v. Kizzier*, 250 Neb. 180, 548 N.W.2d 757 (1996). As an example, "[i]n an action on a promissory note in which defendants fail to plead affirmative defenses, such as lack of consideration or any other defense that would controvert the amount due, no issue of fact is presented for determination and plaintiff is entitled to summary judgment." *Pabst v. First American Distrib., Inc.*, 222 Neb. 591, 594, 386 N.W.2d 422, 424 (1986).

In *Columbus Bank & Trust Co. v. High Country Stable*, 202 Neb. 724, 277 N.W.2d 81 (1979), the plaintiff sued on a promissory note and under the above rule was entitled to summary judgment unless the defendants pled a defense. The trial court concluded that the plaintiff was entitled to summary judgment. On appeal, the defendants argued that certain statements in the deposition of one of the defendants could be construed as justification for inferring that certain partnership funds had been wrongfully commingled, as well as other possible defenses, and that such created a factual issue as to the amount due on the note. In affirming the judgment of the trial court, the Supreme Court said:

> Defendants failed to plead payment, partial payment, wrongful acts, fraud, want of authority, or any other defense that would contravert plaintiff's allegation of amount due. Such defenses must be affirmatively pleaded in order to be available to defendants. Not being pleaded, no issue of fact is presented for determination.

Id. at 726, 277 N.W.2d at 82.

[13,14] *Cass Constr. Co. v. Brennan*, 222 Neb. 69, 382 N.W.2d 313 (1986), is another example of the importance the Supreme Court has attached to the pleading of an affirmative defense in order to have that defense available on a motion for summary judgment. In *Cass Constr. Co.*, the court considered and determined on a motion for summary judgment whether the Uniform Commerical Code had altered the common-law doctrine of accord and satisfaction. For our purposes, the significance of the case is that the *Cass Constr. Co.* court stated that before it could consider the underlying issue, it had to determine whether the defendants had sufficiently pled accord and

satisfaction as an affirmative defense. It cited and quoted from Neb. Rev. Stat. § 25-811 (Reissue 1995), which has remained the same since 1867 and provides, "The answer shall contain . . . a statement of any new matter constituting a defense, counterclaim or setoff, in ordinary and concise language, and without repetition." We conclude that the clear import of the holdings of the above cases is that upon a motion for summary judgment, a defendant cannot have the benefit of a possible affirmative defense that is not pled in the answer.

As Allied failed to properly plead the existence and effect of the IDHS' lien or the attorney fees paid by Lynam as defenses in its answer, we will not address them on appeal. In making this ruling, we assume, but do not decide, that the attorney fees Lynam paid would be deductible. See § 52-401 and *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994), for authority that would imply that result. As a result, there is nothing which prevents judgment in favor of AMISUB. The order of the district court is therefore affirmed.

Tinley's Motion for Summary Judgment.

Allied also argues that the court erred in granting Tinley's motion for summary judgment on the grounds that before Allied made Tinley a party to the lawsuit, Tinley filed an action in Iowa governing the same issues which was still pending at the time of the hearing. Evidence of the Iowa action is found in exhibit 5, as well as attached to Tinley's motion to dismiss Allied's petition.

Allied's action against Tinley is based upon the April 8, 1994, settlement agreement which was signed by Lynam and "approved and agreed to" by Tinley and which purported to release and discharge all of Lynam's claims against Askey resulting from the collision. Allied attempts to hold Tinley liable under the covenant which provided that there were no third parties which would be entitled to subrogation, indemnity, or reimbursement of medical payments except AMISUB and the State of Iowa "which will be satisfied from the trust account of the attorney for the undersigned." Tinley's signature creates the possibility that he might be held liable under such provision

of the release. However, for the reasons discussed below, we need not reach such issue.

[15] In *Miller v. Miller*, 213 Neb. 219, 328 N.W.2d 210 (1982), the petitioner brought an action for dissolution of marriage in Nebraska. On the ground that the parties were also parties to a dissolution of marriage action pending in California which had not become final, the court sustained the respondent's demurrer and dismissed the petition. On appeal, the Nebraska Supreme Court reversed, concluding:

> The two actions involved here, however, are not in the same court; indeed, they are pending in courts of different and sovereign jurisdictions. The general rule that pendency of a prior action between the same parties for the same cause may be pled in abatement of a subsequent action will not be sustained where the prior action is pending in a court of a foreign or different jurisdiction. [Citations omitted.] It must be concluded, therefore, that the pendency of the California action does not bar the present action and the demurrer ought not have been sustained, nor the petition dismissed.

Id. at 222, 328 N.W.2d at 211. The resulting rule is that when the same cause of action, involving the same parties, is pending in courts of different and sovereign jurisdictions, the actions may proceed independently of each other. *Id.* See, also, *VanDeWalle v. Albion Nat. Bank*, 243 Neb. 496, 500 N.W.2d 566 (1993) (applying federal law, between two actions pending at same time, first of two judgments announced has preclusive effect). Thus, the district court erred in sustaining Tinley's motion for summary judgment. As such, that judgment is reversed.

CONCLUSION

The judgment of the district court sustaining AMISUB's motion for summary judgment is affirmed, and the judgment sustaining Tinley's motion is reversed.

AFFIRMED IN PART, AND IN PART REVERSED.

DANIEL J. KOUMA, APPELLANT, V.
BLUE VALLEY COOPERATIVE, APPELLEE.
576 N.W.2d 854

Filed March 24, 1998. No. A-96-1037.

1. **Negligence.** The doctrine of negligent misrepresentation has been recognized in Nebraska.
2. **Negligence: Liability.** The doctrine of negligent misrepresentation limits the liability of a supplier of information to the person who receives the information or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it.
3. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Seward County: ALAN G. GLESS, Judge. Affirmed.

T.J. Hallinan, of Cobb & Hallinan, P.C., for appellant.

David A. Dudley, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

HANNON, IRWIN, and MUES, Judges.

IRWIN, Judge.

I. INTRODUCTION

Daniel J. Kouma appeals from an order of the district court granting summary judgment to Blue Valley Cooperative (Blue Valley) in Kouma's action for negligent misrepresentation. Because we conclude that the district court was correct in finding that Blue Valley did not owe Kouma any duty, we affirm the grant of summary judgment.

II. BACKGROUND

Kouma and his son both farm property in Seward County, Nebraska. Blue Valley provides goods and services to farmers in the vicinity of Kouma's farm. In May 1995, Kouma's son contacted Blue Valley seeking a recommendation for a pesticide to be used when planting corn. According to Kouma, his son was seeking a pesticide to use to control rootworm; according

to Blue Valley, he was seeking a pesticide to use to control cutworm. Blue Valley recommended a pesticide named "Furadan."

Kouma's son had his father-in-law pick up the pesticide from Blue Valley. Blue Valley was out of Furadan but recommended using a pesticide named "Ambush" instead. Kouma's son received 1 gallon of Ambush, and he incorporated approximately one-half gallon when planting his corn. At approximately the same time, Kouma was preparing to plant on his land, and after hearing that his son had used Ambush to control rootworm, Kouma decided to purchase some Ambush for use on his own land. Kouma's son contacted Blue Valley and ordered 5 more gallons of Ambush.

Kouma incorporated the Ambush when planting corn on more than 100 acres of land. It is undisputed by the parties that Ambush does not control rootworm when it is incorporated into the soil. Kouma allegedly suffered extensive rootworm damage to his corn crop.

On December 7, 1995, Kouma filed the petition in this case, alleging a cause of action for negligent misrepresentation. Blue Valley filed a motion for summary judgment on May 28, 1996. On September 23, the court sustained the motion for summary judgment. Kouma timely filed this appeal.

III. ASSIGNMENTS OF ERROR

On appeal, Kouma has assigned two errors. First, Kouma asserts that the district court erred in finding that no issue of material fact existed. Second, Kouma asserts that the district court erred in finding as a matter of law that Blue Valley did not owe a duty of due care to Kouma. Through these two assigned errors, Kouma asserts that the district court erred in granting summary judgment.

IV. ANALYSIS

1. Negligent Misrepresentation

[1] In the present case, Kouma asserts that Blue Valley is responsible for negligent misrepresentation concerning the use of Ambush for rootworm control. The doctrine of negligent misrepresentation is relatively new in Nebraska and was not recognized prior to the Nebraska Supreme Court's decision in

Flamme v. Wolf Ins. Agency, 239 Neb. 465, 476 N.W.2d 802 (1991). In that case, however, the Supreme Court did not enumerate the necessary elements of a claim for negligent misrepresentation. See *id.*

In *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994), the court officially adopted the definition of negligent misrepresentation found in Restatement (Second) of Torts § 552 (1977). Section 552 at 126-27 reads, in relevant part, as follows:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it[.]

Blue Valley asserts that the district court correctly granted summary judgment because there is no genuine issue as to whether or not the facts established any duty owed by Blue Valley to Kouma in the present case. It is undisputed from the depositions and affidavits presented to the district court that Blue Valley did not make any representations directly to Kouma, but, rather, allegedly made representations to Kouma's son. Kouma asserts that § 552 is satisfied, however, because it was reasonable to infer that Blue Valley knew of the relationship between Kouma and his son and because it was reasonable to infer that Kouma's son would relate the recommendation about Ambush to Kouma.

We do not agree that the record presented to the district court concerning the motion for summary judgment establishes that Blue Valley had any reason to know of the farming relationship between Kouma and his son or that Kouma's son might relate

the recommendation to Kouma. In Kouma's deposition, he testified that he had not had any conversation with anybody from Blue Valley during the 1995 planting season. In fact, Kouma testified that he had not had conversations with anybody from Blue Valley for several years prior to 1995. The representative from Blue Valley who allegedly made the recommendation in question in this case testified in his deposition that he did not recall ever having spoken to Kouma previously. As such, there is nothing in the record from which it can be inferred that when the recommendation was made, Blue Valley even knew that Kouma was engaged in farming, let alone that he and his son farmed together or that his son would pass on the recommendation.

[2] Nonetheless, even if it could be inferred that Blue Valley knew of the relationship and knew that it was possible that Kouma's son would pass on the information, we do not believe that to be the test established by § 552. Section 552 specifically limits the liability of a supplier of information to the person who receives the information "or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it." Section 552 contemplates liability to third parties only if the supplier intends for the information to ultimately reach the third party or if the supplier knows that the recipient will pass the information on to the third party.

According to the comments to § 552, it is not necessary that the supplier know the specific identity of the third person, so long as the supplier provides the information intending or knowing that it will be repeated to a limited group of persons and the plaintiff ultimately proves to be a member of that limited group. "It is not enough that the maker [of the statement] merely knows of the ever-present possibility of repetition to anyone, and the possibility of action in reliance upon it, on the part of anyone to whom it may be repeated." § 552, comment *h.* at 133. "The maker of the negligent misrepresentation is subject to liability to only those persons for whose guidance he knows the information to be supplied . . . ." § 552, comment *i.* at 136-37.

In the present case, the record does not contain any facts upon which Blue Valley can be held to owe a duty to Kouma. Blue Valley did not make any recommendations to Kouma, and

there are no facts upon which it can be inferred that Blue Valley knew or intended the alleged recommendation to Kouma's son would be conveyed to Kouma. As such, under § 552, Blue Valley cannot be liable for loss suffered by Kouma.

2. Resolution

[3] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998); *Schendt v. Dewey*, 252 Neb. 979, 568 N.W.2d 210 (1997). In reviewing a motion for summary judgment, the question is not how a factual issue is to be decided, but, rather, whether any issue of material fact exists. *Darrah v. Bryan Memorial Hosp., supra.* Conclusions based upon guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment. *Id.* In reviewing a motion for 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. *Whalen v. U S West Communications*, 253 Neb. 334, 570 N.W.2d 531 (1997).

The pleadings, depositions, and affidavits in the present case disclose that there is no genuine issue as to any material fact or the reasonable inferences to be drawn therefrom. Based on the undisputed facts, Blue Valley owed no duty of care to Kouma. As such, Blue Valley is entitled to judgment as a matter of law, and the district court correctly granted summary judgment to Blue Valley.

V. CONCLUSION

Because Blue Valley owed Kouma no duty of care, the district court correctly granted summary judgment. The judgment is affirmed.

Affirmed.

JIM'S DODGE COUNTRY, APPELLANT, V. LEGRANDE EXCAVATING, INC., APPELLEE.

575 N.W.2d 890

Filed March 24, 1998. No. A-96-1173.

1. **Actions.** A suit where only a money judgment is sought is an action at law.
2. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong.
3. ___: ___. In reviewing a judgment awarded in a bench trial, an appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party, who is entitled to every reasonable inference deducible from the evidence.
4. **Reformation: Fraud.** A court may reform an agreement when there has been either a mutual mistake or a unilateral mistake caused by fraud or inequitable conduct on the part of the party against whom reformation is sought.
5. **Reformation: Presumptions: Intent: Evidence.** To overcome the presumption that an agreement correctly expresses the parties' intent and to obtain reformation, the party seeking reformation must offer clear, convincing, and satisfactory evidence.
6. **Reformation: Words and Phrases.** A mutual mistake is a belief shared by the parties which is not in accord with the facts.
7. ____: ____. A mutual mistake is one common to both parties in reference to the instrument to be reformed, both parties laboring under the same misconception about their instrument.
8. **Reformation: Intent.** A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Joseph F. Gross, Jr., of Timmermier, Gross & Burns, for appellant.

Alan L. Plessman, of Plessman Law Offices, for appellee.

HANNON, MUES, and INBODY, Judges.

HANNON, Judge.

Jim's Dodge Country brought an action against LeGrande Excavating, Inc., to recover $4,000, which Jim's Dodge Country alleged it undercharged LeGrande Excavating as the result of a scrivener's mistake on the purchase of a Dodge truck. The trial court, finding that Jim's Dodge Country had failed to establish by clear and convincing evidence that it was entitled

to reformation of the purchase contract, dismissed Jim's Dodge Country's petition. Because we cannot say that the trial court's finding was clearly wrong, we now affirm.

FACTUAL BACKGROUND

The undisputed facts are as follows: In September 1995, Norman LeGrande of LeGrande Excavating in Lincoln called Jim's Dodge Country in Omaha and talked with Jim Sheil, a salesperson, concerning the purchase of a new 1995 Dodge truck. After several telephone calls with Sheil, LeGrande sent Jim's Dodge Country a $1,000 check. Thereafter, on September 26, LeGrande traveled to Jim's Dodge Country, where he dealt with John Parise, a business manager in the finance department. LeGrande, on behalf of LeGrande Excavating, and Parise, on behalf of Jim's Dodge Country, entered into a purchase contract whereby LeGrande Excavating agreed to purchase the truck for $22,858. LeGrande gave Jim's Dodge Country a check in the amount of $21,858 ($22,858 purchase price less the earlier $1,000 payment). Jim's Dodge Country deposited the check and later sent LeGrande the title. On September 29, Jim's Dodge Country discovered that it had made a mathematical error and had undercharged LeGrande Excavating $4,000. When LeGrande refused to pay the $4,000, Jim's Dodge Country brought suit.

In its petition, Jim's Dodge Country alleged that the agreed-upon purchase price of the truck had been $26,858 but that, as a result of a scrivener's mistake, the purchase agreement had been erroneously drafted in the amount of $22,858. Jim's Dodge Country prayed that "the contract be reformed to reflect the purchase price of $26,858.00 and judgment for the Plaintiff in the amount of $4,000.00 together with costs and other relief as provided by law." LeGrande Excavating responded with a general denial.

At trial, Jim's Dodge Country maintained that LeGrande had agreed to a purchase price of $26,858 ($26,200 for the truck plus $400 for running boards and $258 for a bedliner). Sheil testified that LeGrande sent the $1,000 as a deposit. Sheil then prepared a purchase order which contained the following statement: "Customer will own for $26,600 with LEVERN Running Boards." LeGrande never signed the order.

Curtis Lallman, a manager of new car sales who initially computed the price on another part of the purchase order to be $26,600, later recomputed the price to reflect the inclusion of the $258 bedliner requested by LeGrande. Lallman crossed out the "26,600" figure and wrote in "22,858," rather than $26,858. This figure was then used by Parise in the drafting of the purchase contract. As evidence of its mistake, Jim's Dodge Country offered the truck's factory invoice, which reflected that the cost to Jim's Dodge Country was $25,580.92.

Terry Muths, general manager of Jim's Dodge Country, testified that after the discovery of the mistake, LeGrande agreed to pay $2,000 as a settlement. LeGrande generally denied that any agreement had been made prior to the signing of the contract and further denied that he had agreed to settle the dispute for $2,000. LeGrande's testimony is detailed below.

The court found that Jim's Dodge Country had failed to establish by clear and convincing evidence that it was entitled to reformation of the contract and, thus, dismissed its petition. Jim's Dodge Country then filed a motion for new trial, which the court subsequently denied. Jim's Dodge Country now appeals.

ASSIGNMENTS OF ERROR

Jim's Dodge Country contends that the trial court erred in failing to determine that (1) Jim's Dodge Country was entitled to reformation of the contract by clear and convincing evidence, (2) the contract reflected a mutual mistake of fact, and (3) there had been a meeting of the minds regarding the true terms of the contract.

STANDARD OF REVIEW

[1] Both parties assert that this is an equitable action which should be reviewed de novo on appeal. We believe that this is an action at law for the collection of money and not an equity action. This court is therefore in the same position as the Supreme Court was in *Records v. Christensen*, 246 Neb. 912, 915, 524 N.W.2d 757, 760 (1994), where the court stated: "Although the parties argue that this case is an equitable action, it really is an action at law because [the plaintiff] seeks money damages . . . ." In a similar manner, although Jim's Dodge

Country seeks to reform its contract with LeGrande Excavating, the relief it requests is the recovery of money. A suit where only a money judgment is sought is an action at law. *Daubman v. CBS Real Estate Co.*, 6 Neb. App. 390, 573 N.W.2d 802 (1998). While we have recently reviewed the Nebraska authority on this subject, the parties' statements at oral argument, along with their supplemental briefs, lead us to conclude that a further explanation may be in order.

It is well recognized that a suit in equity will not lie when the plaintiff has a plain and adequate remedy at law and, further, that in order to recover on an equitable theory, the plaintiff must prove that it has no adequate remedy at law. *Southwest Trinity Constr. v. St. Paul Fire & Marine*, 243 Neb. 55, 497 N.W.2d 366 (1993). While we can find no Nebraska case which states the obvious, we note that it has been stated:

> Where compensation in money will afford complete and efficient relief, as where a money judgment is the ultimate, or the only, relief sought, the remedy at law is usually adequate for that purpose, and a party will be relegated thereto if the legal remedy is unimpeded and there are no other equitable circumstances to support the jurisdiction.

30A C.J.S. *Equity* § 26 at 192 (1992).

In the case at hand, Jim's Dodge Country did not allege in its petition that it had no adequate remedy at law, and the facts in the petition, if true, would entitle it to only a money judgment. Jim's Dodge Country argues this is an equitable action because it seeks reformation of the contract. It does pray for reformation, but assuming the trial court found it was entitled to reformation on the basis of mistake, the ultimate relief would still only be a money judgment. Jim's Dodge Country also relies upon *York Equip., Inc. v. Ashwill*, 2 Neb. App. 374, 510 N.W.2d 79 (1993), where we reviewed a reformation case as one in equity. *York Equip., Inc.*, is distinguishable because when that action was filed, not all of the installment payments were due and owing and consequently a money judgment would not have been an adequate remedy. We conclude that the case before us is an action at law, and we will review it as such.

[2,3] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set

aside on appeal unless they are clearly wrong. *Hilliard v. Robertson,* 253 Neb. 232, 570 N.W.2d 180 (1997). In reviewing a judgment awarded in a bench trial, an appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party, who is entitled to every reasonable inference deducible from the evidence. *Id.*

ANALYSIS

[4,5] A court may reform an agreement when there has been either a mutual mistake or a unilateral mistake caused by fraud or inequitable conduct on the part of the party against whom reformation is sought. *Walker v. Walker Enter.*, 248 Neb. 120, 532 N.W.2d 324 (1995); *Records v. Christensen*, 246 Neb. 912, 524 N.W.2d 757 (1994). To overcome the presumption that an agreement correctly expresses the parties' intent and to obtain reformation, the party seeking reformation must offer clear, convincing, and satisfactory evidence. *Walker v. Walker Enter., supra*; *Records v. Christensen, supra.*

[6-8] A mutual mistake is a belief shared by the parties which is not in accord with the facts. *Records v. Christensen, supra*; *York Equip., Inc. v. Ashwill, supra.* A mutual mistake is one common to both parties in reference to the instrument to be reformed, both parties laboring under the same misconception about their instrument. *Id.* A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties. *Id.*

If incorrect language or wording is inserted by mistake, including a scrivener's mistake, into an instrument intended to reflect the agreement of the parties, such mistake is mutual and contrary to the real intention and agreement of the parties. *Omaha Door Co. v. Mexican Food Manuf. of Omaha*, 232 Neb. 153, 439 N.W.2d 776 (1989); *York Equip., Inc. v. Ashwill, supra.*

We now view the evidence in the light most favorable to LeGrande. See *Hilliard v. Robertson, supra.* LeGrande testified that although Sheil told him that he could buy the truck for $26,200, he never agreed to that price. LeGrande testified that he and Jim's Dodge Country had not come to an understanding

as to the final amount of the truck. LeGrande further testified that he sent the $1,000 deposit "to hold the vehicle . . . while we were negotiating . . . ."

According to LeGrande, he and his wife drove to Jim's Dodge Country on September 26, 1995, prepared to pay for the truck. He brought only one company check with which to pay. LeGrande did not meet with Sheil, but, instead, with Parise. Parise presented him with three documents: (1) a purchase contract, (2) a "Security 1st Vehicle Theft Program Registration Application," and (3) a "Nebraska Sales/Use Tax and Tire Fee Statement." All three documents listed a purchase price of $22,858. Parise explained each document to LeGrande and had him sign each one. LeGrande asked Parise if the amount was correct because LeGrande had only one check and did not want to drive back to Lincoln for another check. Parise replied affirmatively. LeGrande testified that he asked Parise more than once if the price was correct and that Parise looked at the documents and indicated that it was. LeGrande signed the documents, wrote a check for $21,858 (the difference between the purchase price and the $1,000 deposit), and drove back to Lincoln with the truck. LeGrande did testify that once informed of the error, he told Muths that he would consider settling for an additional $2,000. However, LeGrande never agreed to do so.

The evidence establishes that Jim's Dodge Country made a mathematical error on the purchase order which led to its mistake on the purchase contract. However, LeGrande's testimony that the parties had not come to an agreement concerning the price of the truck prior to the signing of the contract, coupled with his testimony that Parise repeatedly assured him of the accuracy of the purchase price, is evidence that no mistake was made on the part of LeGrande.

Even when viewed most favorably to Jim's Dodge Country, the evidence does not establish that LeGrande was mistaken, but, rather, it establishes that he realized the mistake on the part of Jim's Dodge Country and took advantage of it. The rule stated above, that a court may reform an agreement when there has been a unilateral mistake caused by fraud or inequitable conduct, is not as limited as that short, concise statement might imply. See Restatement (Second) of Contracts § 153 (1981) and

related sections on mistake. However, we have not analyzed the evidence under the unilateral mistake theory because facts supporting recovery under that theory were not pled and because the case was argued in this court as one of mutual mistake.

Having viewed the evidence in the light most favorable to LeGrande Excavating, we cannot say that the trial court was clearly wrong in finding that Jim's Dodge Country failed to establish by clear and convincing evidence that it was entitled to reformation. The judgment of the trial court is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. RICKY J. TURCO, APPELLANT AND CROSS-APPELLEE.
576 N.W.2d 847

Filed March 24, 1998. No. A-97-419.

1. **Trial: Evidence: Motions to Suppress: Waiver: Appeal and Error.** The failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal.
2. **Constitutional Law: Criminal Law: Due Process.** The Constitutions of the United States and the State of Nebraska guarantee a criminal defendant the rights to due process and a fair trial.
3. **Effectiveness of Counsel.** In order to ensure that the right to effective assistance of counsel does not become a hollow right, it is the duty of the State not only to provide an indigent defendant with an attorney, but also to provide the lawyer with the appropriate tools and services necessary to provide a proper, competent, and complete defense.
4. **Trial: Expert Witnesses.** The right of an indigent defendant to the appointment of an expert witness at State expense generally rests in the discretion of the trial court.
5. **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.
6. **Presentence Reports: Sentences.** The use of a presentence investigation before sentencing an offender is required only as to those convicted of felonies.
7. **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.

Appeal from the District Court for Dodge County, MARK J. FUHRMAN, Judge, on appeal thereto from the County Court for Dodge County, DANIEL J. BECKWITH, Judge. Judgment of District Court affirmed.

Richard Register for appellant.

Don Stenberg, Attorney General, and David T. Bydalek for appellee.

MILLER-LERMAN, Chief Judge, and SIEVERS and INBODY, Judges.

INBODY, Judge.

I. INTRODUCTION

Ricky J. Turco appeals his conviction and sentence for third-offense driving while under the influence of alcoholic liquor or drugs in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1993). He appealed to the district court, claiming, among other things, that the county court erred in denying his motions to hire an expert witness and to exclude the breath test result, that the jury had insufficient evidence on which to base its finding of guilt, and that his sentence was excessive. The district court agreed that the county court erred in denying Turco's motions to hire an expert witness and to exclude the breath test result, but found that there was sufficient other evidence to support Turco's conviction and that his sentence was not excessive.

Turco has appealed to this court, contending that the district court erred in finding that there was sufficient evidence to support his conviction and that his sentence was not excessive. The State has cross-appealed, contending that the district court erred in finding that Turco's motions to hire an expert witness and to exclude the breath test result should have been granted by the county court. Although we disagree with some of the findings made by the district court, for the reasons set forth herein, we affirm the district court's order upholding Turco's conviction and sentence.

II. STATEMENT OF FACTS

On August 7, 1995, Fremont police officer Robert Buer stopped Turco's vehicle for speeding in Fremont, Dodge

County, Nebraska. When Officer Buer made contact with Turco, he noticed that Turco's "words were mumbled," his speech was slurred, his face was flushed, and his eyes were watery and bloodshot. Officer Buer inquired if Turco had consumed any alcohol, to which Turco responded that he was returning to Fremont from Sioux City and that he had consumed several drinks in Sioux City. Officer Buer then asked Turco to perform several field sobriety maneuvers, and Turco's performance on all of them indicated signs of impairment. Officer Buer testified that in his opinion, Turco was under the influence of alcohol.

Officer Buer arrested Turco for driving while under the influence and took him to the Fremont Police Department to request a chemical test. After Turco was read the postarrest chemical test advisement form, or implied consent form, he was asked to submit to a chemical breath test. At first, Turco refused to take the breath test and asked several times to be given a blood test. Officer Buer advised Turco that he had to submit to a breath test before any other tests could be given. Eventually, Turco did submit to the breath test, which showed his blood alcohol level to be .112. The Intoxilyzer machine has a deviation allowance of 10 percent.

On August 14, 1995, a complaint was filed in Dodge County Court charging Turco with third-offense driving while under the influence, in violation of § 60-6,196, a Class W misdemeanor.

On August 21, 1996, Turco filed a motion to exclude use of the breath test for the reason that he was not allowed to obtain an independent blood test, as is his right pursuant to Neb. Rev. Stat. § 60-6,199 (Reissue 1993). A hearing on the motion to exclude was held on October 4, with only two witnesses testifying, Officer Buer and Turco.

Officer Buer testified that on August 7, 1995, he arrested Turco for driving while under the influence, then transported him to the Fremont Police Department. Once there, Officer Buer read Turco the postarrest advisement form and requested that Turco submit to a breath test. At first, Turco refused to take the breath test, asking to take a blood test instead. Officer Buer testified that he advised Turco that he had to submit to a breath test before any other tests could be given. Eventually, Turco did

submit to the breath test. After submitting to the breath test, Turco did not request that any other tests be taken.

Turco testified that he requested a blood test three or four times, but could not remember if any of those requests were made after he had submitted to a breath test. Turco also testified that he believed that he had requested that a blood test be performed and that Officer Buer was going to follow through on that request. After hearing this evidence, the county court denied Turco's motion to exclude the breath test evidence.

At the hearing on October 4, 1996, the county court also heard Turco's motion to hire an expert witness to testify. It was Turco's position that because his blood alcohol level was fairly low, he required an expert witness to challenge the accuracy of the Intoxilyzer machine and to testify concerning the machine's margin of error. The State contended that such an expert was not necessary because, pursuant to Department of Health regulations, the Intoxilyzer machine has to test within a 10-percent error factor; that the machine used in this case always tested much less than the 10-percent error factor; and that even given a 10-percent error factor, Turco's blood alcohol level would still be over the legal limit. After listening to counsels' comments, the court denied Turco's motion to hire an expert witness.

On October 10, 1996, the case proceeded to trial before a jury. Evidence was presented as previously set forth, and the breath test result was admitted into evidence without objection. The jury found Turco guilty of the charged offense. The court sentenced Turco to 12 months' imprisonment, ordered him to pay a $500 fine, and revoked/suspended his license for 15 years. Turco timely appealed to the Dodge County District Court. The district court found that Turco's breath test result should not have been admitted into evidence and that Turco's motion to hire an expert witness should have been granted; however, the court affirmed Turco's conviction and sentence because it found that the other evidence against Turco was sufficient to establish his guilt. Turco then timely appealed to this court.

III. ASSIGNMENTS OF ERROR

We summarize Turco's assigned errors and the errors assigned by the State in its cross-appeal. In his appeal to both

the district court and this court, Turco assigned as error the trial court's denial of his motions to exclude the breath test result and to hire an expert witness. The district court ruled in Turco's favor on these assigned errors, and the State has filed a cross-appeal objecting to these findings. The State's cross-appeal is proper in this case because, in an appeal of a criminal case from the county court to the district court, the latter acts as an intermediate court of appeal, and the State has the right to cross-appeal from an erroneous ruling made by the district court in its review. See *State v. Thompson*, 224 Neb. 922, 402 N.W.2d 271 (1987).

The district court went on to find that the other evidence against Turco was sufficient to establish his guilt, and Turco contends that this determination by the district court was erroneous. Additionally, Turco claims that the sentence imposed upon him was excessive.

IV. DISCUSSION

Although we would ordinarily address a defendant's issues on appeal before addressing issues raised in the State's cross-appeal, in this particular case, it is the more logical approach to address the State's contentions first, then to address Turco's claims.

1. Issues Raised in State's Cross-Appeal

(a) Motion to Exclude Breath Test Result

The State contends that the district court erred in finding that the trial court should have granted Turco's motion to exclude the breath test result. Prior to trial, Turco filed a motion to exclude the breath test result because he claimed that his statutory right to have an independent test taken had been denied. The State contends that this issue was not properly preserved for appeal because Turco did not object to the introduction of the breath test result at trial.

[1] It is well established that the failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal. *State v. Thieszen*, 252 Neb. 208, 560 N.W.2d 800 (1997); *State v. Jensen*, 238 Neb. 801, 472 N.W.2d 423 (1991).

The record reflects that Turco did not object to the breath test evidence at trial, and therefore, he has failed to preserve this issue for appellate review. Consequently, the district court, which also acted as an appellate court, could not properly consider this issue and thus erred in finding that the county court should have excluded the breath test evidence.

(b) Motion to Hire Expert Witness

The State's second claim in its cross-appeal is that the district court erred in finding that the trial court should have granted Turco's motion to hire an expert witness to testify regarding the accuracy of the Intoxilyzer equipment used and the result obtained.

[2] The Constitutions of the United States and the State of Nebraska guarantee a criminal defendant the rights to due process and a fair trial. U.S. Const. amend. XIV, § 1; Neb. Const. art. I, § 11. Pursuant to the federal Constitution, the U.S. Supreme Court has ruled that an indigent defendant's right to a fair trial includes the right to fees for transcripts and records, *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956); the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); and the right to a psychiatric examination, *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). See *State v. Volker*, 477 N.W.2d 909 (Minn. App. 1991).

> The basis for the state's assistance to an indigent defendant is rooted in the belief that: "A criminal trial is fundamentally unfair if the state proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. . . . [F]undamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system.' "

Volker, 477 N.W.2d at 910 (quoting *Ake v. Oklahoma, supra*).

[3] In order to ensure that the right to effective assistance of counsel does not become a hollow right, it is the duty of the State not only to provide an indigent defendant with an attorney, but also to provide the lawyer with the appropriate tools and services necessary to provide a proper, competent, and com-

plete defense. See *State v. Ryan*, 133 N.J. Super. 1, 334 A.2d 402 (1975). Thus, it appears that an indigent defendant being prosecuted for driving while under the influence may, in certain circumstances, be entitled to the appointment of an expert witness at the State's expense.

However, an expert need not be supplied every time a request is made by an indigent defendant, nor must the court provide defense counsel with equipment for a "fishing expedition." See *United States v. Schultz*, 431 F.2d 907 (8th Cir. 1970). There must be some showing by defense counsel that the expert is necessary for an adequate defense. See *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993). In *White*, the Nebraska Supreme Court held that although there may be circumstances under which a district court's denial of a defendant's request for funds to hire an expert would be an abuse of discretion, under the circumstances of that case, where no evidence to support the motion was offered, the district court did not abuse its discretion. This showing may be made by affidavits or other evidence. See *id.*

[4] Additionally, in our determination of the case at bar, we must also keep in mind that our standard of review is as follows: The right of an indigent defendant to the appointment of an expert witness at State expense generally rests in the discretion of the trial court. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994).

At the hearing on Turco's motion to hire an expert witness, defense counsel argued that an expert was necessary to challenge the accuracy of the Intoxilyzer machine and to testify regarding the Intoxilyzer machine's margin of error and that a proper defense could not be mounted without the expert testimony. The State responded that a defense expert was not necessary because (1) pursuant to Department of Health regulations, the Intoxilyzer machine has to test within a 10-percent error factor; (2) the machine used in this case always tested much less than the 10-percent error factor; (3) the Intoxilyzer machine was properly maintained; (4) there was no substance of any kind or nature that interfered with the proper function of the Intoxilyzer on the date in question; and (5) there was no showing that Turco ingested anything or suffered any physical dis-

abilities that would affect the Intoxilyzer machine or the test result. Furthermore, the State argued, even given a 10-percent error factor, Turco's blood alcohol level would still have registered over the legal limit.

Stated simply, defense counsel gave no indication as to why the requested expert testimony was necessary or how such testimony would likely benefit the defense, or as to why a vigorous cross-examination of the State's witnesses would not achieve the same result. There must be some threshold showing of necessity for expert assistance before a trial court may grant a defendant's request therefor.

In sum, while we conclude that there may be circumstances under which the denial of funds for an expert witness would be an abuse of discretion, we conclude that under the circumstances of this case, where no evidence to support the motion was offered, the county court did not abuse its discretion in denying the motion to hire an expert witness, and the district court's reversal thereof was error.

2. Turco's Assigned Errors on Appeal

(a) Insufficiency of Evidence

Turco's first assignment of error is that the district court erred in its finding that the evidence was sufficient to support his conviction.

[5] 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. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995); *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995).

Based upon our review of the record, viewing the properly admitted evidence in the light most favorable to the State, we find that the evidence was sufficient to support Turco's conviction.

(b) Excessive Sentence

[6] Turco's final assignment of error is that the sentence imposed upon him for his conviction of third-offense driving while under the influence, a Class W misdemeanor, was excessive. The use of a presentence investigation before sentencing an offender is required only as to those convicted of felonies. *State v. Cardin*, 194 Neb. 231, 231 N.W.2d 328 (1975). See Neb. Rev. Stat. § 29-2261(1) (Reissue 1995) (requiring presentence investigation when offender has been convicted of felony, unless impractical to do so). The instant case involves a misdemeanor; no presentence investigation was required, none was ordered, and consequently, we have no presentence investigation report to review in this case.

[7] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997); *State v. Cook*, 251 Neb. 781, 559 N.W.2d 471 (1997).

A third conviction for a Class W misdemeanor carries a mandatory minimum of 90 days' imprisonment and a $500 fine, and a maximum of 1 year's imprisonment and a $500 fine. See Neb. Rev. Stat. § 28-106 (Reissue 1995). Turco was sentenced to 12 months' imprisonment and ordered to pay a $500 fine. Additionally, his license was revoked/suspended for 15 years, as is statutorily required by § 60-6,196. Since Turco's sentence is within the statutory sentencing range, we do not see an abuse of discretion by the sentencing court.

V. CONCLUSION

With regard to the State's cross-appeal, we determined that Turco had not properly preserved his motion to exclude the breath test result because he failed to object to the introduction of the breath test result at trial. Furthermore, we determined that the trial court acted within its discretion in denying Turco's motion to hire an expert witness.

With regard to Turco's assigned errors, we determined that the evidence was sufficient to support his conviction and that his sentence was not excessive. Consequently, although we disagree with some of the findings made by the district court, we

affirm the district court's order upholding Turco's conviction and sentence.

AFFIRMED.

BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA AT LINCOLN, APPELLEE, V. FRANCES THOMPSON, APPELLANT.

577 N.W.2d 749

Filed March 31, 1998. No. A-96-873.

1. **Actions: Pleadings: Judgments: Proof.** Where a defendant has filed an answer, the fact that the defendant does not appear for trial does not entitle the plaintiff to a judgment without proof of the facts constituting the plaintiff's cause of action, unless the facts admitted by the defendant in the answer make out a prima facie case in the plaintiff's favor.
2. **Constitutional Law: Due Process.** The U.S. and Nebraska Constitutions provide that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amends. V and XIV; Neb. Const. art. I, § 3.
3. **Due Process.** Parties whose rights are to be affected are entitled to be heard.
4. ____. When a person has a right to be heard, procedural due process includes notice to the person whose right is affected by a proceeding, that is, timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a 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 constitution or statute; and a hearing before an impartial decisionmaker.
5. **Due Process: Prisoners.** Although it is clear that a prisoner has no absolute constitutional right to be released from prison so that he or she can be present at a hearing in a civil action and that due process does not require the appointment of counsel to represent the prisoner in a private civil matter, due process does require that the prisoner receive meaningful access to the courts to defend suits brought against him or her.

Appeal from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge, on appeal thereto from the County Court for Lancaster County, GALE POKORNY, Judge. Judgment of District Court vacated, and cause remanded for further proceedings.

Frances Thompson, pro se.

James A. Cada for appellee.

Susan Poser for amicus curiae ACLU Nebraska.

MILLER-LERMAN, Chief Judge, and SIEVERS and INBODY, Judges.

INBODY, Judge.

INTRODUCTION

Frances Thompson, an inmate at the Nebraska Correctional Center for Women in York, Nebraska, appeals the entry of a judgment against her in an action to collect an unpaid student loan. For the reasons set forth herein, we vacate the judgment entered against Thompson and remand the cause to the Lancaster County District Court with directions to remand the matter to the Lancaster County Court for further proceedings.

STATEMENT OF FACTS

On April 25, 1995, Thompson, who was incarcerated, was served with a summons from Lancaster County Court naming her as the defendant in a civil action to collect a debt from her participation in the Perkins student loan program. After being served with the petition, Thompson, acting pro se, filed a timely answer, denying the amounts claimed to be owed by the plaintiff, the Board of Regents of the University of Nebraska at Lincoln; claiming the action was not brought in good faith; and claiming various other defenses, including false representation and promissory estoppel. This answer was later amended to also allege specific instances of alleged bad faith by the plaintiff. On or about September 13, Thompson filed a motion, requesting that hearings on motions be conducted telephonically, and if the matter went to trial, that she be physically transported for trial or, in the alternative, that the trial be held telephonically. The motions for telephonic access or to be transported to trial were denied on September 19.

Trial in this matter was held on September 21, 1995. Thompson failed to appear for obvious reasons. The following is a quote of the trial in its entirety:

> [Plaintiff's attorney]: Okay. Thompson.
> THE COURT: Yes.
> [Plaintiff's attorney]: 95B1669.
> THE COURT: I got it.

> [Plaintiff's attorney]: It's set for trial. Defendant did not appear. Ask that judgment be entered for the amount prayed for. The amount of $6,874.18 plus interest per note.
>
> THE COURT: Okay.

Judgment in the amount of $6,874.18 plus interest per note and costs was entered in Lancaster County Court for the plaintiff due to Thompson's failure to appear at trial. The judgment was timely appealed to the Lancaster County District Court, which affirmed the decision of the county court. Thompson then timely appealed to this court.

ASSIGNMENTS OF ERROR

On appeal, Thompson identifies eight assignments of error, which can be consolidated into the following two issues: (1) The county court erred in granting judgment against Thompson where an answer had been timely filed and where the plaintiff did not produce any evidence to support the judgment rendered against Thompson, and (2) Thompson's federal and state due process rights were violated because she was prevented not only from defending the lawsuit filed against her, but prevented from even participating at trial.

DISCUSSION

Judgment Against Thompson.

Thompson's first assigned error is that the county court erred in granting judgment against her where an answer had been timely filed and where the plaintiff did not produce any evidence to support the judgment rendered against Thompson.

[1] Where a defendant has filed an answer, the fact that the defendant does not appear for trial does not entitle the plaintiff to a judgment without proof of the facts constituting the plaintiff's cause of action, unless the facts admitted by the defendant in the answer make out a prima facie case in the plaintiff's favor. *Scudder v. Haug*, 201 Neb. 107, 266 N.W.2d 232 (1978). Thompson's answer to the plaintiff's petition raised an issue of fact which was required to be decided before judgment could be rendered against Thompson. There is no sworn testimony, affidavit, or other such evidence in the record to support the plaintiff's allegations. Without evidence or testimony regarding the

alleged student loan contract and the amount of damages in the record, the record before this court does not support the entry of judgment on liability or damages. Therefore, the judgment against Thompson was flawed because there was no factual support for the judgment rendered. Thus, the district court erred in affirming the county court's entry of judgment against Thompson, the judgment is vacated, and the matter is remanded to the Lancaster County District Court with directions to remand to the Lancaster County Court for further proceedings.

Although we have determined that the judgment must be vacated and the matter remanded for further proceedings, we deem it necessary to address Thompson's claims of a violation of due process rights because of the likelihood that the same issue will arise during the proceedings on remand.

Violation of Due Process Rights.

Thompson contends that her federal and state due process rights were violated because she was prevented not only from defending the lawsuit filed against her, but prevented from even participating at trial.

[2-4] The U.S. and Nebraska Constitutions provide that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amends. V and XIV; Neb. Const. art. I, § 3.

> As stated in *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972): "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard . . . .' " When a person has a right to be heard, procedural due process includes notice to the person whose right is affected by a proceeding, that is, timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a 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 constitution or statute; and a hearing before an impartial decisionmaker.

In re Interest of L.V., 240 Neb. 404, 413-14, 482 N.W.2d 250, 257 (1992).

[5] Although it is clear that a prisoner has no absolute constitutional right to be released from prison so that the prisoner can be present at a hearing in a civil action, *In re Interest of L.V., supra*; *Wilson v. Wilson*, 238 Neb. 219, 469 N.W.2d 750 (1991), and that due process does not require the appointment of counsel to represent the prisoner in a private civil matter, *Caynor v. Caynor*, 213 Neb. 143, 327 N.W.2d 633 (1982), due process does require that the prisoner receive meaningful access to the courts to defend suits brought against him or her.

In the instant case, Thompson's motion to physically attend trial was denied, her motion to have the trial conducted telephonically so that she could participate was denied, and the Lancaster County Court and the plaintiff's attorney were aware that Thompson was acting pro se. We fail to see how the plaintiff can seriously argue that Thompson's due process rights were not violated by the procedures employed at the county court trial. When the trial on remand takes place, due process does not require Thompson's physical presence at the trial, *provided that she is otherwise afforded procedural due process which provides her an opportunity to present her side of the case.*

CONCLUSION

The Lancaster County District Court erred in affirming the Lancaster County Court's entry of judgment against Thompson where no evidence or testimony was presented at trial. Furthermore, at the trial on remand, we hold that due process does not require Thompson's physical presence at the trial, provided that she is otherwise afforded procedural due process.

JUDGMENT VACATED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLANT, V. DIANE F. LANGAN, APPELLEE.

577 N.W.2d 742

Filed March 31, 1998. No. A-98-014.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court.
3. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Statutes.** In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute.
5. ____. When a challenged statute is susceptible of more than one reasonable construction, a court uses the construction that will achieve the purposes of the statute and preserve the statute's validity.
6. **Statutes: Legislature: Intent: Appeal and Error.** In determining the meaning of a statute, an appellate court may conjunctively consider and construe a collection of statutes which pertain to a certain subject matter to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
7. **Police Officers and Sheriffs: Arrests.** The arrest powers granted to carrier enforcement officers under Neb. Rev. Stat. § 60-1306 (Cum. Supp. 1996) do not allow arrests for all stated law violations which are observed while on duty generally. Rather, such powers are limited to arrests only for such stated violations which are viewed by the officer while performing a function specifically related to the duties enumerated in subsections (1) and (2) or a function specifically related to those duties addressed in the statutes and laws referred to in subsections (3), (4), and (5).

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Affirmed.

John J. Kohl, Platte County Attorney, and George R. Love, for appellant.

Wm. D. Kurtenbach, of Kurtenbach Law Office, for appellee.

MUES, Judge.

INTRODUCTION

Pursuant to Neb. Rev. Stat. §§ 29-824 to 29-826 (Reissue 1995), the State of Nebraska appeals an order of the district

court for Platte County, suppressing all evidence resulting from the July 16, 1997, stop of a passenger vehicle and the subsequent arrest by a carrier enforcement officer of the operator of the vehicle for driving while under the influence of alcoholic liquor.

STATEMENT OF FACTS

Neb. Rev. Stat. § 60-1303(2) (Cum. Supp. 1996) defines carrier enforcement officers as a separate group within the Nebraska State Patrol which is designated to operate weighing stations and portable scales and to perform carrier enforcement duties. On July 16, 1997, at approximately 10:10 p.m., carrier enforcement officer Robert Filkin was in uniform in a marked cruiser sitting to the side of U.S. Highway 30 near Monroe, Nebraska, observing traffic. Traffic was slow, so Filkin decided to move to U.S. Highway 81. As he pulled out onto Highway 30, he noticed the vehicle in front of him, a small Jeep-like vehicle, "starting to swerve." As he followed the vehicle for approximately 6 miles, he observed the vehicle cross the centerline and then swerve back to the right shoulder on several occasions. At one point, the vehicle was off the shoulder and driving on the grass. When it pulled back onto the highway, it barely missed hitting the back end of an oncoming pickup truck. Filkin stopped the vehicle and contacted the driver, Diane F. Langan. He noticed an odor of alcohol and observed that Langan's eyes were bloodshot and watery. She had a hard time finding her driver's license and could not produce registration for the vehicle. Langan subsequently failed the sobriety tests and was arrested for driving while under the influence of alcoholic liquor.

Langan was subsequently charged in county court with driving while under the influence of alcoholic liquor. She filed a motion to suppress, alleging, inter alia, that Filkin did not have the authority to arrest her. Said motion was sustained, and the State dismissed the charges in county court and refiled in district court. Langan filed a new motion to suppress, alleging that Filkin was without authority to arrest Langan, that the arrest was not based on probable cause, and that her statements were not made freely and voluntarily. The motion was sustained, and

the State appeals the district court's order suppressing "all evidence of any kind whatsoever obtained by carrier enforcement officers."

ASSIGNMENT OF ERROR

The State alleges that the district court erred in finding that Filkin was not "in the performance of his duties" and lacked the power to arrest Langan under Neb. Rev. Stat. § 60-1306 (Cum. Supp. 1996).

STANDARD OF REVIEW

[1] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998).

[2] Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court. *State v. Stubblefield,* 249 Neb. 436, 543 N.W.2d 743 (1996).

ANALYSIS

The critical issue on appeal is whether a carrier enforcement officer, under the circumstances of this case, has the statutory authority to stop and arrest a motor vehicle operator for driving while under the influence of alcoholic liquor when that operator is operating a passenger vehicle rather than a bus, motor truck, truck-tractor, semi-trailer, trailer, or towed vehicle. Section 60-1306 details the authority and powers of carrier enforcement officers. It provides in pertinent part:

> The carrier enforcement officers shall have the power (1) of peace officers solely for the purpose of enforcing the laws relating to the trip permits provided for in section 66-492 and the International Fuel Tax Agreement Act and the laws relating to the size, weight, load, and registration of buses, motor trucks, truck-tractors, semitrailers, trailers, and towed vehicles, (2) when in uniform, to require the driver thereof to stop and exhibit his or her operator's license and registration issued for the vehicle and submit to an inspection of such vehicle, the plates, the registration

> thereon, and licenses and permits required under the motor fuel laws, (3) to make arrests upon view and without warrant for any violation committed in their presence of the provisions of the Motor Vehicle Operator's License Act or of any other law regulating the operation of vehicles or the use of the highways *while in the performance of their duties referred to in subdivisions (1) and (2) of this section and of sections 60-305.12, 60-1308, 60-1309, and 75-363 to 75-368,* (4) to make arrests upon view and without warrant for any violation committed in their presence which is a misdemeanor or felony under the laws of this state *while in the performance of their duties referred to in subdivisions (1) and (2) of this section and of sections 60-305.12, 60-1308, 60-1309, and 75-363 to 75-368,* and (5) to make arrests on warrant for any violation which is a misdemeanor or felony under the laws of this state *while in the performance of their duties referred to in subdivisions (1) and (2) of this section and of sections 60-305.12, 60-1308, 60-1309, and 75-363 to 75-368.*

(Emphasis supplied.)

At the outset, I note that this court recently discussed the authority of conservation officers to make similar arrests. See *State v. Connick*, 5 Neb. App. 176, 557 N.W.2d 713 (1996). The outcome in *Connick* depended in large measure on interpreting specific statutes discussing the power and authority of conservation officers and peace officers, the court having concluded that conservation officers fell within that latter category. Here too the resolution of the issue presented depends mostly on interpreting statutory provisions addressing the authority of carrier enforcement officers, and while § 60-1306(1) grants carrier enforcement officers the general power of peace officers, it does so only for purposes of enforcing specifically enumerated laws not involved in the present appeal. Therefore, *Connick* is not particularly helpful in resolving this appeal.

The State contends that § 60-1306 grants to carrier enforcement officers the power to arrest passenger vehicle operators for driving while under the influence of alcoholic liquor when the officers observe such violations on a highway while the officers are on duty and moving from observation point A to observation

point B. There is no suggestion by the State that the vehicle operated by Langan was one normally associated with the duties of a carrier enforcement officer or that Filkin was engaged in any specific enforcement duty at the time he observed the erratic driving. In other words, the State urges me to interpret the "while in the performance of their duties" portion of the statute to mean that the officers have the authority to arrest such motor vehicle operator for such violation so long as the officers are on duty and generally acting within the course of their employment at the time they observe the violation.

Not surprisingly, Langan argues that the authority of carrier enforcement officers under § 60-1306 is limited to arrests of those drivers who are contacted while the carrier enforcement officer is engaged in enforcing the specific laws relating to trip permits; the International Fuel Tax Agreement Act; laws relating to size, weight, load, and registration of buses, motor trucks, truck-tractors, semi-trailers, trailers, and towed vehicles; and other laws enumerated in subsections (1) and (2) of § 60-1306. She contends that since she was not operating any of these described vehicles, Filkin was not and could not have been engaged in the enforcement of these specified laws when he stopped her.

[3,4] Familiar principles of statutory interpretation must be applied when determining whether or not § 60-1306 grants on-duty carrier enforcement officers the power to arrest a passenger vehicle operator such as Langan for driving while under the influence of alcoholic liquor. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Metropolitan Utilities Dist. v. Balka*, 252 Neb. 172, 560 N.W.2d 795 (1997). In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute. *Omaha World-Herald v. Dernier*, 253 Neb. 215, 570 N.W.2d 508 (1997).

[5,6] When a challenged statute is susceptible of more than one reasonable construction, a court uses the construction that

will achieve the purposes of the statute and preserve the statute's validity. *Southeast Rur. Vol. Fire Dept. v. Neb. Dept. of Rev.*, 251 Neb. 852, 560 N.W.2d 436 (1997). In determining the meaning of a statute, an appellate court may conjunctively consider and construe a collection of statutes which pertain to a certain subject matter to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *Snipes v. Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997).

With these principles in mind, I first examine the language of the statute at issue in this case. Subsection (1) of § 60-1306 grants carrier enforcement officers certain powers in enforcing laws relating to trip permits; the International Fuel Tax Agreement Act; and the size, weight, load, and registration of buses, motor trucks, truck-tractors, semi-trailers, trailers, and towed vehicles. Subsection (2) authorizes the officers to stop drivers of such vehicles and to inspect the operator's license and registration issued for the vehicle, such vehicle, the plates, the registration thereon, and licenses and permits required under the motor fuel laws. The grant of the arrest powers in subsections (3), (4), and (5) is made in connection with performing specific activities as referred to in subsections (1) and (2) and those addressed in Neb. Rev. Stat. § 60-305.12 (Cum. Supp. 1996) (display of registered owner's name), Neb. Rev. Stat. § 60-1308 (Reissue 1993) (failure to stop at weigh station), Neb. Rev. Stat. § 60-1309 (Reissue 1993) (resisting arrest, refusing to obey carrier enforcement officer), and Neb. Rev. Stat. §§ 75-363 to 75-368 (Reissue 1996) (motor carrier safety regulations, federal hazardous material regulations). In addition, § 60-1306(3) grants arrest powers for violations of the Motor Vehicle Operator's License Act, Neb. Rev. Stat. §§ 60-462 to 60-4,188 (Reissue 1993 & Cum. Supp. 1996). The plain language of § 60-1306 grants arrest powers to carrier enforcement officers only in the performance of specific enumerated duties and functions.

Neb. Rev. Stat. § 81-2005 (Reissue 1994) provides in pertinent part:

> The Superintendent of Law Enforcement and Public Safety and all officers of the Nebraska State Patrol, *except*

> *all carrier enforcement officers assigned to the carrier enforcement division*, shall have the power:
>
> (1) Of peace officers for the purpose of enforcing the provisions of the Motor Vehicle Operator's License Act and any other law regulating the registration or operation of vehicles or the use of the highways.

(Emphasis supplied.) Conjunctively considering § 81-2005 and § 60-1306 and giving effect to all of the parts of each, it is clear that carrier enforcement officers are not granted the full realm of powers possessed by State Patrol troopers. Rather, they are granted only those powers specifically enumerated in § 60-1306. As discussed later, § 81-2005 was initially the subject of amendment when § 60-1306 was changed in 1994 but, in the end, remained the same insofar as excluding carrier enforcement officers from the broad power given other State Patrol troopers.

The Legislature, in 1994 Neb. Laws, L.B. 28, amended § 60-1306 to include the relevant subsections (3), (4), and (5). The legislative history for L.B. 28 offers guidance on the legislative intent and purpose. Prior to the 1994 amendment, carrier enforcement officers could arrest only for violations of the laws specifically enumerated in § 60-1306, i.e., the laws they were responsible for enforcing. See § 60-1306 (Reissue 1993). For example, if a truckdriver came through a weigh station and it was clearly evident that the driver was intoxicated or had illegal drugs in his or her possession, the carrier enforcement officer would have to call in another trooper or local law enforcement officer to make the arrest. If the carrier enforcement officer discovered through a computer check that a certain truckdriver had a felony warrant out for robbery, the carrier enforcement officer was required to call in another officer to make the arrest. See, Transportation Committee Hearing, 93d Leg., 1st Sess. 52 (Feb. 23, 1993); Floor Debate, 93d Leg., 2d Sess. 7863 (Jan. 12, 1994).

The main thrust of L.B. 28 appears to have been to expand the arrest power of carrier enforcement officers so as to effectuate arrests for violations committed in view of the officers though the law violated was not one which the officers were otherwise specifically empowered to enforce. See Floor Debate,

93d Leg., 2d Sess. 7877 (Jan. 12, 1994). Senator David Bernard-Stevens, one of the introducers of L.B. 28, stated that "[w]hat this bill will basically say is, look, if, *in the line of what you're doing on weights and measures*, you come across something, instead of having to wait and possibly let the person go, we're going to give you the power to make the arrest." (Emphasis supplied.) Floor Debate, 93d Leg., 2d Sess. 7913 (Jan. 12, 1994). In its original form, L.B. 28 sought to amend § 81-2005 to eliminate the exception and to include carrier enforcement officers in the general grant of powers given to State Patrol troopers as discussed above.

In the floor debate on L.B. 28, a concern was expressed over expanding the powers of carrier enforcement officers to the point where they had more authority than a State Patrol trooper, i.e., all the powers of a State Trooper plus those of a carrier enforcement officer. See Floor Debate, 93d Leg., 2d Sess. 7910-11 (Jan. 12, 1994) and 9030 (Feb. 14, 1994). To address these concerns, the bill was amended to leave § 81-2005 intact, and additional amendments were made resulting in the relevant version of § 60-1306 involved here. It seems apparent to me that these amendments were intended to preserve the original bill's intent to expand the carrier enforcement officers' arrest powers yet restrict those powers to something less than those granted to State Patrol troopers generally. This is evident from omitting the section of L.B. 28 amending § 81-2005 as well as from the following comment by Senator Bernard-Stevens:

> One of the questions that was asked [about the original version of L.B. 28 concerning] the carrier enforcement was, would . . . they be kind of super troopers and this type of thing? . . . The only time they would have the arrest capabilities that would be granted to them under this particular law, if passed, would be in the performance of their duties, period. So they will only be able to do this while they're performing their duties so they can't be pulled off to do something else, only in performance of their duties as carrier enforcement.

Floor Debate, 93d Leg., 2d Sess. 9030-31 (Feb. 14, 1994). While I fully understand that this, and other debate occurring in

the legislative process on L.B. 28, does not conclusively answer the precise issue before me, I believe it is helpful, particularly when viewing it in context.

[7] I conclude that in adopting the 1994 amendments to § 60-1306, the Legislature intended to expand the arrest powers of carrier enforcement officers, but to limit such powers to arrest only for violations observed while enforcing the specific laws enumerated. I believe that the language authorizing arrest powers only if violations are observed "while in the performance of their duties" followed immediately by references to certain specific functions and laws leads to such an interpretation. Thus, the arrest powers granted to carrier enforcement officers under § 60-1306 do not allow arrests for all stated law violations which the officers may observe while on duty generally. Rather, such powers are limited to arrests only for such stated violations which are viewed by the officers while they are performing a function specifically related to the duties enumerated in subsections (1) and (2) or a function related to those duties addressed in the statutes and laws referred to in subsections (3), (4), and (5). To read the statute as granting arrest powers for violations observed at any time while such officers are "on duty," as the State urges, would effectively require me to ignore the disharmony that such a construction would create vis-a-vis § 81-2005. See *Snipes v. Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997). Such a construction would also, I believe, require me to read out of the statutes the rather clear language restricting the arrest powers of such officers. See *Omaha World-Herald v. Dernier*, 253 Neb. 215, 570 N.W.2d 508 (1997). This I am not at liberty to do.

Filkin stopped Langan's passenger vehicle because of her erratic driving. While clearly he was on duty and acting within the general course of his employment as a carrier enforcement officer at the time he observed the vehicle, the vehicle was not one over which a carrier enforcement officer has enforcement powers under § 60-1306(1) or (2), and Filkin was not at that time performing a function specifically related to any duties enumerated in § 60-1306 or the statutes referenced therein.

CONCLUSION

Section 60-1306 does not grant the same arrest authority to carrier enforcement officers as enjoyed by State Patrol troopers generally. Rather, the statute restricts the carrier enforcement officers' arrest authority to situations where they observe law violations while performing functions specifically related to the duties enumerated. I agree with the district court that Filkin was not performing such functions at the time of the stop and arrest of Langan. Therefore, Filkin was not "in the performance of his duties" so as to authorize the arrest of Langan under § 60-1306. Thus, the trial court's order suppressing the evidence obtained from this unlawful arrest is affirmed.

AFFIRMED.

SGT. GEORGE F. COX AND FRATERNAL ORDER OF POLICE, LODGE NO. 8, APPELLANTS, V. DOUGLAS COUNTY CIVIL SERVICE COMMISSION, APPELLEE.

577 N.W.2d 758

Filed April 7, 1998. No. A-96-788.

1. **Jurisdiction: Appeal and Error.** Petition-in-error jurisdiction is limited by statute to a review of a judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court.
2. **Appeal and Error.** In reviewing a decision based on a petition in error, an appellate court determines whether the inferior tribunal acted within its jurisdiction and whether the inferior tribunal's decision is supported by sufficient evidence.
3. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach a conclusion independent from the trial court's conclusion.
4. **Appeal and Error.** The proceedings to obtain the reversal, vacation, or modification of orders issued by tribunals inferior to a district court shall be by petition entitled "Petition in Error," setting forth the errors complained of.
5. **Pleadings.** The statutes in article 8 of chapter 25 of the Nebraska Revised Statutes deal with general rules of pleading in civil actions in trial courts.
6. **Demurrer: Pleadings.** There is no provision under article 19 of chapter 25 of the Nebraska Revised Statutes for a demurrer in an error proceeding. A petition, enumerating the errors relied upon for reversal, must be filed.
7. **Pleadings.** An answer or other pleading by a defendant in error can have no function other than to advise the court of events that have occurred after the order appealed from, such as acceptance of benefits.
8. **Appeal and Error: Records.** In an error proceeding in the district court, that court must look to the transcript of the proceedings of the inferior tribunal filed with the petition in error to ascertain what happened there. Such a proceeding is ordinarily

tried on the appropriate and relevant questions of law set out in the petition in error and appearing in the transcript.

9. **Appeal and Error: Evidence: Records.** In an error proceeding, the sufficiency of the evidence cannot be considered unless all material, relevant evidence is contained in the bill of exceptions and the transcript shows an error prejudicial to the petitioner in error.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Reversed and remanded with directions.

Thomas J. Wik for appellants.

James S. Jansen, Douglas County Attorney, and Christine A. Lustgarten for appellee.

HANNON, IRWIN, and MUES, Judges.

HANNON, Judge.

Sgt. George F. Cox and Fraternal Order of Police, Lodge No. 8 (Lodge), appealed to the district court by petition in error from an order of the Douglas County Civil Service Commission (Commission) denying Cox's grievance. The district court dismissed that appeal after sustaining a demurrer to Cox and the Lodge's amended petition in error. We conclude that a petition for an appeal from the Commission by petition in error must set forth the errors complained of, as distinguished from facts sufficient to state a cause of action as required for ordinary petitions filed in district court. See Neb. Rev. Stat. §§ 25-804 and 25-806 (Reissue 1995). We conclude that a demurrer is improper in an error proceeding and that the action of the court below in dismissing the petition as demurrable is error requiring the cause to be remanded for a hearing on the merits of the alleged errors.

BACKGROUND

On January 17, 1996, Cox and the Lodge filed what they entitled a "Petition in Error (Equity)." The petition contained what might be called a summary of the facts which Cox and the Lodge believed entitled them to the relief they sought through the grievance procedure instituted before the Commission, a copy of the grievance procedure steps, and a copy of the order that resulted from that procedure. The petition also alleged that

the order was erroneous because it was (1) contrary to the labor agreement, (2) contrary to the evidence, (3) contrary to law, and (4) arbitrary and capricious. Cox and the Lodge prayed that the court vacate the Commission's order and order the Commission to uphold the terms of the labor agreement.

A notice of appeal and praecipe for transcript was filed with the petition. In due time, the clerk of the district court filed a transcript and a stenographically recorded and transcribed record of the December 20, 1995, hearing of the Commission from which the order resulted. However, the district court disposed of the case by sustaining the Commission's demurrer, and therefore, there was no evidentiary hearing in the district court. In *Olsen v. Grosshans*, 160 Neb. 543, 71 N.W.2d 90 (1955), the Supreme Court noted that the stenographically reported and transcribed record was not offered in evidence and that there was no bill of exceptions. As such, the court stated that any discussion of the contents of the record would serve no purpose. We therefore will not review the contents of the transcribed record even though it was filed with the clerk.

The Commission filed a demurrer "pursuant to Neb. Rev. Stat. §25-806 et seq. [(Reissue 1995)]," alleging there was a defect of parties and that the petition did not state facts sufficient to constitute a cause of action. After a hearing, the trial court sustained the demurrer and found, "Plaintiff has failed to state facts sufficient to support a cause of action, to-wit: That the Douglas County Civil Service Commission's failure to strictly comply with the time guidelines as set out in the labor agreement caused a deprivation which resulted in some harm to the Plaintiff." Cox and the Lodge were given 10 days to amend their petition. Cox and the Lodge filed an amended petition with a new allegation to the effect that as a result of the Commission's failure to act in a timely fashion, Cox has suffered, and will continue to suffer, damage as a result of lost wages and rank. A new demurrer was filed and sustained, and the case was dismissed.

ASSIGNMENT OF ERROR

Cox and the Lodge allege the district court erred in sustaining the demurrer, because the amended petition did not contain

a defect of parties and the petition stated facts sufficient to state a cause of action.

STANDARD OF REVIEW

[1,2] For petitions in error, the standard of review in the district court and this court is as follows: "Petition-in-error jurisdiction is limited by statute to a review of '[a] judgment rendered or final order . . . made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court.'" *Kropp v. Grand Island Pub. Sch. Dist. No. 2*, 246 Neb. 138, 140, 517 N.W.2d 113, 115 (1994). In reviewing a decision based on a petition in error, an appellate court determines whether the inferior tribunal acted within its jurisdiction and whether the inferior tribunal's decision is supported by sufficient evidence. See, *Luet, Inc. v. City of Omaha*, 247 Neb. 831, 530 N.W.2d 633 (1995); *Ashby v. Civil Serv. Comm.*, 241 Neb. 988, 492 N.W.2d 849 (1992).

[3] The questions presented by this appeal are strictly questions of law, and on questions of law, an appellate court has an obligation to reach a conclusion independent from the trial court's conclusion. *State v. Champoux*, 252 Neb. 769, 566 N.W.2d 763 (1997); *Fiese v. Sitorius*, 247 Neb. 227, 526 N.W.2d 86 (1995). As explained below, a legal issue determines the outcome of this appeal.

Counsel for both parties and the trial court apparently misunderstand the relationship of the statutes on pleading in civil cases and the statutes providing for appeals by petition in error. We say this because the petition in error contains the designation "(Equity)," the Commission demurred to the petition under § 25-806 et seq., the trial court sustained that demurrer, and Cox and the Lodge's counsel argued that the petition did state a cause of action and cited authority that would be relevant if the petition was filed in a civil action. At oral argument, Cox and the Lodge's attorney argued for the first time that a demurrer was not a proper pleading in an error proceeding. The Commission continues to maintain the demurrer was properly sustained. We are unable to consider the substantive issues argued by the parties because not only is a demurrer not a proper pleading to a petition in error, but also since the case was

disposed of upon a demurrer, we have no bill of exceptions giving us the evidence necessary to consider any of the issues argued in the parties' briefs. We must remand the cause to the district court for further proceedings. Our reasons for this conclusion are given in the next section of this opinion.

DISCUSSION

[4,5] Neb. Rev. Stat. § 25-1903 (Reissue 1995) provides: "The proceedings to obtain such reversal, vacation or modification [of orders issued by tribunals inferior to the district court] shall be by petition entitled petition in error . . . setting forth the errors complained of . . . ." The Commission relies on § 25-806, which provides a defendant may demur to the petition "only when it appears on its face . . . (4) that there is a defect of parties . . . (6) that the petition does not state facts sufficient to constitute a cause of action." That statute must be read in light of the rules of pleading in civil actions in trial courts. For instance, Neb. Rev. Stat. § 25-801 (Reissue 1995) provides that pleadings are written statements of the facts constituting the parties' claims and defenses; Neb. Rev. Stat. § 25-803 (Reissue 1995) states which pleadings are allowed, that is, a petition, an answer, and replies and demurrers to them. Section 25-804 provides what a petition must contain, and Neb. Rev. Stat. § 25-811 et seq. (Reissue 1995) state what an answer must contain.

[6,7] The appeal in this case is brought under article 19 of chapter 25 of the Nebraska Revised Statutes, and there is no provision in that article for a demurrer in an error proceeding. We point out that a demurrer to a petition in error is no more valid than a demurrer to the assignments of error in a brief. A demurrer accomplishes no more than a simple argument that the errors assigned in the petition in error are not errors. Section 25-1903 provides in significant part: "The proceedings to obtain such reversal, vacation or modification shall be by petition entitled petition in error . . . setting forth the errors complained of . . . ." A petition, enumerating the errors relied upon for reversal, must be filed. *Lean v. Andrews*, 38 Neb. 656, 57 N.W. 401 (1894). An answer or other pleading by a defendant in error can have no function other than to advise the court of events that have occurred after the order appealed from, such as

acceptance of benefits. See, *Gray v. Smith*, 17 Neb. 682, 24 N.W. 340 (1885); *Treischke v. Western Grain Co.*, 10 Neb. 358, 6 N.W. 427 (1880).

[8] The Supreme Court has said:

> "In an error proceeding in the district court, that court must look to the transcript of the proceedings of the [inferior tribunal] filed with the petition in error to ascertain what happened there." Such a proceeding is ordinarily tried on the appropriate and relevant questions of law, set out in the petition in error and appearing in the transcript.

In re Estate of Vance, 149 Neb. 220, 223, 30 N.W.2d 677, 680 (1948), quoting *In re Estate of Berg*, 139 Neb. 99, 296 N.W. 460 (1941).

[9] The Supreme Court has also held that in an error proceeding the sufficiency of the evidence could not be considered unless all material, relevant evidence was contained in the bill of exceptions and the transcript showed an error prejudicial to the petitioner in error. See *In re Estate of Berg, supra*. The Supreme Court in *Olsen v. Grosshans*, 160 Neb. 543, 547, 71 N.W.2d 90, 95 (1955), said: "[N]othing can be added to or taken from the record by simple averment in a petition in error, and extrinsic facts pleaded therein do not form part of the record in which an order is sought to be reversed."

Without some study of *Olsen,* the requirement of a bill of exceptions is possibly misleading. For instance, in the case at hand we have a stenographic record of the hearing before the Commission which includes the exhibits offered at that hearing. The record is certified by someone purporting to be a notary and an "RPR." The record was filed by the clerk of the district court. If this proceeding was an appeal from the county court, the bill of exceptions made in the county court would not need to be made a part of a bill of exceptions in the district court. See Neb. Rev. Stat. § 25-2733 (Reissue 1995). The record we have before us is what the *Olsen* court referred to as a "stenographically reported and transcribed record," 160 Neb. at 547, 71 N.W.2d at 95, but it was not offered and received in evidence and hence, is not part of the bill of exceptions of the case. Probably because of the nature of the proceedings in all tribunals inferior to a district court, the offer and receipt of a tran-

scribed record into evidence in district court has always been thought to be a necessary step to ensure the accuracy of the record of those proceedings. At any rate, under *Olsen*, the record clearly must be made a part of the bill of exceptions to be utilized by the district court or this court. Since in the instant case the document is not part of the bill of exceptions, we follow the lead of the *Olsen* court and do not summarize the record which might well have been admissible if it had been offered and received as evidence.

We therefore conclude that the district court improperly dismissed the case upon a demurrer, which had the effect of denying Cox and the Lodge a hearing, and more importantly, it denied them an opportunity to make a bill of exceptions. Accordingly, we reverse the order of the district court dismissing the petition in error and remand the cause with directions to hold a hearing on the errors alleged in the petition in error.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF CLIFFORD M. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. SUZETTE M., APPELLANT.

577 N.W.2d 547

Filed April 7, 1998. No. A-97-449.

1. **Constitutional Law: Statutes: Self-Incrimination.** A person's right against self-incrimination emanates from three distinct sources, the U.S. Constitution, the Nebraska Constitution, and the Nebraska statutes.
2. **Constitutional Law: Self-Incrimination.** The Fifth Amendment privilege not only permits a person to refuse to testify against himself or herself during a criminal trial in which he or she is a defendant, but also privileges him or her to refuse to answer questions put to him or her in any other proceeding, civil or criminal, formal or informal, where the answers might tend to incriminate him or her in future criminal proceedings.
3. **Self-Incrimination: Parental Rights.** The protections afforded against self-incrimination may, in the proper context, be applicable in termination of parental rights proceedings.
4. **Self-Incrimination: Juvenile Courts: Parental Rights.** It is impermissible for a juvenile court to terminate a person's parental rights because the person invokes his or her privilege against self-incrimination.

5. **Pleadings: Notice.** The system embodied in Nebraska's pleading system has many purposes and functions, not the least of which is to provide adequate notice as to what allegations a party will be required to meet at trial.
6. **Collateral Attack: Parental Rights: Appeal and Error.** A parent may not generally raise a collateral attack challenging the provisions of a rehabilitation plan if the parent failed to timely appeal from the plan.

Appeal from the Separate Juvenile Court of Douglas County: DOUGLAS F. JOHNSON, Judge. Reversed and remanded with directions.

Stephanie Weber Milone for appellant.

James S. Jansen, Douglas County Attorney, and Karen S. Kassebaum for appellee.

Thomas C. Riley, Douglas County Public Defender, and Ann C. Holtz, guardian ad litem.

MILLER-LERMAN, Chief Judge, and HANNON and IRWIN, Judges.

IRWIN, Judge.

I. INTRODUCTION

Suzette M., the natural mother of Clifford M., Colette M., and Chelsea M., appeals from an order of the separate juvenile court of Douglas County, Nebraska, terminating her parental rights with respect to the three children. On appeal, Suzette challenges the termination order. Because the court terminated Suzette's parental rights solely on the basis that she refused to waive her right against self-incrimination, we reverse, and remand with directions.

II. BACKGROUND

On November 10, 1994, the State filed a second amended petition seeking jurisdiction over Clifford, Colette, and Chelsea. The State asserted that Clifford was born on February 17, 1990; that Colette was born on February 1, 1992; and that Chelsea was born on December 28, 1992. The State alleged that on or about February 22, 1994, Suzette's live-in boyfriend had thrown Clifford into a wall, resulting in bruising on the side of Clifford's face. Additionally, the State alleged that all three children had been subjected to sexual contact by both Suzette and

the live-in boyfriend. The State also alleged that Clifford had been subjected to a beating with a belt. The State sought jurisdiction over the children on the basis that Suzette failed to protect them and that she had had sexual contact with them.

After evidentiary hearings, the juvenile court entered an adjudication order. The court found that Suzette admitted the dates of birth of the children. The court found that the allegation that Clifford had been beaten with a belt was not true. The court found that the remaining allegations of the petition were true, including the allegations concerning sexual contact. As such, the court adjudicated the three children to be within the terms of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993). The temporary custody of the children was placed in the Nebraska Department of Social Services for appropriate care and placement.

On March 3, 1995, the juvenile court entered a rehabilitation plan designed to continue the efforts at eventual reunification of this family. Among other requirements, the court ordered Suzette to submit to psychiatric examinations, participate in a YWCA domestic violence program, find appropriate housing, find a legal source of income, and participate in the children's therapy as requested by their therapist. Suzette was granted reasonable rights of visitation, at a minimum of once per week and twice per week if possible. The rehabilitation order was thereafter periodically reviewed and reaffirmed.

The record reveals that Suzette presented evidence at the hearing on the motion to terminate her parental rights, which indicates that she complied with portions of the rehabilitation plan ordered by the juvenile court. Suzette completed psychiatric examinations, enrolled in and completed parenting classes, participated in the YWCA domestic violence program, received income from a legal source, participated in personal counseling, and attended visitation regularly. The record further reveals that the children's therapist desired Suzette to participate in a program known as Parents United as a precursor to participation in family therapy with the children.

Subsequent to a review hearing regarding the rehabilitation plan, on May 3, 1996, the juvenile court entered an order which reaffirmed the prior rehabilitation plan and additionally ordered Suzette to enroll and participate in the Parents United program.

The court specifically held that Suzette's request that the children be returned to her possession was denied "for the reason that the evidence shows that [Suzette] has not addressed the issue of sexual abuse which placed her children into protective custody . . . ."

According to the record, Parents United is a program designed to work specifically with families affected by sexual abuse issues. The program involves therapy both for victims of sexual abuse and for offenders of sexual abuse. As the program is operated in the Nebraska area, a person may be admitted into the program either as a nonoffender who has been affected by sexual abuse or as an offender who has committed sexual abuse. If a person is to be admitted into the program as an offender, Parents United requires that the offender first admit responsibility for the sexual abuse which he or she perpetrated on the victim.

The record indicates that Suzette contacted the director of Parents United in May or June 1996 about participating, after being requested to do so by the children's therapist and after being ordered to do so by the juvenile court order of May 3, 1996. Suzette refused to make statements acknowledging responsibility for the alleged sexual abuse perpetrated upon Clifford, Colette, and Chelsea. As a result, Suzette was denied admission into the program. The director of Parents United authored a letter to the juvenile court in June, which now appears in the bill of exceptions, explaining that Suzette could not be admitted into the program as a nonoffender because of the court's prior adjudication order finding that she was responsible for the sexual contact and that Suzette could not be admitted into the program as an offender without an acknowledgment by her of responsibility for the sexual contact.

On December 5, 1996, the court-appointed guardian ad litem for the children filed a motion to terminate Suzette's parental rights. The guardian ad litem generally alleged in the motion that termination was appropriate under Neb. Rev. Stat. § 43-292(2) and (7) (Reissue 1993). Section 43-292(2) provides that parental rights may be terminated when "[t]he parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protec-

tion." Section 43-292(7) provides that parental rights may be terminated when a "juvenile has been in an out-of-home placement for eighteen or more consecutive months and the parents have failed to correct the conditions leading to the juvenile's out-of-home placement in spite of reasonable efforts and services" offered to the parents by the Department of Social Services or court order.

The guardian ad litem asserted that termination of Suzette's parental rights was appropriate under § 43-292(2), alleging as follows:

> [The children] come within the meaning of §43-292 (2) . . . because the natural parent, Suzette M[.] has substantially and continuously neglected [the children] and refused to give the necessary parental care and protection, to wit:
>
> A. After a February 2, 1995, finding by [the juvenile court] that said children have been subjected to sexual contact by Suzette M[.] and [her live-in boyfriend]. Suzette M[.] refuses to acknowledge said sexual contact occurred. Suzette M[.] refuses to acknowledge any parental responsibility that she has toward said children's care and protection to that end.

The guardian ad litem asserted that termination of Suzette's parental rights was appropriate under § 43-292(7), alleging as follows:

> [The children] come within the meaning of §43-292 (7) . . . being under the age of 18 years and having been in an out-of-home placement for 18 or more consecutive months and Suzette M[.] has failed to correct the conditions leading to the juvenile's out-of-home placement in spite of reasonable efforts and services to the parent ordered by the Court or offered by the Nebraska Department of Social Services.
>
> A. Since March, 1994, said children have been in the Nebraska Department of Social Services for out-of-home placement.
>
> B. Since March, 1994, Suzette M[.] has gained no insight regarding her children's care and protection with respect to having been subjected to sexual contact by herself and [her live-in boyfriend].

> C. Due to Suzette M[.'s] denial of the sexual contact to which she and [her live-in boyfriend] subjected said children, she has effectively barred her participation in the children's therapy as ordered by [the juvenile court].

Although no motion is contained in the record in which Suzette sought a modification of the rehabilitation plan to resolve the difficulties presented by the juvenile court's requirement that she participate in Parents United, it appears that such a motion was made. In a December 12, 1996, order reviewing the rehabilitation plan, the court noted that Suzette's attorney "requested that participation in Parents United b[e] stricken for the reason that [Suzette] is not a candidate for the program" pursuant to the letter to the court, which was authored by the director of the program and is referenced above. The court denied Suzette's request to modify the rehabilitation plan in this manner and kept the requirement that Suzette participate in Parents United. The previous order was to remain "in full force and effect."

On March 27, 1997, the juvenile court entered an order terminating Suzette's parental rights. The court specifically found that termination was appropriate under § 43-292(2) and (7). The court specifically set forth as the basis for termination a verbatim recitation of the allegations of the motion to terminate, as set forth above. The court found that there was clear and convincing evidence to support termination and that termination was in the best interests of the children. The court ordered that temporary custody of the children remain in the Department of Social Services and that the children be placed in the adoption unit for adoptive planning and placement. Suzette filed this appeal from the termination order.

III. ASSIGNMENTS OF ERROR

On appeal, Suzette has assigned four errors. Our analysis requires us to review only two of these errors, however, and we will not further iterate the remaining two. First, Suzette asserts that the juvenile court erred in using her refusal to acknowledge sexual contact with her children as a basis for termination of her parental rights, as such action violated her right against self-incrimination. Second, Suzette asserts that the court's findings

under § 43-292(2) and (7) are not supported by clear and convincing evidence.

IV. STANDARD OF REVIEW

In an appeal from a judgment terminating parental rights, an appellate court tries factual questions de novo on the record, which requires an appellate court to reach a conclusion independent of the findings of the trial court, but when evidence is in conflict, an appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994); *In re Interest of Tabitha J.*, 5 Neb. App. 609, 561 N.W.2d 252 (1997). Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *Smith v. Smith*, 246 Neb. 193, 517 N.W.2d 394 (1994); *In re Interest of Tabitha J., supra.*

V. ANALYSIS

1. Self-Incrimination

(a) Self-Incrimination Generally

(i) Sources of Right

[1,2] In Nebraska, a person's right against self-incrimination emanates from three distinct sources, the U.S. Constitution, the Nebraska Constitution, and the Nebraska statutes. In the U.S. Constitution, the Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." This provision of the 5th Amendment applies to the states through the 14th Amendment. *Allen v. Illinois*, 478 U.S. 364, 106 S. Ct. 2988, 92 L. Ed. 2d 296 (1986). The Fifth Amendment privilege not only permits a person to refuse to testify against himself or herself during a criminal trial in which he or she is a defendant, but also privileges him or her to refuse to answer questions put to him or her in any other proceeding, civil or criminal, formal or informal, where the answers might tend to incriminate him or her in future criminal proceedings. *Allen v. Illinois, supra.*

In Nebraska, the protections of the Fifth Amendment are further supported by the provisions of the Nebraska Constitution,

as well as by a statutory safeguard. The Nebraska Constitution specifically provides that "[n]o person shall be compelled, in any criminal case, to give evidence against himself . . . ." Neb. Const. art. I, § 12. Additionally, statutory protection is provided by Neb. Rev. Stat. § 25-1210 (Reissue 1995), which provides that a witness is not compelled to answer "[w]hen the matter sought to be elicited would tend to render the witness criminally liable . . . ."

(ii) Application to Termination Proceedings

[3] Our research has indicated that the question of the applicability of the right against self-incrimination to proceedings for termination of parental rights has not been significantly litigated in this state. Nonetheless, the Nebraska Supreme Court has indicated, in at least one prior case, that the protections afforded against self-incrimination, in the proper context, are applicable in termination of parental rights proceedings. See *In re Interest of M.S.*, 218 Neb. 889, 360 N.W.2d 478 (1984). In *In re Interest of M.S.*, the court recognized that a proceeding to terminate parental rights is statutorily mandated and is brought about to protect a child, rather than being criminal in nature. The court concluded that absent questions which would subject the parent to criminal sanctions, a termination proceeding does not trigger the self-incrimination protections. Nonetheless, it is apparent from the court's holding that if a parent is subjected to questions the response to which would potentially subject the parent to criminal penalties, the protections against self-incrimination do apply.

(iii) Self-Incrimination in Present Case

Initially, we believe it is important to assess and characterize the actions of the juvenile court with respect to Suzette and the Parents United program. Our review of the record indicates that the juvenile court required Suzette to participate in Parents United in two manners. First, the court initially ordered Suzette to participate in the children's therapy "as requested by the children's therapist." The children's therapist requested Suzette to participate in Parents United as a precursor to any family therapy involving Suzette and the children. Second, in the May 3, 1996, order reviewing the existing rehabilitation plan, the court

specifically ordered Suzette to enroll and participate in Parents United. The court ordered this again on December 12.

The record indicates that Parents United would not accept Suzette as a participant in the program unless and until Suzette acknowledged that she was a sexual abuse offender with respect to her children. In June 1996, the court became aware of this specific requirement by way of a letter from the director of Parents United to the juvenile court. In the December 12 order reviewing the rehabilitation plan, the court noted that Suzette's attorney sought to have participation in Parents United stricken from the rehabilitation plan because Suzette would not incriminate herself by admitting to sexual contact with the children and therefore was not a proper candidate for the program pursuant to the letter to the court from the Parents United program. Nonetheless, the court denied Suzette's request to modify the rehabilitation plan in this manner and kept the requirement that she participate in Parents United. The previous order was to remain "in full force and effect."

Because of Suzette's refusal to acknowledge that she sexually abused her children, she was denied admission in the Parents United program. Specifically, because of this same refusal to acknowledge her role in the sexual abuse of the children and Parents United denying her permission to participate in the program, the guardian ad litem sought termination of Suzette's parental rights.

A review of the motion for termination of parental rights indicates that both of the counts contained in the motion upon which termination was sought are framed entirely around Suzette's refusal to acknowledge that she had sexually abused the children. The guardian ad litem asserted in the motion that Suzette's parental rights should be terminated pursuant to § 43-292(2) and alleged as follows:

> [The children] come within the meaning of §43-292 (2) . . . because the natural parent, Suzette M[.] has substantially and continuously neglected [the children] and refused to give the necessary parental care and protection, to wit:
>
> A. After a February 2, 1995, finding by [the juvenile court] that said children have been subjected to sexual

> contact by Suzette M[.] and [her live-in boyfriend]. Suzette M[.] refuses to acknowledge said sexual contact occurred. Suzette M[.] refuses to acknowledge any parental responsibility that she has toward said children's care and protection to that end.

The guardian ad litem further asserted in the motion that Suzette's parental rights should be terminated pursuant to § 43-292(7) and alleged as follows:

> [The children] come within the meaning of §43-292 (7) . . . being under the age of 18 years and having been in an out-of-home placement for 18 or more consecutive months and Suzette M[.] has failed to correct the conditions leading to the juvenile's out-of-home placement in spite of reasonable efforts and services to the parent ordered by the Court or offered by the Nebraska Department of Social Services.
>
> A. Since March, 1994, said children have been in the Nebraska Department of Social Services for out-of-home placement.
>
> B. Since March, 1994, Suzette M[.] has gained no insight regarding her children's care and protection with respect to having been subjected to sexual contact by herself and [her live-in boyfriend].
>
> C. Due to Suzette M[.]'s denial of the sexual contact to which she and [her live-in boyfriend] subjected said children, she has effectively barred her participation in the children's therapy as ordered by [the juvenile court].

We read sections A, B, and C of the guardian ad litem's allegations concerning § 43-292(7) to be conjunctive allegations. The record does not indicate any services offered by the Department of Social Services or by the juvenile court to assist Suzette in gaining insight or fostering her "participation in the children's therapy," except the Parents United program. Similarly, there was no evidence presented regarding these allegations, except that Suzette did not participate in Parents United, and the evidence thus supports a conjunctive reading of the allegations.

The juvenile court's order terminating Suzette's parental rights is also based entirely on her refusal to acknowledge that

she committed alleged criminal acts upon her children. In the termination order, the court made findings which amount to a verbatim recitation of the motion's allegations. The court held that Suzette's parental rights should be terminated pursuant to § 43-292(2) and found as follows:

> [The children] come within the meaning of Section 43-292(2) . . . because the natural parent, Suzette M[.], has substantially and continuously neglected [the children] and refused to give the necessary parental care and protection, to wit:
>
> A. After a February 2, 1995, finding by [the juvenile court] that said children have been subjected to sexual contact by Suzette M[.] and [her live-in boyfriend], Suzette M[.] refuses to acknowledge said sexual contact occurred. Suzette M. refuses to acknowledge any parental responsibility that she has toward said children's care and protection to that end.

The court's order further held that Suzette's parental rights should be terminated pursuant to § 43-292(7) and found as follows:

> [The children] come within the meaning of Section 43-292(7) . . . being under the age of eighteen years and having been in an out-of-home placement for 18 or more consecutive months and Suzette M[.] has failed to correct the conditions leading to the juveniles' out-of-home placement in spite of reasonable efforts and services to the parent ordered by the Court or offered by the Nebraska Department of Social Services.
>
> A. Since March, 1994, said children have been in the Nebraska Department of Social Services for out-of-home placement.
>
> B. Since March, 1994, Suzette M[.] has gained no insight regarding her children's care and protection with respect to having been subjected to sexual contact by herself and [her live-in boyfriend].
>
> C. Due to Suzette M[.]'s denial of the sexual contact to which she and [her live-in boyfriend] subjected said children, she has effectively barred her participation in the children's therapy as ordered by [the juvenile court].

As such, the limited question we are presented with on appeal is whether the juvenile court may terminate Suzette's parental rights solely because she refused to publicly acknowledge to a Parents United counselor that she had had sexual contact with her children. We are only concerned here with whether a person's parental rights may be terminated solely because the parent refuses to waive his or her right against self-incrimination.

On appeal, Suzette accurately characterizes the dilemma with which the juvenile court presented her: either acknowledge that she sexually abused her children so that she can become enrolled in Parents United, while at the same time potentially incriminating herself for sexual abuse of her children, or refuse to incriminate herself and have her parental rights terminated because she exercised her right not to incriminate herself. Our review of the court's rehabilitation orders, coupled with the court's knowledge that Suzette's acknowledgment of sexual contact with the children was a prerequisite to satisfying the rehabilitation plan, and review of the motion to terminate Suzette's parental rights and the court's order terminating her parental rights, leads us to conclude that the court presented Suzette with precisely that dilemma.

(b) Self-Incrimination in Other Jurisdictions

Our research has revealed no case in Nebraska which specifically addresses the issue of whether a person's parental rights may be terminated solely for refusing to waive the fundamental right against self-incrimination. Other states have, however, addressed the issue. A review of the authority in other states indicates that there is a very fine, although very important, distinction between terminating parental rights based specifically upon a refusal to waive protections against self-incrimination and terminating parental rights based upon a parent's failure to comply with an order to obtain meaningful therapy or rehabilitation, perhaps in part because a parent's failure to acknowledge past wrongdoing inhibits meaningful therapy. The latter is constitutionally permissible; the former is not. See, *Mullin v. Phelps*, 647 A.2d 714 (Vt. 1994); *Matter of Welfare of J.G.W.*, 433 N.W.2d 885 (Minn. 1989); *Matter of Welfare of J.W.*, 415 N.W.2d 879 (Minn. 1987). As such, we do not disagree with the

dissent's assertion that termination of parental rights may be based, in an appropriately pled and proven case, on a parent's failure to undergo meaningful therapy. The record in the present case indicates, however, that termination of Suzette's parental rights was pled and obtained solely on the basis of her refusal to incriminate herself by acknowledging to a Parents United counselor that she had had prior sexual contact with her children.

(i) Supporting Case Law

A strikingly similar situation was presented before the Supreme Court of Minnesota in *Matter of Welfare of J.W., supra.* In *Matter of Welfare of J.W.*, the district court adjudicated J.W. and A.W. to be dependent and neglected children and entered a disposition order requiring, inter alia, that the parents undergo psychological evaluations, which would include an explanation of the death of J.W. and A.W.'s cousin, who had been under the parents' care, consistent with medical findings that the cousin had died because of a fatal abdominal blow caused by someone with the strength of an adult. The court's adjudication order included a finding that the parents were responsible for the death of the cousin. At the disposition hearing, the county attorney informed the court and the parents that if the parents did not intend to comply with this provision of the disposition order, then he would seek to have their parental rights terminated. The parents asserted their privilege against self-incrimination and alleged that the disposition order provision in question violated that privilege because it required them to choose between incriminating themselves or losing their children.

The Minnesota Supreme Court in *Matter of Welfare of J.W.* held that termination of the parents' parental rights as a result of their invocation of the privilege against self-incrimination was impermissible. The court noted that the critical issue was how far the mantle of the protection afforded by the privilege against self-incrimination extends. The court ultimately held that a trial court may not directly require parents to incriminate themselves as part of a dispositional order, and a trial court may not compel therapy which would require the parents to incriminate themselves. *Id.* However, the court held that a trial court may compel the parents to undergo "effective" treatment and recog-

nized that it may be difficult for the parents to demonstrate that any treatment has been effective if it does not involve fully disclosing their prior actions. *Id.* The court also noted that the privilege did not prevent the trial court from considering at disposition the evidence that the parents had previously been found responsible for the cousin's death and that the parents would have to attempt to overcome that evidence in conjunction with demonstrating that they had undergone meaningful therapy. In this context, if the court concludes that the therapy undergone by the parents has been ineffectual in resolving the underlying cause of the adjudication, termination of the parents' parental rights will not be a consequence of having invoked the Fifth Amendment, but, rather, will simply be a consequence of the reality that it is unsafe for children to be with abusive and violent parents who have not undergone meaningful and effectual therapy. *Id.*

The Minnesota Supreme Court revisited the issues of *Matter of Welfare of J.W.*, 415 N.W.2d 879 (Minn. 1987), in *Matter of Welfare of J.G.W.*, 433 N.W.2d 885 (Minn. 1989). The court iterated the basic holdings of the prior case, concluding first, that a trial court's order, to the extent it directly requires a party to incriminate himself or herself in order to avoid having parental rights terminated, violates the privilege against self-incrimination and, second, that the privilege does not protect a parent from the consequences of any failure to succeed in a court-ordered treatment plan. *Id.*

The reasoning of the Minnesota court was recently followed by the Vermont Supreme Court. See *Mullin v. Phelps*, 647 A.2d 714 (Vt. 1994). In *Mullin v. Phelps*, the Vermont Supreme Court confronted a similar issue in the context of a motion for modification of custody provided in a divorce decree. In *Mullin v. Phelps*, the husband had been awarded custody of the parties' two minor children after divorce proceedings. The wife sought modification and, during the modification hearing, presented evidence of alleged sexual abuse perpetrated by the husband on the children. The trial court found by a preponderance of the evidence that the husband had sexually abused the children, transferred custody to the wife, and ordered that the husband was to have no further contact with the children unless and until

he acknowledged sexually abusing them. On appeal, the Vermont Supreme Court, citing *Matter of Welfare of J.W., supra*, held that specifically conditioning any future contact between the husband and the children on his acknowledgment of sexually abusing them violated his privilege against self-incrimination. *Mullin v. Phelps, supra.* The Vermont court also noted, however, that parental rights could be terminated based on the fact that the husband's denial of the problem prevented effective therapy. *Id.*

(ii) Distinguishable Case Law

The dissent relies upon the holding of the Minnesota Court of Appeals in *Matter of Welfare of S.A.V.*, 392 N.W.2d 260 (Minn. App. 1986), though it was decided prior to the decisions of the Minnesota Supreme Court in *Matter of Welfare of J.W., supra*, and *Matter of Welfare of J.G.W., supra.* In *Matter of Welfare of J.W.*, the Minnesota Supreme Court specifically noted that the issue before the Minnesota Court of Appeals in *Matter of Welfare of S.A.V.* was the fact that the parents' claims regarding self-incrimination were premature because the parents had not been threatened with any sanctions for refusing to waive the privilege. As such, any language in *Matter of Welfare of S.A.V.* concerning the probable outcome at termination was merely dictum. See *Matter of Welfare of J.W., supra.* We find the precise holding of the Minnesota Supreme Court on this issue more persuasive than the dictum of the Minnesota Court of Appeals.

In *In Interest of H.R.K.*, 433 N.W.2d 46 (Iowa App. 1988), the Iowa Court of Appeals followed the dictum of *Matter of Welfare of S.A.V., supra.* The Iowa decision is, however, further distinguishable from the present case. It is clear from the opinion in *In Interest of H.R.K.* that the Iowa statutory scheme for termination of parental rights is not entirely consistent with our statutes on the matter. Additionally, a review of the court's decision in *In Interest of H.R.K.* reveals that the parents' failure to complete a sexual abuse program requiring them to first acknowledge sexually abusing their children was only part of the basis for terminating their parental rights. As such, the presence of other grounds for termination could have provided the

Iowa court with independent reasons for affirming the termination. As noted above, in the case before us, the refusal to waive the privilege against self-incrimination was the sole ground upon which Suzette's rights were terminated.

Finally, the dissent relies upon *Matter of Tammy B.*, 185 A.D.2d 881, 587 N.Y.S.2d 377 (1992), in which a New York appellate court affirmed the termination of a father's parental rights based on permanent neglect. A review of the decision in *Matter of Tammy B.*, however, reveals no indication that the father ever asserted that his privilege against self-incrimination was being violated or that the appellate court was in any way presented with the issue. No mention of the issue appears in the opinion. As such, we find the case to be inapposite concerning the issue of whether or not parents may be forced to waive the privilege against self-incrimination or risk losing their children.

(iii) Nebraska Cases

We also recognize that in at least two prior cases of the appellate courts of this state, termination of parental rights based in part on a parent's failure to acknowledge sexually abusing the interested children has been affirmed. See, *In re Interest of N.W. and R.W.*, 238 Neb. 620, 472 N.W.2d 887 (1991); *In re Interest of Robert D. et al.*, 94 NCA No. 26, case No. A-93-382 (not designated for permanent publication). However, each of those cases is distinguishable from the present case, and neither provides us any guidance in the present case. In neither of those cases did the parent assert any privilege against self-incrimination. Additionally, in *In re Interest of N.W. and R.W.*, the parent who refused to acknowledge the sexual abuse had already pleaded guilty to criminal charges for the sexual assault and in *In re Interest of Robert D. et al.*, the parents had entered into a written stipulation agreeing to have the court order therapy and agreeing to acknowledge their respective roles in the sexual abuse.

(c) Application of Law to Present Case

(i) Termination

[4] We find the reasoning of the Minnesota and Vermont courts to be persuasive. It is apparent that the situation in the

present case is materially no different than the situation in those cases where the trial court specifically ordered the parties to make incriminating statements. In the present case, the juvenile court ordered Suzette to enroll in a program which the court was aware required her to make incriminating statements as a prerequisite to enrollment. The dilemma the court presented Suzette with in the present case is best characterized by a question asked by the deputy county attorney during questioning of Suzette at the termination hearing. The deputy county attorney asked Suzette, "[A]re you choosing your right against self-incrimination over your children?" Interestingly, although the court sustained objections to the question, the ultimate actions of the court forced Suzette, in essence, to make that choice between her right against self-incrimination and her children. According to the court's order terminating Suzette's parental rights, her parental rights were terminated solely because she refused to make the incriminating statements necessary to enroll in Parents United as a precursor to further participation in family therapy. Such an action is contrary to the Constitutions of the United States and Nebraska.

As noted above, the record in the present case indicates that the juvenile court found at adjudication that Suzette had sexually abused her children, that given that adjudication Suzette could not enroll in Parents United without making potentially incriminating statements, and that the court was aware that Suzette would be required to make the statements but, nonetheless, ordered her to enroll in and complete the program. Additionally, the record fails to indicate that Suzette has been prosecuted or entered any criminal pleas or stipulations regarding the alleged sexual conduct, either of which would make her situation analogous to prior Nebraska case law. See, *In re Interest of N.W. and R.W., supra*; *In re Interest of Robert D. et al., supra.*

(ii) Notice

We note that implicit in the dissent is the conclusion that the juvenile court in this case did, in fact, terminate Suzette's parental rights on an improper basis, i.e., the failure to waive her right against self-incrimination. However, the dissent sets

out the testimony presented which, according to the dissent, would allow us to make a de novo finding that Suzette failed to achieve meaningful rehabilitation, which in turn, according to the dissent, would allow us to conclude that Suzette's parental rights were properly terminated because she failed to comply with the rehabilitation plan and failed to remedy the circumstances for which the children were removed from her home. We cannot accept this as an appropriate means of upholding the court's actions in the present case, even were we to agree that the evidence supported such a finding, which we do not.

As noted previously, a review of the motion for termination of Suzette's parental rights indicates that the sole basis for which termination was sought, under either of the two statutory sections pled in the motion, was that she had failed to acknowledge sexually abusing the children. The guardian ad litem did not plead as a basis for termination that Suzette had failed to comply with the rehabilitation plan or that she had failed to make appropriate therapeutic progress. As such, the motion put Suzette on notice only that she was being accused of failing to waive her privilege against self-incrimination. The dissent acknowledges this when it concedes that "at first blush, it might appear that the guardian ad litem sought termination solely on the basis that Suzette refused to acknowledge that sexual contact had occurred."

[5] The system embodied in Nebraska's pleading system has many purposes and functions, not the least of which is to provide adequate notice as to what allegations a party will be required to meet at trial. See *In re Interest of Kelly D.*, 3 Neb. App. 251, 526 N.W.2d 439 (1994). A review of the motion in this case indicates that Suzette was in no way given notice that she would have to answer any allegation other than that her parental rights were being terminated because of her invocation of the privilege against self-incrimination. Had she been notified otherwise, she could have prepared evidence to rebut any testimony presented by the State which suggested that she could not get effective therapy without first admitting to having committed the abuse.

As it is, the evidence in the record is not conclusive on whether or not meaningful therapy is possible without Suzette's

first acknowledging that she has abused her children, an issue which appears to play a vital role in the reasoning of the dissent. The State's witnesses testified, in essence, that it is "difficult" or "almost impossible" to make progress in therapy without such an admission. Suzette's own therapist testified that it was possible for Suzette to begin therapy prior to admitting involvement in the abuse. Despite our de novo review, the fact remains that the pleadings in this case failed to put Suzette on notice that she would be called to answer any charges about the adequacy of available therapy or her ability to receive meaningful therapy without first admitting that she had abused her children. As such, contrary to the assertions of the dissent, we cannot find that termination of Suzette's parental rights was appropriate for reasons not pled or for any reason beyond that which the juvenile court was called upon to decide the case. Our review is, therefore, limited to whether Suzette's parental rights were properly terminated based upon her refusal to waive the privilege against self-incrimination.

(iii) Collateral Attack

[6] We also recognize that the Nebraska Supreme Court has said that a parent may not generally raise a collateral attack challenging the provisions of a rehabilitation plan if the parent failed to timely appeal from the plan. See *In re Interest of J.H.*, 242 Neb. 906, 497 N.W.2d 346 (1993). The present case is distinguishable from *In re Interest of J.H.*, however, and we do not perceive Suzette's appeal as constituting an impermissible collateral attack on the rehabilitation plan. Unlike the parent in *In re Interest of J.H.*, Suzette does not generally challenge whether the plan contained reasonable and material rehabilitative provisions. Rather, as noted above, Suzette challenges specifically the juvenile court's termination of her parental rights in violation of her privilege against self-incrimination.

The claim in the present case is not an impermissible collateral attack because Suzette's claim in this appeal could not have been properly asserted in an appeal directly from the rehabilitation plan. When the plan was entered, she had not been immediately threatened with any judicial sanction as a result of the plan provision ordering her to counseling at Parents United and,

thereby, incriminating herself. In fact, had she chosen to waive her privilege against self-incrimination and proceeded to counseling with Parents United, she would have no basis to object to this provision. Therefore, until she invoked her right to be free from self-incrimination, any appeal regarding this provision of the plan would have been premature and futile. See *Matter of Welfare of S.A.V.*, 392 N.W.2d 260 (Minn. App. 1986).

Had Suzette appealed directly from the rehabilitation plan, she would not have been entitled to relief. See *id.* When the juvenile court took action against Suzette to terminate her parental rights specifically because she had invoked her privilege against self-incrimination, Suzette was entitled to assert the privilege and file a timely appeal from the actions of the court resulting from her invocation of the privilege. This was the earliest time at which Suzette could properly have sought review of the court's actions, unlike the situation in *In re Interest of J.H.*, where the parent merely challenged the reasonableness of the terms of the rehabilitation plan, a right which the parent had immediately available upon imposition of the plan. On these facts, Suzette's challenge does not constitute an impermissible collateral attack.

(d) Resolution

We conclude that because the juvenile court terminated Suzette's parental rights solely because she refused to waive her right to be free from self-incrimination, which is an impermissible basis for termination under constitutional and statutory law in Nebraska, the court's termination order must be reversed. We do not conclude that the order can, on the facts of the present case, be supported on any independent basis despite our de novo review. Finally, we conclude that Suzette's challenge does not present an impermissible collateral attack. Therefore, the order terminating Suzette's parental rights must be reversed.

In reversing the termination order in this case, we do not hold that juvenile courts may not or should not order parents to enroll in therapy programs, such as Parents United. Such programs may be effective and may be essential to a particular parent's rehabilitation, and if the privilege against self-incrimination is brought into play, a parent may choose to waive that privilege in

favor of rehabilitation. Such a decision, whether to waive a constitutional privilege, is for the parent to make, not for the court to compel. The limited holding of this opinion is that courts may not *terminate* parental rights on the sole basis that a parent *refuses* to waive his or her right against self-incrimination.

2. Clear and Convincing Evidence

Suzette's second assigned error is that the order terminating her parental rights is not supported by clear and convincing evidence. As noted above, the juvenile court's order terminating Suzette's parental rights was based entirely on her failure to acknowledge sexual contact with her children. The Constitutions of the United States and Nebraska dictate that the court cannot condition her parental rights upon such acknowledgment. Additionally, as noted above, because of the nature of the pleadings in this case, the notice given Suzette, and the evidence presented, we are unable to find that termination could properly be supported on any basis beyond that pled in the motion for termination. As such, there was not sufficient evidence to support the termination order in this case.

It is obvious that, as the dissent asserts, no responsible public official will return children to an environment where they may be subjected to sexual contact by an adult. That is not, however, what this opinion suggests should happen, nor is it what will happen in the present case. As a result of our decision, the termination order is reversed, and the matter is remanded with directions. The children will remain in the custody of the State until further order of the juvenile court, a rehabilitation plan will remain in effect, and the juvenile court judge will continue to enter appropriate orders guaranteeing the safety, health, and welfare of these children. The State is not prejudiced from filing another motion to terminate Suzette's parental rights on lawful grounds and presenting evidence to support such motion, if and when such action becomes appropriate.

It may also be true, as the dissent suggests, that the chances of reunification are marginal without meaningful therapy and treatment. These observations, however, do not address the issue presented to this court. The only issue properly before us is whether a juvenile court may terminate a parent's rights

solely on the basis that the parent will not incriminate himself or herself after being ordered by the court to do so. Because we conclude that a court may not do so, we similarly conclude that there was not clear and convincing evidence presented to support termination on a proper basis in the present case. The potential for termination of Suzette's parental rights based upon other constitutionally permissible grounds is not raised by the facts of the case before us, and such other grounds do not properly constitute independent bases for termination of Suzette's parental rights at this time, as the dissent argues.

VI. CONCLUSION

Because the juvenile court improperly terminated Suzette's parental rights solely for refusing to waive her right to be free from self-incrimination, we reverse, and remand to the court to enter an order denying the guardian ad litem's motion to terminate Suzette's parental rights.

REVERSED AND REMANDED WITH DIRECTIONS.

HANNON, Judge, dissenting.

I respectfully dissent. Primarily, I do not agree with the majority's conclusion that the termination of Suzette's parental rights was pled and obtained solely on the basis of her refusal to incriminate herself. I also do not agree with that portion of the majority's opinion which essentially holds that Suzette is not collaterally attacking the dispositional order requiring her to participate in Parents United. I apologize for the length of the analysis, but it is necessary to demonstrate my position.

Sufficiency of Pleadings.

The majority opinion glosses over the fact that one of the alleged grounds for termination was Neb. Rev. Stat. § 43-292(7) (Reissue 1993), that is, that parental rights may be terminated when

> [t]he juvenile has been in an out-of-home placement for eighteen or more consecutive months and the parents have failed to correct the conditions leading to the juvenile's out-of-home placement in spite of reasonable efforts and services to the parents ordered by the court or offered by the Department of Social Services or other designated agency.

For completeness, we set forth the allegations in the guardian ad litem's petition as they apply to subsection (7). The guardian ad litem alleged that

> Suzette [M.] has failed to correct the conditions leading to the juvenile's [sic] out-of-home placement in spite of reasonable efforts and services to the parent ordered by the Court or offered by the Nebraska Department of Social Services.
>
> A. Since March, 1994, said children have been in the Nebraska Department of Social Services for out-of-home placement.
>
> B. Since March, 1994, Suzette M[.] has gained no insight regarding her children's care and protection with respect to having been subjected to sexual contact by herself and [her live-in boyfriend].
>
> C. Due to Suzette [M.'s] denial of the sexual contact to which she and [her live-in boyfriend] subjected said children, she has effectively barred her participation in the children's therapy as ordered by [the juvenile court].

I believe these allegations are sufficient to raise issues under § 43-292(7). They do not, as the majority opinion repeatedly suggests, "put Suzette on notice only that she was being accused of failing to waive her privilege against self-incrimination." Rather, they put her on notice that her children had been in out-of-home placement for 18 or more consecutive months and that she had failed to correct the conditions leading to the children's out-of-home placement. As discussed below, relevant authority holds that parental rights may be terminated based on the parents' refusal to acknowledge sexual or other abuse of their children as part of effective therapy without violating the Fifth Amendment. Such is the case here.

Concerning § 43-292(2), the allegations in the guardian ad litem's petition are organized in such a fashion that, at first blush, it might appear that the guardian ad litem sought termination solely on the basis that Suzette refused to acknowledge that sexual contact had occurred. The guardian ad litem alleged that Suzette had "substantially and continuously neglected" the children and had "refused to give the necessary parental care and protection." Subsection (2) in support thereof alleges that

after a finding by the juvenile court that the children had been subjected to sexual contact by Suzette and her live-in boyfriend, Suzette had refused to acknowledge that the sexual contact had occurred and that she had refused to "acknowledge any parental responsibility that she has toward said child[ren]'s care and protection to that end."

Section 43-292(2) and (7) does not, however, contain the psychological conclusions which the evidence shows, namely, that without admitting to the sexual contact, Suzette's therapy cannot be successful, and that without successful therapy, Suzette cannot be given custody of the children. Given the fact that in this day and age, judges, prosecutors, guardians ad litem, attorneys, and the public generally know that sexual abusers do not change without therapy, and that admission of the past harmful conduct is a necessary prerequisite to successful therapy, I would hold the petition to be adequate under § 43-292(2). In fact, the allegation that she substantially and continuously neglected them and refused to give them the necessary parental care is in itself sufficient. At least, I am satisfied that Suzette and her attorney knew and understood the basis of the guardian ad litem's allegation.

Law and Evidence Under § 43-292(7).

Section 43-292(7) focuses on a parent's failure to remedy the circumstances for which the child was removed from the parent's custody. Suzette is essentially challenging the legality of the underlying orders, which (1) found that she had sexually abused her children and (2) required that she participate in Parents United. In Nebraska, both adjudication and dispositional orders are final, appealable orders. See, *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997); *In re Interest of Andrew H. et al.*, 5 Neb. App. 716, 564 N.W.2d 611 (1997). The majority overlooks the well-settled proposition of juvenile law that 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., supra*; *In re Interest of J.H.*, 242 Neb. 906, 497 N.W.2d 346 (1993); *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992). In *In re Interest of*

Joshua M. et al., supra, the mother attempted to collaterally attack, on an appeal from a termination of her parental rights, a rehabilitation plan which had been part of a previous dispositional order. The court concluded that she could not collaterally attack the rehabilitation plan adopted in that order because it was a final, appealable order and that she had failed to appeal it. As stated by the court,

> A parent's unwillingness to comply with a rehabilitation program directed at reuniting the parent with his or her child and designed to secure the continued long-term health and well-being of the child compels the conclusion that termination of that parent's rights is in the best interests of the child.

251 Neb. at 637, 558 N.W.2d at 564.

The foregoing authority convinces me that the orders Suzette is attempting to challenge cannot be collaterally attacked. Suzette had her opportunity to appeal the orders but chose not to do so. As a result, Suzette's present appeal cannot question the validity of the dispositional order requiring her to participate in therapy and, more specifically, Parents United. There can be no question but that the therapy was a reasonable effort and service to Suzette ordered by the juvenile court. It may be that the rehabilitation order requiring Suzette to admit her sexual contact was in error, but it was not appealed from. Therefore, that order was final and effective.

The majority adopts the reasoning of the Minnesota and Vermont courts. I note, however, that none of the three cases cited was an appeal from a termination of parental rights.

In *Matter of Welfare of J.W.*, 415 N.W.2d 879 (Minn. 1987), the parents appealed from the trial court's rehabilitation treatment plan, which followed a finding that they were responsible for the death of their 2-year-old nephew. The plan required the parents to obtain psychological evaluations and to explain the death of the 2-year-old consistent with the medical findings.

In finding that the order requiring the parents to incriminate themselves was violative of the Fifth Amendment, the *Matter of Welfare of J.W.* court stated:

> While the state may not compel therapy treatment that would require appellants to incriminate themselves, it may

> require the parents to otherwise undergo treatment. *Therapy, however, which does not include incriminating disclosures, may be ineffective; and ineffective therapy may hurt the parents' chances of regaining their children. These consequences lie outside the protective ambit of the Fifth Amendment.*

(Emphasis supplied.) *Id.* at 883.

Moreover, in a discussion of future decisions regarding the placement of the children, the court stated:

> All we can say is that it remains to be seen whether a less than candid therapy will suffice to make appellants good parents. Admittedly, the parents are confronted with a dilemma, but *it is not a dilemma that triggers the Fifth Amendment to the extent the parents would wish. In the lexicon of the Fifth Amendment, the risk of losing the children for failure to undergo meaningful therapy is neither a "threat" nor a "penalty" imposed by the state. It is simply a consequence of the reality that it is unsafe for children to be with parents who are abusive and violent.*

(Emphasis supplied.) *Id.* at 884.

In my opinion, if Suzette had appealed from the rehabilitation plan, *Matter of Welfare of J.W.* might have been used as authority for finding that the plan violated her privilege against self-incrimination because it required her to admit to criminal conduct. However, Suzette did not appeal from that dispositional order. She is still not required to admit to the conduct; she is simply suffering the consequences in the termination proceedings.

In *Matter of Welfare of J.G.W.*, 433 N.W.2d 885 (Minn. 1989), the juvenile court required a father to admit, as a prerequisite to obtaining even closely supervised visitation with his children, that he had sexually abused the children. The Minnesota Court of Appeals held that such was violative of the father's privilege against compelled self-incrimination. The Supreme Court of Minnesota affirmed on the same grounds but wrote separately because it believed that "the second part of our holding in [*Matter of Welfare of*] *J.W.*, that the privilege does not protect the parent from the consequences of any failure to succeed in a court-ordered treatment plan merits equal empha-

sis." *Id.* at 886. In the first part of its holding in *Matter of Welfare of J.W.*, the court held that it is a violation of a parent's Fifth Amendment privilege for a court to directly require the parent to admit guilt as a part of a court-ordered treatment plan.

In *Mullin v. Phelps*, 647 A.2d 714 (Vt. 1994), the family court ordered that custody of the parties' two minor children be transferred from the father to the mother and that all contact be cut off between the father and the children unless the father acknowledged abusing the children. The Supreme Court of Vermont, citing the Minnesota court, stated:

> While a court may require abusive parents to submit to therapy, and parental rights may be terminated without violating the fifth amendment based on the fact that the parents' denial of their problem prevented effective therapy, the court's specific condition requiring the father to acknowledge conduct for which he could be prosecuted must be stricken.

Id. at 724-25.

Read together, these cases stand for the proposition that a court cannot order a parent in a juvenile proceeding to admit to criminal conduct for which he or she could be later prosecuted. Such would be contrary to the privilege against self-incrimination. However, a parent's rights may be terminated as a result of failing to undergo meaningful therapy—even if that includes admitting past conduct which may be criminal.

I find controlling a decision of the Minnesota Court of Appeals, even though it was announced prior to *Matter of Welfare of J.W., supra.* In *Matter of Welfare of S.A.V.*, 392 N.W.2d 260 (Minn. App. 1986), the juvenile court found, in essence, that the parents had caused serious injury to their children. In a dispositional order, the court continued legal custody of the children in foster care and found that " 'the parents need to acknowledge the causes of the children's injuries before any meaningful change will occur in the care and treatment they provide to the children.' " *Id.* at 262. The court of appeals framed the issue as whether the dispositional order requiring the parents to cooperate in the evaluation process violated the father's constitutional right to be free from compelled self-incrimination. In holding that the dispositional order did not

violate the father's privilege against self-incrimination, the court stated:

> Termination of appellant's parental rights is a very real possibility if he does not cooperate with counseling because the state will be unable to work with him toward resumption of his parental responsibilities. The trial court's finding that the parents need to recognize the cause of the children's injuries before any meaningful change can occur recognizes that a parent who acknowledges the need for professional help is more amenable to treatment than one who denies the need for help. . . . Termination in such a situation is not, however, a sanction for exercise of a constitutional right, but simply the necessary result of failure to rectify parental deficiencies. Although the state cannot require appellant to waive his constitutional right, that does not mean it must relinquish its right and obligation to protect these children.

Id. at 264.

Such reasoning was followed in *In Interest of H.R.K.*, 433 N.W.2d 46 (Iowa App. 1988), where the juvenile court terminated parental rights because the parents had failed to complete a sexual abuse treatment program which required that they admit to the sexual abuse of their children. Citing the above quote from *Matter of Welfare of S.A.V., supra*, the Iowa Court of Appeals concluded that the parents' due process argument was without merit. And in *Matter of Tammy B.*, 185 A.D.2d 881, 587 N.Y.S.2d 377 (1992), the court terminated a father's parental rights, based on permanent neglect. In upholding the judgment, the court found:

> [T]he father was found to have sexually abused her. The Family Court directed him to seek sexual offender therapy if he wanted to reunite himself with his daughter.
>
> The record reflects that although the father attended therapy sessions, due to his lack of acknowledgment of guilt, the cause of abuse was never explored and he was unable to gain any insight to his behavior. Since the father failed to make any therapeutic progress, we find that he cannot make an adequate plan for Tammy's future. Thus, Tammy is a permanently neglected child . . . .

185 A.D.2d at 883, 587 N.Y.S.2d at 379.

These authorities further support my position that courts may terminate parental rights based on the parents' refusal to undergo therapy, which requires that they stop denying and admit their past harmful conduct, without impinging upon the parents' privilege against self-incrimination. The termination of parental rights is not a sanction for the exercise of a constitutional right, but, rather, the necessary result of the failure of the parents to rectify their parental deficiencies. In view of the judicial determination that Suzette did sexually abuse the children, her protestations that she is innocent must be ignored in any proceeding, except a criminal one where the burden of proof would be greater.

The record reveals that the repercussions of a parent's failure to admit to past harmful conduct are great. At trial, Dr. Joseph Stankus, a clinical psychologist, testified that it is "hard" to rehabilitate a sexual abuser unless there is an admission that he or she was involved in the abuse. He further testified that since Suzette refuses to admit the sexual abuse, it is impossible to start individual or family therapy working toward the goal of reintegrating Suzette with the children. According to Stankus, family therapy could only begin when two "variables" were met: (1) when Suzette had "worked through enough of her apparent abuse of the children" and (2) when the children felt less fearful of their mother. When asked about the effect that a parent's refusal to acknowledge past sexual abuse had on the children, Stankus opined with a reasonable degree of medical certainty that it destroys the children's trust even more, it makes the children feel like their parent is not protecting them, and it retraumatizes them.

Stankus' testimony was echoed by Kay McMahon, a child and family therapist. McMahon testified that it is "almost impossible" to resolve the children's issues either without Suzette acknowledging and working through the issues or without visitation being suspended. McMahon further testified that the children recognize Suzette as a perpetrator and that her denial of the abuse blocks

> any progress. It creates confusion . . . of their own real[i]ty. . . . [A]ny trust that might be there between the children and their mother would totally be destroyed. They

> have distinct memories, especially Clifford, and to have mother say I didn't do it, [her live-in boyfriend] did, would then have — it puts Clifford in a position of either having to choose whether he's crazy or his mother's a liar and neither one of those positions is a healthy position for a child.

It seems clear to me that no responsible public official is going to return the children to Suzette until experts determine that she is no longer a danger to her children. The chances of reunification are slim to none if she does not fully participate in her own treatment and therapy. The evidence in the record is clear that there is no chance of reconciliation without Suzette participating in therapy and that one of the initial steps of such therapy is her admission that she sexually abused her children. A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity. *In re Interest of C.N.S. and A.I.S.*, 234 Neb. 406, 451 N.W.2d 275 (1990).

While a psychotherapist did testify that it is possible for Suzette to begin therapy prior to admitting involvement in the abuse, he admittedly was not an expert in sexual assault issues dealing with children. Moreover, his testimony contradicts the great weight of the evidence. I think that there is no evidence to establish any hope that Suzette will be able to have custody of her children without successful therapy. She has had more than 18 months to change and has failed to do so. I therefore think the juvenile court was justified in accepting the testimony of Stankus and McMahon, and upon a de novo review, I would so accept. Suzette's participation in therapy may result in her making admissions that could result in her being convicted of a crime, but there is no evidence that the purpose of the termination proceeding is to force an admission or to sanction her for failing to admit the sexual abuse. Here, it is undisputed that Suzette did not participate in the Parents United program. Thus, I would conclude that Suzette's parental rights should be terminated under § 43-292(7).

Evidence Under § 43-292(2).

I additionally believe that there are grounds to terminate Suzette's parental rights under § 43-292(2) for "substantially

and continuously or repeatedly neglect[ing] the [children] and refus[ing] to give the [children] necessary parental care and protection." A parent's failure to take proper measures to protect children from abuse by another furnishes sufficient cause to terminate parental rights under subsection (2). *In re Interest of C.P.*, 235 Neb. 276, 455 N.W.2d 138 (1990). The evidence of Suzette's refusal to acknowledge the sexual abuse is also relevant here. According to the experts, Suzette's failure to acknowledge the past sexual abuse would confuse the children, destroy their trust, and retraumatize them. Clearly, Suzette, by maintaining her innocence in the face of a previous order which found to the contrary, has not taken proper measures to protect her children from further abuse. As such, she would not be able to give the children the necessary parental care and protection that they need and deserve. Suzette's parental rights should also be terminated under subsection (2).

The evidence in the record establishes that Suzette cannot undergo successful therapy unless she admits she abused her children. In my opinion, by the very nature of the situation, the conditions cannot change unless Suzette admits her conduct and undergoes successful therapy. However, it is entirely possible that even if Suzette admits her conduct and engages in prolonged therapy, the State may still be able to prove that successful therapy is not possible in spite of her admissions. If I were the juvenile court judge and this case were returned to me with the direction stated in the majority opinion, in view of the evidence in the record, I would have no idea how to proceed, except to keep the children in foster care until Suzette agrees to admit her misconduct to a therapist or until the children reach the age of majority. For all of these reasons, I would affirm.

IN RE GUARDIANSHIP OF SUEZANNE P., A CHILD UNDER 18 YEARS OF AGE. DODGE COUNTY, APPELLANT, V. HELEN B., APPELLEE.

578 N.W.2d 64

Filed April 7, 1998. No. A-97-628.

1. **Judges: Witnesses: Testimony: Affidavits.** Judges are not to serve as witnesses in actions pending before them either through formal testimony or through assuming the role of a witness via affidavit.
2. **Courts: Counties: Guardians and Conservators: Attorney Fees.** There is no authority for a county court to order a county to pay the fees of a court-appointed attorney in a civil guardianship case in which the county was in no way involved.

Appeal from the County Court for Dodge County: DANIEL J. BECKWITH, Judge. Judgment vacated.

Dean Skokan, Dodge County Attorney, for appellant.

No appearance for appellee.

MILLER-LERMAN, Chief Judge, and IRWIN and INBODY, Judges.

PER CURIAM.

I. INTRODUCTION

Dodge County (County) appeals from an order of the Dodge County Court awarding attorney fees to an attorney appointed to represent an interested party in a guardianship proceeding. Because the county court lacked the authority to order the County to pay these fees, we vacate the order.

II. BACKGROUND

The praecipes for transcript and bill of exceptions requested all filings and all proceedings. There is no bill of exceptions because there were no proceedings recorded. We note that as addressed more fully below, the record in this case presents a myriad of significant difficulties.

On January 24, 1996, a petition for appointment of a guardian was filed in the Dodge County Court, in which Helen B. sought to be appointed guardian of her great-granddaughter, Suezanne P. At some point in time, an attorney was apparently appointed by the court to represent Suezanne's mother, although no order in the record reflects this. On May 2, 1997,

Suezanne's mother filed a document consenting to the appointment of Helen as guardian. On May 12, the court entered an order appointing Helen as guardian.

On May 15, 1997, the attorney appointed by the court to represent Helen filed an application for allowance of attorney fees. The application included an order, which was completed and signed by the county court judge on the same date. Although the order indicates that the "matter came on for Hearing," there is no bill of exceptions in this case to indicate that any such hearing ever occurred.

On May 21, 1997, the County filed an "Objection to Payment of Attorney's Fees." The County asserted that the court file contained no court order appointing counsel at public expense, that the file contained no determination of indigency, and that there is no statutory authority for appointing counsel in this case. The record does not contain any ruling on this objection, and we will not address these specific allegations. See *Toombs v. Driver Mgmt., Inc.*, 248 Neb. 1016, 540 N.W.2d 592 (1995). Nonetheless, the County timely filed an appeal from the order which granted the appointed counsel's application for fees.

III. ASSIGNMENTS OF ERROR

On appeal, the County has assigned two errors. The County asserts that the county court erred in ordering the County to pay attorney fees and that the county court failed to provide the County with procedural due process. As noted, there is no bill of exceptions because, according to an affidavit of the court stenographer, "no tape recording was made in connection with the case." The record is, therefore, limited to a transcript. In such cases, the issue on appeal is the sufficiency of the pleadings to support the judgment. *Howard v. Howard*, 234 Neb. 661, 452 N.W.2d 283 (1990); *Buda v. Humble*, 2 Neb. App. 872, 517 N.W.2d 622 (1994).

IV. ANALYSIS

1. RECORD

We initially feel compelled to note the significant difficulties presented by the record in this case. The record in this case is inadequate for numerous reasons. Initially, the record is lacking various orders and other documents which clearly should have

been filed and made part of the court file. As noted above, there is no order anywhere in the record reflecting that counsel was appointed for Suezanne's mother. It is apparent that such was done, but the order is not present for our review. Additionally, there is no application for appointment of counsel in the record. As discussed below, it is apparent that Suezanne's mother sent a motion for appointment of counsel, as well as a motion seeking in forma pauperis status and a poverty affidavit. None of these documents are properly in the record, nor are the court's rulings on any of these motions or requests properly in the record.

The foregoing are the documents which we can deduce were filed at some time but do not appear in the record. There is no explanation for why these items were not made part of the record. The county court clerk filed a certification that the entire court file was included in the transcript, and as such, we can only conclude that these documents were never made part of the file.

The record also presents difficulty for us because there are items in the transcript which clearly do not belong in the court file and which clearly are not properly before us. For unexplained reasons, the transcript includes a letter authored by the Dodge County Attorney to the county court judge concerning these proceedings. The letter references the county board's desire not to pay these attorney fees and includes some form of proposal as to how the matter can be resolved without the County resorting to appealing from the court's order. Aside from the troubling nature and subject matter of this letter, it is clearly not a document filed with the court which should have been in the court file or which should be in the record before us.

[1] The record also contains documents prepared by the county court judge. First, the record contains an affidavit of the county court judge, in which he testifies that he did appoint counsel to represent Suezanne's mother in response to a letter from the mother. Attached to the affidavit are copies of the letter, a motion for leave to proceed in forma pauperis, a poverty affidavit, and a motion for appointment of counsel. Also attached is a copy of an unsigned order granting Suezanne's mother in forma pauperis status and granting her poverty affidavit. With the exception of the letter from Suezanne's mother

to the court, none of these documents bear a court file stamp. Additionally, the referenced order is not signed and does not include a date. This affidavit, as well as the items attached to it, are not properly in the record before us, and there is no explanation for their presence in the transcript except for a statement in the affidavit that "[t]he original documents cannot be found." Our court rules do not authorize a trial judge to make re-creations of missing documents part of the transcript via affidavit. See Neb. Ct. R. of Prac. 4 (rev. 1996). But see Neb. Ct. R. of Prac. 5B(3) (rev. 1996).

Finally, the transcript also includes a memorandum authored by the county court judge. The memorandum is addressed to "all court appointed attorneys of Dodge County." The memorandum appears to outline procedures to be followed for payment of attorney fees and expenses. We are at a loss as to why this memorandum is included in the transcript. It does not include a file stamp and, in fact, does not appear to relate directly to the present case.

We note that this is not the first instance in which a case has appeared before this court on appeal from this particular lower court where the record has lacked documents which should be in the file or has included documents which do not appear to be properly part of the court file. See, *In re Interest of Cassandra L. & Trevor L.*, 4 Neb. App. 333, 543 N.W.2d 199 (1996); *State v. Hanus*, 3 Neb. App. 881, 534 N.W.2d 332 (1995). Obviously, we will not consider items not properly in the record in our resolution of this appeal. Additionally, although we generally hold the appellant responsible for presenting a proper record on appeal, see, e.g., *State v. Biernacki*, 237 Neb. 215, 465 N.W.2d 732 (1991); Neb. Ct. R. of Prac. 4 and 5, we note the difficulties presented for the County in this case. The County was not made a party to these proceedings in any form until the court's order granting the appointed attorney's request for payment of fees. As such, the County had no opportunity to ensure that the items which should be in the transcript but which are unexplainably missing were properly included in the record. The inadequacies of the record in this case are especially troublesome where the party appealing was in no position to prevent or remedy the deficiencies.

2. AUTHORITY TO GRANT COSTS

With the inadequacies of the record in mind, we turn to the issue presented to us: Do the pleadings support a finding that the County may be ordered to pay the reasonable fees of a court-appointed attorney who is appointed to represent a minor's parent in a guardianship proceeding? We initially point out that the issue of the propriety of the appointment of counsel in this civil case is not before us, and we will not comment on it further.

Our review of the pleadings in this case indicates that Suezanne's great-grandmother filed a petition for guardianship. Suezanne's mother, through her court-appointed counsel, eventually consented to the guardianship. The court-appointed counsel then sought allowance of fees, and the court granted his application. No authority for requiring the County to pay the fees of this court-appointed attorney was pled, and none was cited in the order granting the application. In fact, the County was not involved in this civil action in any way prior to the court's granting of the application.

[2] Our research indicates no authority for the court ordering the County to pay these attorney fees. Although there are various statutory provisions granting the court authority to require counties to pay attorney fees in other circumstances, see, e.g., Neb. Rev. Stat. § 30-2620.01 (Reissue 1995); Neb. Rev. Stat. § 42-358 (Cum. Supp. 1996); Neb. Rev. Stat. §§ 83-1049 through 83-1051 (Reissue 1994), none of those provisions is applicable to the present case. There simply is no authority for the court to order the County to pay the fees of the court-appointed attorney in this civil guardianship case in which the County was in no way involved.

This is not the first time we have encountered this court acting beyond its authority. We have reversed or vacated numerous judgments of this lower court during the past 3 years for lack of jurisdiction. See, e.g., *In re Interest of Torrey B.*, 6 Neb. App. 658, 577 N.W.2d 310 (1998); *State v. David C.*, 6 Neb. App. 198, 572 N.W.2d 392 (1997); *In re Interest of Cassandra L. & Trevor L., supra*; *State v. Schulz*, 97 NCA No. 10, No. A-96-816 (not designated for permanent publication). See, also, *In re Interest of Riley M.*, 97 NCA No. 12, No. A-96-409 (not desig-

nated for permanent publication). Because the court lacked authority to order the County to pay the fees in the present case, we similarly vacate the order in the present case.

V. CONCLUSION

Because the court lacked the authority to order the County to pay the fees in the present case, the order granting fees is vacated.

JUDGMENT VACATED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN L. DAVIS, APPELLANT.
577 N.W.2d 763

Filed April 14, 1998. No. A-97-060.

1. **Constitutional Law: Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
2. **Rules of Evidence: Other Acts.** Under Neb. Rev. Stat. § 27-609 (Reissue 1995), once a prior conviction has been established, the inquiry must end, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof.
3. **Constitutional Law: Warrantless Searches: Probation and Parole.** A provision in a parole order requiring a parolee to submit to a warrantless search of his or her person or property at any time is valid, enforceable, and constitutional, if it is applied in a reasonable manner and contributes to the rehabilitation of the parolee.
4. **Right to Counsel.** A defendant's mere distrust of, or dissatisfaction with, his or her attorney is not a sufficient reason to require appointment of substitute counsel.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Affirmed.

Eugene G. Schumacher, of Sipple, Hansen, Emerson & Schumacher, for appellant.

Don Stenberg, Attorney General, and David T. Bydalek for appellee.

HANNON, IRWIN, and MUES, Judges.

MUES, Judge.

I. INTRODUCTION

On September 13, 1994, Steven L. Davis was convicted of burglary, first degree criminal trespass, third degree assault on an officer, and tampering with physical evidence. Davis directly appealed to this court, and we affirmed his convictions in *State v. Davis*, 95 NCA No. 31, case No. A-94-1056 (not designated for permanent publication).

Davis subsequently filed a motion for postconviction relief, requesting an evidentiary hearing and appointment of counsel to assist in his appeal. Davis' motion was granted, and Davis' newly appointed counsel filed a supplemental motion for postconviction relief. Following an evidentiary hearing, the district court denied Davis' motions. Davis now appeals that judgment. For the reasons set forth below, we affirm.

II. BACKGROUND

On the morning of May 5, 1994, police officers received a report that Bob's Bike Shop had been burglarized. Reportedly stolen were several pairs of Oakley sunglasses, a Schwinn Moab mountain bike, and some cash.

During an initial search of the area, the Schwinn mountain bike was discovered on the roof of a building near the bike shop. The only window near the bike which appeared to be functional was the window to Davis' apartment. Investigator Douglas Molczyk, of the Columbus Police Department, proceeded to Davis' apartment to question him about the burglary. After knocking on the door and announcing who he was, Molczyk was admitted into the apartment.

When Molczyk entered the apartment, there was a male standing in the living room, later identified to be Terry McHugh, and Davis was lying on the couch. Molczyk informed Davis and McHugh that there had been a burglary at the bike shop and asked if they knew anything about it. Davis got up off the couch, revealing a pair of sunglasses. The sunglasses had a white tag attached by a white string, similar to the tags used by Bob's Bike Shop.

Both Molczyk and Davis grabbed for the sunglasses. Molczyk grabbed the sunglasses, and Davis ripped off the tag.

Molczyk attempted to place Davis under arrest, but Davis broke free and ran to the bathroom. While in the bathroom, Davis flushed the tag down the toilet. When Davis came out of the bathroom, he told Molczyk to get out of his apartment. Molczyk attempted to calm Davis down, but Davis refused to do so. Molczyk asked a passerby to go to the bike shop and tell the officers that he needed assistance. Davis took a boxer's stance and stated, " 'Leave my apartment or I'll deck you.' " 95 NCA No. 31 at 46. Molczyk backed away from Davis, and Davis hit Molczyk in the chest, causing him to lose his balance and fall out of the apartment. Molczyk skinned a knuckle in the process.

Officer Jeffrey Uhl arrived from the bike shop to assist Molczyk, and they attempted to reenter the apartment by kicking in the door. They were unable to do so, since the door had apparently been barred by an object. Someone inside the apartment said they were going to shoot the first officer who came through the door. The officers called for backup, and a standoff ensued, lasting for 2 hours. After the standoff, McHugh exited the apartment and was placed under arrest. Officers entered Davis' apartment and placed Davis under arrest for assault on an officer. Other charges were pending upon the outcome of the investigation of the burglary.

During the standoff, officers had called Davis' parole officer, Terry Denney, and informed him of the burglary and standoff. Denney decided that he needed to join the officers, and he drove to the location of Davis' apartment. After Davis had been arrested and escorted from the apartment, Denney requested that several officers assist in a "parole search" of Davis' apartment. Molczyk and one or two other officers assisted Denney in the search. Denney instructed the officers to search for contraband, weapons, and evidence from the burglary, any of which would have been a violation of the terms of Davis' parole.

Upon entering the apartment, Denney and the officers observed smoke in the kitchen and found evidence that someone had tried to destroy a pair of sunglasses by "cooking" them in the stove. A further search of the apartment produced a Schwinn mountain bike owner's manual, which contained the same serial number as the reportedly stolen bike. The officers also found several pairs of Oakley sunglasses, with tags similar

to those used by Bob's Bike Shop; a pair of tennis shoes with tread which appeared to match a footprint found near the bike shop; and an ax, which may have been used in an attempt to gain access to the bike shop.

Prior to trial, Davis filed a motion to suppress evidence found during the first "search" of Davis' apartment. Davis alleged that the search was done prior to, not incident to, his arrest; that the search was done without a warrant and without probable cause to believe a felony had been committed; and that there were no exigent circumstances. At the hearing, held August 31, 1994, Davis' counsel argued that the evidence showed that Molczyk entered Davis' apartment without Davis' consent and therefore had no right to be in Davis' apartment. The trial court determined that Molczyk did have permission to enter the apartment and overruled the motion. The court's finding was not the subject of Davis' direct appeal.

On the morning trial was scheduled to commence, Davis' court-appointed counsel, Thomas Spinar, informed the court that Davis had requested that Spinar withdraw as counsel. The court inquired of Davis as to why he wished Spinar to withdraw. Davis informed the court that Spinar was working with the prosecutor; that Spinar failed to have evidence independently tested so that Davis could prove it was planted; and that at the suppression hearing, Davis was not given the opportunity to get on the stand and tell his side of the story.

Davis also introduced a letter of complaint he had written to the Nebraska State Bar Association. In the letter, Davis alleged that Spinar had refused to accept several of Davis' telephone calls; that Spinar had tried to persuade Davis to plead guilty; and that at the hearing on the motion to suppress, Spinar refused to call McHugh to testify. According to Davis, McHugh was going to admit his guilt and testify that Davis was not involved in the burglary. The court explained that during the trial, Davis would have the opportunity to call his witnesses. The court further explained that mere distrust or dissatisfaction with an attorney was not a sufficient reason to require appointment of substitute counsel and informed Davis that it was going to overrule his request. Davis then asked the court for a continuance in order to hire another attorney. The court, noting that it was the

day of trial, denied Davis' request. Davis then informed the court that he wished to proceed pro se. However, upon further inquiry, Davis stated that he did not wish to proceed pro se. Accordingly, Spinar remained as counsel throughout the trial.

On September 13, 1994, Davis was found guilty of burglary, first degree criminal trespass, third degree assault on an officer, and tampering with physical evidence. Davis, acting pro se, filed a motion for new trial on September 27. On October 5, Davis filed an amended motion for new trial. On October 13, Davis filed another motion for new trial. A sentencing hearing was held October 28. On that same date, prior to sentencing, the court addressed the three motions for new trial. The court first inquired as to who had filed the motions. Spinar informed the court that Davis had filed the motions. Spinar advised the court that Davis had contacted him within the initial 10-day period for filing a motion for new trial and requested Spinar to file such motion but that for reasons which Spinar did not want to comment on, he chose not to file the motion on Davis' behalf. The court found that the three motions for new trial were untimely and therefore a nullity, and of no force or effect.

Davis was then sentenced to terms of imprisonment of not less than 7 nor more than 10 years on the charge of burglary, 1 year on the charge of first degree criminal trespass, not less than 1 nor more than 2 years on the charge of third degree assault on an officer, and not less than 3 nor more than 4 years on the charge of tampering with physical evidence.

Spinar, on Davis' behalf, timely appealed to this court, alleging that the trial court erred in admitting irrelevant evidence, that there was insufficient evidence to support the convictions for burglary and trespass, and that the sentences were excessive. Davis' convictions were affirmed in *State v. Davis*, 95 NCA No. 31, case No. A-94-1056 (not designated for permanent publication).

On October 20, 1995, Davis filed a motion for postconviction relief in Platte County District Court and a motion that counsel be appointed to assist in his motion. Davis' request for counsel was granted, and a supplemental motion for postconviction relief was filed May 15, 1996. In his motions, Davis alleged that prior to trial, the trial court erred in not granting his request for

new counsel due to a conflict of interest, since he had filed a notice of complaint with the Nebraska State Bar Association against Spinar. Davis also alleged that Spinar was ineffective due to (1) his failure to file a motion to suppress evidence obtained in a warrantless search, (2) his failure to file a motion to quash Davis' warrantless arrest and to suppress evidence obtained pursuant to the illegal arrest, (3) Spinar's inquiry into Davis' past criminal history and Spinar's failure to object to the prosecution's cross-examination of Davis, and (4) Spinar's failure to file a motion for new trial as requested. After an evidentiary hearing, the district court dismissed Davis' motions.

In a well-reasoned opinion, which will be set forth more fully in the discussion, the district court dismissed Davis' motions. Davis now appeals this judgment.

III. ASSIGNMENTS OF ERROR

Davis alleges the district court erred in failing to grant his motion for postconviction relief based upon ineffective assistance of counsel due to Spinar's (1) failing to file a motion to suppress all evidence obtained subsequent to Davis' warrantless arrest, (2) failing to file a motion to suppress all evidence obtained in the warrantless search of Davis' apartment, (3) adducing evidence with respect to Davis' prior convictions and not objecting when the State further questioned Davis regarding the same, and (4) failing to file a motion for new trial. Davis also alleges the district court erred in not granting postconviction relief because of the district court's failing to appoint new counsel due to a conflict of interest.

IV. STANDARD OF REVIEW

In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or federal Constitution, causing the judgment against the defendant to be void or voidable. *State v. Barrientos*, 245 Neb. 226, 512 N.W.2d 144 (1994).

A criminal defendant requesting postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997).

V. DISCUSSION

1. Ineffective Assistance of Counsel

[1] To sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997); *State v. Massey*, 252 Neb. 426, 562 N.W.2d 542 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. McGurk*, 3 Neb. App. 778, 532 N.W.2d 354 (1995).

(a) Prior Convictions Inquiry

Davis elected to testify at his trial. During direct examination, Spinar asked Davis if he had been convicted of a felony within the past 10 years. Davis indicated that he had. Spinar then elicited testimony that Davis had been "talked into getting [some] guy an eight ball of coke" and was convicted of delivery of a controlled substance. Davis also testified that when the alleged burglary occurred, he had 2 weeks left on parole.

During cross-examination, the State inquired into the fact that Davis had previously testified that he had been drinking and questioned whether drinking violated the terms of Davis' parole. Davis answered that drinking was permissible as long as he was not drunk. Spinar made no objections during any of this cross-examination.

[2] Under Neb. Rev. Stat. § 27-609 (Reissue 1995), once a prior conviction has been established, the inquiry must end, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof. See *State v. Edwards*, 2 Neb. App. 149, 507 N.W.2d 506 (1993). The district court determined that because Spinar went beyond the permissible inquiry and did not object when the State made further inquiry, Spinar's performance was deficient, thus satisfying the first prong of the two-pronged test for determining the effec-

tiveness of counsel in a postconviction case as explained in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The district court then addressed the second prong of *Strickland*, whether "but for counsel's deficient performance, the result of the proceeding would have been different."

In addressing this second prong, the district court found:

> In the case at hand, although the defendant's convictions largely rested on circumstantial evidence, such evidence is nonetheless rather overwhelming in establishing the defendant's guilt. During the defendant's trial, it was established that access to the victim's business was gained by breaking off a padlock to a rear door that led to the basement. Cut, or ax marks appeared on another door indicating an attempt to gain entry by chopping through it. An ax, with paint chips on the cutting edge similar to the paint on the victim's door, was found at the defendant's residence. At trial, the defendant acknowledged ownership of the ax. A partial shoe print discovered in the victim's basement at a location where access to his business was ultimately gained by hacking through a ceiling board, was similar to that which was produced by the tread of a pair of tennis shoes recovered from the defendant's residence. At trial, the defendant acknowledged ownership of the tennis shoes as well.
>
> Various items of property stolen from the victim's business were recovered from the defendant's residence. In fact, some stolen merchandise was recovered directly underneath the defendant himself after he got up from a couch at his residence. After law enforcement officials arrived at the defendant's residence to investigate the burglary, the defendant assaulted one officer, and a two-hour standoff occurred. During the standoff, either the defendant or his co-defendant threatened to shoot the first officer who might attempt to come through the door. Likewise, during the standoff an attempt was made to burn and destroy in the kitchen stove certain of the merchandise that had been stolen from the victim's business during the course of the burglary.

> In reviewing the entire record of the defendant's trial and all evidence offered against him, the Court cannot conclude that the defendant has demonstrated a reasonable probability that the jury would have acquitted him had it not been for his trial counsel's violation of and apparent unfamiliarity with Rule 609 [§ 27-609]. A review of the entire record in this case leads the Court to the conclusion that the defendant's jury convictions were rendered with overwhelming record support, rather than only weakly supported by the record. Therefore, it is the conclusion of the Court that the defendant has failed to satisfy the second prong of the *Strickland* test, and, accordingly, his request for postconviction relief premised upon his trial counsel's deficient performance with respect to the application of Rule 609 must be denied.

Having reviewed the evidence, we wholeheartedly agree with the district court's observations. See *State v. McGurk*, 3 Neb. App. 778, 532 N.W.2d 354 (1995).

(b) Warrantless Arrest

Davis next argues that "[s]ince [Davis] was arrested without a warrant all evidence which was obtained following his arrest is the fruit of the unlawful arrest and, as stated in [*State v. Tipton*, 206 Neb. 731, 294 N.W.2d 869 (1980)], should have been suppressed." Brief for appellant at 23.

Contrary to Davis' assertion, the *Tipton* court did not hold that a warrantless arrest may never be made in a person's residence or that *all* evidence acquired after such arrest must be suppressed. See, e.g., *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997); *State v. Ware*, 219 Neb. 594, 365 N.W.2d 418 (1985) (holding that once officer is lawfully inside residence, officer may make warrantless arrest if officer has probable cause to believe felony has been, or is being, committed).

In *Nissen*, the trial court denied the defendant's motion to suppress a statement made after the defendant was arrested. On appeal, the defendant argued that the statement was the fruit of an unconstitutional warrantless arrest in his home. The Nebraska Supreme Court determined that it was immaterial where the defendant was when he was arrested because officers

had probable cause to arrest the defendant and that the complained of statement was not related to the purported unconstitutional arrest. See, also, *New York v. Harris*, 495 U.S. 14, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990) (holding that to be suppressible, evidence complained of must have resulted from exploitation of illegal action of government).

In the present case, we need not decide the validity of Davis' warrantless in-home arrest because the evidence which he now complains of was not the fruit of his warrantless arrest, but, rather, the fruit of the warrantless search. Thus, the district court's finding that a motion to suppress on this ground would have been unsuccessful is not clearly erroneous.

(c) Warrantless Search

Davis next contends that Spinar was deficient for failing to file a motion to suppress evidence seized during the warrantless search of Davis' apartment. At the hearing on the motion to suppress, Spinar testified that he did not file a motion to suppress because he believed that Denney, as Davis' parole officer, had the right to search the premises. The district court concluded that the warrantless search did not violate Davis' right to be free from unreasonable search and seizure because it was done in a reasonable manner pursuant to the terms of Davis' parole order. The court thus concluded that Davis had failed to demonstrate that but for Spinar's failure to file a motion to suppress the results of the warrantless search, Davis' proceeding would have been different. We agree.

The Fourth Amendment to the U.S. Constitution protects against unreasonable searches and seizures. Generally, a search should be undertaken only pursuant to a warrant supported by probable cause. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995). The Supreme Court, however, has recognized exceptions to the warrant requirement "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' " *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987).

In *Griffin*, the Supreme Court held that a probation officer's warrantless search of a probationer's home complied with the

Fourth Amendment because the officer followed Wisconsin statutes and regulations which authorized such searches when the officer had " 'reasonable grounds,' " 483 U.S. at 875, to believe that the probationer had possession of contraband. The Supreme Court stated, "We think it clear that the special needs of Wisconsin's probation system make the warrant requirement impracticable and justify replacement of the standard of probable cause by 'reasonable grounds,' as defined by the Wisconsin Supreme Court." 483 U.S. at 875-76.

[3] The Nebraska Supreme Court has also upheld probation searches, as long as the search was conducted in a reasonable manner and contributed to the rehabilitation of the offender. See *State v. Morgan*, 206 Neb. 818, 295 N.W.2d 285 (1980). Although the Nebraska courts have never before considered the issue in the parole context, other courts addressing the issue have held that *Griffin's* reasoning applies equally to the parole system. See, *U.S. v. Lewis,* 71 F.3d 358 (10th Cir. 1995); *U.S. v. Coleman*, 22 F.3d 126 (7th Cir. 1994); *U.S. v. Hill*, 967 F.2d 902 (3d Cir. 1992); *U.S. v. Harper,* 928 F.2d 894 (9th Cir. 1991); *U.S. v. Cardona*, 903 F.2d 60 (1st Cir. 1990). " 'Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is a risk that they will not be able to live in society without committing additional antisocial acts.' " *U.S. v. Hill*, 967 F.2d at 909, quoting *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

> The parole system is "a controlled passageway between prison and freedom." [Citation omitted.] Parole agents necessarily exercise close supervisory powers over their subjects to assure a successful transition. To adequately monitor a parolee's progress and deter further criminal conduct, a parole agent must be permitted in the proper instance to act expeditiously and without warning. "[T]he delay inherent in obtaining a warrant would make it more difficult for . . . officials to respond quickly to evidence of misconduct and would reduce the deterrent effect that the possibility of expeditious searches would otherwise create." *Griffin*, 483 U.S. at 876, 107 S.Ct. at 3170.

U.S. v. Lewis, 71 F.3d at 361-62.

> [T]here is "no constitutional difference between probation and parole for purposes of the fourth amendment." [Citation omitted.] In fact, parole may be an even more severe restriction on liberty because the parolee has already been adjudged in need of incarceration. [Citation omitted.] For this reason, the "special needs" of probation would appear to be heightened for parole.

U.S. v. Hill, 967 F.2d at 909.

Davis acknowledges that in some circumstances, warrantless searches do not violate the Fourth Amendment but argues that pursuant to the terms of his parole order, and in particular the portion emphasized below, the parole officer was required to obtain Davis' permission *at the time of the search.* Davis' parole agreement in pertinent part provides:

> You shall obey all city, county, state and federal laws, ordinances, and orders . . . .
>
> . . . .
>
> . . . *You shall permit* your parole officer and/or personnel of Parole Administration to conduct routine searches of your person, residence, vehicle, or any property under your control, at such times as they deem necessary.
>
> . . . You shall not possess, own, carry, or have under your control any type of weapon.
>
> . . . You shall not use, purchase, sell, nor possess any narcotic or dangerous drug unless first prescribed by a licensed physician.

(Emphasis supplied.)

In *State v. Morgan*, 206 Neb. 818, 819, 295 N.W.2d 285, 286 (1980), condition 14 of Morgan's probation order required him to " 'submit to a search of his person or property at any time by any Law Enforsement [sic] Officer, with or without probable cause, *for controlled substances.*' " Officers received information which led them to suspect Morgan was selling drugs. Pursuant to condition 14, Morgan's probation officer and a police officer proceeded to Morgan's residence and advised him of the purpose of their visit. Morgan responded, " 'Okay, you can search my room.' " *Id.* at 820, 295 N.W.2d at 286. Upon searching Morgan's person and room, officers discovered marijuana.

After the State filed a motion to revoke Morgan's probation, Morgan filed a motion to suppress the evidence, alleging that the search was without probable cause and that condition 14 was a violation of his constitutional rights. The district court held that " 'the search was not illegal, but [was] by *prior consent.*' " (Emphasis supplied.) *Id.* at 821, 295 N.W.2d at 287. Accordingly, the court denied Morgan's motion. Morgan's probation was subsequently revoked, and he appealed.

On appeal, the Nebraska Supreme Court observed that Morgan had accepted condition 14 as part of the probation order. "Morgan had already been convicted and could have been imprisoned by the court and not placed on probation. Morgan clearly had the choice of submitting to the conditions and remaining out of prison on probation or serving a prison term in the penal complex." *Id.* at 825, 295 N.W.2d at 289. The court concluded, "It is clear that the search of Morgan's premises was a 'consent' search under the authority contained in condition 14." *Id.* at 826, 295 N.W.2d at 289.

Contrary to Davis' position, it is clear that the Supreme Court's ruling was not dependent on Morgan's purported consent at the time of the search. Other courts addressing similar language have also concluded that consent at the time of the search is not necessary if the terms of the probation or parole permit warrantless searches. In *Rowe v. Lamb*, 130 F.3d 812 (8th Cir. 1997), a probation order required the defendant to submit to warrantless searches. The jailed defendant denied the probation officer consent to search his apartment; but the jailer gave the probation officer the keys, and a search was conducted. The defendant filed an action pursuant to 42 U.S.C. § 1983 (1994) against the jailer. The court found no constitutional violation because the search was valid pursuant to the terms of the probation order. In *U.S. v. Hill*, 967 F.2d 902 (3d Cir. 1992), the court found no evidence that the defendant had agreed to a warrantless search or that a warrantless search was an express condition of the parole agreement. Notwithstanding, the court upheld the search, citing the " 'special needs' " of the parole system. *Id.* at 909. In *Patterson v. Bd. of Probation and Parole*, 851 F. Supp. 194 (E.D. Pa. 1994), the defendant brought a § 1983 claim. The court held that there had been no constitu-

tional violation and found that the defendant had consented to the search when he signed the parole agreement. In *State v. Martinez*, 811 P.2d 205 (Utah App. 1991), the terms of the probation agreement required the defendant to allow the Department of Corrections to search his residence without a warrant upon reasonable suspicion. The court rejected the defendant's argument that he had to be present and give actual consent, stating such an interpretation would "nullify such provisions in probation agreements, making such provisions merely 'agreements to agree.'" *Id.* at 209. Contra *Com. v. Pickron*, 535 Pa. 241, 634 A.2d 1093 (1993) (holding that in absence of statutory scheme, actual consent was needed).

In the present case, we find that the warrantless search of Davis' apartment was permitted by the terms of his parole agreement and fell within the "special needs" exception to the Fourth Amendment.

Citing *State v. Morgan*, 206 Neb. 818, 295 N.W.2d 285 (1980), Davis next argues that the search was invalid because there was no rehabilitative purpose to be achieved, since

> it was a foregone conclusion at the point that the parole officer entered the apartment that [Davis] had violated his parole and evidence to that effect was available by virtue of the injury to the officer's finger unrelated to the purpose of the search. [Davis] had already been taken into custody on at least one if not more felonies. For all intents and purposes his parole was over.

Brief for appellant at 30.

While it is certainly true that the assault on the police officer was a violation of Davis' parole agreement, this incident did not eliminate the need for Denney to ascertain the full extent of Davis' parole violations. See Neb. Rev. Stat. § 83-1,122 (Reissue 1994) (when parolee has violated terms of parole, parole board has authority to issue reprimand, intensify supervision, withhold good time, or implement additional conditions rather than revoking parole).

> Although any immediate threat to the community is abated when a parolee is taken into custody, the state has a continuing interest in determining in a timely fashion whether the parolee has violated the conditions of his

> parole. Only then will the parole officer and the parole board be equipped to decide whether revocation of parole is appropriate.
>
> Importantly, the parole officer, in conducting a search pursuant to an investigation of the parole, has a duty to determine parole violations independent of the duty of the police to investigate new crimes. The state's interest in closely controlling its parolees is not undermined by defendant's arrest for a new violation as there is no guarantee that the defendant will remain in custody or that the police will continue to investigate or prosecute the newly alleged crime.

U.S. v. Phillips, 977 F. Supp. 1418, 1422 (D. Colo. 1997).

> Reasonable searches are necessary and should be permitted in order to determine whether the [parolee] is abiding by the conditions of the [parole order], so that those supervising such persons may determine whether the [parolee] is making progress in rehabilitation efforts, particularly in drug offenses, or whether the [parolee] has fallen by the wayside and has resumed his or her incursions into the field of drug addiction, drug abuse, and similar activities.

State v. Morgan, 206 Neb. at 826, 295 N.W.2d at 289.

In the present case, Davis was on parole from a drug-related offense. Following a 2-hour standoff, in which someone inside Davis' residence threatened to shoot officers, Denney determined that it was necessary to search Davis' apartment for parole violations. In light of the fact that there was evidence Davis had been involved in a burglary and might have a gun in the house, Denney had reasonable grounds to believe that Davis had violated several conditions of his parole and that Denney had a duty, independent of the duty of the police, to conduct an investigation to determine the extent of Davis' parole violations.

In sum, had Spinar sought to suppress the evidence seized as a result of the parole search of Davis' apartment, such a motion would have failed. Therefore, the district court correctly denied Davis' postconviction relief on this ground.

(d) Failure to File Motion for New Trial

Davis next argues that he was provided ineffective assistance of counsel because Spinar failed to file a motion for new trial when Davis requested Spinar to do so.

Davis' motion for postconviction relief does not contain any allegation as to what issues should have been raised in a motion for new trial or what grounds he would have had for raising those issues. More importantly, there are no allegations explaining why the motion would have been successful or how Davis was prejudiced by Spinar's failure to file the motion. See *State v. McGurk*, 3 Neb. App. 778, 532 N.W.2d 354 (1995) (in order to satisfy prejudice prong of *Strickland* analysis, defendant must first make allegation of nature and effect of requisite prejudice).

To the extent that Davis' brief argues that his burden of proof for obtaining relief from his conviction is greater in this postconviction proceeding than it would have been had a motion for new trial been filed, Davis cites no authority for such a proposition, nor does our search disclose any such authority. The showing necessary to obtain relief on direct appeal on the ground of ineffectiveness of counsel is the same as in a postconviction proceeding, provided the record on direct appeal is sufficient to address it. See, e.g., *State v. Dawn*, 246 Neb. 384, 519 N.W.2d 249 (1994).

In sum, the district court properly denied postconviction relief on this ground of alleged ineffectiveness of counsel.

2. Failure to Appoint New Counsel

In Davis' brief, he states:

> Appellant contacted the Nebraska State Bar Association by letter, prior to the time that trial was to commence, with respect to a complaint against his attorney. *The letter basically recited an inability of the Appellant and his attorney to get along.* Prior to the commencement of trial, by way of letters to his attorney and to the court dated September 6, 1994, 6 days before trial, Appellant communicated the difficulties he was having with his attorney. . . . The letters further reflect a *problem which existed with respect to trial*

> *counsel accepting phone calls, answering questions and communicating with Appellant.*

(Emphasis supplied.) Brief for appellant at 37.

Davis contends that because he had made pretrial complaints against Spinar, a conflict arose and that the trial court was required to appoint substitute trial counsel and failure to do so denied him his Sixth Amendment right to effective counsel. The district court determined:

> [Davis'] complaint to the bar association was merely an expression of his mistrust of, or dissatisfaction with, his appointed counsel, and accordingly, in consideration of the entire record in this case, did not require the appointment of new counsel. Finding no merit to the defendant's conflict of interest claim, [Davis'] request for postconviction relief predicated on this argument is denied.

In *State v. Reddick*, 230 Neb. 218, 430 N.W.2d 542 (1988), the Nebraska Supreme Court addressed a situation nearly identical to the case at bar. The court held:

> The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard of another; a conflict of interest places a defense attorney in a situation inherently conducive to divided loyalties. [Citation omitted.] Assuming for purposes of argument, but not concluding, that Reddick's complaints against his attorneys created the awkward situation he claims, there is nothing to indicate that this situation was "inherently conducive to divided loyalties." If anything, the attorneys' best defense against Reddick's allegations would have been made by providing Reddick with the very best defense to the criminal charges facing him that was possible. Thus, Reddick's interests and those of his attorneys were in harmony, not at odds.

230 Neb. at 222, 430 N.W.2d at 545.

[4] When counsel is court-appointed, the defendant does not have a constitutional right to counsel of his or her choice. *State v. Schlund*, 249 Neb. 173, 542 N.W.2d 421 (1996). A defendant's mere distrust of, or dissatisfaction with, his or her attorney is not a sufficient reason to require appointment of substitute

counsel. *State v. Rosales*, 3 Neb. App. 26, 521 N.W.2d 385 (1994).

The district court properly decided that the trial court's failure to appoint Davis substitute trial counsel did not afford Davis grounds for postconviction relief.

VI. CONCLUSION

The district court's order denying Davis postconviction relief on the grounds alleged in his motion was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE,
v. JOHN C. McLEANEY, APPELLANT.
578 N.W.2d 68

Filed April 14, 1998. No. A-97-829.

1. **Sentences: Appeal and Error.** Unless a sentencing court has abused its discretion in imposing a sentence, a sentence imposed within the statutory guidelines will not be disturbed on appeal.
2. **Criminal Law: Sentences: Time.** Neb. Rev. Stat. § 83-1,106(1) (Reissue 1994) provides that an offender is entitled to credit for time spent in custody as a result of the criminal charge for which a prison sentence is imposed; such credit is to include, but is not limited to, time spent in custody prior to trial, during trial, and pending sentence.
3. ____: ____: ____. Where the imposed sentence of imprisonment is the statutory maximum for the offense, the sentencing court must give the defendant credit for jail time pursuant to Neb. Rev. Stat. § 83-1,106(1) (Reissue 1994).
4. **Criminal Law: Statutes: Sentences: Time.** Repeal of Neb. Rev. Stat. § 83-1,105 (Reissue 1994), which had required that the minimum term of a sentence imposed by a sentencing court could not be more than one-third of the maximum term of the sentence imposed, does not affect sentences for crimes committed prior to the repeal.
5. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not necessary to adjudicate the case and controversy before it.
6. **Criminal Law: Sentences: Time.** The rationale behind the jail time credit provided by Neb. Rev. Stat. § 83-1,106(1) (Reissue 1994) is to avoid the situation where one convicted of a crime is incarcerated for a period greater than the maximum term of years prescribed as punishment for the particular offense.
7. ____: ____: ____. In Nebraska, a convicted felon incarcerated for one offense and awaiting trial on an unrelated offense receives no credit for time served while awaiting trial and sentencing on the unrelated offense.

8. **Criminal Law: Foreign Judgments: Sentences: Time.** Where an offender is held in a Nebraska jail prior to disposition of his Nebraska charges but is already in custody because of a conviction and sentence for criminal offense in another state, any jail time credits relate solely to the sentence in that other state.

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

Thomas C. Riley, Douglas County Public Defender, and Scott C. Sladek for appellant.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellee.

HANNON, INBODY, and MUES, Judges.

INBODY, Judge.

John C. McLeaney appeals from sentences imposed on him by the district court for Douglas County. McLeaney asserts he was erroneously denied credit for jail time served. For the reasons set forth herein, we affirm.

STATEMENT OF FACTS

The factual basis for McLeaney's convictions is not in dispute. On March 6, 1997, McLeaney pled no contest to Nebraska charges of manslaughter and possession of a firearm by a felon. On May 31, 1997, he was sentenced to 20 years' imprisonment on the manslaughter conviction (the statutory maximum), with a minimum sentence of 6⅔ years, and to 5 years' imprisonment on the possession conviction (the statutory maximum), with a minimum sentence of 1⅔ years.

McLeaney was brought to Nebraska from a Missouri prison on or about June 5, 1996, pursuant to the Agreement on Detainers, Neb. Rev. Stat. § 29-759 (Reissue 1995). According to the presentence investigation report, on May 1, 1995, McLeaney was sentenced to 5 years' imprisonment in the Jefferson City, Missouri, Correctional Center, for unlawful possession of a firearm. McLeaney's Nebraska sentences are to run consecutively to the Missouri sentence.

McLeaney was held in the Douglas County Correctional Center for 435 days while awaiting trial on the Nebraska charges. At his sentencing hearing, he asked that this jail time

be credited against the sentences imposed for the Nebraska offenses. The sentencing court refused, concluding that "the time here in Nebraska is just a continuation of the Missouri incarceration." This appeal timely followed.

ASSIGNMENT OF ERROR

McLeaney makes a single assignment of error: The sentencing judge erred in failing to grant him credit for time served while awaiting trial in Nebraska.

STANDARD OF REVIEW

[1] Unless the sentencing court has abused its discretion in imposing a sentence, that sentence, imposed within the statutory guidelines, will not be disturbed on appeal. *State v. Baker*, 250 Neb. 896, 553 N.W.2d 464 (1996).

ANALYSIS

[2,3] Neb. Rev. Stat. § 83-1,106(1) (Reissue 1994) provides that an offender is entitled to credit for "time spent in custody as a result of the criminal charge for which a prison sentence is imposed"; such credit is to include, but not is limited to, "time spent in custody prior to trial, during trial, [and] pending sentence." Where the imposed sentence of imprisonment is the statutory maximum for the offense, the sentencing court must give the defendant credit for jail time pursuant to § 83-1,106(1). *State v. Groff*, 247 Neb. 586, 529 N.W.2d 50 (1995).

[4,5] The threshold question, therefore, is whether McLeaney was sentenced to the statutory maximum. That inquiry is complicated by the fact that effective September 9, 1993, the Nebraska Legislature repealed Neb. Rev. Stat. § 83-1,105 (Reissue 1994), which had provided that the minimum term of a sentence could be no more than one-third of the maximum term of the sentence imposed. McLeaney committed manslaughter on November 30, 1987 (before the repeal), and committed the offense of possession of a firearm by a felon on November 9, 1993 (after the repeal). Because "repeal of the statute does not apply to crimes committed prior to the repeal," *State v. Groff*, 247 Neb. at 589, 529 N.W.2d at 53, § 83-1,105 applies to the manslaughter offense; the sentence imposed on McLeaney for that offense is clearly the maximum permitted by

statute, in terms of both upper and lower limits. But because the offense of possession of a firearm by a felon occurred after the repeal of § 83-1,105, the argument could be made that this sentence was not at the statutory maximum, in terms of the lower limit imposed. However, because resolution of that issue is not necessary for resolution of this appeal, we will assume without deciding that the sentence for possession of a firearm by a felon was at the statutory maximum. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court is not obligated to engage in analysis which is not necessary to adjudicate case and controversy before it).

[6] McLeaney argues that if he was in fact sentenced to the statutory maximum, he is entitled to credit for the 435 days spent in the Douglas County Correctional Center pending trial on those charges. However, the rationale behind the jail time credit of § 83-1,106(1) is "'to avoid the situation where one convicted of a crime is incarcerated for a period greater than the maximum term of years prescribed as punishment *for the particular offense*.'" (Emphasis supplied.) *State v. Heckman*, 239 Neb. 25, 29, 473 N.W.2d 416, 419 (1991). Thus, the dispositive fact is not that McLeaney happened to be in a Nebraska jail pending trial on Nebraska charges, but, rather, that he had already been incarcerated for his Missouri offense, although serving a portion of that sentence in Nebraska.

[7] Nebraska case law is clear that a convicted felon, incarcerated for one offense and awaiting trial on an unrelated offense, receives no credit, pursuant to § 83-1,106(1), for time served while awaiting trial and sentencing on the unrelated offense. See, e.g., *State v. Baker, supra* (offender not entitled to credit for that portion of time awaiting trial for murder during which offender was serving previously imposed sentence on unrelated charge). In other words, the statute provides for credit for the time the offender is forced to be in custody *as a result of the criminal charge for which sentence is imposed.* Although we have located no published Nebraska cases dealing with the specific issue of jail time credit involving separate offenses in separate states, we note the general rule as set out in 24 C.J.S. *Criminal Law* § 1577 at 169 (1989):

> [C]redit for presentence incarceration generally, need not be given to an individual incarcerated by another jurisdiction for an unrelated offense. Thus, where a defendant is held in one state on charges from that state and a different state places a hold on him for criminal charges in that different state, such hold is irrelevant where the defendant is unable to satisfy the conditions for his release from the first state, and thus the defendant's custody is not time spent pursuant to that different state's offense and he is not entitled to credit for such time in respect to that different state's offense.

Further, article V(f) of the Agreement on Detainers, § 29-759(f), provides:

> During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

[8] We therefore conclude that even though McLeaney was in a Nebraska jail prior to disposition of his Nebraska charges, he was not in custody because of the Nebraska charges. He was in custody because of his conviction of a criminal offense and sentence in Missouri, and any jail time credits relate solely to that Missouri sentence.

CONCLUSION

Because McLeaney was being held on the Missouri sentence, the sentencing court did not abuse its discretion in refusing to credit McLeaney for time served in Nebraska. We accordingly affirm.

AFFIRMED.

IN RE INTEREST OF ANTHONY G., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. ANDREW L. AND WENDY L., APPELLEES.

578 N.W.2d 71

Filed April 14, 1998. No. A-97-859.

1. **Parental Rights: 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 trial court's findings; however, where the evidence is in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts.
3. **Jurisdiction: Appeal and Error.** An appellate court has the power and duty to determine whether the appellate court has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
4. **Jurisdiction: Judgments: Final Orders: Appeal and Error.** In order for an appellate court to acquire jurisdiction, there must be a final judgment or final order in the court from which the appeal is taken.
5. **Final Orders: Appeal and Error.** There are three types of final orders which may be reviewed on appeal. The three types are (1) an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment; (2) an order affecting a substantial right made in a special proceeding; and (3) an order affecting a substantial right made upon summary application in an action after judgment has been rendered.
6. **Juvenile Courts.** A proceeding before a juvenile court is a special proceeding.
7. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
8. **Jurisdiction: Final Orders: Appeal and Error.** In the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction.

Appeal from the Separate Juvenile Court of Douglas County: DOUGLAS F. JOHNSON, Judge. Appeal dismissed.

James S. Jansen, Douglas County Attorney, and Karen S. Kassebaum for appellant.

Peter C. Bataillon for appellee Andrew L.

Jeffrey A. Wagner, for Legal Aid Society, Inc., for appellee Wendy L.

MILLER-LERMAN, Chief Judge, and IRWIN and INBODY, Judges.

INBODY, Judge.

INTRODUCTION

This matter is before this court on the State's appeal of the Douglas County Separate Juvenile Court's August 7, 1997, order denying further detention of Anthony G., ordering that Anthony be returned to the parental home, and ordering that the matter be set for pretrial. We hold that a juvenile court order denying further detention and returning the juvenile's custody to the parent or parents pending an adjudication hearing is not a final order and thus is not appealable by the State. Consequently, this appeal is dismissed for lack of jurisdiction.

STATEMENT OF FACTS

On June 17, 1997, the State filed a petition alleging that Anthony was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1996) because he lacked proper parental care by reason of the faults or habits of his mother, Wendy L., and his stepfather, Andrew L., for the reasons that his stepfather committed acts of domestic abuse against Anthony and his mother and because the mother failed to protect Anthony from said abuse. On that same date, a motion for temporary custody and accompanying affidavit were filed and an order for immediate custody was entered by the Douglas County Separate Juvenile Court placing custody of Anthony with the Nebraska Department of Health and Human Services. The original petition was amended on June 30 to include additional allegations of physical violence by Anthony's stepfather.

On August 7, 1997, a detention hearing was held, the court entered an order denying further detention of Anthony and ordering that he be returned to the parental home, and the matter was ordered to be set for pretrial. The State filed a timely appeal to this court.

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and

accepted one version of the facts over another. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997).

[2] On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts. *In re Interest of Borius H. et al.*, 251 Neb. 397, 558 N.W.2d 31 (1997).

ASSIGNMENTS OF ERROR

The State appeals the August 7, 1997, juvenile court order denying further detention of Anthony and ordering Anthony's return to the parental home, alleging various errors committed by the juvenile court during the course of the hearing.

DISCUSSION

Our practice is to closely examine all cases in their initial stages to ensure that jurisdiction has been properly conferred on this court. Our objective is to quickly terminate appeals when we lack jurisdiction because of procedural defects. However, because the issue of whether a juvenile court order entered after a hearing which returns a juvenile's custody to the parent or parents pending an adjudication hearing is an appealable final order has not heretofore been addressed by the appellate courts of this state, we believe that an opinion explaining our decision is in order, rather than merely a summary dismissal of the appeal, as is our normal practice when jurisdiction is lacking.

[3,4] An appellate court has the power and duty to determine whether the appellate court has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. *In re Interest of D.W.*, 249 Neb. 133, 542 N.W.2d 407 (1996). In order for an appellate court to acquire jurisdiction, there must be a final judgment or final order in the court from which the appeal is taken. *Schaad v. Simms*, 240 Neb. 758, 484 N.W.2d 474 (1992).

[5] There are three types of final orders which may be reviewed on appeal. Neb. Rev. Stat. § 25-1902 (Reissue 1995); *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993). The three types are (1) an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment; (2) an order affecting a substantial right made in a special proceeding; and (3) an order affecting a substantial

right made upon summary application in an action after judgment has been rendered. § 25-1902; *Jarrett v. Eichler, supra*; *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991).

The August 7, 1997, order entered by the juvenile court was not an order which determined the action and prevented a judgment, nor was it an order affecting a substantial right made upon summary application in an action after judgment had been rendered. Consequently, we must determine whether the juvenile court's order was an order affecting a substantial right made in a special proceeding.

[6,7] The Nebraska Supreme Court has held that a proceeding before a juvenile court is a special proceeding. *In re Interest of Borius H. et al., supra.* However, this does not end our inquiry. To be final and appealable, the order must affect a substantial right. "A substantial right is an essential legal right, not a mere technical right." *Jarrett v. Eichler*, 244 Neb. at 314, 506 N.W.2d at 685.

Although we have found no case law analyzing whether the substantial rights of the *State* are affected by an order returning custody of a juvenile to his or her parents, the Nebraska Supreme Court has conducted an analysis of when the substantial right of a *parent* has been affected by an order in juvenile court litigation. In its analysis, the court considered the object of the order and the length of time over which the parent's relationship with the juvenile could reasonably be expected to be disturbed. *In re Interest of R.G., supra.*

Applying this reasoning, the court has held that a juvenile court order entered after a hearing which continued to keep a juvenile's custody from the parent pending an adjudication hearing was an order affecting a substantial right made in a special proceeding and, thus, was final and appealable. *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991). See, also, *In re Interest of R.G., supra.* The substantial right affected is the parent's liberty interest in raising his or her children. *In re Interest of R.G., supra.*

However, unlike *In re Interest of R.G., supra*, wherein the mother of a juvenile appealed an order which kept custody of the juvenile from the parents, in the instant case we have the State appealing a juvenile court order which returns a juvenile's

custody to his parents pending an adjudication hearing. Consequently, the "substantial right" analysis must be modified to determine whether the order affects a substantial right of the State.

The State contends that the juvenile court order affects its parens patriae interest in setting standards for the care and protection of children, and Anthony in particular. It is this parens patriae doctrine that allows the State to take custody of children within Nebraska's borders in emergency situations. *In re Interest of R.G., supra.* However, the flaw in the State's analysis involves the fact that such ex parte temporary orders are of limited duration and designed to preserve the status quo until an adversarial hearing can be held. See *id.*

In the instant case, the State, pursuant to court order, took temporary emergency custody of Anthony pending an adversarial hearing. The hearing was held, and after considering the evidence presented, the juvenile court determined that Anthony should not be further detained and ordered him returned to his parents pending adjudication.

Although we agree that the juvenile court's order does affect the State's parens patriae right, the State's right does not rise to the level of a parent's liberty interest in raising children. Further, the State, by acting expeditiously in getting the adjudication set for hearing, may allow the juvenile court to reconsider its decision to return custody of Anthony to his parents. Consequently, we find that after an adversarial hearing has been conducted and a juvenile court has not found sufficient evidence to further detain a juvenile, the State does not possess a substantial right allowing it to appeal that determination.

[8] In sum, the August 7, 1997, juvenile court order appealed from was not a final order, and in the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction. See *In re Adoption of Krystal P. & Kile P.*, 248 Neb. 907, 540 N.W.2d 312 (1995). Consequently, the instant case must be dismissed for lack of jurisdiction.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, v. MICHAEL E. JOHNSON, APPELLANT.

578 N.W.2d 75

Filed April 21, 1998. Nos. A-97-632, A-97-633.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
2. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach conclusions independent of the decisions reached by the court below.
3. **Search Warrants: Probable Cause: Appeal and Error.** In evaluating the validity of a search warrant, the duty of a reviewing court is to ensure that the magistrate issuing the warrant had a substantial basis for finding the existence of a fair probability that evidence of a crime or contraband would be found.
4. **Search Warrants: Affidavits: Evidence: Appeal and Error.** An appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit underlying a search warrant. Evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.
5. **Search Warrants: Affidavits: Probable Cause.** To be valid, a search warrant must be supported by an affidavit establishing probable cause, or reasonable suspicion founded on articulable facts.
6. **Search and Seizure: Search Warrants: Probable Cause.** Searches conducted pursuant to warrants supported by probable cause are generally considered to be reasonable.
7. **Search and Seizure: Search Warrants: Motions to Suppress: Proof.** A defendant seeking to suppress evidence seized in a search of his or her home pursuant to a search warrant has the burden of establishing that the search was improper and that the fruits of the search should be suppressed.
8. **Search Warrants: Probable Cause.** Probable cause to believe that a person has committed a crime previously and elsewhere is not, by itself, adequate to secure a search warrant for the person's home or another place.
9. **Constitutional Law: Search and Seizure.** General searches simply to find evidence of any crime are constitutionally impermissible.
10. **Search Warrants: Affidavits.** A search warrant should not be invalidated by interpreting the supporting affidavit in a hypertechnical, rather than a commonsense, manner.
11. **Search Warrants: Probable Cause: Police Officers and Sheriffs: Hearsay.** Probable cause for a search warrant may be founded on a law enforcement officer's personal knowledge, on hearsay, or on information from an informant. If the information is in the nature of hearsay or is otherwise beyond the officer's personal knowledge, it must be supported with indicia of the source's reliability.

Appeal from the District Court for Dakota County: MAURICE REDMOND, Judge. Judgment in No. A-97-632 reversed, and cause remanded for further proceedings. Judgment in No. A-97-633 reversed, and cause remanded with directions to dismiss.

Thomas A. Fitch, of Fitch & Tott Law Firm, for appellant.

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

MILLER-LERMAN, Chief Judge, and IRWIN and INBODY, Judges.

MILLER-LERMAN, Chief Judge.

In these consolidated appeals, Michael E. Johnson (Johnson) appeals from the orders of the Dakota County District Court denying his motions to suppress physical evidence seized pursuant to a search warrant and the subsequent introduction of that evidence over objection at the consolidated trial. Case No. A-97-632 pertains to the information charging Johnson with possession with intent to distribute a controlled substance, identified as both methamphetamine and cocaine. Case No. A-97-633 pertains to the information charging Johnson with unlawful possession of a controlled substance, diazepam.

The judgment of the district court in case No. A-97-632 is reversed and the cause remanded for proceedings consistent with this opinion. The judgment of the district court in case No. A-97-633 is reversed and the cause remanded with directions to dismiss.

FACTS

A warrant for the arrest of Johnson for failure to pay child support was issued on May 17, 1995. The warrant was made known to law enforcement officials the following day. On May 19, 1995, at approximately 11:25 p.m., South Sioux City, Nebraska, police officers Robert Johnson (Officer Johnson) and Terry Ivener were patrolling city streets, and they observed Johnson driving his car.

Ivener stated that Johnson's car entered traffic and traveled directly behind the officers' police car. Officer Johnson was driving the police car. He slowed its speed and pulled over to the right, allowing Johnson to pass the police car. Both officers

observed Johnson as he passed, and they visually confirmed his identity. Officer Johnson activated the police car's overhead emergency lights, and Johnson stopped his car after turning right at the next intersection.

Officer Johnson proceeded to make radio contact with Frank Peck, a Nebraska State Patrol officer in the vicinity who had a drug-sniffing dog with him. Meanwhile, Ivener exited the police car and approached Johnson's car. Johnson produced identification and exited his car. Ivener told Johnson that he was being placed under arrest and directed Johnson to place his hands on the car's trunk so that Ivener could conduct a pat-down search of Johnson's person.

Johnson complied with Ivener's request. Ivener testified that he felt a small, cylindrical object in one of Johnson's pockets. Johnson claimed the item was a knife. Ivener testified that "[i]t didn't feel like any knife that I've ever felt before." Upon Johnson's continued assertion that the object was a knife, Ivener handcuffed Johnson, reached into Johnson's pocket, and retrieved the object, which was a small, clear plastic vial with a black lid containing several small, off-white "rocks."

Ivener's suspicion that the rocks were methamphetamine was confirmed by chemical field tests performed at the site of the arrest. Johnson was placed in the rear seat of the police car, and Ivener proceeded to assist Peck in searching Johnson's car. Peck and Ivener were aided in their search by Peck's dog, which was specially trained to alert to the scent of narcotics. The dog alerted at the front seat of Johnson's vehicle, and the officers found a plastic baggie which contained two small paper packets. Ivener testified that he suspected the packets to be "snow seals," a commonly used means of containing methamphetamine and other drugs. The contents of each packet were subjected to a chemical field test at the arrest site, which indicated the contents to be methamphetamine. The total combined weight of the methamphetamine found in Johnson's car was less than 1 gram. Ivener testified at the suppression hearing that the amount found in the snow seals in Johnson's car, which was found to be .53 of a gram, was consistent with personal use. At trial, Nebraska State Patrol Investigator James Kelly also testified that the cumulative total of the methamphetamine found in

Johnson's car and in the vial in Johnson's pocket was consistent with personal use.

An empty snow seal was discovered in Johnson's billfold. The search of Johnson's billfold also yielded $269.50 in cash. Ivener testified that he found nothing else on Johnson's person or in Johnson's car which he suspected of being related to illegal drug activity.

Later, in the early morning hours of May 20, 1995, Ivener prepared a complaint and affidavit for a warrant to search Johnson's home. In the affidavit, Ivener described Johnson's arrest several hours earlier, including finding the snow seals in Johnson's car and billfold. Ivener did not allege in his affidavit that the amounts of methamphetamine discovered in Johnson's car and on his person were consistent with distribution. In the affidavit, Ivener swore that "I am aware that Michael E. Johnson is a person known to have engaged in the use and sale of controlled substances [and] that Michael E. Johnson has previously been convicted of drug charges." In the affidavit, Ivener claimed that based on his training and experience and from information received from other law enforcement officers, he was aware that "individuals frequently keep controlled substances on their persons . . . as well as at their residence [sic]." Ivener also claimed to be aware that "individuals involved in the possession, use and distribution of controlled substances use paraphernalia to ingest the controlled substance[;] that this paraphernalia is retained by the individual for . . . future use[;] and that this paraphernalia retains residue of the controlled substance." Ivener also stated that he had been to Johnson's home on "service calls" at least three times in the past. Ivener requested a warrant to search Johnson's home as soon as possible, to be served during "the hours of darkness" so as "to avoid any possibility of destruction of evidence."

Based upon Ivener's affidavit, the magistrate issued a search warrant which allowed officers to search Johnson's home for the following:

> Controlled Substances including but not limited to cocaine, methamphetamine and marijuana; drug paraphernalia, homemade or otherwise; telephone answering machines or other devices used to record messages or con-

versations; records, documents and U.S. currency or other monies resulting from controlled substances transactions; vehicles and other devices used for transportation of controlled substances; scales used to weigh cocaine, methamphetamine and marijuana or other controlled substances; packaging materials for controlled substances; computers or other electronic devices to maintain records of controlled substances transactions; hand written notes, books, diaries or other documents used to maintain records of controlled substances transactions; weapons, firearms and ammunition used in the furtherance of controlled substances transactions; and/or other drug paraphernalia as defined by Nebraska State Statutes, and any evidence of occupancy.

Upon obtaining the warrant, Ivener and other officers proceeded to search Johnson's home at 2 a.m. on May 20, 1995. The officers seized numerous items from Johnson's home, including a small quantity of cocaine; a triple-beam scale; precut small squares of glossy paper alleged to be unused snow seals; a jewelry catalog with glossy pages containing photographs and lettering consistent with those on the unused snow seals; two pairs of scissors; a razor blade and a small, black glass board; and drug paraphernalia. The officers also seized tablets which were later determined to contain diazepam, a pharmaceutical drug which acts as a depressant to the human central nervous system. The discovery of the diazepam led to the filing of a separate charge.

Johnson was charged in separate informations with one count of possession of cocaine and methamphetamine with intent to deliver, a Class II felony in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1994), and one count of unauthorized possession of diazepam, a Class IV felony in violation of § 28-416(3).

Before trial, Johnson filed a motion in each case to suppress the physical evidence obtained from the search of his home, alleging, inter alia, that the search warrant was not supported by probable cause. Separate hearings were held in each case. Ivener personally testified at the first suppression hearing. His transcribed testimony was admitted at the second suppression

hearing, in lieu of live testimony. The trial court denied both of Johnson's motions to suppress evidence seized in the search of Johnson's home.

The charges against Johnson were consolidated and tried to a jury on March 26 through 28, 1997. Evidence gathered from the search of Johnson's home was introduced at trial over objection. The jury convicted Johnson of possession of methamphetamine and/or cocaine with intent to deliver, a Class II felony, and unauthorized possession of diazepam, a Class IV felony.

Johnson was sentenced to a term of 2 to 4 years' imprisonment for the possession of methamphetamine and cocaine with intent to deliver and a concurrent term of 1 to 2 years' imprisonment for the unauthorized possession of diazepam. At the time of sentencing, Johnson was also sentenced to 1 to 2 years' imprisonment on an unrelated charge of failure to appear, to be served consecutively to the sentences involved in these consolidated appeals. Johnson appeals from his convictions for possession with intent to deliver and unauthorized possession.

ASSIGNMENTS OF ERROR

Johnson filed separate notices of appeal in each of the cases pertaining to charges for controlled substances. In each appeal, Johnson claims that the trial court erred in overruling his motion to suppress items which were seized from his home pursuant to a search warrant and in admitting those items into evidence at trial over objection. Because the cases were tried together and the errors assigned in each case are identical, this court consolidated the cases for the purpose of appellate review.

STANDARD OF REVIEW

[1,2] A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Swift*, 251 Neb. 204, 556 N.W.2d 243 (1996). On questions of law, an appellate court has an obligation to reach con-

clusions independent of the decisions reached by the court below. *Id.*

[3-5] In evaluating the validity of a search warrant, the duty of a reviewing court is to ensure that the magistrate issuing the warrant had a substantial basis for finding the existence of a fair probability that evidence of a crime or contraband would be found. *State v. Valdez*, 5 Neb. App. 506, 562 N.W.2d 64 (1997). See, also, *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996). An appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit underlying a search warrant. Evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued. *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992). To be valid, a search warrant must be supported by an affidavit establishing probable cause, or reasonable suspicion founded on articulable facts. *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994).

ANALYSIS

Searches Pursuant to Warrants.

[6,7] Searches conducted pursuant to warrants supported by probable cause are generally considered to be reasonable. *State v. Swift, supra.* Since a defendant seeking to suppress evidence seized in a search of his or her home pursuant to a search warrant has the burden of establishing that the search was improper and that the fruits of the search should be suppressed, the initial burden of proof is on Johnson. See Neb. Rev. Stat. § 29-822 (Reissue 1995). See, also, *State v. Swift, supra.* If the defendant establishes a prima facie case of an unconstitutional search and seizure, the burden of proof shifts to the State to establish that the search and seizure were constitutionally permissible. *State v. Harms*, 233 Neb. 882, 449 N.W.2d 1 (1989).

Johnson claims generally that the search of his home was unreasonable and constitutionally impermissible because there was no probable cause for the search. He specifically argues that possession of methamphetamine in the amount found in his vehicle several hours earlier, an amount Ivener testified was consistent with personal use, was not a sufficient basis to later search his residence. Johnson challenges the sufficiency of the affidavit used to obtain the warrant.

[8,9] Since a citizen's expectation of privacy is greatest in his or her home, it follows that Johnson had a reasonable expectation of privacy in his home. See *State v. Farber*, 1 Neb. App. 460, 498 N.W.2d 797 (1993). See, also, *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). To be valid, the search warrant obtained by Ivener must have been supported by an affidavit establishing probable cause to search the home or by reasonable suspicion based on articulable facts that evidence of crime would be found in the home. See *State v. Flores, supra*. In evaluating such probable cause, only a probability, rather than a prima facie showing, of criminal activity is required. *Id.* Probable cause to believe that a person has committed a crime previously and elsewhere is not, by itself, adequate to secure a search warrant for the person's home or another place. *U.S. v. Ramos*, 923 F.2d 1346 (9th Cir. 1991). General searches simply to find evidence of any crime are constitutionally impermissible. See *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992).

[10] We look to the totality of the circumstances to determine the sufficiency of an affidavit offered to show probable cause for a search warrant. If the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, indicate there is a fair probability that evidence may be found at the place described, the affidavit is sufficient. See *State v. Flores, supra*. See, also, *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). A search warrant should not be invalidated by interpreting the supporting affidavit in a hypertechnical, rather than a commonsense, manner. *State v. Swift*, 251 Neb. 204, 556 N.W.2d 243 (1996).

[11] The three-page Ivener affidavit regarding the earlier vehicle stop coupled with historical information and statements regarding drug activity in general was the exclusive basis offered to the magistrate to determine probable cause to issue the subsequent search warrant of Johnson's home. We examine the statements in the affidavit to determine if taken together they provide probable cause. See *Illinois v. Gates, supra*. We also review the affidavit to determine if the facts therein are "'"so closely related to the time of the issuance of the warrant

as to justify a finding of probable cause at that time." '" *State v. Valdez*, 5 Neb. App. 506, 516, 562 N.W.2d 64, 72 (1997). Probable cause for a search warrant may be founded on a law enforcement officer's personal knowledge, on hearsay, or on information from an informant. If the information is in the nature of hearsay or is otherwise beyond the officer's personal knowledge, it must be supported with indicia of the source's reliability. See, *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994); *State v. Valdez, supra.* Hearsay observations of a fellow law enforcement officer may provide a reliable basis for a probable cause finding if the officer supplying the hearsay information is actively involved in the investigation. See *State v. Huggins*, 186 Neb. 704, 185 N.W.2d 849 (1971).

It has been stated: "'"Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time."'" *Valdez*, 5 Neb. App. at 516, 562 N.W.2d at 72. "'[P]robable cause must exist at the time of the execution of a search warrant just as it must at the time of its issuance.'" *Swift*, 251 Neb. at 213, 556 N.W.2d at 250, quoting *State v. Evans*, 815 S.W.2d 503 (Tenn. 1991).

Ivener's Affidavit.

In our appellate review of Johnson's claim regarding the sufficiency of the affidavit to support the search warrant, we review the four corners of the affidavit to see if probable cause is established. See *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992).

In his affidavit, Ivener asserts that a warrant had been issued for Johnson's arrest; that he observed Johnson driving on May 19, 1995; and that he arrested Johnson. The affidavit does not state the basis for the arrest warrant. Ivener's affidavit describes his discovery of a vial of methamphetamine in Johnson's pocket after Johnson's arrest and of the two snow seals in a plastic baggie in the front seat of Johnson's car, without an indication of the amount found—which amount was consistent with personal use, as Ivener later testified.

The affidavit continues in paragraph 6 that based on Invener's experience, he was aware that "individuals frequently

keep controlled substances on their persons . . . *as well as at their residence* [sic]." (Emphasis supplied.)

In paragraph 7, Ivener states that based on his "experience, and from information received from other law enforcement officers, that individuals involved in the possession, use *and distribution* of controlled substances use paraphernalia to ingest the controlled substance[;] that this paraphernalia is retained by the individual for . . . future use[;] and that this paraphernalia retains residue of the controlled substance." (Emphasis supplied.)

In paragraph 8, Ivener states that "I am aware that Michael E. Johnson is a person known to have engaged in the use *and sale* of controlled substances. I am further aware that Michael E. Johnson has *previously been convicted of drug charges.* I know that Michael E. Johnson lives at 3401 El Dorado Way, South Sioux City, Dakota County, Nebraska as *I have been to his home on service calls* on at least three separate occasions." (Emphasis supplied.)

Paragraphs 6 and 7 of the affidavit describe the purported habits of drug users in general without attribution and do not explain how these generalizations applied by particularized facts to Johnson. There is nothing in the record that links these concepts to particularized articulable facts that provide probable cause for the search of Johnson's house hours after the vehicle stop in a different location.

Paragraph 8 of the affidavit attests that Johnson "is a person known to have engaged in the use and sale of controlled substances" and that Johnson "has previously been convicted of drug charges." The source of this knowledge is not disclosed. Furthermore, this paragraph regarding Johnson's past, without an indication of the time in the past of the event referred to, fails to support a reasonable finding of probable cause to search Johnson's residence at the time in question. For the sake of completeness, we note that the testimony shows that the statement regarding Johnson's drug history pertains to a drug conviction which was 10 years prior to this incident.

As to the statement in the affidavit that Ivener had visited Johnson's residence at least three times before for "service calls," there is no indication in the affidavit as to the dates or

purposes of these calls or that anything drug related was observed during these calls.

Was There Probable Cause to Issue Search Warrant?

It is uncontroverted that Ivener's affidavit, standing alone, was the entire basis presented to the magistrate in support of Ivener's request for a search warrant. Based upon our review of the affidavit, we find that the warrant issued for the search of Johnson's house was not supported by probable cause.

The information in the affidavit concerning Johnson's prior criminal conviction failed to indicate a timeframe for the previous conviction and, in fact, was simply too old to be probative of present probable cause. *State v. Reeder*, 249 Neb. 207, 212, 543 N.W.2d 429, 433 (1996), quoting *State v. Hodge and Carpenter*, 225 Neb. 94, 402 N.W.2d 867 (1987), reiterates the imperative that " '[p]roof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause *at that time*.' " (Emphasis supplied.) The affidavit does not state that the prior conviction was closely linked in time to the current episode. The prior conviction does not compel a finding of probable cause to search Johnson's residence at the time of his May 19, 1995, arrest.

Taken as a whole, the affidavit, which describes a vehicle stop, does not explain why Johnson's home should be searched. The statements and allegations in the affidavit do not support issuance of a warrant to search Johnson's home. Compare *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993). In this regard, we agree with the reasoning expressed in *U.S. v. Hove*, 848 F.2d 137, 140 (9th Cir. 1988), which states:

> The affidavit . . . does not offer an explanation of why the police believed they may find incriminating evidence there; the affidavit simply lists the . . . address as a location to be searched. It is critical to a showing of probable cause that the affidavit state facts sufficient to justify a conclusion that evidence or contraband will probably be found at the premises to be searched.

It has been held that the arrest of a defendant's alleged roommate, pursuant to a vehicle stop, for possession of a large quantity of cocaine on her person did not provide probable cause to search the defendant's residence at a later time. See *United States v. Stout*, 641 F. Supp. 1074 (N.D. Cal. 1986). It has also been held that there was no probable cause for the issuance of a search warrant for a defendant's home based on the defendant's arrest, pursuant to a vehicle stop a few hours earlier, on a drug possession charge, even though cocaine found in the defendant's vehicle was in a quantity greater than for personal use. See *Minnesota v. Kahn*, 555 N.W.2d 15 (Minn. App. 1996). Compare *State v. Godbersen*, 493 N.W.2d 852 (Iowa 1992) (holding that where drugs found in car were packaged to indicate person is involved in drug dealing there existed reasonable belief that person kept drugs, weighing and measuring devices, packaging materials, and profits at residence). It has been observed that if mere probable cause to arrest a suspect also established probable cause to search the suspect's home, there would be no reason to distinguish search warrants from arrest warrants. *United States v. Lucarz*, 430 F.2d 1051 (9th Cir. 1970).

In the instant case, the supporting affidavit contains generalizations about the habits of users and dealers of controlled substances. There are no articulable facts in the affidavit to support a finding of probable cause that these generalizations applied to Johnson. The facts of Johnson's arrest hours earlier, of the discovery of drugs without an indication of the amount or an inference that the amount was other than that consistent with personal use, and of a prior conviction at some unspecified time in the past did not support the issuance of the search warrant.

CONCLUSION

We find that the search warrant at issue was not supported by probable cause and that the fruits of that search were not admissible. Therefore, we reverse the trial court's orders overruling Johnson's motions to suppress and the objection to the admission of the evidence obtained from the search of his house.

The evidence supporting Johnson's conviction for possession of diazepam in case No. A-97-633 was obtained entirely from

the unlawful search of Johnson's house, and for that reason, the district court's judgment and its conviction of Johnson for this offense must be reversed and the cause remanded with directions to dismiss for lack of evidence.

Evidence in case No. A-97-632 of the triple-beam scale, unused snow seals, scissors, catalog, and other objects seized from Johnson's house must be excluded as the result of an invalid search. After suppression of the foregoing evidence, there remains admissible evidence in case No. A-97-632, including, inter alia, the methamphetamine found on Johnson at the time of his arrest. Therefore, we reverse the judgment and remand the cause in case No. A-97-632 to the trial court for proceedings consistent with this opinion.

JUDGMENT IN NO. A-97-632 REVERSED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.
JUDGMENT IN NO. A-97-633 REVERSED, AND CAUSE REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. TALLULAH WOODS, APPELLANT.
577 N.W.2d 564

Filed April 21, 1998. No. A-97-642.

1. **Trial: Evidence: Notice: Time: Waiver.** Neb. Rev. Stat. § 29-1927 (Reissue 1995) provides that no evidence offered by a defendant for the purpose of establishing an alibi to an offense shall be admitted in the trial of the case unless notice of intention to rely upon an alibi is given to the county attorney and filed with the court at least 30 days before trial, except that such notice shall be waived by the presiding judge if necessary in the interests of justice.
2. **Pretrial Procedure: Evidence.** A court may require a defendant to grant the State like access to comparable items or information included within the defendant's discovery request.
3. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination reached by the courts below.
4. **Statutes: Words and Phrases.** It is not for the courts to supply missing words or sentences to a statute to make clear that which is indefinite, or to supply that which is not there.
5. **Criminal Law: Statutes.** Penal statutes must be strictly construed by the courts.
6. **Statutes.** Statutes which effect a change in the common law must be strictly construed.

7. **Criminal Law: Witnesses: Notice.** The alibi notice statute, Neb. Rev. Stat. § 29-1927 (Reissue 1995), requires a defendant to disclose his or her intention to rely on an alibi defense but does not require him or her to disclose the identity of alibi witnesses.
8. **Rules of Evidence: Other Acts: Proof.** Prior bad acts of a defendant are not properly admissible without a separate hearing being conducted outside the presence of the jury, at which time the State bears the burden of proving by clear and convincing evidence that the defendant committed the prior actions.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed and remanded for a new trial.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

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

HANNON, IRWIN, and MUES, Judges.

IRWIN, Judge.

I. INTRODUCTION

Tallulah Woods appeals from her conviction and sentence after a jury trial on a charge of acquiring a controlled substance through fraud. On appeal, Woods challenges, inter alia, the district court's order requiring her to disclose the identity of alibi witnesses and the court's denial of a separate hearing concerning the admissibility of prior bad acts evidence. Because we conclude that the district court erred with respect to both of these issues, the judgment of the court is reversed, and the matter is remanded for a new trial.

II. BACKGROUND

Woods was acquainted with a woman named "Evangelisa Kingston." Kingston suffered from chronic pain and had been prescribed various painkillers, including Lorcet and Darvocet. On several prior occasions, Woods had gone to the pharmacy for Kingston, picked up Kingston's prescription, and delivered it to Kingston. However, sometime in 1996, Kingston informed Woods that she was no longer authorized to pick up Kingston's prescriptions for her.

On August 1, 1996, Woods and Kingston had a conversation, the substance of which was disputed at the time of trial. According to Kingston, Woods went to Kingston's home and asked Kingston if she had any painkillers which Woods could have. Kingston testified that she informed Woods that she had not picked up her latest prescription yet and that she would not get the prescription until the next day, August 2. According to Woods, the conversation concerned the possibility of Woods' living with Kingston for a short time. Woods testified that the subject of medication never came up during the conversation.

On August 2, 1996, Kingston went to a drugstore to pick up her prescription and discovered that it had already been picked up by somebody else. Brady Brostrom, a pharmacist from the drugstore, testified that he dispensed Kingston's prescription during the early morning hours of August 2, and he identified Woods as the individual who picked up the prescription.

In an information filed on October 11, 1996, the State charged Woods with acquiring a controlled substance through fraud, in violation of Neb. Rev. Stat. § 28-418 (Reissue 1995). Prior to trial, Woods filed a motion for discovery, pursuant to Neb. Rev. Stat. § 29-1912 (Reissue 1995), requesting to inspect and copy any statements made by Woods; any prior criminal record of Woods; the results and reports of any physical, mental, or scientific tests or experiments; and any other documents, papers, books, accounts, letters, photographs, objects, or other tangible things which could be used as evidence by the State.

According to a docket entry on March 3, 1997, at some time prior to trial Woods also filed a notice of intent to rely on alibi defense, although the notice itself does not appear in the transcript. According to the same docket entry, the court ordered Woods to disclose the identity of alibi witnesses. Woods first filed a motion to have the court reconsider the order to disclose the identity of alibi witnesses, but ultimately filed an "involuntary" disclosure of alibi witnesses, listing seven potential alibi witnesses, including Woods herself.

After a jury trial, Woods was found guilty on April 3, 1997, of acquiring a controlled substance through fraud. The district court subsequently sentenced Woods to 180 days in jail. This timely appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Woods has assigned 10 errors. Because our resolution of the first two assigned errors disposes of the case, we need not engage in a lengthy analysis of Woods' remaining assignments. Woods asserts that the district court erred in ordering her to disclose the identity of her alibi witnesses and that the district court erred in allowing testimony of prior bad acts without first conducting a separate hearing concerning the evidence's admissibility.

We note that Woods also challenges the sufficiency of the evidence to support her conviction. Our review of the record indicates that there was sufficient evidence to pass our scrutiny under *State v. Noll*, 3 Neb. App. 410, 527 N.W.2d 644 (1995).

IV. ANALYSIS

1. Disclosure of Alibi Witnesses

[1] Neb. Rev. Stat. § 29-1927 (Reissue 1995) provides as follows:

> No evidence offered by a defendant for the purpose of establishing an alibi to an offense shall be admitted in the trial of the case unless notice of intention to rely upon an alibi is given to the county attorney and filed with the court at least thirty days before trial, except that such notice shall be waived by the presiding judge if necessary in the interests of justice.

The record indicates that Woods filed a notice at some time prior to trial. It appears as if the notice may not have been timely, but it also appears that the case was held over to a later jury panel and the State acquiesced in the notice prior to trial. As such, the timeliness of the filing has not been presented for our review.

The first issue presented to us is whether the district court was correct in ordering Woods to disclose the identity of her alibi witnesses after she filed her notice of alibi defense pursuant to § 29-1927. Woods argues that there is no statutory authority for the district court to order her to disclose the identity of the witnesses. The State argues, primarily, that the court was authorized to order disclosure pursuant to the reciprocal discovery provisions of Neb. Rev. Stat. § 29-1916 (Reissue

1995). We will consider first whether reciprocal discovery mandated disclosure and second whether the alibi notice statute requires disclosure.

(a) Reciprocal Discovery

Section 29-1916(1) provides as follows:

> (1) Whenever the court issues an order pursuant to the provisions of sections 29-1912 and 29-1913, the court may condition its order by requiring the defendant to grant the prosecution like access to comparable items or information included within the defendant's request which:
>
> (a) Are in the possession, custody, or control of the defendant;
>
> (b) The defendant intends to produce at the trial; and
>
> (c) Are material to the preparation of the prosecution's case.

The State asserts that because Woods obtained a discovery order pursuant to § 29-1912 and because the identity of alibi witnesses was in Woods' sole possession and was material information, the district court was justified in ordering disclosure pursuant to § 29-1916. We disagree.

[2] Section 29-1916 specifically provides that the court may require the defendant to grant the State "like access to comparable items or information included within the defendant's request." This provision, in plain language, limits the State's right to reciprocal discovery to items comparable to those items requested by the defendant. Woods did not request any information concerning the identities, addresses, or substance of testimony of any of the State's witnesses. As such, the identities and addresses of Woods' witnesses, in addition to the fact that these particular witnesses would testify concerning an alibi, was not "comparable" to the information requested by Woods in her discovery request. The State was not entitled to this disclosure pursuant to the reciprocal discovery statute.

(b) Alibi Notice Statute

[3,4] The issue, then, becomes whether or not the alibi notice statute, § 29-1927, includes a grant of authority to the district court to order disclosure of the identity of alibi witnesses. Statutory interpretation is a matter of law, in connection with

which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination reached by the courts below. *State v. Kennedy*, 251 Neb. 337, 557 N.W.2d 33 (1996); *State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991). In considering and applying a statute, an appellate court has an obligation to determine and give effect to the purpose and intention of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *State v. Tingle, supra.* It is not for the courts to supply missing words or sentences to a statute to make clear that which is indefinite, or to supply that which is not there. *State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128 (1996).

A review of § 29-1927 reveals that the statute took effect in 1993—long after the federal rules of criminal procedure adopted an alibi notice rule, long after numerous other jurisdictions adopted alibi notice rules, and long after our own jurisdiction adopted other notice rules such as the hearsay exception notice rule contained in Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1995). Nebraska's alibi notice rule, however, does not appear to have been modeled after the language of any of the foregoing.

Fed. Rule of Crim. P. 12.1 requires the defendant in a criminal case, upon written demand of the government, to file a written notice of intention to offer an alibi defense. Rule 12.1 further requires that "[s]uch notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi." Similarly, the Maryland Court of Appeals noted in a 1983 decision that, at that time, "[a] requirement for notice of an alibi defense, with identification of proposed alibi . . . witnesses, now exists under statute or rule of court in 35 of our sister states and in the District of Columbia." *Taliaferro v. State*, 295 Md. 376, 387, 456 A.2d 29, 35 (1983).

The Nebraska alibi notice statute, § 29-1927, as noted above, was adopted in 1993. The Nebraska statute, however, does not contain an explicit requirement similar to that in the federal system or the other jurisdictions referenced above which would require a defendant, in addition to providing "notice of intention to rely upon an alibi," to also provide the names and

addresses of the witnesses upon which the defendant intends to rely in establishing the alibi defense. In addition to the fact that this Nebraska statute was adopted after the federal and other state statutes, such that the Legislature could have modeled the Nebraska statute after those statutes, we note that the Nebraska Legislature did require notice of the names and addresses of witnesses when it enacted § 27-804(2)(e). The Legislature stated that a proponent who desires to use the catch-all hearsay exception must make known to the adverse party "his intention to offer the statement and the particulars of it, including the name and address of the declarant." As such, it is apparent that the Legislature was fully aware of how to require such disclosure if it had desired to also require it in § 29-1927.

[5,6] The statute in question, § 29-1927, must be strictly construed for two reasons. First, because it is a criminal discovery statute, it is comparable to a penal statute, and the Nebraska Supreme Court has repeatedly noted that penal statutes must be strictly construed by the courts. *State v. Kennedy, supra*; *State v. Brozovsky*, 249 Neb. 723, 545 N.W.2d 98 (1996); *State v. Ryan, supra*. Second, § 29-1927 effected a change in the common law in Nebraska because it required a defendant to make disclosure of intent to rely on a particular defense which was not previously required in Nebraska. According to the Nebraska Supreme Court, statutes which effect a change in the common law also must be strictly construed. *State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991); *State Code Agencies Ed. Assn. v. State*, 231 Neb. 23, 434 N.W.2d 684 (1989).

[7] Giving § 29-1927 a strict construction, and considering its plain language, it is apparent that the Legislature did not include a requirement that the defendant disclose the identity of alibi witnesses. The statute requires only that the defendant disclose his or her intention to rely on an alibi defense. We decline to infringe on the Legislature's province by adding disclosures not required by the language of the statute. We especially decline to do so in this arena, where the State's rights to discovery are strictly limited by statutory provisions. As such, we conclude that the district court erred in ordering Woods to disclose the identity of her alibi witnesses, and the case must be remanded. Recognizing that a certain amount of the damage

which such disclosure may cause has already occurred in this case, it is necessary that, as part of our remand, we direct a special prosecutor be appointed to prosecute the case. This remedy takes into account the fact that an error occurred and removes the prosecutor who received the improper information. We additionally order the district court to ensure that the special prosecutor shall not receive or use any information obtained as a result of the court's having ordered Woods to disclose the identity of her alibi witnesses. We trust that this procedure will ensure that the alibi witness information will be unexposed when the case is retried.

2. Rule 404(3) Hearing

Woods also asserts that the district court erred in allowing Kingston to testify concerning prior bad acts allegedly committed by Woods without first affording her a separate hearing pursuant to Neb. Rev. Stat. § 27-404(3) (Reissue 1995). Section 27-404 provides for the admissibility of evidence of other crimes, wrongs, or acts for purposes other than to show that a person acted in conformity with his or her character. § 27-404(2). Such evidence may be admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* Section 27-404(3) provides:

> When such evidence is admissible pursuant to this section, in criminal cases evidence of other crimes, wrongs, or acts of the accused may be offered in evidence by the prosecution if the prosecution proves to the court by clear and convincing evidence that the accused committed the crime, wrong, or act. Such proof shall first be made outside the presence of any jury.

During her testimony, Kingston testified that Woods had picked up prescriptions for Kingston before and that the two had then shared the medication. Woods objected that Kingston's testimony constituted testimony of prior bad acts and that such testimony was inadmissible under § 27-404 without a separate hearing's being held. The court overruled Woods' objection. Kingston then testified that Woods had picked up Kingston's prescription on one prior occasion and that when the prescrip-

tion was given to Kingston, the quantity portion of the label had been torn off and several pills were missing. As a result of this occurrence, Kingston told Woods that she was no longer authorized to pick up Kingston's prescriptions for her. Woods objected to this testimony, also on the basis of § 27-404. The court again overruled Woods' objection.

On appeal, the State asserts that this testimony is not covered by the parameters of § 27-404. The State asserts that the first statement was volunteered by the witness, not given in direct response to a question by the prosecutor, and that the second statement was foundational information for why Kingston revoked the permission to pick up prescriptions and, therefore, is not covered by § 27-404. We disagree with both contentions.

[8] Both of the statements at issue here concern prior actions of Woods. The first statement revealed to the jury that on prior occasions, Woods had received controlled substances without a prescription when Kingston "shared" the pills with her. The second statement revealed to the jury that on one prior occasion, Woods tore the quantity portion off a prescription bottle label and stole a portion of the pills. These statements are clearly evidence of prior bad acts of Woods, and if they were offered for any permissible use rather than to show that Woods acted in conformity with the prior actions, then they fall within the constraints of § 27-404. As such, the statements were not properly admissible without a separate hearing's being conducted outside the presence of the jury, at which time the State would have borne the burden of proving by clear and convincing evidence that Woods committed the prior actions. See *State v. Wilson*, 5 Neb. App. 125, 556 N.W.2d 643 (1996). This error by the district court constitutes another reason why the judgment must be reversed and the case remanded for new trial.

V. CONCLUSION

Because we conclude that the district court committed reversible error both with respect to ordering Woods to disclose the identity of her alibi witnesses and with respect to admitting prior bad acts evidence without conducting a separate hearing, we reverse the conviction and remand the case for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

J.C. PENNEY CO., INC., APPELLANT AND CROSS-APPELLEE, V. LANCASTER COUNTY BOARD OF EQUALIZATION, APPELLEE AND CROSS-APPELLANT.

578 N.W.2d 465

Filed April 21, 1998. No. A-97-778.

1. **Taxation: Valuation: Equity: Appeal and Error.** Neb. Rev. Stat. § 77-1511 (Reissue 1996) explicitly provides that the Nebraska Tax Equalization and Review Commission shall hear appeals from a county board of equalization as in equity and without a jury and determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof.
2. **Taxation: Valuation: Evidence: Proof: Appeal and Error.** Neb. Rev. Stat. § 77-1511 (Reissue 1996) provides that the Nebraska Tax Equalization and Review Commission shall affirm the action taken by a county board of equalization unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary, or unless evidence is adduced establishing that the property of the taxpayer is assessed too low.
3. **Taxation: Valuation: Appeal and Error.** Neb. Rev. Stat. § 77-5007 (Reissue 1996) provides that the Nebraska Tax Equalization and Review Commission has the power and duty to hear and determine appeals of decisions of any county board of equalization equalizing the value of individual tracts, lots, or parcels of real property so that all real property is assessed uniformly and proportionately.
4. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results.
5. **Statutes: Legislature: Intent.** When considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.
6. **Taxation: Valuation: Proof: Appeal and Error.** In an appeal to the county board of equalization or to the district court, and from the district court to the Nebraska Court of Appeals, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment.
7. **Taxation: Valuation: Presumptions: Proof: Appeal and Error.** There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.

8. **Taxation: Valuation: Notice: Appeal and Error.** In an appeal from a decision of a county board of equalization to the Nebraska Tax Equalization and Review Commission, Neb. Rev. Stat. § 77-5015 (Reissue 1996) specifically requires the commission to notify the parties of the issues involved and afford them the opportunity to present evidence and argument on those issues.

Appeal from the Nebraska Tax Equalization and Review Commission. Affirmed.

Jerry M. Slusky, of Gross & Welch, P.C., for appellant.

Gary E. Lacey, Lancaster County Attorney, and Michael E. Thew for appellee.

HANNON, SIEVERS, and MUES, Judges.

SIEVERS, Judge.

INTRODUCTION

J.C. Penney Co., Inc., appeals the order of the Nebraska Tax Equalization and Review Commission (Commission) which upheld the valuation of the Lancaster County Board of Equalization (Board) of $8,685,000 for property tax purposes of the J.C. Penney department store in Lincoln's Gateway Shopping Center.

BACKGROUND

J.C. Penney, a nationally known retail department store chain, owns commercial real property located in the city of Lincoln, Lancaster County, Nebraska. Construction on this property of a 125,870-square-foot anchor department store at the Gateway Shopping Center began in 1994 and was completed on March 6, 1995. The land upon which the store sits was purchased by J.C. Penney in 1994 for $2,267,000.

For the 1996 tax year, the county assessor proposed to value the subject property at $9,007,973. This figure was calculated using the cost method of valuation. The cost method involves using a computer program which first takes into consideration the characteristics of the subject property, such as the perimeter of the building, its area, and its height. After this data is compiled, the computer "uses electronic modeling and tables that estimate the cost of construction of a building with those [features]." Based on this figure, the computer estimates a sug-

gested value for the subject property, which is called the "replacement cost." The computer then adds the value of the land to the replacement cost to get the final appraised value. Using this method, the subject property was valued at $9,007,973. As a method of confirming this value, the county assessor's office used another method—the income valuation approach. This method also uses a computer program which estimates the income value of the property based upon averages for retail rental rates, less the estimated average for expenses that would be expected to be charged against a building. Using the income valuation approach, the subject property was valued higher, at $10,315,500.

On June 16, 1996, J.C. Penney filed a protest with the Board pursuant to Neb. Rev. Stat. § 77-1502 (Reissue 1996). J.C. Penney claimed that the county assessor's figure of $9,007,973 was not the true market value of the property and requested a valuation of $5,285,910. Pursuant to Neb. Rev. Stat. § 77-1502.1 (Reissue 1996) (Board may direct referees to conduct hearings on any protests filed pursuant to § 77-1502), Richard Keith, a Nebraska licensed real estate appraiser, was assigned to review the valuation of J.C. Penney's property. Wayne Kubert was designated referee coordinator, and a hearing was set for July 2.

At the hearing on July 2, 1996, no one appeared on behalf of J.C. Penney. Despite that fact, Keith's pro forma analysis was introduced. Keith's report recommended that the value of the subject property be reduced to $6,815,860. This value was based upon (1) the property record data provided by the county assessor, (2) market sales data used by the assessor, (3) income data used by the assessor, and (4) the referee's personal inspection of the interior and exterior of the subject property. No information was provided to Keith by J.C. Penney for preparation of the appraisal.

Initially, Kubert concurred with Keith's recommendation and signed the referee report valuing the subject property at $6,815,860. Subsequently, however, Kubert began valuing other properties in the Gateway Shopping Center, and he became concerned about the lack of equalization among these properties. As a result, Kubert changed his mind and decided to override Keith's recommendation. With respect to Keith's report, a hand-

written note was made on the front page which stated, "BOE - Reviewed market rents - & sales - Dillards - also cost of cons. of Penney's est. 9-10 mil Adjust value to $69 or $8.25 rent 125,870 sq. ft. x $69. $8,685,000." Although this figure is the Board's final assessment and there was testimony that this handwriting looked like Kubert's, the notation was never directly proved to be his—nor did he testify and claim it as his.

In the meantime, Keith's original report, containing the recommendation of $6,815,860 and Kubert's signature, was sent to J.C. Penney by mail and received at its Dallas, Texas, offices on July 22, 1996. The report also gave notice to J.C. Penney that the Board was scheduled to take final action on the recommendation on July 23 at 9:30 a.m. Due to the short notice, no representative of J.C. Penney was able to personally appear at the hearing; however, George Rawlings, an appraiser employed by J.C. Penney, did participate by telephone. The hearing was recorded, and a transcript is part of our record.

Only minutes before the hearing formally began did Rawlings learn that Keith's recommendation had been overridden and that the property was now appraised at $8,685,000 rather than $6,815,860. Kubert explained to Rawlings the change in value by stating:

> We're reviewing all the shopping center. The shopping center itself, obviously, has been rebuilt and redone. It has a new value going out very shortly . . . and that value is in the range of $80 a square foot. [We note that the county's original valuation of $9,007,973 resulted in an assessment of $72 per square foot and that Kubert's revised recommended value of $8,685,000 resulted in an assessment of about $69 per square foot.] And in equalizing all the buildings within the shopping center . . .
>
> . . . .
>
> . . . we decided we'd better take a look at the whole picture as opposed to dropping down to something that is probably premature at this point.
>
> . . . .
>
> . . . [W]e've all read the paper up here in which . . . we had heard that you were spending close to $10,000,000 out there or something . . . would you share with us the cost of this facility?

Rawlings responded that he would "be more than happy to supply any information in regards [sic] to cost" and requested additional time to assemble the necessary information. The conversation continued:

> [Kandra Hahn, Lancaster County Clerk]: He doesn't think he can get that to you this morning. When . . .
>
> [Darlene Tussing, Board member]: When's our final date?
>
> HAHN: The 25th.
>
> [Kathy Campbell, Board member]: Thursday is the final . . . we haven't scheduled any meetings for Thursday.
>
> [Kubert]: Just get . . . it up as soon as you can. It's going to have to come out anyway. We're going to have to deal with it. That's the best we can do.

Rawlings then faxed a letter objecting to the short notice. That same day, the Board took final action on the protest and accepted Kubert's recommendation of $8,685,000 as the final valuation of the property.

J.C. Penney then appealed to the Commission, pursuant to Neb. Rev. Stat. § 77-1510 (Reissue 1996). In preparation for the hearing before the Commission, the Board requested commercial appraiser Court Monroe of the county assessor's office, who had prepared the original appraisal of $9,007,973, to prepare yet another appraisal of the subject property. The hearing before the Commission was held on February 5, 1997. J.C. Penney adduced the following as evidence of value: lease data for J.C. Penney stores located in Kansas, Oklahoma, Nebraska, and Iowa; a buyer settlement statement showing that the land the subject property sits on was purchased for $2,267,000; and assessments for J.C. Penney stores located in five other midwestern states. J.C. Penney also introduced evidence of the Board's hearing procedures and the facts that J.C. Penney was allowed only 1 day's notice to prepare for the hearing and was notified 5 minutes prior to this hearing that Keith's recommendation had been overridden. The Board introduced Monroe's appraisal of the property, transcripts of the proceedings before the Board, and a copy of Keith's recommendation. In preparing his appraisal, Monroe employed three traditional approaches to

value—the cost approach, the income approach, and the sales comparison approach.

Monroe's cost approach began with an estimate of land value based upon an analysis of six recent sales of vacant land in Lancaster County which were subsequently used for development of large retail establishments. His estimate of value for the J.C. Penney land was $2,265,660. Monroe then estimated the value of the improvements (replacement cost new) using the segregated cost method as defined by the Marshall Valuation Service. The total replacement cost new of the improvements on the land was $8,578,236. Monroe estimated the total depreciation of the improvements to be $722,686 and subtracted that from the replacement cost new to arrive at a value of $7,855,550 for the improvements. Addition of the land value of $2,265,660 resulted in a final value, under the cost approach, of $10,121,210.

Monroe also used the income approach. Using data from four large retail facilities in Lincoln, Monroe developed estimates of what rents the subject property would likely generate, what expenses it would incur, and an expected net operating income. Relying on published data, Monroe determined that 7.5 percent was an appropriate capitalization rate. Application of this rate to the estimated net operating income resulted in a value, under the income approach, of $8,307,420.

Finally, Monroe used the sales comparison approach. This approach compares the property being appraised with similar properties sold in the recent past. However, because only one department store in the Lincoln area had been sold in recent years, the data available for such an analysis was obviously limited. Monroe used the confirmed sales price of that single property, together with reported costs of its rehabilitation, to arrive at a valuation of $71.86 per square foot. He then applied that figure to the square footage of the subject property for a value, under the sales comparison approach, of $9,045,018.

In an order filed June 26, 1997, the Commission affirmed the decision of the Board appraising the subject property at a value of $8,685,000 for the 1996 tax year. In its analysis, the Commission noted that J.C. Penney's evidence was of no assistance in establishing a proper valuation. In evaluating the

Board's evidence, the Commission rejected Monroe's income approach because of a lack of comparability of the other rental properties, primarily because with respect to size there was more than a 10-percent difference in square footage. In addition, the sales comparison approach was rejected because it relied on only one sale. However, the Commission recognized Monroe's use of the cost approach as valid.

The Commission also found that J.C. Penney had received only 1 day's notice of the fact that the Board was going to take final action on its protest and that it was not until 5 minutes prior to the hearing that J.C. Penney learned that Keith's recommended valuation of $6,815,860 had been changed. On the basis of the above factors, the Commission concluded:

> The record in this case demonstrates that the County's procedures for holding "protest" hearings pursuant to . . . Neb. Rev. Stat. § 77-1501, *et seq.* (Reissue 1996) are unreasonable and arbitrary. However, the record before the Commission *supports* [emphasis supplied] the assessed value of the subject property for tax year 1996. Therefore, the Commission must, and hereby does, conclude as a matter of law that the determination of the County that the assessed value of the subject property should be $8,685,000 for tax year 1996 was neither unreasonable nor arbitrary.

J.C. Penney then appealed to this court pursuant to Neb. Rev. Stat. § 77-5019 (Reissue 1996), and the Board cross-appealed.

ASSIGNMENTS OF ERROR

J.C. Penney argues that the Commission erred in (1) affirming the Board's valuation because there was sufficient evidence presented that this valuation was either inflated or based upon a questionable application of valuation methods, (2) affirming the Board's valuation by relying solely on one appraisal in a report prepared specifically to defend the Board's decision, (3) failing to compel the production of information and additional evidence determined to be necessary to properly assess the valuation, and (4) failing to accurately assess the value of J.C. Penney's property even though finding that the Board acted in an arbitrary and unreasonable manner. On cross-appeal, the

Board argues that the Commission erred in finding that the procedures employed by the county for holding hearings on protests filed pursuant to § 77-1502 were unreasonable and arbitrary.

STANDARD OF REVIEW

Our review of a final decision of the Commission is for error on the record of the Commission. § 77-5019(5). When reviewing an order for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *In re Conservatorship of Estate of Marsh*, 5 Neb. App. 899, 566 N.W.2d 783 (1997).

ANALYSIS

Commission's Standard of Review.

We first briefly discuss the Commission's standard of review of an appeal from a decision of a county board of equalization. In its decision on the matter in the instant case, the Commission discussed, but did not actually pronounce, what it thought was its standard of review. The Commission stated:

> The Tax Equalization and Review Commission is not a court. The Commission was created pursuant to state law to provide for an accessible and affordable system of review of valuation decisions. Under such circumstances, applying the standard devised by the Nebraska Supreme Court to the Commission would be presumptuous and ill-advised.
>
> Therefore, the Commission must adopt a standard applicable to cases it hears and decides. This standard must be in keeping with the precept that tax laws are to be strictly construed, and construed in the light most favorable to the taxpayer. [Citations omitted.] In determining that standard, resort must be made to the language of the statute. The Nebraska Supreme Court has often held that statutory construction is a simple task. The Court has held "In construing a statute, it is presumed that the Legislature intended a sensible rather than an absurd result. . . [.] Statutory Language is to be given its plain and ordinary meaning. . . ."

[1,2] There is a lack of authority for some of what the Commission said, but, in any event, Neb. Rev. Stat. § 77-1511 (Reissue 1996) explicitly provides that the Commission shall hear appeals from a county board of equalization "as in equity and without a jury and determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof." Section 77-1511 further provides that the Commission shall affirm the action taken by a county board of equalization unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary, or unless evidence is adduced establishing that the property of the taxpayer is assessed too low.

In *Harrison Square v. Sarpy Cty. Bd. of Equal., ante* p. 454, 574 N.W.2d 180 (1998), we recognized § 77-1511 as setting forth the Commission's standard of review. Thus, despite the Commission's apparent uncertainty about its standard of review, we think the law is clear. The Commission is directed to the above statutory language.

Failure of Commission to Compel Production of Information.

J.C. Penney argues that the Commission erred by failing to compel the production of information and additional evidence determined by the Commission to be necessary to properly assess the valuation of J.C. Penney's property. The Commission was critical of the evidence offered by J.C. Penney. Under the subheading "Taxpayer's Evidence," the Commission said:

> Exhibit one shows lease data for J. C. Penney stores which are located in Kansas, Oklahoma, Nebraska and Iowa. However, the record does not establish that these stores are anchor stores in a super regional center, the demographics of the towns, market information, etc. This information is essential in order to determine whether these stores are comparable to the subject property. Exhibit four consists of assessments for J. C. Penney stores located in five midwestern states. However, "assessed value" is meaningless without information regarding the real property tax laws of the states of Kansas, Iowa, and Colorado. That information is therefore of no assistance. Furthermore, the information regarding

> the assessments in Kearney and Omaha is likewise of little value, since the Taxpayer did not make the indicated levels of value for those cities part of the record, and further did not request the Commission to take notice of that information. Finally, no evidence was presented to establish the quality, condition, or income for those properties.

The Commission's observations about the shortcomings of J.C. Penney's proof are on target.

J.C. Penney alleges that the Commission had a mandatory duty stemming from Neb. Rev. Stat. § 77-5007 (Reissue 1996) to order the submission of information and documentation regarding the shortcomings it recited in J.C. Penney's proof.

[3] Section 77-5007 provides in pertinent part: "The commission has the power and duty to hear and determine appeals of: (1) Decisions of any county board of equalization equalizing the value of individual tracts, lots, or parcels of real property so that all real property is assessed uniformly and proportionately." From this language, J.C. Penney reasons that the Commission has "an affirmative duty to determine the proper valuation of the property, and if necessary to employ its statutory powers to compel the production of all evidence needed to make that determination." Brief for appellant at 27. As support for that conclusion, J.C. Penney quotes the language of Neb. Rev. Stat. § 77-5014 (Reissue 1996) that the Commission " '*shall* take evidence and otherwise conduct the appeal as provided in sections 77-5015 to 77-5019.' " Brief for appellant at 28. Finally, J.C. Penney notes Neb. Rev. Stat. § 77-5016(3) (Reissue 1996), which requires in part that in appeals to the Commission, "[a]ll evidence including records and documents in the possession of the commission of which it desires to avail itself shall be offered and made a part of the record in the case."

J.C. Penney then catalogs certain powers afforded the Commission under the provisions of 1995 Neb. Laws, L.B. 490, which established the Commission. These powers, labeled "broad" by J.C. Penney, brief for appellant at 17, include (1) the power to issue writs of mandamus to compel compliance with the Commission's orders, see Neb. Rev. Stat. § 77-5008 (Reissue 1996); (2) the power to order reappraisals of property within a county, see Neb. Rev. Stat. § 77-5017 (Reissue 1996);

and (3) the power to take notice of certain statistical information, see § 77-5016(5). Despite the fact that these powers are described in permissive ("may") terms, J.C. Penney reasons that their exercise becomes mandatory when the Commission is performing one of its mandatory duties, i.e., accurately assessing property to achieve uniformity and proportionality. J.C. Penney concludes that the Commission has a mandatory duty to individually assess and equalize the value of the subject property and because such duty is mandatory, it is also mandatory that the Commission exercise its broad powers to require the parties to obtain and make part of the record the information identified above as lacking.

In short, J.C. Penney argues that the Commission should act as a "litigation advisor" and help the parties decide what evidence to introduce before the Commission. In fact, J.C. Penney would have the Commission tell the parties what evidence it wants to hear. This proposition can charitably be described as unsound. Neither the language of the cited statutes nor the legislative history of L.B. 490, which created the Commission, justifies such an expansive (and novel) construction of the statutes regarding the Commission.

While § 77-5007 generally sets forth the powers of the Commission, § 77-1511, in pertinent part, articulates how these powers are exercised:

> The Tax Equalization and Review Commission shall hear appeals and cross appeals taken under section 77-1510 as in equity and without a jury and determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof. The commission shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary or unless evidence is adduced establishing that the property of the appellant is assessed too low.

[4,5] Statutory language is to be given its plain and ordinary meaning, and we will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results. *Hilliard v. Robertson*, 253 Neb. 232, 570 N.W.2d 180 (1997).

When considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible. *Baker's Supermarkets v. State*, 248 Neb. 984, 540 N.W.2d 574 (1995). A sensible reading of §§ 77-5007 and 77-1511, against the backdrop of the American legal system, which proceeds on the core notion that the adversary process produces truth and justice, leads to the conclusion that it was not the Commission's duty to compel J.C. Penney to produce more probative evidence at the hearing.

Furthermore, it must be remembered that the creation of the Commission removed the district courts from the valuation process and substituted the Commission in this phase. During the floor debate on L.B. 490, Senator Doug Kristensen, the bill's introducer, said:

> [I]n a district court they're only limited to the evidence that is presented. The Tax Equalization and Review Commission is going to have the information from the Department of Revenue. They're going to be able to use that and they're also going to be able to look at the techniques.

Floor Debate, 94th Leg., 1st Sess. 3465 (Mar. 29, 1995). But beyond this, the history reveals that the Commission is to review evidence just as the district court did in appeals from county boards of equalization. The only material difference between an appeal from a board of equalization before the passage of L.B. 490 and after is that § 77-5016(5) allows the Commission to take judicial notice of "general, technical, or scientific facts within its specialized knowledge or statistical information regarding general levels of assessment." Although the process is a trial "anew," that hardly means that the Commission is also to order up the evidence. The district courts did not have a mandatory duty to compel litigants to produce more, different, or better evidence when hearing appeals from county boards of equalization, and neither does the Commission.

Finally, with regard to this assignment of error, we note that while the Commission cited specific foundational deficiencies in J.C. Penney's evidence as the basis for its decision not to give

weight to that evidence, it did not say that filling the foundational gaps was necessary to a proper resolution of the issues before it. In other words, the Commission never indicated that the evidence presented to it made the resolution of the case impossible, but, as the Board observes, "it simply made it impossible to resolve the case in taxpayer's favor." Brief for appellee at 25. The assignment of error is without merit.

Validity of Board's Valuation.

We take J.C. Penney's remaining three assignments of error as one. They are, restated, that the Commission erred in affirming the Board's valuation because (1) there was evidence that the valuation of $8,685,000 was inflated and inaccurately determined; (2) the Commission relied solely on Monroe's appraisal, an appraisal prepared specifically for the hearing before the Commission; and (3) having found that the Board acted in an arbitrary and unreasonable manner, the Commission had a duty to reverse its decision under the provisions of § 77-1511.

[6] The Commission shall affirm the action taken by a county board of equalization unless evidence is adduced establishing that the action taken by the board was unreasonable or arbitrary, or unless evidence is adduced establishing that the property of the appellant is assessed too low. § 77-1511. This language is the same as in the statute preceding it, when property tax matters went from the county board of equalization to the district court instead of to the Commission. Thus, it logically follows that the principles which were articulated from this statutory language when the district court heard these matters maintain viability now that the Commission has taken over the district court's role. Before the Commission existed, the Nebraska Supreme Court held with regard to this statutory language:

> In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exer-

> cise of intentional will or failure of plain duty, and not mere errors of judgment.

Bumgarner v. County of Valley, 208 Neb. 361, 366, 303 N.W.2d 307, 310 (1981). We hold that this standard for the taxpayer's burden of persuasion applies with equal force when appeals on real property valuations are heard before the Commission. We also believe it appropriate to remind taxpayers that the *Bumgarner* court said that " 'absolute or perfect equality and uniformity in [property] taxation cannot be attained. . . .' " *Id.* The *Bumgarner* court referred to the principle of " 'practical uniformity,' " *id.*, a concept which also bears remembering.

[7] In determining whether to affirm the decision of a county board of equalization, the Supreme Court has stated:

> There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.

Ideal Basic Indus. v. Nuckolls Cty. Bd. of Equal., 231 Neb. 653, 654-55, 437 N.W.2d 501, 502 (1989). See, also, *Helvey v. Dawson County Bd. of Equal.*, 242 Neb. 379, 495 N.W.2d 261 (1993). In proceedings before the Commission, if the taxpayer overcomes the presumption, then the issue before the Commission is essentially a question of fact, with the taxpayer having the burden of persuasion.

The Commission held that "[t]he record in this case demonstrates that the County's procedures for holding 'protest' hearings pursuant to . . . Neb. Rev. Stat. § 77-1501, *et seq.* (Reissue 1996) are unreasonable and arbitrary." We address this issue more closely in our examination of the Board's cross-appeal, but note, for the purposes of this assignment of error, that the

Commission did not find that the Board's final valuation of the subject property at $8,685,000 was arbitrary or unreasonable.

In our review of the Board's valuation of J.C. Penney's property, we must focus first on the presumption of regularity. Our review of the record reveals that Kubert's decision to override Keith's recommendation on valuation was deficient because it was based on insufficient evidence and improper considerations, such as other Gateway property not yet valued and newspaper articles. Therefore, the Board's approval of Kubert's new valuation of $8,685,000 was unreasonable. The record shows that Keith's independent recommendation set a value of $6,815,860. This value was based upon (1) the property record data provided by the county assessor, (2) market sales data used by the assessor, (3) income data used by the assessor, and (4) the referee's personal inspection of the interior and exterior of the subject property. Kubert originally approved this recommendation, going so far as to transmit the $6,815,860 figure to J.C. Penney at its headquarters in Dallas as the valuation for its Lincoln property. However, Kubert changed his mind with respect to this figure, a decision J.C. Penney learned about only minutes before the telephonic Board hearing on July 23, 1996.

Kubert revalued the subject property at $8,685,000 based on (1) an attempt to place all properties located in the Gateway Shopping Center in the projected $80-per-square-foot range and (2) a newspaper article indicating that the cost of constructing the subject property was approximately $10,000,000. Picking a target for a property's value by aiming for a figure to be used for "all of the shopping center" is suspect, and there is no evidence that this is a regular and proper valuation tool. While cost is relevant to the valuation process, relying on a newspaper article for the cost of improvement rather than securing the actual cost is flawed. The procedure surrounding this matter became arbitrary when J.C. Penney was asked for cost data and agreed to provide it, but the Board set its final valuation that same day without waiting for the information it had requested. Apparently, the Board decided not to wait for the information because "we haven't scheduled any meetings for Thursday."

Having determined that the board acted in an arbitrary manner in valuing the subject property at $8,685,000, the presump-

tion that the Board faithfully performed its duties in making an accurate assessment based upon competent evidence disappears, and "the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented" to the Commission. *Ideal Basic Indus. v. Nuckolls Cty. Bd. of Equal.*, 231 Neb. 653, 655, 437 N.W.2d 501, 502 (1989). Even if the presumption in favor of the value set by the board of equalization is overcome, the burden rests on the taxpayer to show that the board's value was unreasonable. See *id.* Here, the issue before the Commission was one of fact. We find that the Commission was correct in affirming the Board's decision. It is undisputed that the county assessor's computer-assisted appraisal system generated value estimates of $9,007,973 and $10,315,500 for the subject property by the cost approach and the income approach, respectively.

The above cost-approach value was also verified by a separate "off-system evaluation" performed by Monroe. J.C. Penney's failure to introduce any probative evidence as to valuation (as said, we agree with the Commission's characterization of J.C. Penney's evidence) did not, as mentioned before, make it impossible to accurately assess the subject property. J.C. Penney simply failed to introduce sufficient evidence at the hearing to carry its burden of persuasion that the Board's appraisal was wrong. J.C. Penney did not introduce any evidence of its own appraisal of the property. Monroe's cost-approach appraisal relied upon by the Commission was competent evidence upon which to uphold the $8,685,000 valuation adopted by the Commission.

Cross-Appeal.

[8] In its cross-appeal, the Board argues that the Commission erred in finding that the procedures employed by the county for protest hearings filed pursuant to § 77-1502 were unreasonable and arbitrary. The Board alleges that it had no notice that its procedures for conducting protest hearings would be an issue and that because Neb. Rev. Stat. § 77-5015 (Reissue 1996) specifically requires the Commission to notify the parties of the issues involved and afford them the opportunity to present evidence and argument on those issues, the Commission's failure

to do so in this case renders its findings on the issue of the county's procedures contrary to law.

The Commission found that "[t]he record in this case demonstrates that the County's procedures for holding 'protest' hearings pursuant to . . . Neb. Rev. Stat. § 77-1501, *et seq.* (Reissue 1996) are unreasonable and arbitrary." The Board apparently sees this finding as a blanket condemnation of the Board's protest hearing procedures rather than merely condemnation of the actions of the Board in this particular case. We do not see that the Commission found, nor do we hold in this opinion, that the Board's regular or routine protest and hearing procedures are arbitrary and unreasonable. Rather, certain actions in this particular case were arbitrary and unreasonable. For example, J.C. Penney received 1 day's notice as to the Board's final hearing. In addition, J.C. Penney discovered approximately 5 minutes prior to this hearing that its property had been substantially revalued to J.C. Penney's detriment. Finally, J.C. Penney was given only 3 to 4 hours to collect and fax information on improvement costs—costs which were important to the Board's decision and which were asked for.

Although Kubert's valuation finds support in other evidence before the Commission, specifically the Monroe appraisal, Kubert's reasoning by which he overrode Keith's appraisal was flawed and should not have been adopted by the Board. But since the Board's valuation is supported by other evidence and J.C. Penney introduced no competent evidence before the Commission to dispute the Monroe appraisal in any meaningful way, we cannot say that the Commission erred in its valuation.

As said, there were flaws in the way the Board handled this particular case, but none which change the result before the Commission. To the extent that the cross-appeal seeks a blanket endorsement of the Board's protest procedures, it lacks merit.

CONCLUSION

The Commission's order affirming the Board's decision regarding valuation of the subject property is affirmed, and the Board's cross-appeal is denied.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES J. MAYS, APPELLANT.

578 N.W.2d 453

Filed April 21, 1998. No. A-97-797.

1. **Motions to Suppress: Courts: Records.** District courts shall articulate in writing or from the bench their general findings when denying or granting a motion to suppress.
2. **Criminal Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** Investigatory stops are permissible only upon a reasonable suspicion supported by specific and articulable facts that the person is, was, or is about to be engaged in criminal activity. In determining whether an officer acted reasonably, it is not the officer's inchoate or unparticularized suspicion or hunch that will be given due weight, but the specific reasonable inferences which the officer is entitled to draw from the facts in light of his or her experience.
3. **Police Officers and Sheriffs: Investigative Stops: Probable Cause.** Whether a police officer has a reasonable suspicion based on sufficient articulable facts requires taking into account the totality of the circumstances.
4. ____: ____: ____. An investigative stop, like probable cause, is to be evaluated by the collective information of the police engaged in a common investigation.
5. **Motor Vehicles: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** A reasonable suspicion to stop a vehicle cannot be found when there is no factual foundation explaining the source of the information being relayed between officers.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and dismissed.

Adam J. Sipple, of Quinn & Wright, for appellant.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellee.

MILLER-LERMAN, Chief Judge, and IRWIN and INBODY, Judges.

IRWIN, Judge.

I. INTRODUCTION

Charles J. Mays was charged with operating a motor vehicle while his operator's license was revoked, in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1993). Mays filed a motion to suppress, alleging that the stop of his vehicle was unconstitutional and that all evidence obtained as a result should be suppressed. After a hearing, the motion was denied. A bench trial was held on a stipulated record, at which time Mays preserved the objections raised in his motion to suppress. Mays was found guilty of the above charge and sentenced to 24 months' inten-

sive supervision probation. See Neb. Rev. Stat. § 29-2262.03 (Reissue 1995). Mays appeals his conviction and sentence. Because we conclude that the police did not possess a reasonable suspicion to justify the stop of Mays' vehicle, we reverse the judgment of the district court and dismiss the case.

II. FACTUAL BACKGROUND

The facts relevant to our decision are as follows: On July 10, 1996, at approximately 6:30 p.m., Officer Adam Kyle of the Omaha Police Division conducted a traffic stop of Mays' vehicle. As a result of the stop, Kyle learned that Mays was driving while his license was revoked. Mays was then charged and prosecuted.

At the hearing on Mays' motion to suppress, the State's evidence consisted exclusively of Kyle's testimony. Kyle testified as follows regarding his reasons for stopping Mays' vehicle on July 10, 1996: According to Kyle, he received information from an Officer Baudler that the driver of a red pickup truck had drugs on his person and was dealing drugs in the Pleasantview West housing projects (Pleasantview). Baudler told Kyle that the driver was known by the street name "Twin" and that he had a suspended driver's license. Although Kyle testified that Baudler had received the above information that day, Kyle was unsure whether he had received this information from Baudler earlier in the day or over the radio prior to the stop.

The record provides no further description of the driver, the vehicle, or the activity. Kyle did not explain his basis of knowledge for the information except that he was told of it by Baudler. In no way did Kyle explain Baudler's source of the information. In addition, Kyle did not indicate whether he was aware who "Twin" was at the time of the stop. Kyle was also unsure whether he received the information prior to the stop indicating that "Twin" was a black male.

Sometime before 6:30 p.m. on July 10, 1996, Baudler contacted Kyle and told him either that the red pickup truck was leaving Pleasantview or that the red pickup truck was arriving at Pleasantview. The record does not reflect whether this information was received at the same time as the prior information regarding "Twin," or at a later time. After receiving this latest

message, Kyle saw a red pickup truck traveling on Parker Street away from Pleasantview. There was no testimony suggesting that Kyle saw or recognized the driver prior to the stop. Kyle testified that he was unable to read the license plate due to a trailer ball on the back of the truck. However, a tape recording of Kyle's radio transmissions indicates that Kyle called in a partial plate number a few moments before the stop of Mays' vehicle. After observing the red pickup truck, Kyle initiated a stop. Kyle testified that he observed no traffic violations prior to the stop.

III. ASSIGNMENTS OF ERROR

For his assignments of error, Mays contends that the district court erred in overruling his motion to suppress, in admitting over his objection an exhibit purporting to show that his license was revoked for 15 years, and in finding him guilty despite a lack of proof that his driving privileges were revoked at the time of his arrest.

IV. ANALYSIS

Mays assigns that the district court erred in overruling his motion to suppress. He argues that the officer did not have a reasonable suspicion to justify the stop of Mays' vehicle. Mays further argues that if the stop of his vehicle was unjustified, all evidence subsequently obtained was constitutionally inadmissible as the "fruit of the poisonous tree." See *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

1. District Court's Suppression Order

[1] We initially address the lack of specificity in the district court's order overruling Mays' motion to suppress. In *State v. Osborn*, 250 Neb. 57, 67, 547 N.W.2d 139, 145 (1996), the Nebraska Supreme Court mandated: "Henceforth, district courts shall articulate in writing or from the bench their general findings when denying or granting a motion to suppress. The degree of specificity required will vary, of course, from case to case." In an attempt to comply with *Osborn*, the district court stated in its order: "Upon consideration of the evidence and the law, the Court finds that there was reasonable suspicion to justify the stop of the automobile that defendant was operating and

that, therefore, the defendant's motion should be overruled." In this case, some detailed findings of fact would have been illuminating. As indicated above, certain aspects of Kyle's testimony were conflicting, and how the district court judge arrived at his conclusion to overrule the motion to suppress would have helped us apply the standard of review we are obliged to follow. Even after resolving all conflicts in the testimony of Kyle in favor of the State, we conclude that there was not sufficient justification for the stop of Mays' vehicle. We set forth the reasons for our conclusion below.

2. Standard of Review

If police acted without a warrant, the State has the burden to prove the reasonableness of the search or seizure. *State v. Vermuele*, 241 Neb. 923, 492 N.W.2d 24 (1992); *State v. Valdez*, 5 Neb. App. 506, 562 N.W.2d 64 (1997). On appeal, the ultimate determination of reasonable suspicion is reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996).

3. Reasonable Suspicion

[2,3] Investigatory stops are permissible only upon a reasonable suspicion supported by specific and articulable facts that the person is, was, or is about to be engaged in criminal activity. In determining whether an officer acted reasonably, it is not the officer's inchoate or unparticularized suspicion or hunch that will be given due weight, but the specific reasonable inferences which the officer is entitled to draw from the facts in light of his or her experience. *State v. Ellington*, 242 Neb. 554, 495 N.W.2d 915 (1993). See, also, *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Whether a police officer has a reasonable suspicion based on sufficient articulable facts requires taking into account the totality of the circumstances. *Ellington, supra.*

[4,5] The record before us does not reveal the source of the information Kyle received from Baudler which provided the basis for Kyle's stop of Mays' vehicle. It is well established that an investigative stop, like probable cause, is to be evaluated by the collective information of the police engaged in a common

investigation. *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997); *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997). It is also well established that a reasonable suspicion to stop a vehicle cannot be found when there is no factual foundation explaining the source of the information being relayed between officers. In *Soukharith*, 253 Neb. at 321, 570 N.W.2d at 354, quoting *State v. Benson*, 198 Neb. 14, 251 N.W.2d 659 (1977), the Nebraska Supreme Court held that reasonable suspicion to stop a vehicle cannot be based solely on receipt by the stopping officer of a radio dispatch to stop the described vehicle " 'without any proof of the factual foundation for the relayed message.' " (Emphasis omitted.) See, also, *State v. Thompson*, 231 Neb. 771, 438 N.W.2d 131 (1989). In *Benson, supra*, the court held that where no evidence was provided at the suppression hearing regarding the information or facts relied on as the factual foundation for the broadcast message, the radio message alone did not establish the existence of reasonable suspicion.

In the present case, the State did not offer evidence regarding the factual foundation for the information conveyed to Kyle by Baudler. We can only speculate as to the source of Baudler's information. We certainly cannot presume that the source of the information was reliable. See, e.g., *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992) (holding that status of citizen informant cannot attach unless affidavit sets forth circumstances from which existence of status can reasonably be inferred). As stated by one court when explaining why an unknown informant had little credibility: "The tip could have been based on first-hand information but, absent even a claim that it was, it is also possible that the tipster's purported knowledge was second-hand or third-hand or supposition or rumor or the product of a grudge against a rival or vengeance against an enemy." *Brown v. U.S.*, 590 A.2d 1008, 1017 (D.C. 1991).

For these reasons, we conclude, based on the totality of the circumstances presented in the record before us, that Kyle failed to articulate specific and objective facts that would justify an investigatory stop under *Terry v. Ohio, supra*. The record does not establish that the police possessed a factual foundation to support a reasonable suspicion justifying the stop of Mays' vehicle. Because Kyle's knowledge of Mays' revoked driver's

license was obtained as a direct result of the illegal stop, it was error for the district court to deny Mays' motion to suppress. See *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

4. Sufficiency of Evidence

Mays also challenged the sufficiency of the evidence to support his conviction. After determining reversible error occurred at the trial level, it is necessary for an appellate court to address a defendant's assigned error regarding the sufficiency of the evidence. See, *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987); *State v. Noll*, 3 Neb. App. 410, 527 N.W.2d 644 (1995). "If it appears the evidence is sufficient to support the convictions, the cause may be remanded to the district court for further proceedings; if the evidence is not sufficient . . . the cause must be dismissed." *Lee*, 227 Neb. at 283, 417 N.W.2d at 30.

We have examined the record. Given our ruling on the suppression issue, it is axiomatic that all evidence obtained as a result of the illegal stop may not be used by the State to prosecute Mays. Viewing the remaining evidence in the record in favor of the State, it is insufficient to support a conviction. Therefore, we must reverse, and dismiss.

V. CONCLUSION

For the reasons stated above, we conclude that the district court erred in failing to grant Mays' motion to suppress. Given our resolution of the appeal, we need not address Mays' remaining assigned errors. The judgment is reversed, and the case is dismissed.

Reversed and dismissed.

Omaha Nebraska Hotel Limited Partnership, appellee, v. Douglas County Board of Equalization, appellant.

577 N.W.2d 570

Filed April 21, 1998. No. A-97-819.

1. **Taxation: Valuation: Presumptions: Evidence: Appeal and Error.** There is a presumption that a board of equalization has properly performed its official duties and that in making an assessment it has acted upon sufficient competent evidence to jus-

tify its action. The presumption of correctness disappears when there is competent evidence to the contrary. The reasonableness of the valuation made by the board then becomes a question of fact to be determined from all the evidence tending to establish the actual value of the property.

2. **Taxation: Valuation: Proof: Appeal and Error.** The burden rests on the taxpayer to establish that the valuation placed on his or her property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value.
3. **Judgments: Appeal and Error.** When reviewing an order for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

Appeal from the Nebraska Tax Equalization and Review Commission. Affirmed.

James S. Jansen, Douglas County Attorney, and Jeanne A. Burke for appellant.

Paul J. LaPuzza, of Young & LaPuzza, for appellee.

MILLER-LERMAN, Chief Judge, and IRWIN and INBODY, Judges.

IRWIN, Judge.

I. INTRODUCTION

At issue is the proper valuation for the 1996 tax year of a commercial property (Property) owned by Omaha Nebraska Hotel Limited Partnership (Partnership). The Partnership protested the $4,220,300 valuation of the Property to the Douglas County Board of Equalization (Board). The Board denied all relief. Thereafter, the Partnership appealed to the Nebraska Tax Equalization and Review Commission (TERC). After a hearing, the TERC reversed the determination of the Board, concluding that the Partnership adduced evidence establishing that the Board's decision was unreasonable or arbitrary. The TERC determined that the Property should be valued at $2,215,675 for the 1996 tax year. The Board appeals the decision of the TERC. We note that proceedings in appeals concerning the valuation and taxation of real property are unique in that a county board of equalization sits as a quasi-judicial body and apparently is also a party. See Neb. Rev. Stat. §§ 77-1502, 77-1510, 77-1510.01, and 77-1513 (Reissue 1996). As a party, a county board of equalization may appeal a decision of the

TERC, which is the situation at hand. See Neb. Rev. Stat. § 77-5019 (Reissue 1996). For the reasons stated below, we affirm.

II. FACTUAL BACKGROUND

The Property is a Ramada Inn located at 7007 Grover Street in Omaha. The Property is a nine-story hotel that was built in 1973. It comprises 133,300 square feet with 215 rooms. The Property is considered a full-service hotel, meaning that it provides food and beverage service and has lounge facilities. The Partnership acquired the Property as part of a bulk purchase of six properties in September 1994. The Property was purchased for $3,000,000, which price included land, improvements, personal property, and business value/goodwill. The portion of the purchase price applicable to land and improvements was $2,215,675.

In 1996, the Property was assessed at $4,220,300. The assessed value of the Property had been largely unchanged since 1988. The Partnership protested the Property's 1996 property tax assessment to the Board. There is no transcription of a hearing before the Board in the record on appeal. It appears that as a result of the protest, the Board referee recommended an inspection of the Property. Based on two field inspections conducted in July 1996, James Daly, a real estate appraiser for Douglas County, recommended no change in the 1996 assessed valuation of $4,220,300. As part of his field inspections, Daly determined the 1994 sale of the Property to be for less than market value and compared the assessed value for the Property on a per-square-foot basis to hotels and motels in the immediate vicinity. The Board adopted Daly's recommendation and dismissed the protest. Although the Board's determination is not dated, § 77-1510 provides a taxpayer 30 days after a county board of equalization's adjournment to file an appeal to the TERC. For protests such as the one before us, the adjournment is deemed to be July 25 of the relevant year. See *id.* Therefore, the Partnership's appeal to the TERC on August 23 was timely.

At the hearing before the TERC, the Partnership offered the testimony of Michael J. Costa, senior vice president of First American Tax Valuation, and Mark L. Nunnelly, assistant trea-

surer for FGS Nebraska Hotel Corporation, which is a general partner of the Partnership. Daly testified for the Board. We generally describe the testimony below. Additional facts necessary for the resolution of this appeal will be set forth in the analysis.

Costa was hired by the Partnership to prepare a market value analysis of the Property. According to Costa's market value analysis, the market value of the land and building of the Property was $2,215,675. Costa provided reasons why Daly's comparison of the Property's assessed value with the assessed values of other hotels in the immediate area was improper and why the 1994 sale of the Property was a good measure of its market value. Generally, Nunnelly testified regarding the 1994 sale of the property and the present condition of the property. Daly testified regarding the reasons for his recommendation that the valuation of the Property remain unchanged.

After hearing the evidence, the TERC reversed the decision of the Board and ordered that the Property be valued for the 1996 tax year at $2,215,675. The TERC first concluded that the Board's comparables were inadequate. In support, the TERC found that only one of the Board's comparables was similar to the Property and that this one similar comparable was valued lower than the Property although it had been significantly renovated prior to valuation. The TERC reasoned that one comparable did not provide a sound basis to derive reliable valuation conclusions. In addition, the TERC found that there had been a marked decline in the hotel and motel business for several years since the last time the valuation of the Property had been adjusted. For these reasons, the TERC found that the Board's assessed value was not supported by the evidence and that the Partnership had proved that the Board's decision was unreasonable or arbitrary. The Board timely appealed to this court.

III. ASSIGNMENTS OF ERROR

We summarize the Board's assignments of error as follows: (1) The TERC failed to apply the proper standard of review, (2) the TERC improperly placed the burden of proof on the Board, and (3) the TERC erred in finding that the decision of the Board was unreasonable or arbitrary.

IV. STANDARD OF REVIEW

The applicable standard of review will be set forth in the analysis below.

V. ANALYSIS

1. TERC'S STANDARD OF REVIEW

We first address whether the TERC employed the proper standard of review. The Board argues that the TERC ignored the "rebuttable presumption afforded to the [Board] and failed to enumerate what standard of review it was utilizing." Brief for appellant at 17.

Regarding the proper standard of review, Neb. Rev. Stat. § 77-1511 (Reissue 1996) provides that the TERC

> shall hear appeals and cross appeals . . . as in equity and without a jury and determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof. The commission shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary . . . .

We note that the type of review set forth in the statute is unchanged from the earlier version of the statute, which provided that appeals from county boards of equalization be heard by the district court. See § 77-1511 (Reissue 1990).

[1] The Nebraska Supreme Court has dealt with whether a rebuttable presumption exists regarding the decision of a board of equalization. The court held, under a predecessor to the present § 77-1511, that there is a presumption that a board of equalization has properly performed its official duties and that in making an assessment it has acted upon sufficient competent evidence to justify its action. However, the court further held that " '[t]he presumption disappears when there is competent evidence to the contrary . . . . The reasonableness of the valuation made by the county board of equalization then becomes a question of fact to be determined from all the evidence tending to establish the actual value of the property.' " *Boss Hotels Co. v. County of Hall*, 183 Neb. 19, 21, 157 N.W.2d 868, 869 (1968).

In the present case, the TERC determined that the Partnership presented evidence showing that the manner by which the

Board determined to leave the Property's assessed value unchanged was deficient. Therefore, the presumption of correctness was rebutted, and the reasonableness of the Board's valuation became a question of fact. The Board's allegation that the TERC ignored a rebuttable presumption of correctness is without merit. It is apparent from its written order that the TERC employed the proper standard of review. The order specifically provides: "[T]he decision of the [Board] was unreasonable or arbitrary."

2. Burden of Proof

The Board also assigns that the TERC improperly placed the burden of proof on the Board rather than the Partnership. The Board argues that it can be inferred from the TERC's findings of fact that the TERC shifted the burden to the Board. According to the Board, the TERC improperly required the Board to defend its valuation of the property.

[2] It is well established that the burden rests on the taxpayer to establish that the valuation placed on his or her property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value. *Future Motels, Inc. v. Custer Cty. Bd. of Equal.*, 252 Neb. 565, 563 N.W.2d 785 (1997); *Gordman Properties Co. v. Board of Equal.*, 225 Neb. 169, 403 N.W.2d 366 (1987).

Our review of the TERC's order and the record shows that the TERC did not place the burden of proof on the Board. Instead, after the Partnership presented evidence rebutting the presumption that the Board's valuation was correct, the TERC determined the reasonableness of the Board's valuation based on the evidence before it. This assigned error is without merit.

3. Propriety of TERC's Determination

The Board's remaining assigned errors may be summarized as asserting that the TERC erred in determining that the Board's decision was unreasonable or arbitrary. In its argument, the Board contends that the market value analysis by Costa was flawed in many respects and that the TERC ignored the competent testimony of Daly. We note that the Board does not challenge the admissibility of any of the Partnership's evidence.

[3] We review the decision of the TERC for error appearing on the record. See § 77-5019(5). When reviewing an order for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Harrison Square v. Sarpy Cty. Bd. of Equal.*, 6 Neb. App. 454, 574 N.W.2d 180 (1998); *In re Conservatorship of Estate of Marsh*, 5 Neb. App. 899, 566 N.W.2d 783 (1997).

In making its decision, the Board relied on the inspections conducted by Daly. In reaching his conclusion that the assessed valuation for the Property should remain unchanged, Daly found the 1994 sale of the Property to be for less than market value and not to be an arm's-length transaction. Daly also compared the assessed value of the Property to those of other motels and hotels in its vicinity.

At the hearing before the TERC, the Partnership offered evidence showing that the 1994 sale of the Property was a good indication of its market value. The Partnership evidence showed that after the Property was on the market for several months, the Partnership's offer was apparently the only offer made on the Property; that the parties indicated in their contract that it was an arm's-length transaction; and that the values assigned by the parties to each property in the group of six were used for federal income tax purposes and were determined by a review of the income generated by the properties.

The Partnership also offered evidence that the properties to which Daly compared the Property were not comparable. All of the Board's comparables except a Best Western were limited-service hotels, which are much less labor intensive than full-service hotels and, therefore, have a higher bottom-line net operating income. The Best Western also had some distinguishing characteristics. It is on a major strip road, whereas the Property is on a secondary strip road. The Partnership's evidence showed that the assessed value of the Best Western per square foot was 20 cents less than that established by the Board for the Property.

In addition, the Partnership offered a market value analysis prepared by Costa. Costa had analyzed the market value of the

Property using several different approaches and determined that the market value of the Property was $2,215,675.

Given the expertise of the members of the TERC, the TERC is authorized by Neb. Rev. Stat. § 77-5016(5) (Reissue 1996) to "utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it." We conclude that the Partnership's evidence provided a basis for the TERC's conclusion that the Partnership rebutted any presumption that the Board's decision was correct. As a result, the reasonableness of the Board's valuation became a question of fact. Based upon the evidence presented, the TERC did not act arbitrarily or capriciously in determining that the decision of the Board was unreasonable or arbitrary. The TERC also did not act arbitrarily or capriciously in arriving at its valuation of the Property. The TERC's valuation is supported by competent evidence and conforms to the law.

VI. CONCLUSION

For the reasons stated above, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. DAVID N. LEWIS, APPELLEE.

577 N.W.2d 774

Filed April 21, 1998. No. A-97-917.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Criminal Law: Weapons.** Any person who carries a weapon or weapons concealed on or about his or her person such as a revolver, pistol, bowie knife, dirk or knife with a dirk blade attachment, brass or iron knuckles, or any other deadly weapon commits the offense of carrying a concealed weapon.
3. **Criminal Law: Weapons: Legislature.** The Legislature, in enacting Neb. Rev. Stat. § 28-1202(1) (Reissue 1995), designated certain weapons such as revolvers, pistols, bowie knives, dirks or knives with dirk blade attachments, and brass or iron knuckles as deadly weapons per se.
4. **Criminal Law: Weapons: Intent.** When a weapon has been classified as a deadly weapon per se for the purposes of Neb. Rev. Stat. § 28-1202 (Reissue 1995), the manner of the actual or intended use of such deadly weapon is immaterial.

5. **Criminal Law: Weapons: Words and Phrases.** Regarding the phrase "or any other deadly weapon" in Neb. Rev. Stat. § 28-1202(1) (Reissue 1995), it is the element of actual or intended use which renders the words "other deadly weapons" sufficiently definite to provide citizens an opportunity to conform their conduct to the statute and to distinguish between situations involving culpable concealment and those involving innocent concealment.
6. **Statutes: Legislature: Intent: Appeal and Error.** When asked to interpret a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
7. **Statutes: Legislature: Intent.** A court has a duty to discover, if possible, legislative intent from the statute itself.
8. **Statutes: Words and Phrases.** When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning.
9. **Statutes: Legislature: Intent.** As a series or collection of statutes pertaining to a certain subject matter, statutory components of an act, which are in pari materia, may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
10. **Statutes: Appeal and Error.** 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.
11. **Statutes: Words and Phrases.** Effect must be given, if possible, to all the several parts of a statute. No sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.
12. **Statutes.** It is not within the province of a court to read meaning into a statute that is not warranted by legislative language; neither is it within the province of the court to read anything plain, direct, and unambiguous out of a statute.
13. **Criminal Law: Weapons: Words and Phrases.** Neb. Rev. Stat. § 28-1201(5) (Reissue 1995) defines "[k]nuckles and brass or iron knuckles" as any instrument that consists of finger rings or guards made of a hard substance and that is designed, made, or adapted for the purpose of inflicting serious bodily injury or death by striking a person with a fist enclosed in the knuckles. Additionally, the statute specifically provides that the terms defined in § 28-1201 are to be applicable to Neb. Rev. Stat. §§ 28-1201 to 28-1212 (Reissue 1995) unless the context otherwise requires.
14. **Criminal Law: Courts: Judgments: Double Jeopardy: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 29-2316 (Reissue 1995), the judgment of the court in any action taken under Neb. Rev. Stat. § 29-2315.01 (Reissue 1995) shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy, but in such cases the decision of the appellate court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered or which may thereafter arise in the state. When the decision of the appellate court establishes that the final order of the trial court was erroneous and the defendant had not been placed legally in jeopardy prior to the entry of such erroneous order, the trial court may upon application of the county attorney issue its war-

rant for the rearrest of the defendant, and the cause against him or her shall thereupon proceed in accordance with the law as determined by the decision of the appellate court.

15. **Constitutional Law: Double Jeopardy.** Under Neb. Const. art. I, § 12, jeopardy attaches when a judge, hearing a case without a jury, begins to hear evidence as to the defendant's guilt.

Appeal from the District Court for Sarpy County, RONALD E. REAGAN, Judge, on appeal thereto from the County Court for Sarpy County, LARRY F. FUGIT, Judge. Exception sustained.

Tricia A. Freeman, Deputy Sarpy County Attorney, for appellant.

Richard H. Hoch, of Hoch, Funke & Kelch, for appellee.

MILLER-LERMAN, Chief Judge, and IRWIN and INBODY, Judges.

INBODY, Judge.

INTRODUCTION

The State, pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 1995), has appealed the dismissal of the charge of carrying a concealed weapon against David N. Lewis. The charges against Lewis were dismissed when the Sarpy County Court determined that aluminum knuckles were not a deadly weapon per se under Neb. Rev. Stat. § 28-1202 (Reissue 1995) and that the State had not proved that Lewis used or intended to use the knuckles in a manner capable of producing death or serious bodily injury. This determination was affirmed by the Sarpy County District Court. The State requests that this court clarify what constitutes "brass or iron knuckles" for the purposes of § 28-1202.

STATEMENT OF FACTS

On July 29, 1996, at approximately 8:40 a.m. at Gold Coast Road on 84th Street, in Sarpy County, Nebraska, Deputy Frank Lara stopped a blue Ford Tempo which had been traveling 51 m.p.h. in a 35-m.p.h. zone. There were two individuals in the car, the driver and a front seat passenger, who was identified as Lewis. The driver stated that he was taking Lewis to work because Lewis' driver's license was suspended.

Deputy Lara obtained consent to search the vehicle from both the driver and Lewis. While searching the vehicle, Deputy

Lara noticed a small blue and white Igloo brand six-pack cooler located on the rear floorboard. Deputy Lara searched the cooler, finding one sandwich, two cans of Mountain Dew soda, a bag of chips, and a set of metal or aluminum knuckles. Lewis claimed ownership of the cooler. The driver of the vehicle was given a speeding ticket and released. Lewis was cited for carrying a concealed weapon and was transported to the Sarpy County Jail.

On August 7, 1996, a complaint was filed charging Lewis with carrying a concealed weapon, in violation of § 28-1202(1). On April 21, 1997, a bench trial was held in the Sarpy County Court. At trial, Deputy Lara testified to the facts as previously set forth. At the close of the State's case, Lewis made a motion to dismiss, which motion was granted by the county court. The county court concluded that because aluminum knuckles are not specifically enumerated in § 28-1202, the State had to prove that the knuckles were carried for the purpose of causing death or serious bodily injury, and that the State did not do so.

On May 2, 1997, the State filed a notice of intent to appeal to the district court. On May 16, the State filed a statement of errors giving notice that the issue intended to be presented on appeal to the district court was that

> the County Court erred in its ruling that the State failed to prove a prima facie case because it failed to prove the element of intent. The State further contends it was not required to prove intent because the weapon that was the subject of the proceedings was a per se dangerous weapon as specifically enumerated in §28-1202 R.R.S. Nebraska (1943).

On July 15, the district court affirmed the decision of the county court albeit using different reasoning.

The district court looked to the general rules of statutory construction and the Nebraska Supreme Court case *State v. Williams*, 218 Neb. 57, 352 N.W.2d 576 (1984), in making its determination. The district court reasoned that because the Nebraska Supreme Court in *Williams* refused to expand the list of deadly weapons specifically enumerated to include all knives with a blade in excess of 3½ inches in length, the phrase "brass

or iron knuckles" should likewise not be expanded by applying the statutory definition for said phrase found at Neb. Rev. Stat. § 28-1201(5) (Reissue 1995). The district court stated that

> it is my opinion and conclusion the phrase "brass or iron knuckles"needs [sic] no definition. A reasonable person of common intelligence can read the language of § 28-1202(1) and understand that it is a criminal violation to carry certain concealed weapons, including brass or iron knuckles. This phrase is not ambiguous nor subject to interpretation. To substitute a contrary definition for a commonly understood term, and expect a person to guess that when the legislature used the term "brass or iron," it actually meant any hard substance is to defy reason.

On August 8, 1997, the State filed an application for leave to docket an appeal to this court, which application was sustained.

ASSIGNMENT OF ERROR

The State's sole assigned error is that the trial court erred in granting Lewis' motion to dismiss at the close of the State's case in chief because aluminum knuckles are per se a deadly weapon under § 28-1202 as defined in § 28-1201(5).

STANDARD OF REVIEW

[1] Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Van Ackeren v. Nebraska Bd. of Parole*, 251 Neb. 477, 558 N.W.2d 48 (1997); *State v. Kennedy*, 251 Neb. 337, 557 N.W.2d 33 (1996).

DISCUSSION

The State has filed this appeal pursuant to § 29-2315.01, seeking a ruling by this court that aluminum knuckles are per se a deadly weapon under § 28-1202. Lewis argues that because aluminum knuckles are not specifically enumerated in § 28-1202, such an item is not per se a deadly weapon. What both the State and Lewis do agree on is that this case turns upon the language contained in §§ 28-1201(5) and 28-1202 and how these two statutory sections relate to each other.

[2] Section 28-1202(1) provides:

> Except as provided in subsection (2) of this section, any person who carries a weapon or weapons concealed on or about his or her person such as a revolver, pistol, bowie knife, dirk or knife with a dirk blade attachment, brass or iron knuckles, or any other deadly weapon commits the offense of carrying a concealed weapon.

Subsection (2) provides for affirmative defenses to the offense and is not at issue in the case at bar.

[3-5] The Legislature, in enacting § 28-1202(1), designated certain weapons such as revolvers, pistols, bowie knives, dirks or knives with dirk blade attachments, and brass or iron knuckles as deadly weapons per se. See *State v. Valencia*, 205 Neb. 719, 290 N.W.2d 181 (1980). When a weapon has been classified as a deadly weapon per se for the purposes of § 28-1202, the manner of the actual or intended use of such deadly weapon is immaterial. *State v. Kanger*, 215 Neb. 128, 337 N.W.2d 422 (1983); *State v. Valencia, supra*. However, regarding the phrase "or any other deadly weapon," the Nebraska Supreme Court held that

> it is the element of actual or intended use which renders the words "other deadly weapons" sufficiently definite to provide citizens an opportunity to conform their conduct to the statute; and to distinguish between situations involving culpable concealment, and those involving innocent concealment.

Valencia, 205 Neb. at 724-25, 290 N.W.2d at 184.

In *State v. Williams*, 218 Neb. 57, 352 N.W.2d 576 (1984), the Nebraska Supreme Court reaffirmed the holdings in *Valencia* that § 28-1202(1) designated certain enumerated weapons deadly weapons per se, that the carrying of deadly weapons per se concealed on or about the person constituted a crime regardless of the manner of the actual or intended use of the weapon, and that items not enumerated could be determined to be deadly weapons only if the manner in which they were used, or intended to be used, was capable of producing death or serious bodily injury.

The facts of *Williams* are these: Williams and a codefendant were arrested on suspicion of driving a stolen automobile.

While searching the car for contraband, the police discovered a pellet gun, which resembled a .357 Magnum firearm, in the glove compartment and an 8½-inch-long serrated steak knife with a 4¾-inch blade beneath the driver's seat. Williams was convicted of carrying a concealed weapon, in violation of § 28-1202(1), and claimed on appeal that the trial court erred in failing to instruct the jury that the concealment of a weapon may be innocent as opposed to culpable. In response, the State argued that the list of per se deadly weapons enumerated in § 28-1202 should be expanded to include the steak knife and pellet gun. The Nebraska Supreme Court disagreed, holding that the steak knife and pellet gun were not per se deadly weapons under § 28-1202 and reversed Williams' convictions, stating:

> We refuse to expand the *Valencia* holding or to construe § 28-1202(1) in that fashion. The context of Chapter 28, article 12, requires that the concept of per se deadly weapon[s] be limited to the specific weapons enumerated in § 28-1202(1). To hold otherwise would mean that every citizen carrying a kitchen paring knife with a 4-inch blade in a picnic basket containing other appropriate picnic items would be concealing a per se deadly weapon and would be guilty of a [crime] without being able to explain his innocent intent.

State v. Williams, 218 Neb. at 60, 352 N.W.2d at 579.

However, there is a critical distinction between the Nebraska Supreme Court's analysis in *Williams* and the necessary analysis required for the case at bar. In *Williams*, the State argued that the definition of "knife" included in § 28-1201 should be applied in conjunction with § 28-1202 to provide that all knives with blades over 3½ inches in length were per se deadly weapons under § 28-1202. The Nebraska Supreme Court, in reading the plain language of § 28-1202, determined that prohibiting all knives was not the intent of the Legislature. In drafting § 28-1202, the Legislature specifically prohibited certain types of knives, i.e., bowie knives, dirk knives, or knives with a dirk blade attachment. Thus, even though § 28-1201 included a definition for a knife, that section contained no definition for a "bowie knife, dirk or knife with a dirk blade attachment."

Consequently, the Nebraska Supreme Court reasoned that only the specific knives listed in § 28-1202 were per se deadly weapons, and the court refused to extend § 28-1202's "per se" classification of knives to include the more general definition of knives, as defined in § 28-1201.

Likewise, in *Williams*, the court determined that a pellet gun is not per se a deadly weapon under § 28-1202. Only "revolver[s]" and "pistol[s]" were specifically prohibited by § 28-1202, and those terms were not defined within § 28-1201. Thus, the court looked to dictionaries for definitions of those terms. The court held that a pellet gun, which is a gun that discharges BB shots by means of compressed gas or a spring, was not a firearm, nor did it fall within the definition of either a revolver or a pistol. Consequently, the court determined that a pellet gun was not per se a deadly weapon under § 28-1202.

However, in the instant case, we are dealing with a different scenario. "[B]rass or iron knuckles" are considered to be per se a deadly weapon because they are specifically enumerated in § 28-1202. There is no argument from either the State or Lewis about that fact. However, unlike *Williams*, where "bowie knife, dirk or knife with a dirk blade attachment" were not specifically defined in § 28-1202, we have before us the question of how to proceed where the term "brass or iron knuckles" has been specifically defined by the Legislature in a separate statutory provision.

[6-12] For guidance, we turn to the following general rules regarding statutory interpretation:

> When asked to interpret a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. A court has a duty to discover, if possible, legislative intent from the statute itself. [Citations omitted.] "When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning." [Citations omitted.] "As a series or collection of statutes pertaining to a certain subject matter, statutory

> components of an act, which are in pari materia, may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible." [Citation omitted.] "[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. [Citation omitted.] Further, effect must be given, if possible, to all the several parts of a statute. No sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. It is not within the province of this court to read meaning into a statute that is not warranted by legislative language; neither is it within the province of the court to read anything plain, direct, and unambiguous out of a statute."

Arizona Motor Speedway v. Hoppe, 244 Neb. 316, 321-22, 506 N.W.2d 699, 702 (1993). Therefore, we must turn to the specific language set forth in § 28-1201.

[13] Section 28-1201(5) defines "[k]nuckles and brass or iron knuckles" as "any instrument that consists of finger rings or guards made of a hard substance and that is designed, made, or adapted for the purpose of inflicting serious bodily injury or death by striking a person with a fist enclosed in the knuckles." Additionally, the statute specifically provides that the terms defined in § 28-1201 are to be applicable to "sections 28-1201 to 28-1212, unless the context otherwise requires."

From our reading of the plain language of §§ 28-1201 and 28-1202, we determine that the Legislature intended that the specific definitions set forth in § 28-1201 are to be applied to "sections 28-1201 to 28-1212, unless the context otherwise requires." See § 28-1201. Section 28-1202 specifically lists "brass or iron knuckles" as per se a deadly weapon. The term "brass or iron knuckles" is specifically defined in § 28-1201(5). Pursuant to the clear statutory language of § 28-1201(5), the definition of "brass or iron knuckles" is to be applied to § 28-1202, and consequently, "any instrument that consists of finger rings or guards made of a hard substance and that is

designed, made, or adapted for the purpose of inflicting serious bodily injury or death by striking a person with a fist enclosed in the knuckles" is per se a deadly weapon for the purpose of § 28-1202, and the State need not prove that the knuckles were used, or intended to be used, to produce death or serious bodily injury. This determination is in line with the rules of statutory interpretation requiring that a collection of statutes should be conjunctively considered and construed. We believe that this determination gives effect to the different portions of the statutory provisions and provides the most consistent and reasonable interpretation of the statutes which best serves its purpose.

Summarized, we hold that the statutory definition of "brass or iron knuckles" found at § 28-1201(5) must be read in pari materia with the provisions of § 28-1202. The county court erred in sustaining Lewis' motion to dismiss, and the district court erred in affirming the dismissal.

[14] Having concluded that the trial court erred in sustaining Lewis' motion to dismiss at the close of the State's case in chief, we must determine the effect of such a ruling. Pursuant to Neb. Rev. Stat. § 29-2316 (Reissue 1995), the judgment of the court in any action taken under § 29-2315.01

> shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy, but in such cases the decision of the appellate court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered or which may thereafter arise in the state. When the decision of the appellate court establishes that the final order of the trial court was erroneous and the defendant had not been placed legally in jeopardy prior to the entry of such erroneous order, the trial court may upon application of the county attorney issue its warrant for the rearrest of the defendant and the cause against him or her shall thereupon proceed in accordance with the law as determined by the decision of the appellate court.

[15] It is well established in Nebraska that under Neb. Const. art. I, § 12, jeopardy attaches when a judge, hearing a case without a jury, begins to hear evidence as to the defendant's guilt. *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996); *State*

v. Dail, 228 Neb. 653, 424 N.W.2d 99 (1988). It is obvious in the instant case that the trial court, which heard the case without a jury, had begun to hear evidence as to Lewis' guilt. Obviously, Lewis had been placed in jeopardy, and therefore, our legal determination pursuant to § 29-2316 is limited to the purpose of instructing the parties as to the law for pending and subsequent cases.

CONCLUSION

In sum, we have determined that the definition of "brass or iron knuckles" found in § 28-1201(5) applies to § 28-1202. Consequently, "any instrument that consists of finger rings or guards made of a hard substance and that is designed, made, or adapted for the purpose of inflicting serious bodily injury or death by striking a person with a fist enclosed in the knuckles" is per se a deadly weapon under § 28-1202. See § 28-1201(5). It follows then that the manner of the actual or intended use of such "[k]nuckles and brass or iron knuckles" is immaterial. *Id.* The State's exception is sustained.

EXCEPTION SUSTAINED.

NORBERT DORSZYNSKI AND DELORES DORSZYNSKI, APPELLANTS, V. HOWARD ARTHUR REIER, JR., APPELLEE.

578 N.W.2d 457

Filed April 21, 1998. No. A-97-995.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by inferior courts.
2. **Judgments: Child Custody: Jurisdiction: Appeal and Error.** The review of a judgment in a proceeding under the Nebraska Child Custody Jurisdiction Act is de novo. In the absence of an abuse of discretion, the judgment of the trial court will be affirmed.
3. **Actions: Child Custody: Jurisdiction: States.** The Nebraska Child Custody Jurisdiction Act, as its name suggests, addresses the matter of child custody, the end goal being that litigation concerning the custody of a child take place in the state which can best decide the case.
4. **Judgments: Child Custody: Visitation: Words and Phrases.** A child custody determination is defined as a court decision and court orders and instructions provid-

ing for the custody of a child, including visitation rights, and a contestant is defined as a person, including a parent, who claims a right to custody or visitation rights with respect to a child.

5. **Modification of Decree: Child Custody: Visitation: Jurisdiction: States.** When grandparent visitation is sought in a Nebraska court through the modification of another state's order of custody, the provisions of the Nebraska Child Custody Jurisdiction Act control the issue of whether the Nebraska court has jurisdiction over the proceeding.
6. **Child Custody: Jurisdiction.** In determining whether a court should entertain a child custody proceeding having interstate implications, the court should first determine whether it has jurisdiction and then determine whether it is appropriate to exercise jurisdiction.
7. **Pleadings: Waiver.** Matters contained in pleadings are judicial admissions insofar as the adversary is concerned, and admissions contained in a defendant's answer waive all controversy concerning the matter.
8. **Child Custody: Jurisdiction: States.** The Nebraska Child Custody Jurisdiction Act establishes a strong jurisdictional preference for the state which originally determined custody to exercise continuing jurisdiction, provided the requirements of Neb. Rev. Stat. § 43-1203(1)(b) (Reissue 1993) are satisfied. This continuing jurisdiction concept furthers the overall purpose of the act, which is to achieve greater stability and to avoid forum shopping.
9. **Modification of Decree: Child Custody: Jurisdiction: States.** Neb. Rev. Stat. § 43-1207(1) (Reissue 1993) provides that a court which has jurisdiction to make an initial or a modification decree may decline to exercise its jurisdiction if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.
10. **Child Custody: Jurisdiction: States.** The finding of an inconvenient forum can be made upon the motion of a party or the court, and in determining if it is an inconvenient forum, the court shall consider (1) if another state is or recently was the child's home state; (2) if another state has a closer connection with the child and his or her family or with the child and one or more of the contestants; (3) if substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state; (4) if the parties have agreed on another forum which is no less appropriate; and (5) if the exercise of jurisdiction would contravene the purposes of the Nebraska Child Custody Jurisdiction Act. A paramount consideration in balancing these various factors is a determination of what court is most able to act in the best interests of the child.

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

Michael J. Shaughnessy, of Shaughnessy Law Office, for appellants.

Charles R. Maser, of Bradley, Maser, Kneale, & Elsbernd, P.C., for appellee.

HANNON, SIEVERS, and MUES, Judges.

MUES, Judge.

INTRODUCTION

Norbert Dorszynski and Delores Dorszynski appeal an order of the district court for Hall County dismissing their petition for grandparent visitation. This appeal involves the issue of whether a proceeding for grandparent visitation under Neb. Rev. Stat. §§ 43-1801 through 43-1803 (Reissue 1993) is subject to the Nebraska Child Custody Jurisdiction Act (NCCJA), Neb. Rev. Stat. §§ 43-1201 through 43-1225 (Reissue 1993, Cum. Supp. 1994 & Supp. 1995). We conclude that it is.

BACKGROUND

On January 17, 1997, the Dorszynskis filed a petition in Hall County District Court. The Dorszynskis' petition alleges that Howard Arthur Reier, Jr. (Reier), has custody of Rochelle Reier (Rochelle), the Dorszynskis' granddaughter, and that Reier lives in Montana, while Rochelle's mother, Kathleen Jarvio, lives in Wyoming. The petition alleges that the Dorszynskis are the parents of Jarvio and that her marriage to Reier was dissolved in Hall County District Court in August 1985. At that time, Jarvio was granted custody of Rochelle. The petition further alleges that a district court in the State of Wyoming subsequently granted Reier custody. The final allegation is that the parties had attempted to reconcile their differences but those differences were irreconcilable, which left them no recourse but to seek redress from the court. Thus, the Dorszynskis asked the district court to grant them grandparent visitation with Rochelle.

Reier answered, admitting all of the allegations except that his marriage to Jarvio had been dissolved in Hall County and that the parties have irreconcilable differences forcing them to seek legal recourse. On July 9, 1997, Reier filed a motion to dismiss the action, alleging that the State of Nebraska no longer had subject matter jurisdiction.

A hearing was held on Reier's motion to dismiss on August 5, 1997, whereat the only evidence offered was a copy of a modification order filed on August 31, 1995, in the Carbon County District Court, State of Wyoming. The order is in a case

entitled "Howard Arthur Reier, Jr., Petitioner, vs. Kathleen A. Reier, a/k/a Kathleen A. Jarvio, Respondent," civil case No. 95C-109. It reflects that upon receipt of evidence, the court made certain findings, including that it had jurisdiction over the parties and the subject matter; that Jarvio had been a bona fide resident of Wyoming for at least 60 days before the action was commenced and had "waived any objection to jurisdiction and venue in open court"; that the parties had been divorced by decree of the Hall County, Nebraska, district court on August 21, 1985, wherein custody of Rochelle, born January 12, 1985, was granted to Jarvio; and that significant changes had occurred since that decree justifying a modification. The court then went on to grant Reier a modification of the decree by awarding joint custody of Rochelle to both parties, with physical custody granted to Reier. Jarvio was granted certain visitation rights and was not ordered to pay child support for reasons unnecessary to this opinion. The Wyoming court's order is comprehensive and not unlike that expected to be entered under similar circumstances by a court of this state.

In a written order filed August 21, 1997, the Hall County District Court found that the marriage of Jarvio and Reier had been dissolved in Hall County on August 21, 1985, and that custody of Rochelle was given to Jarvio at that time. The court further found that pursuant to agreement of the parties, custody was changed by the district court for Carbon County, Wyoming, on August 31, 1995, wherein Jarvio and Reier "submitted themselves to the jurisdiction of the Wyoming court and the child was a resident of the state of Wyoming." Observing that § 43-1803 provides that grandparents seeking visitation have the right to file a petition in the district court of the county in which the dissolution took place, the district court nonetheless found that the parents had subsequently "waived jurisdiction to the state of Wyoming which assumed jurisdiction of the matter of the custody and well-being of the minor child." Determining that it was not in the child's best interests to have custody or visitation matters decided and orders entered in more than one forum in regard to parents or grandparents, that Wyoming had assumed jurisdiction, and that Nebraska was an inconvenient forum under the NCCJA and specifically under § 43-1207, the

court refused "to assume jurisdiction and issue more orders affecting the life of the child which may or may not be in conflict with the court in Wyoming." The Dorszynskis' petition was dismissed, and they timely appealed.

ASSIGNMENTS OF ERROR

The Dorszynskis allege that the district court misinterpreted the NCCJA and that it erred in finding that Nebraska was an inconvenient forum to decide grandparent visitation and in dismissing the petition before a hearing on the merits was held.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by inferior courts. *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996).

[2] The review of a judgment in a proceeding under the NCCJA is de novo. In the absence of an abuse of discretion, the judgment of the trial court will be affirmed. *Van Norman v. Upperman*, 231 Neb. 524, 436 N.W.2d 834 (1989).

DISCUSSION

It is obvious from the allegations of the Dorszynskis' petition that they were seeking visitation pursuant to Nebraska's grandparent visitation statutes, §§ 43-1801 through 43-1803. Section 43-1803(1) requires that a grandparent seeking visitation in a case where a dissolution of marriage has occurred shall file a petition for such visitation in the district court of the county in which the dissolution proceeding took place. The Dorszynskis filed their petition in the district court for Hall County, which is clearly where the marriage of Jarvio and Reier was dissolved in 1985. However, the evidence is that all interested parties, save the Dorszynskis, reside outside Nebraska and that Rochelle's current physical custody in Reier is the result of an order issued by a district court in the State of Wyoming. These allegations are contained in the Dorszynskis' petition and appear to be mandated by § 43-1209(1)(b). This statute, a part of the NCCJA, is obviously designed to alert a court to real or potential jurisdictional disputes and to avoid jurisdictional competi-

tion and conflict with courts of other states in matters of child custody. See § 43-1201.

[3,4] The NCCJA, as its name suggests, addresses the matter of child custody, the end goal being that litigation concerning the custody of a child take place in the state which can best decide the case. See § 43-1201. Certainly the Dorszynskis do not seek custody of Rochelle in the strict sense of the term. However, the NCCJA speaks to the jurisdiction of courts of this state to make child custody determinations by initial or modification decree. See § 43-1203. A child custody determination is defined as "a court decision and court orders and instructions providing for the custody of a child, including visitation rights," § 43-1202(2), and a contestant is defined as "a person, including a parent, who claims a right to custody *or visitation rights with respect to a child*" (emphasis supplied), § 43-1202(1).

[5] We believe the Dorszynskis' proceeding to obtain visitation rights squarely fits the aforesaid definitions. The Wyoming order clearly contains no visitation rights in the Dorszynskis, and while the Nebraska decree is not in our record, a fair inference is that it did not grant grandparent visitation either. To that extent, the present application might be viewed as seeking a modification decree. See § 43-1202(7). On the other hand, it might also be characterized as seeking an initial decree, at least insofar as grandparent visitation is concerned. See § 43-1202(6). But whether seeking an initial order or one modifying prior orders of a Nebraska or Wyoming court, there is little doubt that the Dorszynskis, as grandparents, have commenced a proceeding in which a custody determination, visitation, is the issue. The NCCJA makes no distinction between grandparents, parents, or any other person who claims a right to custody or visitation. To allow the venue provisions of § 43-1803 to circumvent the jurisdictional considerations of the NCCJA would create disharmony and frustrate the purpose of the NCCJA. Thus, despite the Dorszynskis' petition's complying with the venue provisions of § 43-1803, we conclude that the provisions of the NCCJA control the issue of whether the Hall County District Court had jurisdiction over the grandparent visitation proceeding under §§ 43-1801 through 43-1803. Accordingly,

we hold that when grandparent visitation is sought in a Nebraska court through the modification of another state's order of custody, the provisions of the NCCJA control the issue of whether the Nebraska court has jurisdiction over the proceeding.

This holding is consistent with cases from other jurisdictions. See, *Matter of Smith*, 840 S.W.2d 268 (Mo. App. 1992) (holding that court lacked jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) to determine grandparents' visitation rights because children had lived outside of state for 6 months prior to commencement of action); *In re Cifarelli*, 158 Vt. 249, 611 A.2d 394 (1992) (holding that under UCCJA, Bermuda was proper forum to determine custody and grandparent visitation issues because child had no home state since she was only 5 months old and had lived in several states when her parents died, and child had closest connection to Bermuda since she had been living there for 13 months prior to grandparent's action being filed); *Lee v. Meeks*, 592 So. 2d 282 (Fla. App. 1991) (holding that UCCJA had not displaced principles of law traditionally applied to habeas corpus proceedings and that in ruling on and denying habeas corpus, trial court's determination of child's best interest was required, thus Florida trial court properly denied enforcement of Tennessee court's order granting temporary custody to grandparents); *In re Gibson*, 61 Ohio St. 3d 168, 573 N.E.2d 1074 (1991) (holding that there was no jurisdiction under UCCJA where grandfather was seeking visitation rights when no precipitating event such as parental death or divorce had occurred, and that UCCJA's definition of custody limited grandparent visitation issues to actions under UCCJA); *Counts v. Bracken*, 494 So. 2d 1275 (La. App. 1986) (holding that Louisiana court did not have jurisdiction under UCCJA to determine grandparent visitation when custodial parent and child had lived continually in Arkansas for 7 years).

[6] In determining whether a court should entertain a child custody proceeding having interstate implications, the court should first determine whether it has jurisdiction and then determine whether it is appropriate to exercise jurisdiction. *Van Norman v. Upperman*, 231 Neb. 524, 436 N.W.2d 834 (1989).

Did District Court Have Jurisdiction?

Reier's motion alleges that the Hall County District Court does not have subject matter jurisdiction because the State of Wyoming has assumed jurisdiction over Rochelle.

[7] Section 43-1203 addresses jurisdiction under the NCCJA and makes it apparent that such determination cannot be made in a vacuum. Rather, factual determinations are required on several salient matters to be discussed. As stated earlier, the evidence in this case is sparse. The pleadings in Hall County District Court and exhibit 1, the Wyoming court's modification order, form the basis of our review. Matters contained in pleadings are judicial admissions insofar as the adversary is concerned, *Miller v. Radtke*, 230 Neb. 561, 432 N.W.2d 542 (1988), and admissions contained in a defendant's answer waive all controversy concerning the matter, *State ex rel. Douglas v. Morrow*, 216 Neb. 317, 343 N.W.2d 903 (1984). Thus, the substance of the Dorszynskis' petition was, for the most part, established by Reier's answer. The only other evidence in our record is exhibit 1.

Section 43-1203(1) provides, in pertinent part, that a court of this state has jurisdiction to make a child custody determination if:

> (a) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of his or her removal or retention by a person claiming his or her custody or for other reasons, and a parent or person acting as parent continues to live in this state;
>
> (b) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his or her parents, or the child and at least one contestant, have a significant connection with this state and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships;
>
> (c) The child is physically present in this state and (i) the child has been abandoned or (ii) it is necessary in an

emergency to protect the child because he or she has been subjected to or threatened with mistreatment or abuse or is otherwise neglected;

(d)(i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with subdivision (a), (b), or (c) of this section, or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction; or

(e) The child is not an Indian child over which jurisdiction is otherwise provided under the Nebraska Indian Child Welfare Act.

Subsections (1)(c) and (e) are not applicable here based on the pleadings and evidence.

Thus, there are potentially three bases upon which the district court here could exercise jurisdiction over the Dorszynskis' proceedings to obtain grandparent visitation. The first is the "home state" prong, subsection (1)(a). Home state is defined in pertinent part in § 43-1202(5) as the state in which the child immediately preceding the time involved lived with his or her parents, a parent, or a person acting as parent, for at least 6 consecutive months.

In this regard, the record establishes that the Dorszynskis live in Nebraska, Jarvio in Wyoming, and Rochelle and Reier in Montana. How long Rochelle had lived outside Nebraska is neither alleged nor directly addressed by the evidence. However, the Wyoming court order was entered on August 31, 1995, and according to its terms, Jarvio then resided in Wyoming and had for at least 60 days. The Wyoming order changed physical custody to Reier, implying that Rochelle had resided with Jarvio immediately prior to the order and with Reier immediately following it. The evidence does not clearly establish where Reier resided at the time of the Wyoming order or how long Reier has resided in Montana. The inference is that Reier resided in either Montana or Wyoming at the time of the August 1995 Wyoming order and that he has continued to do so since that time with Rochelle in his physical custody. Thus, the evidence clearly demonstrates that Nebraska was not Rochelle's home state

when the petition was filed, and the only reasonable inference is that she had not resided in Nebraska within the 6 months prior to such filing. No jurisdiction exists under § 43-1203(1)(a).

[8] The next potential basis for the exercise of jurisdiction is what we will refer to as the "significant connection—substantial evidence" grounds of § 43-1203(1)(b). The Dorszynskis, citing *Range v. Range*, 232 Neb. 410, 440 N.W.2d 691 (1989), argue that Nebraska's jurisdiction was not affected by the fact that Rochelle has a new home state. Indeed, the NCCJA establishes a strong jurisdictional preference for the state which originally determined custody to exercise continuing jurisdiction, provided the requirements of § 43-1203(1)(b) are satisfied. *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996). This continuing jurisdiction concept furthers the overall purpose of the act, which is to achieve greater stability and to avoid forum shopping. See *id.*

While the Dorszynskis, as residents of Nebraska and as "contestants" under the NCCJA, presumably have a significant connection with Nebraska, Rochelle had lived outside the state for over 18 months at the time the petition was filed; there is no evidence in the record attempting to establish that Rochelle continues to have any connection with Nebraska except for the Dorszynskis, and there is no evidence of the nature of Rochelle's relationship with the Dorszynskis or with any other person in this state. Thus, there is no showing that there is substantial evidence connecting Nebraska to Rochelle's present or future care, protection, training, and personal relationships. Indeed, the opposite prevails on our review. It is clear from the sparse record before us that the conditions of § 43-1203(1)(b) were not satisfied. As stated in *Range*:

> " 'Although the new state becomes the child's home state, significant connection jurisdiction continues in the state of the prior decree where the court record and other evidence exists and where one parent or another contestant continues to reside. *Only when the child and all parties have moved away is deference to another state's continuing jurisdiction no longer required.*' . . ."

(Emphasis in original.) 232 Neb. at 414, 440 N.W.2d at 694. Here, the evidence is that Rochelle and her parents have moved away from this state.

We move to the final prong of potential jurisdiction here, § 43-1203(1)(d). This provision authorizes jurisdiction if it appears that no other state would have jurisdiction under prerequisites substantially in accordance with subsections (1)(a), (b), or (c) of § 43-1203 or another state has declined to exercise jurisdiction because Nebraska is the more appropriate forum, and if it is in the child's best interests that Nebraska assume jurisdiction. Both Wyoming and Montana have prerequisites to jurisdiction similar to subsections (1)(a), (b), and (c) of § 43-1203. See, Mont. Code Ann. § 40-4-211 (1997); Wyo. Stat. Ann. § 20-5-104 (Michie 1997). On the evidence here, it would seem that either of these states would be more likely candidates to exercise jurisdiction than Nebraska. Moreover, neither party alleged or proved that either Wyoming or Montana has declined jurisdiction over this matter in favor of Nebraska as the more appropriate forum.

Based on the undisputed evidence before us, we find it highly unlikely that the Hall County District Court had jurisdiction over this proceeding under any of the grounds recognized in § 43-1203.

Did District Court Properly Decline to Exercise Jurisdiction?

But even were we to assume that jurisdiction existed under § 43-1203, a Nebraska court may still be precluded from modifying a custody decree entered by another state, see § 43-1214 (if court of another state has made custody decree, Nebraska court shall not modify decree unless (1) it appears that state in which decree was rendered no longer has jurisdiction or has declined to assume jurisdiction to modify decree and (2) Nebraska court has jurisdiction), or may decline to exercise jurisdiction if it finds that it is an inconvenient forum, see § 43-1207. The district court's order contains language suggestive of both views, but its dismissal is premised on *declining* to exercise jurisdiction under § 43-1207 rather than on being *precluded* from doing so under § 43-1214. Since we conclude that the court's action was proper under § 43-1207, we need not decide whether it was also appropriate under § 43-1214.

[9,10] Section 43-1207(1) provides that a court which has jurisdiction to make an initial or a modification decree may

decline to exercise its jurisdiction if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum. The finding of an inconvenient forum can be made upon the motion of a party or the court, see § 43-1207(2), and in determining if it is an inconvenient forum, the court shall consider (1) if another state is or recently was the child's home state; (2) if another state has a closer connection with the child and his or her family or with the child and one or more of the contestants; (3) if substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state; (4) if the parties have agreed on another forum which is no less appropriate; and (5) if the exercise of jurisdiction would contravene the purposes of the NCCJA, see § 43-1207(3). A paramount consideration in balancing these various factors is a determination of what court is most able to act in the best interests of the child. See *Van Norman v. Upperman*, 231 Neb. 524, 436 N.W.2d 834 (1989). See, also, *Dennis v. Dennis*, 387 N.W.2d 234 (N.D. 1986).

The review of a judgment in a proceeding under the NCCJA is de novo. In the absence of an abuse of discretion, the judgment of the trial court will be affirmed. *Van Norman v. Upperman, supra.* Nebraska is no longer Rochelle's home state. Rochelle resides in Montana with Reier. Jarvio resides in Wyoming. The State of Wyoming, under standards similar to those in Nebraska and with the agreement of the parties, found that it had jurisdiction in 1995. It appears that evidence of Rochelle's future care, protection, training, and personal relationships is more readily available in Wyoming or Montana. Indeed, it is easy to see how the purposes of the NCCJA would be contravened if the Hall County District Court exercised jurisdiction. It was not an abuse of discretion for the district court to find, from the evidence here, that Nebraska was an inconvenient forum in which to litigate the Dorszynskis' grandparent visitation issue.

The Dorszynskis argue that the district court prevented it from adducing evidence and, thus, that the district court erred in failing to give them an opportunity to prove that they and

Rochelle have a significant connection with this state, that they have a personal relationship with Rochelle, and that it was in Rochelle's best interests for the Hall County District Court to assume jurisdiction. There is no evidence in the record that the Dorszynskis were precluded from offering any evidence concerning any of these or other matters that may have concerned them at the hearing on Reier's motion to dismiss. This hearing was held on July 22, 1997, and was continued to August 5. Some evidence was adduced, and written arguments were submitted to the court. Thus, the Dorszynskis' argument that they were precluded from offering evidence is without merit.

Finally, the Dorszynskis contend that the district court should have contacted the Wyoming court to discuss the availability of grandparent visitation and the jurisdictional issue. The Dorszynskis cite no authority for their proposition. However, § 43-1206(3) does provide in pertinent part that before assuming jurisdiction, a court shall communicate with a court involved in another pending proceeding concerning custody of a child. The district court did not assume jurisdiction. Thus, there was no requirement that the Wyoming court be contacted under § 43-1206(3).

CONCLUSION

Assuming, without deciding, that the district court had jurisdiction over this custody proceeding, it did not abuse its discretion in declining to exercise such jurisdiction in the instant case. The order dismissing the Dorszynskis' petition is affirmed.

AFFIRMED.

ELDEAN E. HANSMEYER AND DIANE K. HANSMEYER, APPELLANTS AND CROSS-APPELLEES, V. NEBRASKA PUBLIC POWER DISTRICT, APPELLEE AND CROSS-APPELLANT.
578 N.W.2d 476

Filed April 28, 1998. No. A-96-1164.

1. **Actions: Equity: Public Meetings: Appeal and Error.** Actions for relief under the Nebraska public meetings laws are tried as equitable cases, given that the relief sought is in the nature of a declaration that action taken in violation of the laws is

void or voidable; thus, such cases are tried and reviewed by the appellate courts as equity cases.

2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Judgments: Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
4. **Public Policy: Public Meetings.** The formation of public policy is public business and may not be conducted in secret. Every meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies.
5. **Public Meetings: Notice: Time.** Each public body is required to give reasonable advance notice of the time and place of a meeting and to provide an agenda of the subjects to be considered at the meeting.
6. **Statutes: Public Meetings.** The public meetings laws are to be broadly interpreted and liberally construed to obtain the objective of openness in favor of the public.
7. **Public Meetings: Notice.** The purpose of the agenda requirement of the public meetings laws is to give some notice of the matter to be considered at a meeting so that persons who are interested will know which matters will be for consideration at the meeting.
8. **Public Meetings: Time.** Any motion, resolution, rule, or formal action of a public body made or taken in substantial violation of the public meetings laws shall be voidable by the district court if suit is commenced more than 120 days after, but within 1 year of, the meeting.
9. ____: ____. An action taken in violation of the public meetings laws shall be declared void by the district court if the suit is commenced within 120 days of the meeting of the public body at which the action occurred.
10. **Statutes: Intent: Presumptions.** Where different language is used in different parts of a statute, it is presumed that the language is used with a different intent.
11. **Legislature: Statutes: Intent: Presumptions.** The Legislature, in enacting an amendatory statute, is presumed to have known the preexisting law, and it is presumed that the language was intentionally changed for the purpose of effecting a change in the law itself.
12. **Words and Phrases.** Void is ineffectual, having no legal force or binding effect; whereas, voidable is that which may be avoided or declared void, not absolutely void.
13. **Attorney Fees: Appeal and Error.** Discretionary decisions of the trial courts on attorney fees will be upheld on appeal absent a showing of abuse of discretion.
14. **Attorney Fees.** In awarding attorney fees, courts consider the nature of the case, the amount involved in the controversy, the services performed, the length of time required for preparation, the skill devoted to preparation and presentation of the case, and the novelty and difficulty of the questions raised, as well as customary charges of the bar for similar services.
15. **Statutes: Public Meetings.** The public meetings laws are to be broadly interpreted and liberally construed to obtain the objective of openness in government.

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

Donald J. Pepperl, of Pepperl & McMahon-Boies Law Offices, for appellants.

James A. Eske, of Barlow, Johnson, Flodman, Sutter, Guenzel & Eske, and Bonnie J. Hostetler for appellee.

HANNON, SIEVERS, and MUES, Judges.

SIEVERS, Judge.

Eldean E. Hansmeyer and Diane K. Hansmeyer, husband and wife, brought suit against the Nebraska Public Power District (NPPD), alleging that the agenda for the meeting of NPPD's board of directors (Board) on September 30, 1993, violated the requirements of the Nebraska public meetings laws, Neb. Rev. Stat. §§ 84-1408 to 84-1414 (Reissue 1987, Cum. Supp. 1992 & Supp. 1993). The agenda allegedly failed to provide an adequate description of the matters to be taken up at that meeting. In particular, item No. 3.10 on the agenda listed only "Work Order Reports," but under this topic, the Board approved a work order for $47,549,700 for the construction of a 96-mile, 345 Kilovolt (345 kV) transmission line from the Pauline substation to the Mark Moore substation. The district court found that the public meetings laws had been violated but that the adoption of the work order was only voidable. The court concluded not to void the action of NPPD and denied the Hansmeyers' request for attorney fees. They now appeal to this court.

FACTUAL BACKGROUND

On September 30 and October 1, 1993, the Board held a monthly meeting. The agenda for that meeting under item No. 3.10 listed "Work Order Reports." There was no other description under this agenda item. At this meeting, a category of work orders entitled "Work Orders $50,000 and Above to be Approved by the Board" was taken up by the Board. Within that category was a three-page document designated as "Report #1A" (work order report No. 1A) in the amount of $47,549,700. The third page of work order report No. 1A contained the state-

ment: "Construct 96 mi. 345kV transmission line from Pauline Sub to Mark Moore Sub." The actual work order, a different document than the report, is designated as "Investment 24100 [work order No. 24100]," a designation assigned by NPPD's accounting department. Work order No. 24100 breaks down the total expenditure into 11 different categories. The work order itself is stamped with the approval of the Board on September 30, 1993. It indicates an "approximate start date" of October 1993 and a "required/scheduled completion date" of March 1996. A work order at NPPD is a document which is developed to define the scope of a construction project and its cost components. NPPD work orders are generally written against previously approved budget items.

The third amended petition, upon which trial was had, alleges that the Hansmeyers own real estate across which the "Pauline-Moore" transmission line would be constructed. The third amended petition alleges that the agenda of the Board failed to advise the general public that the matter or issue of the construction of the Pauline-Moore line was to be considered by the Board, resulting in noncompliance with the mandatory requirements of the public meetings laws. The Hansmeyers allege that the Board's vote of approval for the construction of 96 miles of a 345 kV transmission line from the Pauline substation to the Mark Moore substation in the amount of $47,549,700 "is null and void," and they ask that the Board's action be set aside. NPPD admitted the vote on September 30, 1993, to approve the work order but denied the other allegations of the petition.

The case was tried before Paul D. Merritt, Jr., judge of the district court for Lancaster County, and he rendered his decision via a complete and comprehensive order on October 31, 1996. Judge Merritt found that there had been a substantial violation of the public meetings laws, rendering the Board's action voidable, but that there was no basis to void the action. As a result, the court denied the Hansmeyers' request for attorney fees and dismissed their petition.

ASSIGNMENTS OF ERROR

The Hansmeyers assign two errors: The trial court erred (1) in not declaring the vote which approved work order report No.

1A void and (2) in failing to award attorney fees. NPPD has filed a cross-appeal, asserting that the trial court erred in finding that the Board was in substantial violation of § 84-1411, thereby making the Board's action in approving work order report No. 1A voidable under § 84-1414(1) of the public meetings laws.

STANDARD OF REVIEW

[1] Actions for relief under the public meetings laws are tried as equitable cases, given that the relief sought is in the nature of a declaration that action taken in violation of the laws is void or voidable. Thus, the approach taken is that such cases are tried and reviewed by the appellate courts as equity cases. See, *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992); *Meyer v. Board of Regents*, 1 Neb. App. 893, 510 N.W.2d 450 (1993).

[2,3] In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Meyer v. Board of Regents, supra*, citing *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991). Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *Otey v. State, supra.*

DISCUSSION

[4] The Legislature declared its intent in § 84-1408 that the policy of this state is that "the formation of public policy is public business and may not be conducted in secret." That statute continues: "Every meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies . . . ." NPPD admits it is a political subdivision of the State of Nebraska. The meeting at issue is a "meeting" within the parameters of § 84-1409(2) because it involved the discussion of public business, the formation of tentative policy, or the taking of any action of the public body.

> Section 84-1411 provides that each public body shall give reasonable advance publicized notice of the time and place of each meeting . . . transmitted to all members of the public body and to the public. Such notice shall contain an agenda of subjects known at the time of the publicized notice or a statement that the agenda, which shall be kept continually current, shall be readily available for public inspection at the principal office of the public body during normal business hours.

[5] The appeal in this case involves a relatively narrow issue: Did the agenda for the September 30 and October 1, 1993, meeting provide sufficient notice of the matter to be considered, and if not, was the appropriate remedy under the public meetings laws? Each public body is required to give reasonable advance notice of the time and place of a meeting and to provide "an agenda of the subjects to be considered at the meeting." *Steenblock v. Elkhorn Township Bd.*, 245 Neb. 722, 726, 515 N.W.2d 128, 130 (1994).

In *Banks v. Board of Education of Chase County*, 202 Neb. 717, 277 N.W.2d 76 (1979), the plaintiff sought a declaration that a school board meeting which authorized the approval of a contract with Wilson & Company, who were architects, was void because of a violation of the public meetings laws with respect to the contents of the agenda. The court's opinion recited that the agenda included notice of a " 'discussion' " with John Smutz of Wilson & Company which " 'should result in determining whether we want this company or not.' " *Id.* at 723, 277 N.W.2d at 80. The Supreme Court found that although the language was not "a model of clarity, [it] did inform the public that an agreement with the architect was to be discussed and possibly entered." *Id.* The court rejected the contention that the notice on the agenda was inadequate.

When we compare the extent of the agenda notice provided in *Banks* with that provided in the instant matter, material differences are obvious. Here, the lengthy agenda listed 53 separate items and item No. 3.10 simply stated "Work Order Reports." Under that topic, the Board took up and approved work order report No. 1A, which was work order No. 24100, for an expenditure of over $47 million for the construction of a

96-mile transmission line across privately held property to connect two NPPD substations. The minutes of the meeting of September 30 and October 1, 1993, show that the vice president of operations, William A. Merrill, presented work order report No. 1A to the Board. The minutes reflect that Merrill explained that the work order report was for the construction of 96 miles of a 345 kV transmission line from the Pauline substation to the Mark Moore substation, in the amount of $47,549,700. Merrill explained to the Board the available options and the benefits of the project which he said would be a $213 million benefit to the district over a 35-year period, according to a staff study. The minutes further show that Merrill told the Board that the district's cost each month the line was delayed was approximately $750,000. There was a motion that work order report No. 1A be approved, which was carried.

[6,7] The descriptive phrase on the agenda, "Work Order Reports," hardly describes or gives notice of a matter of this magnitude. This is particularly true when we compare it with the descriptive notice approved in *Banks v. Board of Education of Chase County, supra*. The public meetings laws are to be broadly interpreted and liberally construed to obtain the objective of openness in favor of the public. *Grein v. Board of Education*, 216 Neb. 158, 343 N.W.2d 718 (1984). The purpose of the agenda requirement of the public meetings laws is to give "some notice of the matter to be considered at the meeting so that persons who are interested will know which matters will be for consideration at the meeting." *Pokorny v. City of Schuyler*, 202 Neb. 334, 339-40, 275 N.W.2d 281, 285 (1979). We have little hesitancy in concluding that an agenda item stating only "work order reports," which results in a public body's approving a $47 million, 3-year construction project traversing private land for nearly 100 miles with a major power transmission line, violated the notice requirements for an agenda under the public meetings laws. Whether intentional or not, the seemingly innocuous agenda item, "Work Order Reports," camouflaged the true nature of what would be discussed and voted upon and did not give the public meaningful notice so as to enable the public to observe and participate in the decisionmaking process. It does not even hint of the magnitude or nature of the matter to

be taken up. Thus, there was a substantial violation of the public meetings laws, but the Supreme Court's opinion in *Pokorny* requires another step in our analysis.

In *Pokorny v. City of Schuyler, supra*, a taxpayer brought suit to declare void the action taken by the Schuyler City Council relating to the purchase of land for the use and improvement of the city's sanitary sewage disposal system on the ground that the city had violated provisions of the public meetings laws. Although the case involved a number of issues, including when and where notice of a meeting should be posted, the court also addressed the sufficiency of notice in agendas. The agendas for the March 16 and 25 meetings at issue provided, respectively, "'2. Lad (sic) appraisals discussion'" and "'[d]iscussion of terms of land acquisition contract.'" 202 Neb. at 340, 275 N.W.2d at 285.

The Supreme Court said that these items, if considered separately, would not furnish "much notice of the matter to be considered by the council," *id.*, but if viewed in light of the entire record, then it was apparent that few persons would be misled as to the nature of the matter to be considered by the council. The court found that the purchase of land for the sewage disposal improvement project had been an item of business for some time at previous council meetings and that the agendas for those meetings had contained an adequate description of the matter to be considered by the council. Nonetheless, the court found the agenda items "technically deficient," *id.*, but standing alone, the agenda would not destroy the validity of the action taken at the March 16 and 25 council meetings, where the council adopted a resolution agreeing to purchase the land in question for $2,000 per acre contingent upon the city's receipt of a federal grant. The March 16 meeting was a special meeting of the council where the council voted to go into executive session with only the landowners, the board of public works, and the utility superintendent being allowed to remain. When the council reconvened in open session, the council voted to recommend to the board of public works that the board offer the landowners $2,000 per acre for the tract. There were violations of the public meetings laws because notice of this meeting was posted at 10 p.m. on March 15 and because the minutes failed to reflect

the reason for the closed session as required by § 84-1410. The meeting of March 25 was a special meeting called without compliance with Neb. Rev. Stat. § 17-106 (Reissue 1997) (authorizing special meetings of city council).

The court then said that the "effect of the invalidity of the meetings of March 16 and March 25 is the same as if the meetings had never occurred." *Pokorny v. City of Schuyler*, 202 Neb. 334, 341, 275 N.W.2d 281, 285 (1979). In assessing *Pokorny*, we believe it is noteworthy that there were other clearly established violations of the public meetings laws which did not deal with the contents of the agenda. Despite finding that it was as though the meetings had never occurred, the *Pokorny* court summarily rejected the trial court's injunction which permanently enjoined the city " 'from carrying out any action authorized' " at either meeting. *Id.* The court observed that carried to its logical conclusion, this order would prevent the city from ever purchasing the land, and the court did not "think this was the intent or purpose of the public meeting law." *Id.* The *Pokorny* court cited the principle that "where a defect occurs in proceedings of a governmental body, ordinarily the defect may be cured by new proceedings commencing at the point where the defect occurred. See 5 McQuillan, Municipal Corporations, § 16.93, p. 299; 56 Am. Jur. 2d *Municipal Corporations*, § 508 . . . ." *Id.* Thus, the *Pokorny* court said the council could authorize the purchase of the land at a subsequent meeting which complied with all statutory requirements, which actually occurred at a later meeting on March 29, 1977. The *Pokorny* court specifically observed that the agenda description for the March 29 meeting which stated " 'approval of contract with Langemeier-Wagner Company requested by EPA' " was substantial compliance with all statutory requirements concerning notice. 202 Neb. at 341, 275 N.W.2d at 285. This holding seems to construct a rather flexible, perhaps even a low, standard for notice in an agenda. We suggest this because, unless a citizen was already aware that the land under consideration by the city for purchase for the sewage facility was owned by the Langemeier-Wagner Company, this agenda item as listed would tell a citizen virtually nothing about what would be taken up under this agenda item. In short, for the agenda to make sense

and be informative, the citizen must have some prior and rather substantial knowledge of the issue. Nonetheless, on the basis of the notice provided by the quoted agenda description, the *Pokorny* court concluded that the action of the council at the March 29 meeting "cured the defects which resulted from the invalidity of the meetings of March 16 and March 25." *Id.* at 342, 275 N.W.2d at 285. Consequently, the plaintiffs were not entitled to injunctive relief, and the district court's decision was reversed.

The trial court in the instant case relied upon *Pokorny* and examined the agendas for four prior regular Board meetings of July 9 and 10, 1992, and January 7 and 8, April 1 and 2, and August 5 and 6, 1993. The court found that the agendas for those meetings failed to specifically name or allude to the Pauline-Moore transmission line. The meaning of such failure is that the defective notice for the September 30 and October 1 meeting cannot be cured by a contextual reference to a series of immediately preceding Board meetings where the Pauline-Moore project was discussed under adequate agenda notice. The trial court then noted that the agenda for the regular meeting immediately after the September 30 and October 1 meeting specifically referred to the Pauline-Moore project. The agenda for the regular meeting of October 28 and 29 had "Pauline-Moore 345 kV Routing & ROW Acquisition" under agenda item No. 6.1.1. Under this item, the Board received an "update" from the vice president of operations, Merrill, summarizing the routing process for the transmission line, and Merrill told the Board about a "recent influx of correspondence from landowners and concerned citizens along the corridor study area."

The evidence shows that the initial funding for the Pauline-Moore transmission line was approved at the July 9 and 10, 1992, regular Board meeting as part of the 1993 budget and that final funding was provided for in the 1994 budget at the August 5 and 6, 1993, regular meeting. However, after examination, we find that the agendas for neither meeting provided any clue that a major project to build a transmission line between the Pauline substation and the Mark Moore substation would be considered and voted upon. However, the agenda for the March 8 and 10, 1995, regular meeting, under the category of "Work Order

Reports," listed item No. 5.12 as "Contract No. 95-2 - 345 kV Transmission Construction - Pauline-Moore." This agenda description is materially different from that found wanting for the September 30 and October 1 meeting. Under *Pokorny*, there was sufficient agenda notice for the March 1995 meeting.

At the March 1995 meeting, the Board adopted resolution No. 95-49, which recited that bids on contract No. 95-2, 345 kV transmission line construction, had been invited, received, opened, read, and tabulated. The minutes also recite that management had studied and analyzed the bids and recommended acceptance of a certain bid as the lowest and best bid. Consequently, the Board determined and found that the bid of Tri-O, Inc., of Salt Lake City, Utah, was the lowest and best evaluated bid on contract No. 95-2, and thus a resolution was passed by the Board to accept the bid of Tri-O, Inc., at a "base bid price" of $7,806,136.43. However, the minutes also show that during the "time designated for public comments," various citizens, landowners, and an attorney addressed the Board concerning the Pauline-Moore line route. Some of these people urged a delay of the project. Although the Board rejected a proposal for an independent review of the Pauline-Moore transmission line project by People Organized for Wise Energy Representation (POWER), the Board nonetheless formed an ad hoc committee to meet with the POWER group "to review areas of concern by affected landowners in the Pauline-Moore Project."

The foregoing evidence about the agenda and the occurrences at the March 8 and 10, 1995, meeting establishes how easy it was to designate on the agenda that the Pauline-Moore transmission line or some facet thereof was going to be taken up at a Board meeting. The notice provided in the agenda for the March 1995 meeting is clearly sufficient under *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979), to give some notice of the matter to be considered at the meeting so interested persons would know what would be considered at that particular meeting.

Void or Voidable?

[8,9] Any motion, resolution, rule, or formal action of a public body made or taken in substantial violation of the public

meetings laws shall be voidable by the district court if suit is commenced more than 120 days after, but within 1 year of, the meeting. § 84-1414. This lawsuit was commenced more than 120 days after the action of September 30 and October 1, 1993, but within 1 year of that date. Section 84-1414 also pronounces that an action taken in violation of the public meetings laws "shall be declared void by the district court if the suit is commenced within one hundred twenty days of the meeting of the public body" at which the action occurred. The Hansmeyers assert that the district court was obligated to "void the subject vote" once it found that a violation had occurred. Brief for appellants at 17.

[10,11] The Hansmeyers' argument seems to ignore the difference between void and voidable. There are two different terms used in parallel language in § 84-1414: void and voidable. Where different language is used in different parts of a statute, it is presumed that the language is used with a different intent. 73 Am. Jur. 2d *Statutes* § 235 (1974). Prior to 1983, the statute contained a 1-year statute of limitations and provided only that any action made or taken in violation of the public meetings laws "shall be declared void." The statute of limitations provision was amended to its present form by 1983 Neb. Laws, L.B. 43. We have said in *In re Interest of Shea B.*, 3 Neb. App. 750, 755, 532 N.W.2d 52, 56 (1995), quoting *State v. Suhr*, 207 Neb. 553, 300 N.W.2d 25 (1980): "It has been stated that '[t]he Legislature, in enacting [an amendatory] statute, is presumed to have known the preexisting law, and [it is presumed] that the language was intentionally changed for the purpose of effecting a change in the law itself. . . .' "

[12] The sponsor of L.B. 43, Senator Peter Hoagland, during floor debate, stated that the legislation changes "the enforcement provisions a little bit by changing the statute of limitations provisions on the issue of when the decision of a public body is voidable as opposed to . . . being void." Floor Debate, Committee on Government, Military, and Veterans' Affairs, 88th Leg., 1st Sess. 1897 (Mar. 22, 1983). The senator's language comports with the well known legal distinction between void and voidable, whereby, void is ineffectual, having no legal force or binding effect; whereas, voidable is " '[t]hat which may be avoided,

or declared void[,] not absolutely void . . . .'" See *Miller v. School Dist. No. 69*, 208 Neb. 290, 297, 303 N.W.2d 483, 488 (1981), quoting Black's Law Dictionary (5th ed. 1979).

The district court found under the circumstances of this case that "nothing will be served, at this late date, by voiding the September 30/October 1, 1993, vote." This decision is rather unassailable when it is remembered that the Pauline-Moore project was one developed, studied, approved, and budgeted in increments. The reality is that a "no vote" by the Board at any juncture as the project proceeded could have resulted in the death of the project. As we have discussed from the evidence, the quality of notice given to the public varied greatly from meeting to meeting, but there is no evidence that any decision to undertake the project, or to continue moving forward with it, was made in secret without either public discussion or accountability from the Board.

Therefore, given these facts, along with the subsequent ratification at the March 1995 meeting which we have detailed and which was under adequate agenda notice, we conclude that the district court was correct in finding that the Board's action of September 30 and October 1, 1993, should not be declared void. For this reason, we agree with the district court's finding that the action of the Board of September 30 was voidable, but we affirm the conclusion that it should not be declared void.

Attorney Fees.

[13] The Hansmeyers claim that they were successful parties and therefore should have been awarded attorney fees by the district court. The relevant statutory provision is § 84-1414(3), which provides that citizens of this state may commence actions in district court for the purpose of requiring compliance with or preventing violations of the public meetings laws or for the purpose of declaring an action of a public body void. Section 84-1414(3) also provides that "[t]he court may order payment of reasonable attorney's fees and court costs to a successful plaintiff in a suit brought under this section." The Hansmeyers' brief concedes that the decision to award fees is a discretionary one with the trial court. It is well established that discretionary decisions of the trial courts on attorney fees will be upheld on

appeal absent a showing of abuse of discretion. *In re Estate of Watkins*, 243 Neb. 583, 501 N.W.2d 292 (1993). The Hansmeyers also concede that in addition to the question of the trial court's discretion, the term "successful plaintiff" is also a determinative factor on whether attorney fees are awarded.

The court in *Airport Inn v. Nebraska Equal Opp. Comm.*, 217 Neb. 852, 863, 353 N.W.2d 727, 734 (1984), in the portion of its opinion dealing with whether attorney fees should be awarded, acknowledged that "success can sometimes be measured in small ways." *Airport Inn* was a Nebraska Fair Employment Practice Act case, where the plaintiff was successful before the commission. The court held that it was an abuse of discretion for the district court not to award the plaintiff attorney fees. In the case at hand, the case was tried upon the third amended petition, and the relief requested was that the vote of approval of the Board on work order report No. 1A on September 30 and October 1, 1993, be set aside as null and void. The district court did not grant that relief, nor do we. However, the district court found a violation of the public meetings laws with respect to the adequacy of notice in the agenda, which finding we have affirmed. But there was later ratification of the flawed action after proper agenda notice.

[14] We note that the meeting constituting the ratification upon proper agenda notice was held after this suit had been filed. Thus, although the Hansmeyers were not successful in accomplishing all of the prayer of their third amended petition, voiding the action of the Board in approving the work order report on September 30, 1993, there was, during the course of the lawsuit, compliance with the notice requirements for an agenda and a ratification which "saved" a Board decision which could have been voided. The statute, § 84-1414, allows citizens of the state to commence suit for multiple purposes, including requiring compliance with or preventing violations of the public meetings laws, as well as declaring an action of the public body void. Section 84-1414 then allows the court to order payment of costs to a "successful plaintiff in a suit brought under this section." If, as appears to be true here, the agenda requirements for adequate notice were complied with only after the litigation was instituted, and since the trial court found, as have

we, that there was a substantial violation of the agenda requirements, we believe the Hansmeyers are successful plaintiffs. However, their success, as in *Airport Inn v. Nebraska Equal Opp. Comm., supra*, must be measured in small ways. The fact that the Hansmeyers did not accomplish the full objective of their lawsuit does not prevent them from being "successful plaintiffs," but, rather, goes to the extent of an award for attorney fees, as the results obtained are an appropriate consideration on that issue. See *Venter v. Venter*, 249 Neb. 712, 545 N.W.2d 431 (1996). Additionally, courts consider the nature of the case, the amount involved in the controversy, the services performed, the length of time required for preparation, the skill devoted to preparation and presentation of the case, and the novelty and difficulty of the questions raised, as well as customary charges of the bar for similar services. *Id.*

Therefore, we remand the cause to the district court for an award of appropriate attorney fees.

CROSS-APPEAL

The cross-appeal of NPPD assigns error to the district court's conclusion that there was a substantial violation of § 84-1411 with respect to the description in the agenda of the matters to be taken up at the meeting. The notice provided by agenda item No. 3.10, "Work Order Reports," has been thoroughly discussed in the foregoing sections of this opinion and found to be wanting. The fact that the district court did not void the action of the Board and that we have upheld that result, principally due to the subsequent ratification, does not change the fact that the agenda failed to provide adequate notice. NPPD advances the proposition that the agenda was not misleading and that "any question concerning the detailed content of the work order reports that were to be considered by the Board at the meeting could be answered easily by examining the actual work order report documents," which were available for public inspection before the meeting at the same place where the agenda was kept. Brief for appellee on cross-appeal at 35. NPPD cites no authority, statutory or otherwise, for the proposition that the citizen must hunt up and read the documents which underlie the agenda, and we find none either.

There is, however, an alternative provision in § 84-1411 that the notice for a meeting may recite a "statement" that a "continually current" agenda "shall be readily available for public inspection at the principal office of the public body during normal business hours." But from the record, it is clear that NPPD did not utilize the option of making the agenda available for inspection *and* providing notice to the public of that fact via an "advance[d] publicized notice" of the meeting. See § 84-1411. Instead, NPPD's chosen method of operation was to put together an agenda and disseminate it to the public. We do not believe NPPD can nullify the flaw in the agenda for the September 30 and October 1, 1993, meeting by saying NPPD "could have done it by another method," when the record is clear that it did not use an alternative method. We think it self-evident that if the public body uses an agenda to provide notice, then the notice in the agenda must comport with the law for giving notice of what is to be considered at the meeting. The agenda is to give the public notice of what the governing board of the public body will take up. The agenda in this case failed to advise the public of what the Board would take up under item No. 3.10, "Work Order Reports."

[15] NPPD also advances the proposition that there "is no statutory requirement that the Board conduct public hearings or otherwise take any formal action to approve the construction of a transmission line." Brief for appellee on cross-appeal at 36. The public meetings laws are to be broadly interpreted and liberally construed to obtain the objective of openness in government. *Grein v. Board of Education*, 216 Neb. 158, 343 N.W.2d 718 (1984). In *Grein*, the court discussed that the public interest mentioned in the public meetings laws is that shared by citizens in general and by the community at large concerning pecuniary or legal rights and liabilities. The court also said that it is axiomatic that the concerns of citizens and taxpayers of a school district include the fiscal policy and cost of operating the district, as the expenses will ultimately be reflected in taxes borne by the taxpayers. These considerations apply with equal force to public power districts. *Grein* also references Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 Harv. L. Rev. 1199 (1962), saying that the people

must be able to go beyond and behind the decisions reached and be apprised of the pros and cons involved if they are to make judgments on questions of policy and to select their representatives intelligently.

These broad concepts apply with great force to the decision of the Board to expend $47 million to erect a major power transmission line between substations over nearly 100 miles of private land. Such a project obviously has a direct impact on landowners, ratepayers, and the public at large. To suggest that such a matter is not within the ambit of the public meetings laws ignores the fundamental purpose of the statutes that such decisions be made openly and upon notice to those who are affected or interested. This is not to say that every trivial decision made by NPPD and its managers is subject to the public meetings laws. It is, rather, to reject out of hand the argument advanced in the cross-appeal that the decision to build the Pauline-Moore transmission line is not subject to the public meetings laws.

CONCLUSION

We affirm the findings of the district court in all respects except that we find the Hansmeyers to be "successful plaintiffs." Therefore, we remand the cause to the district court for a determination of an appropriate award of attorney fees and costs. The cross-appeal of NPPD is without merit.

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

REBECCA S. DUKAT, APPELLANT, V. LEISERV, INC., DOING BUSINESS AS MOCKINGBIRD LANES, APPELLEE.
578 N.W.2d 486

Filed April 28, 1998. No. A-96-1257.

1. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
2. **Jury Instructions: Appeal and Error.** A jury instruction is not error if, taken as a whole, it correctly states the law, is not misleading, and adequately covers the issues.

3. **Negligence: Proof: Trial.** Before the defense of assumption of risk may be submitted to a jury, the defendant has the burden to establish the elements of assumption of risk, which are that the plaintiff knew of the danger, understood the danger, and voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's injury.
4. **Negligence.** The standard to be applied in determining whether a plaintiff has assumed the risk of injury is a subjective one based upon the particular facts and circumstances of the event. The subjective standard involves what the particular plaintiff in fact sees, knows, understands, and appreciates.
5. ____. If one who knows and comprehends the danger chooses to expose himself or herself thereto, even though the choice is not negligent, he or she will be deemed to have assumed the risk of injury and be precluded from recovery.
6. ____. Assumption of risk is predicated upon an implied consent to be treated negligently. If the person against whom the doctrine is applied is deprived of a choice in the matter, the risk is not assumed, although it may be encountered.
7. ____. A plaintiff does not assume a risk of harm unless he or she voluntarily accepts the risk. The plaintiff's acceptance of a risk is not voluntary if the defendant's tortious conduct has left him or her no reasonable alternative course of conduct in order to (a) avert harm to himself, herself, or another, or (b) exercise or protect a right or privilege of which the defendant has no right to deprive him or her.
8. **Evidence: Appeal and Error.** The submission of issues upon which the evidence is insufficient to sustain an affirmative finding is generally prejudicial and requires a second trial.
9. **Appeal and Error.** Error, to be reversible, must affect a litigant's substantial right.
10. **Juries: Negligence: Appeal and Error.** When contributory negligence is pled as a defense and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence.
11. **Negligence: Proximate Cause.** A plaintiff is contributorily negligent if (1) the plaintiff fails to protect himself or herself from injury; (2) the plaintiff's conduct concurs and cooperates with the defendant's actionable negligence; and (3) the plaintiff's conduct contributes to the plaintiff's injuries as a proximate cause.
12. **Negligence: Proof.** Contributory negligence is an affirmative defense which must be proved by the party asserting such defense.
13. **Negligence.** The distinction between assumption of risk and contributory negligence presents a difference which prevents interchangeable use of those defenses in a negligence action.
14. **Negligence: Juries.** Where different minds may reasonably draw different conclusions or inferences from the evidence adduced concerning the issues of negligence or contributory negligence and the degree thereof when one is compared with the other, such issues must be submitted to the jury.
15. **Jury Instructions.** Generally, the Nebraska Jury Instructions are to be used whenever applicable.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Reversed and remanded for a new trial.

Daniel W. Ryberg for appellant.

Richard J. Gilloon, of Erickson & Sederstrom, P.C., for appellee.

HANNON, SIEVERS, and MUES, Judges.

SIEVERS, Judge.

INTRODUCTION

We consider whether a jury should be instructed on the defense of assumption of risk when (1) the plaintiff slips and falls on an icy sidewalk outside of a bowling alley, (2) the property owner admits that the sidewalk was the only way in and out of the bowling alley, and (3) the injured plaintiff had prior knowledge of the sidewalk's icy condition.

FACTUAL BACKGROUND

Rebecca S. Dukat arrived at Mockingbird Lanes, a bowling alley in Omaha, Nebraska, at approximately 6 p.m. on Wednesday, February 2, 1994, to bowl in her league game. Witnesses described the night of February 2 as cold, with some recalling that there had been sleet and snow during the day, and others testifying that they had no memory of any precipitation. However, all the witnesses who were asked about the conditions of the bowling alley's parking lot and adjacent sidewalk agreed that they were snow and ice covered.

Dukat proceeded to walk into the bowling alley on the only sidewalk provided in and out of the building. She testified that she noticed the sidewalk was icy. After bowling three games and drinking three beers, Dukat exited the bowling alley at approximately 9 p.m. She retraced her steps on the same sidewalk. The sidewalk was still ice covered and in a condition which, according to Frank Jameson, general manager of Mockingbird Lanes, was "unacceptable" if the bowling alley were open to customers. As Dukat proceeded along the sidewalk to her car, she slipped, attempted to catch herself by reaching toward a car, and fell. She suffered a fracture of both bones in her left ankle as well as a ruptured ligament.

PROCEDURAL BACKGROUND

Dukat sued Leiserv, Inc., doing business as Mockingbird Lanes in Omaha, and Brunswick Corporation, the parent company of Leiserv, in the district court for Douglas County,

Nebraska. Dukat alleged that Leiserv and Brunswick were negligent in failing to keep the sidewalk in a reasonably safe condition, in failing to warn her of a dangerous condition, and in failing to take adequate and reasonable measures to protect her.

Leiserv and Brunswick alleged two affirmative defenses: (1) Dukat was contributorily negligent (a) in failing to maintain a proper lookout and take notice of the condition of the sidewalk and (b) in consuming alcohol to the extent that it impaired her ability to walk and to take reasonable precautions, and (2) Dukat had assumed the risk of injury.

Approximately 2 weeks before trial, a hearing was held on Leiserv and Brunswick's motion to strike the certificate of readiness. The motion to strike was precipitated by Dukat's attempt to add four witnesses, including Calvin Naegelin, to the certificate. According to Dukat's attorney, Naegelin was to be used to "interpret climatological data for the period around Feb. 2." Leiserv and Brunswick opposed the addition of Naegelin because Naegelin had not been disclosed as an expert witness in answers to interrogatories and because there was not enough time to thoroughly depose him before trial. Dukat, after arguing that Naegelin would not be used as an expert and that there was still time to depose him before trial, concluded: "Now, I'm going to say this. Should the Court still entertain a motion to strike, then I would not call Mr. Naegelin." The court decided to grant Leiserv and Brunswick's motion to strike the certificate, to which Dukat responded: "Then I won't call Cal Naegelin."

The jury trial proceeded as scheduled on September 5, 6, and 9, 1996. At the end of Dukat's evidence, the court granted Brunswick's motion for a directed verdict on the ground that there was no evidence of Brunswick's responsibility or control over the employees of Mockingbird Lanes.

Leiserv then called Jameson, Mockingbird Lanes' general manager, to the stand. Leiserv introduced exhibit 28, a "local climatological data monthly entry" for February 1994, through Jameson, over objection by Dukat. Jameson was asked to look at exhibit 28, to read data from the exhibit to the jury, and to interpret certain data from the exhibit, e.g., "S" as snow and "SW" as snow showers, using the codes on the exhibit. After Leiserv rested, Dukat indicated that she intended to call

Naegelin as a rebuttal witness to rebut the testimony of Jameson with respect to exhibit 28. Leiserv objected, arguing:

> Before trial started, Mr. Ryberg said he intended to use Naegelin. I objected . . . and the Court appeared to conclude that either the defendant was entitled to a continuance or Mr. Ryberg could proceed without Mr. Naegelin. He chose to proceed without Mr. Naegelin. Now on rebuttal without the defendants having presented any expert testimony Mr. Ryberg is trying to bring in Dr. Naegelin again still without having supplemented his answers to interrogatories, without giving me any indication as to what this man knows, what he's going to testify to.

The court ruled that Dukat could not call Naegelin as a rebuttal witness. Dukat then made an offer of proof that if Naegelin were allowed to testify, he would indicate that definitions such as "S" or "SW" only demonstrated that "a snowflake or two" had come down and that Naegelin's interpretation of exhibit 28 would preclude the finding that it drizzled on February 2.

On September 9, 1996, the jury returned a general verdict for Leiserv. After her motion for new trial was overruled, Dukat appealed to this court.

ASSIGNMENTS OF ERROR

Dukat alleges that the district court erred (1) in giving an instruction on assumption of risk, (2) in giving the instruction on contributory negligence, (3) in failing to direct a verdict of liability against Leiserv, (4) in instructing on Dukat's alleged intoxication, and (5) in failing to permit rebuttal testimony.

STANDARD OF REVIEW

[1] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997).

[2] A jury instruction is not error if, taken as a whole, it correctly states the law, is not misleading, and adequately covers the issues. *Scharmann v. Dayton Hudson Corp.*, 247 Neb. 304, 526 N.W.2d 436 (1995).

ANALYSIS

Assumption of Risk.

[3] Before the defense of assumption of risk may be submitted to a jury, the defendant has the burden to establish the elements of assumption of risk, which are that the plaintiff knew of the danger, understood the danger, and voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's injury. *Williamson v. Provident Group, Inc.*, 250 Neb. 553, 550 N.W.2d 338 (1996). Dukat argues that Leiserv failed to meet its burden of establishing the elements of assumption of risk. Specifically, she argues that Leiserv failed to prove that she knew, understood, and voluntarily exposed herself to the danger of walking unassisted on an icy sidewalk. Dukat's argument focuses primarily on the "voluntary" element of assumption of risk. She maintains that because the sidewalk was the only route into and out of the bowling alley, she did not "voluntarily" expose herself to the danger, rather, according to Nebraska case law, she merely "encountered" it.

Leiserv maintains that Dukat "knew full well that the sidewalk and parking lot were icy," brief for appellee at 12, because on her way into the bowling alley she had noticed the sidewalk was slippery. Leiserv contends that Dukat voluntarily exposed herself to the danger when she failed to (1) ask someone to assist her to her car or (2) tell a Mockingbird Lanes employee about the icy conditions and that the sidewalk needed sand or "ice melt." Brief for appellee at 13.

[4,5] The standard to be applied in determining whether a plaintiff has assumed the risk of injury is a subjective one based upon the particular facts and circumstances of the event. *Williamson, supra.* The subjective standard involves what " 'the particular plaintiff in fact sees, knows, understands and appreciates. In this it differs from the objective standard which is applied to contributory negligence.' " *Makovicka v. Lukes*, 182 Neb. 168, 171, 153 N.W.2d 733, 735 (1967). If one who knows and comprehends the danger chooses to expose himself or herself thereto, even though the choice is not negligent, he or she will be deemed to have assumed the risk of injury and be precluded from recovery. *Circo v. Sisson*, 193 Neb. 704, 229 N.W.2d 50 (1975). See, also, *Hollamon v. Eagle Raceway, Inc.*,

187 Neb. 221, 188 N.W.2d 710 (1971) (car owner assumed risk of watching race from pit area located off first turn where he knew out-of-control race car could land), *overruled on other grounds, Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992). Thus, it was Leiserv's burden to show that Dukat knowingly and voluntarily exposed herself to the risk of walking on the sidewalk, but a subjective standard is employed.

Schwab v. Allou Corp., 177 Neb. 342, 128 N.W.2d 835 (1964), is the case most on point for our analysis. Schwab, a 68-year-old school teacher, sued Allou Corporation when she fell on an icy stoop or porch at the front entrance of an apartment building owned by Allou where Schwab lived. When Schwab left for school the day before the accident, the porch was free of water. When she returned about 4:30 p.m., there was water on the porch. The next morning, the day of the accident, Schwab observed that the entire porch was icy, but, because the rear exit of the apartment building was in a similar icy condition, she proceeded to go to work out the front door. Schwab fell on the ice and broke her ankle.

[6] At trial, the court did not submit the defense of assumption of risk to the jury. On appeal, Allou argued that this was error. The Supreme Court of Nebraska affirmed the trial court's decision:

> The evidence shows that both the front and rear exits were icy. The evidence does not show any freedom of choice to the plaintiff with respect to leaving the apartment. Assumption of risk is predicated upon an implied consent to be treated negligently. If the person against whom the doctrine is applied is deprived of a choice in the matter, the risk is not assumed, although it may be encountered.

Schwab, 177 Neb. at 352, 128 N.W.2d at 841.

Schwab turns on whether there was a choice of a safer route. To us, the essence of the *Schwab* decision is that Schwab could not have voluntarily assumed the risk of using her icy porch, since there was not a choice of a safer route to leave her apartment and go to work. There was no suggestion in the court's opinion that the law required Schwab to remain inside her apartment and miss work.

In *McDermott v. Platte Cty. Ag. Socy.*, 245 Neb. 698, 515 N.W.2d 121 (1994), McDermott sued the Platte County Agricultural Society for damages resulting from a personal injury which occurred when McDermott slipped and fell on ice and snow in the parking lot of Ag Park, which was owned by the Platte County Ag Society. Before the accident, McDermott observed that the sidewalks and streets were covered with patches of ice and snow and that the temperature was 10 to 12 degrees below zero. McDermott parked her car in a lot at Ag Park and proceeded to walk across it. The parking lot was covered with patches of ice and snow. Three people walking ahead of McDermott tried to open the door to the exposition building closest to where McDermott had parked. They found that the door was locked and proceeded on the sidewalk to another door at the opposite end of the building. As McDermott began following them to the other door, she stepped back out of the way to allow two approaching trucks to pass and then stepped forward again, onto snow which concealed ice on the pavement. McDermott slipped and fell, breaking her ankle. The jury found against McDermott.

[7] McDermott, on appeal to the Supreme Court of Nebraska, claimed that the jury was incorrectly instructed on assumption of risk. McDermott argued that the court should have given the following instruction: " 'A plaintiff does not assume a risk of harm unless he or she voluntarily accepts the risk. A plaintiff's acceptance of a risk is not voluntary if the defendant's conduct has left plaintiff no reasonable alternative course of conduct in order to avert harm to plaintiff.' " *McDermott*, 245 Neb. at 705, 515 N.W.2d at 126. The court, finding that McDermott's proposed instruction should have been given, stated:

> " '(1) A plaintiff does not assume a risk of harm unless he voluntarily accepts the risk. (2) The plaintiff's acceptance of a risk is not voluntary if the defendant's tortious conduct has left him no reasonable alternative course of conduct in order to (a) avert harm to himself or another, or (b) exercise or protect a right or privilege of which the defendant has no right to deprive him.' " *Makovicka* [*v. Lukes*], 182 Neb. [168,] 170-71, 153 N.W.2d [733,] 735 [(1967)], quoting the Restatement [(Second) of Torts] § 496 E [(1965)].

McDermott, 245 Neb. at 704-05, 515 N.W.2d at 126.

The first use of the Restatement (Second) of Torts § 496 E (1965) in Nebraska appears to be *Makovicka v. Lukes*, 182 Neb. 168, 153 N.W.2d 733 (1967), where the plaintiff was picked up by the defendant during a horseplay incident, the like of which had occurred before. The defendant carried the plaintiff outside where the defendant jumped off a step 39 inches from the ground. The impact allegedly snapped the plaintiff's neck and aggravated a branchial cleft cyst. The Supreme Court found error in the submission of assumption of risk to the jury, citing evidence that since the defendant did not know what he was going to do with the plaintiff when he picked her up, it would be difficult to attribute knowledge to the plaintiff so that she could then knowingly and voluntarily assume the risk of injury from the horseplay. In short, in *Makovicka*, it was obvious that the plaintiff had no choice in the course of conduct which was followed.

In *McDermott,* § 496 E was used again, and the court's opinion states: "It may be that McDermott, upon finding the parking lot covered with ice and snow, should have returned to Lincoln . . . ." 245 Neb. at 706, 515 N.W.2d at 127. The court held that the "alternative course of conduct" instruction, as the plaintiff requested, should have been given to "permit the jury to determine whether McDermott voluntarily accepted the danger by exiting her car and walking on the snow-covered and icy parking lot toward the building." *Id.* The question posed by the Supreme Court—should McDermott have returned to Lincoln—makes one wonder how McDermott could possibly benefit by the requested instruction and, with all due respect, whether *McDermott* represents how § 496 E is to work. This is particularly true because, at least to us, the opinion clearly suggests that the following would be a proper jury argument using § 496 E, i.e.: McDermott had a safe choice—go back to Lincoln—and because she did not, she voluntarily assumed the risk of injury from walking on the icy parking lot. Close examination of § 496 E of the Restatement does not support the suggestion in *McDermott* that one has to forgo his or her destination or be guilty of assumption of risk. However, whether the "objectively" reasonable man or woman would do so or be guilty of contributory negligence is a different question.

The doctrine of a safer choice as used in *Schwab* and as illustrated by § 496 E suggests something other than retreat from where a person needs to be or wants to be. In other words, the notion that McDermott should return to Lincoln to avoid assuming the risk, with all due respect, is not the type of safer choice contemplated by § 496 E of the Restatement. To further amplify our point, we quote two illustrations from the Restatement, *supra*, comment *d.* at 579:

> 8. A illegally carries on blasting operations next to the public highway. B, approaching in a car, ignores a conspicuous warning sign and a flagman who tries to stop him and informs him that there will be a delay of five minutes. B insists upon proceeding along the highway, and is injured by the blasting. B assumes the risk.
>
> 9. The A City clears the snow and ice from the sidewalk on one side of the street, leaving the sidewalk on the other side covered with ice, slippery, and visibly dangerous. B, having a free choice of either side, and fully understanding the risk, elects to walk on the icy sidewalk, slips, and is injured. B assumes the risk.

In each illustration, there is a reasonable safe choice readily available, and one which allows the "traveler" to reach his or her destination. When the "traveler" rejects the safe and reasonable choice, then there is assumption of risk. That the defendant must introduce evidence of an alternative safe route or course of conduct is supported by *Donald v. Moses*, 254 Minn. 186, 94 N.W.2d 255 (1959), where the Supreme Court of Minnesota, in rejecting the applicability of assumption of risk, approvingly quoted the trial court's reasoning that " 'no evidence was introduced to show alternative routes to the meat market which were safer than the route selected by plaintiff.' " *Id.* at 193, 94 N.W.2d at 260. The court in *Donald* imposed the burden upon the defendant to show the availability of a safer route. Although the Restatement of Torts (1934) did not have § 496 E and the *Donald* decision predates § 496 E, the *Donald* court's reasoning is sound and it is consistent with *Schwab v. Allou Corp.*, 177 Neb. 342, 128 N.W.2d 835 (1964), as well as with § 496 E, which Nebraska has adopted.

In a subsequent opinion acknowledging the difficulty of distinguishing between assumption of risk and contributory negligence with any precision, the Minnesota court once again required evidence of an alternative safe route before instructing on assumption of risk. *Parness v. Economics Laboratory, Inc.*, 284 Minn. 381, 170 N.W.2d 554 (1969). The *Parness* court observed that whether there was an alternative safe route or course of conduct is often a critical disputed fact. However, in the instant case, Leiserv has admitted that there was no alternative route for Dukat to leave the bowling alley and get to her car. Because the burden to prove the defense of assumption of risk is Leiserv's, which includes proof of the availability of a safe alternative route, and there was no such proof, we conclude that assumption of risk should not have been submitted to the jury. Our decision relies heavily upon *Schwab*, where the plaintiff could not leave her house to go to work without encountering ice. The evidence here shows that, similarly, Dukat could not leave the bowling alley to go home without using the icy sidewalk. Because *McDermott v. Platte Cty. Ag. Socy.*, 245 Neb. 698, 515 N.W.2d 121 (1994), seems to suggest that not getting out of one's vehicle, and thereby forgoing doing what one came to do or needs to do, is in fact the sort of alternative safe route or course of conduct contemplated by § 496 E of the Restatement, we find ourselves in the position of being unable to effectively reconcile *Schwab* and *McDermott*. We say this because obviously Schwab could have stayed home from work the day she was injured, just as McDermott could have returned to Lincoln. But, as observed, the court in *Schwab* did not suggest staying home as a consideration on whether assumption of risk was a submissible defense. The difficulty in applying *McDermott* to cases where the plaintiff is "traveling" from point A to point B is that there always will be, in any journey, given the usually perfect acuity of hindsight, an alternative safe course of conduct which can be articulated and which would have avoided the injury. In Dukat's situation, it could be staying in the bowling alley all night or, going back further in time, not leaving home in the first place. But, we do not believe that is what § 496 E of the Restatement contemplates because these

are, at the core, questions of what reasonable people would do. In other words, these are questions involving whether there was contributory negligence. To us, *Schwab* represents the appropriate application of the alternative safe route or course of conduct doctrine in conjunction with the defense of assumption of risk. We reconcile *Schwab* and *McDermott* by applying *Schwab*.

The evidence shows that in response to Dukat's interrogatory No. 8, "Does either of the defendants allege that the plaintiff had an alternate route that she should have taken from the door of the bowling alley to her car?" Leiserv and Brunswick (Brunswick was still a party during discovery) answered "No." Interrogatory No. 8 and its answer were read into the record by Dukat without objection. We conclude that Leiserv did not meet its burden of proving that Dukat voluntarily exposed herself to the risk of injury by walking on the icy sidewalk. We reach this conclusion because Leiserv did not introduce any evidence of an alternative safe route or course of conduct which would have allowed her to safely leave the bowling alley as she had a right to do and wanted to do.

[8,9] Because Leiserv failed to prove the prerequisites for assumption of risk, it was error for the trial court to submit the issue to the jury. The submission of issues upon which the evidence is insufficient to sustain an affirmative finding is generally prejudicial and requires a second trial. *Mandery v. Chronicle Broadcasting Co.*, 228 Neb. 391, 423 N.W.2d 115 (1988). Error, to be reversible, must affect a litigant's substantial right. *Id.* Clearly, submitting a defense to the jury where there is no evidence to justify doing so affects a substantial right of Dukat.

Having found reversible error, we need not reach Dukat's assignment of error concerning the district court's failure to allow the rebuttal testimony of Naegelin because there will be a new trial which "moots" the argument about whether he should have been allowed to testify. However, we deem it necessary to discuss Dukat's other assignments of error because those questions may recur on retrial.

Contributory Negligence.

On the issue of contributory negligence, the jury was told in instruction No. 4, in part:

In defense to Plaintiff's claim, the Defendant claims that the Plaintiff herself was negligent in one or more of the following ways:

1. Failing to keep a proper lookout;

2. In failing to take notice of the condition of the area in which she was walking that a reasonable and prudent person in the same or similar situation would have noticed; and,

3. In failing to see open and obvious conditions in the area in which she was walking.

Dukat argues that the district court erred in giving this instruction because Leiserv failed to meet its burden.

[10] When contributory negligence is pled as a defense and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence. *Gustafson v. Burlington Northern RR. Co.*, 252 Neb. 226, 561 N.W.2d 212 (1997).

[11-13] A plaintiff is contributorily negligent if (1) the plaintiff fails to protect himself or herself from injury; (2) the plaintiff's conduct concurs and cooperates with the defendant's actionable negligence; and (3) the plaintiff's conduct contributes to the plaintiff's injuries as a proximate cause. *Bray v. Kate, Inc.*, 235 Neb. 315, 454 N.W.2d 698 (1990). Contributory negligence is an affirmative defense which must be proved by the party asserting such defense. *Carpender v. Bendorf*, 246 Neb. 77, 516 N.W.2d 619 (1994). The distinction between assumption of risk and contributory negligence presents a difference which prevents interchangeable use of those defenses in a negligence action. *Mandery, supra.*

[14] The Supreme Court of Nebraska has frequently held: "Where different minds may reasonably draw different conclusions or inferences from the evidence adduced concerning the issues of negligence or contributory negligence and the degree thereof when one is compared with the other, such issues must be submitted to the jury." *Sullivan v. Geo. A. Hormel and Co.*, 208 Neb. 262, 273, 303 N.W.2d 476, 482 (1981). See, also, *Swiler v. Baker's Super Market, Inc.*, 203 Neb. 183, 277 N.W.2d 697 (1979); *Jensen v. Hawkins Constr. Co.*, 193 Neb. 220, 226

N.W.2d 346 (1975); *Maxwell v. Lewis*, 186 Neb. 722, 186 N.W.2d 119 (1971).

Minds could reasonably differ on the evidence introduced with respect to Dukat's contributory negligence. It is a permissible inference from the record that the ice alone would not have caused the accident. It is clear from Dukat's testimony that she knew of the icy condition of the sidewalk as she entered the bowling alley and despite this knowledge may have done things a reasonably careful person might not have done. For example, the evidence shows that Dukat drank three beers while she was at the bowling alley and that she did not recall eating dinner that night. Dukat also decided to navigate the same icy path she had come in on without asking the assistance of one of her friends who remained inside the bowling alley. A reasonable person might also have asked management to spread an ice-melting substance on the sidewalk and delayed his or her departure.

Thus, reasonable minds could arrive at the conclusion that Dukat did not act as a reasonable person in one or more ways and that the slip and fall were contributed to by her own negligence. The trial court, therefore, was correct in submitting to the jury the question of Dukat's contributory negligence.

Intoxication Instruction.

We comment briefly on Dukat's argument that the trial court erred in "giving an instruction on intoxication." Instruction No. 15, submitted to the jury over objection, stated:

> Any evidence you find of the drinking of intoxicants by the Plaintiff shall not, by itself, be considered as negligence but is a circumstance which may be considered by you together with all other facts and circumstances in the case in determining the existence or nonexistence of negligence.

The instruction given is derived from *Raskey v. Hulewicz*, 185 Neb. 608, 177 N.W.2d 744 (1970). As we read *Raskey*, the instruction is designed to protect a litigant from a jury's "overreaction" to evidence that a litigant had been drinking, and to some extent it reminds us that intoxication and impairment are what is important on the question of how drinking relates to negligence or contributory negligence.

[15] The given instruction differs from the Nebraska pattern jury instruction on intoxication, NJI2d Civ. 3.07. That instruction provides, "A person who is voluntarily intoxicated must exercise the same care as a person who is sober." Generally, the Nebraska Jury Instructions are to be used whenever applicable. *State v. Jordan*, 229 Neb. 563, 427 N.W.2d 796 (1988). But, the record is void of any evidence tending to establish that Dukat was impaired due to the influence of alcohol. Impairment cannot be inferred merely from the consumption of three beers at an unspecified "pace" during a 3-hour timeframe. As said in *Raskey*, where there is no evidence presented as to the effect of intoxicants, it is not proper to submit that issue directly to the jury. A new trial has been ordered; therefore, whether any instruction about drinking or intoxication should be given must await the evidentiary presentation at the second trial.

CONCLUSION

In view of our determination that the district court committed reversible error by submitting the defense of assumption of risk, the judgment of the district court is reversed, and the cause is remanded to the district court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

COREY V. DAILEY, APPELLEE, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLANT.

578 N.W.2d 869

Filed April 28, 1998. No. A-97-168.

1. **Moot Question: Dismissal and Nonsuit: Appeal and Error.** An appeal will not be dismissed when there is public interest in the moot question presented.
2. **Judgments: Final Orders: Appeal and Error.** A judgment rendered or final order made by a district court may be reversed, vacated, or modified on appeal for errors appearing on the record.
3. **Judgments: Appeal and Error.** An appellate court, in reviewing a judgment of a district court for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
4. ____: ____. On questions of law, a reviewing court reaches a conclusion independent from that of the inferior courts.

5. **Administrative Law: Prisoners.** Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply.
6. **Constitutional Law: Due Process: Administrative Law.** If there is a constitutionally protected liberty interest at stake, then at a minimum, disciplinary proceedings must comply with constitutionally adequate due process standards.
7. **Constitutional Law: Prisoners: Sentences.** The loss of good time is a protected liberty interest.
8. **Due Process: Administrative Law: Prisoners: Evidence.** To affirm the imposition of a prison disciplinary measure and comport with due process, the findings of a prison disciplinary body must be supported by "some evidence" in the record and the decision of the prison disciplinary committee must have "some basis in fact."
9. **Due Process: Administrative Law: Prisoners: Evidence: Appeal and Error.** Under the minimum evidentiary standard required by the Due Process Clause, a district court reviewing the appeal of a prison disciplinary case is only required to find that "some evidence" supports the findings of the disciplinary committee. However, this evidence must be supported by some "indicia of reliability."
10. **Statutes: Administrative Law: Prisoners: Proof.** The standard of proof required to sustain a prison disciplinary charge was changed by statute to "substantial evidence."
11. **Administrative Law: Prisoners: Evidence: Words and Phrases.** In prison disciplinary cases, "substantial evidence" is generally considered a stricter standard than merely reliable evidence or "some evidence."
12. **Rules of Evidence: Administrative Law: Prisoners.** In assessing whether or not the formal rules of evidence should apply to prison disciplinary cases, the weight of authority in both federal and state cases is that the rules of evidence do not apply.
13. **Due Process: Statutes: Administrative Law.** Disciplinary hearings are sui generis, governed by neither the evidentiary rules of a civil trial, a criminal trial, nor an administrative hearing. The only limitations are those imposed by due process, a statute, or administrative regulations.
14. **Administrative Law: Prisoners: Appeal and Error.** The Administrative Procedure Act is a process which applies only to the subsequent judicial review of prison disciplinary outcomes. The Administrative Procedure Act does not apply to the prison disciplinary process prior thereto.
15. ____: ____: ____. The Administrative Procedure Act controls the appeal of prison disciplinary cases, but not the conduct of the initial prison disciplinary hearing.
16. **Administrative Law: Prisoners.** There is no basis to apply Neb. Rev. Stat. § 84-914(1) (Reissue 1994) to the hearings in prison disciplinary cases.
17. **Rules of Evidence: Administrative Law: Prisoners.** The specific statutes controlling the prison disciplinary proceedings, Neb. Rev. Stat. §§ 83-4,109 to 83-4,123 (Reissue 1994 & Cum. Supp. 1996), do not require the use of the rules of evidence.
18. ____: ____: ____. As a matter of law, Neb. Rev. Stat. § 84-914(1) (Reissue 1994) of the Administrative Procedure Act, providing for the use of the rules of evidence, does not apply to prison disciplinary actions tried in accordance with Neb. Rev. Stat. § 83-4,122 (Reissue 1994).

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Reversed.

Don Stenberg, Attorney General, and Melanie J. Whittamore-Mantzios for appellant.

No appearance for appellee.

MILLER-LERMAN, Chief Judge, and IRWIN and INBODY, Judges.

MILLER-LERMAN, Chief Judge.

The Nebraska Department of Correctional Services (DCS) appeals the order of the district court for Douglas County, reversing the decision of the DCS Appeals Board (Appeals Board) which had upheld the decision of the prison disciplinary committee (Committee), finding that Corey V. Dailey violated prison rules against drug or intoxicant abuse. For the reasons recited below, we reverse the order of the district court.

BACKGROUND

On July 1, 1996, Dailey, an inmate at the Omaha Correctional Center, submitted a urine sample for testing, the results of which came back on July 8, 1996, and were positive for cannabinoids.

On July 9, 1996, Dailey completed an inmate interview request form, requesting that the Nebraska rules of evidence be applied to the upcoming hearing. This request referred to Neb. Rev. Stat. § 27-1101(4)(c) (Reissue 1995), which generally provides that the rules of evidence do not apply to contested cases before an administrative agency under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1994 & Cum. Supp. 1996), unless a party requests that the agency be bound by the rules of evidence.

On July 16, 1996, a disciplinary hearing was conducted before the Committee. Only as much of those proceedings are described in this opinion as are necessary for the determination of this appeal. At the hearing, Dailey was presented with written evidence that his urine had tested positive for cannabinoids. Other written evidence was presented that established the chain of custody of Dailey's urine sample and the accuracy of the tests.

Dailey was represented by another inmate. Dailey's defense to the charge of drug use was that his urine tested positive due to passive inhalation. Dailey's evidence, if believed, showed

that he was housed with another inmate, who smoked marijuana heavily in their cell.

Statements by two inmates in the same housing unit were evidently submitted generally describing marijuana use in the unit in which Dailey had been housed. Specifically, Dailey submitted an affidavit from his cellmate, Ray Wolfe, which is in the record, in which Wolfe stated that he was smoking 10 marijuana cigarettes every day during the month of June 1996. Dailey stated that he did not report the marijuana use.

At the disciplinary hearing, Dailey objected to the fact that he could not cross-examine the DCS witnesses whose reports had been received by the Committee. The Committee stated that it felt that the incident report and urinalysis reports were sufficient. Although Dailey indicated that he had questions of the DCS witnesses, upon inquiry, he could not articulate any questions he wished to pose to the witnesses. It is this lack of cross-examination and the absence of the use of the rules of evidence about which Dailey later complained in his appeal to the district court.

The Committee found that Dailey had violated prison prohibitions against drug or intoxicant abuse. A penalty of a loss of 3 months' good time and 30 days' room restriction was imposed for this, Dailey's fifth offense.

Dailey appealed to the Appeals Board. On August 21, 1996, the Appeals Board affirmed the Committee's decision.

On September 20, 1996, Dailey filed a petition in the district court for Douglas County, pursuant to § 84-917 of the Administrative Procedure Act. The district court conducted a hearing on January 28, 1997. On that same date, the district court entered a written order reversing the decision of the Appeals Board. The district court concluded that Dailey had been denied a fair hearing by the Committee because of its failure to employ the rules of evidence. The district court ordered that the determination of Dailey's misconduct be expunged from Dailey's institutional and parole records.

[1] DCS appealed. During the pendency of the appeal in this court, on June 4, 1997, DCS filed a statement pursuant to Neb. Ct. R. of Prac. 7C (rev. 1996) pertaining to mootness, indicating that Dailey had been discharged from the custody of DCS.

DCS claimed that the fact of Dailey's discharge did not moot this appeal and that the case falls within the public interest exception to the mootness doctrine. See, *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992); *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986). See, also, *Williams v. Hjorth*, 230 Neb. 97, 430 N.W.2d 52 (1988); *State ex rel. Coulter v. McFarland*, 166 Neb. 242, 88 N.W.2d 892 (1958). The question presented in this appeal, according to DCS' rule 7C statement, is whether or not the rules of evidence apply in inmate disciplinary proceedings. This court entered an order on June 10 that based on the public interest exception to the mootness doctrine as to this issue, the case should proceed.

ASSIGNMENT OF ERROR

According to the rule 7C statement, the question on appeal is whether inmates, such as Dailey, are entitled to the use of the rules of evidence during prison disciplinary hearings. To the extent that there were other errors assigned in DCS' brief, it has abandoned them in this appeal.

STANDARD OF REVIEW

[2,3] In an appeal of this nature, a judgment rendered or final order made by a district court may be reversed, vacated, or modified on appeal for errors appearing on the record. § 84-918(3); *Lynch v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 603, 514 N.W.2d 310 (1994). An appellate court, in reviewing a judgment of a district court for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Lynch v. Nebraska Dept. of Corr. Servs., supra.*

[4] However, on questions of law, a reviewing court reaches a conclusion independent from that of the inferior courts. *Dittrich v. Nebraska Dept. of Corr. Servs.*, 248 Neb. 818, 539 N.W.2d 432 (1995).

ANALYSIS

The sole issue in this appeal is whether or not inmates, such as Dailey, are entitled to the application of the formal rules of evidence at prison disciplinary hearings. Based on the case law, statutes, and facts of this case, we conclude as a matter of law

that Dailey was not entitled to the application of the rules of evidence at the Committee hearing in this case and that, therefore, the district court's reversal on the basis that Dailey was denied a fair hearing for lack of the rules of evidence must be reversed.

Due Process.

[5] It is well settled that " '[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply.' " *State v. Kerns*, 201 Neb. 617, 620, 271 N.W.2d 48, 50 (1978).

[6,7] It is also well settled that if there is a constitutionally protected liberty interest at stake, then at a minimum, the disciplinary proceedings must comply with constitutionally adequate due process standards. See *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974). In Nebraska, the loss of good time is a protected liberty interest. *Lynch v. Nebraska Dept. of Corr. Servs., supra.* Compare *Dittrich v. Nebraska Dept. of Corr. Servs., supra* (holding that imposition of room restriction alone is not protected liberty interest).

[8,9] In *Superintendent v. Hill*, 472 U.S. 445, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985), the U.S. Supreme Court stated that to affirm the imposition of a disciplinary measure and comport with due process, the findings of a prison disciplinary body must be supported by "some evidence" in the record, 472 U.S. at 454, and the decision of the prison disciplinary committee must have "some basis in fact," 472 U.S. at 456. In *Lynch v. Nebraska Dept. of Corr. Servs.*, 245 Neb. at 608, 514 N.W.2d at 314, the Nebraska Supreme Court stated that "under the minimum evidentiary standard required by the Due Process Clause, the district court [reviewing the appeal of a prison disciplinary case] was only required to find that 'some evidence' supported the findings of the disciplinary committee. However, this evidence must be supported by some 'indicia of reliability.' "

[10] *Lynch* was decided on April 8, 1994, and pertained to a disciplinary committee hearing conducted on January 2, 1992. Pursuant to 1993 Neb. Laws, L.B. 455, now found at Neb. Rev. Stat. § 83-4,122(9) (Reissue 1994) and which applies to hearings held on or after September 9, 1993, the standard of proof required to sustain a prison disciplinary charge was changed by

statute to "substantial evidence." No mention of § 83-4,122(9) appears in *Lynch*, presumably because the disciplinary hearing involved in that case occurred prior to the effective date of L.B. 455, and *Lynch* was, therefore, decided on due process grounds.

[11] In federal and state jurisdictions which have considered the issue in prison disciplinary cases, "substantial evidence" is generally considered a stricter standard than merely reliable evidence or "some evidence." See *Cepulonis v. Commissioner of Correction*, 15 Mass. App. 292, 445 N.E.2d 178 (1983) (cases collected). Substantial evidence has been defined, for example, as "findings [which] are supported by such evidence as 'a reasonable mind might accept as adequate to support a conclusion,' . . . taking into account whatever in the record fairly detracts from the weight of the evidence." 15 Mass. App. at 296, 445 N.E.2d at 180.

According to the Statement of Intent accompanying L.B. 455, the passage of that bill "would replace the 'some evidence' standard [in prison discipline cases] with the 'substantial evidence' standard — which is more than 'some evidence' but less than 'preponderance of the evidence'." Statement of Intent, Judiciary Committee, 93d Leg., 1st Sess. (Feb. 10, 1993). Under Nebraska case law, "substantial evidence" has been defined as " '[e]vidence which a reasoning mind would accept as sufficient to support a particular conclusion and consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance.' " *Wright v. State ex rel. State Real Estate Comm.*, 208 Neb. 467, 476-77, 304 N.W.2d 39, 44 (1981), quoting Black's Law Dictionary 1281 (5th ed. 1979). We also note for the sake of completeness that the preponderance of evidence standard has been rejected in related cases. See, e.g., *United States v. Smith*, 571 F.2d 370 (7th Cir. 1978) (holding that due process does not require preponderance of evidence in probation revocation cases).

Case Law.

[12,13] In assessing whether or not the formal rules of evidence should apply to prison disciplinary cases, the weight of authority in both federal and state cases is that the rules of evidence do not apply. See 2 Michael Mushlin, *Rights of*

Prisoners, § 9-21 (2d ed. 1993). The federal cases rely on the requirements of due process, and the state cases rely on both due process and state statutes in reaching this conclusion. As summarized in *Rights of Prisoners*:

> A disciplinary hearing is neither a civil nor a criminal proceeding. As a consequence, the formal rules of evidence observed in criminal and civil trials do not apply. Courts in most states have also rejected the argument that a disciplinary hearing must conform to the evidentiary requirements of the state's Administrative Procedure Act. The end result appears to be that disciplinary hearings are sui generis, governed by neither the evidentiary rules of a civil trial, a criminal trial, nor an administrative hearing. The only limitations appear to be those imposed by due process, a statute, or administrative regulations.

Id. at 476-77.

With respect to the federal cases, the conclusion that the rules of evidence do not apply in prison discipline cases is generally based on the requirements of due process. Thus, for example, in *Hrbek v. Nix*, 12 F.3d 777, 780 (8th Cir. 1993), *cert. denied* 513 U.S. 926, 115 S. Ct. 313, 130 L. Ed. 2d 275 (1994), the U.S. Court of Appeals for the Eighth Circuit stated: "In the prison discipline context, where swift and sure punishment is often imperative, the Constitution does not require trial-like evidentiary standards."

Furthermore, the federal courts have consistently held that the requirement under *Superintendent v. Hill*, 472 U.S. 445, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985), that the findings be supported by the "standard of 'some evidence' does not require compliance with the Federal Rules of Evidence, but only that the decision of the disciplinary committee have 'some indicia of reliability.' " *Acuna v. Lewis*, No. 90-15319, 1991 WL 122373 at *1 (9th Cir. July 9, 1991) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 937 F.2d 611 (9th Cir. 1991)). See, also, *Pella v. Adams*, 702 F. Supp. 244, 246 (D. Nev. 1988) (" 'some evidence' standard does not require that the evidence presented to the prison disciplinary committee comply with the Federal Rules of Evidence"). Compare, *Lenea v. Lane*, 882 F.2d 1171 (7th Cir. 1989); *Soto v.*

Lord, 693 F. Supp. 8, 18-19 (S.D.N.Y. 1988) (holding that although " 'technical rules of evidence do not apply in prison disciplinary proceedings' [citations omitted], nevertheless 'the basic integrity of the system' must be insured").

The state cases brought as prison discipline appeals and post-conviction cases which have considered the issue of whether or not rules of evidence are required in prison disciplinary hearings have consistently concluded that the rules of evidence are not required under due process or relevant state statute. Thus, for example, certain cases rely on the cases collected in the *Rights of Prisons, supra*, with or without attribution. See, e.g., *Varnson v. Satran*, 368 N.W.2d 533 (N.D. 1985); *Owens v. State*, 507 So. 2d 576 (Ala. Crim. App. 1987). Others so conclude, based on the individual state's case law which has its origins in the state's administrative law cases, that technical rules of evidence are not required in disciplinary proceedings before administrative officers. See, e.g., *Price v. Coughlin*, 116 A.D.2d 898, 498 N.Y.S.2d 209 (1986) (relying on *Matter of Sowa v. Looney*, 23 N.Y.2d 329, 244 N.E.2d 243, 296 N.Y.S.2d 760 (1968)). Where the state's administrative procedure act has been considered, it has been concluded that the rules of evidence are not required in prison disciplinary cases under the individual state's administrative procedure act. See, e.g., *Wolfe v. State*, 114 Idaho 659, 661, 759 P.2d 950, 952 (Idaho App. 1988) (holding that "[p]rison administrative and disciplinary proceedings are subject neither to the Rules of Evidence nor the provisions of the Administrative Procedure Act"). See, also, *Wightman v. Superintendent*, 19 Mass. App. 442, 445, 475 N.E.2d 85, 88 (1985) (holding that although disciplinary body is not bound by courtroom rules of evidence, it may admit and accord probative value only to kind of evidence on which " 'reasonable persons are accustomed to rely in the conduct of serious affairs,' " latter definition equating to standard in Massachusetts State Administrative Procedure Act). Where the state statute governing prison disciplinary proceedings does not require the rules of evidence, obviously they do not apply. Thus, in *Farrell v. Or. State Penitentiary, Corr. Div.*, 51 Or. App. 465, 468, 625 P.2d 1380, 1382 (1981), the court concluded that the evidence in a prison disciplinary case need not conform to the rules of evi-

dence applicable to court trials because, inter alia, "[Or. Rev. Stat. §] 421.190 provides: 'Evidence may be received at disciplinary hearings even though inadmissible under the rules of evidence applicable to court procedure . . . .' "

Relevant Nebraska Statutes.

The Nebraska statutes dealing specifically with disciplinary proceedings in adult institutions administered by DCS are found in Neb. Rev. Stat. ch. 83, art. 4 (Reissue 1994 & Cum. Supp. 1996), "Penal and Correctional Institutions." Section 83-4,122(9) provides: "The standard of proof to sustain the [prison disciplinary] charge shall be substantial evidence." Pursuant to § 83-4,122, the director of DCS is to establish disciplinary procedures consistent with the principles enumerated in subsections (1) to (9) as follows, inter alia: the establishment of disciplinary boards to hear charges against inmates, § 83-4,122(1); advance notice of the charge against an inmate, § 83-4,122(2); a hearing on the charge, § 83-4,122(3); the right to call witnesses where not unduly hazardous to institutional safety or correctional goals, § 83-4,122(4); if the charge is sustained, a written statement including a basis therefor and the action taken, § 83-4,122(5); no change in work or other program assignment can be used for disciplinary purposes, § 83-4,122(6); an opportunity to prepare a defense to a charge including the assistance of another inmate, § 83-4,122(7); a recording of the disciplinary hearing to be preserved for 6 months, § 83-4,122(8); and proof by substantial evidence, § 83-4,122(9).

[14] Section 83-4,123 provides for judicial review "in accordance with the Administrative Procedure Act" of a prison disciplinary action resulting in disciplinary isolation or the loss of good-time credit. Notably, statutory reference to the Administrative Procedure Act in chapter 83 first appears in connection with appeals and is limited to a review of the decision after the factfinding hearing is completed pursuant to the provisions of § 83-4,122. That is, the Administrative Procedure Act is a process which applies only to the subsequent judicial review of prison disciplinary outcomes. The Administrative Procedure Act does not apply to the prison disciplinary process prior thereto.

Section 84-919 of the Administrative Procedure Act provides that "[e]xcept as otherwise provided by law, the Administrative Procedure Act establishes the exclusive means of judicial review of a final decision of any agency in a contested case." Section 84-919 of the Administrative Procedure Act has been found to be an avenue for the judicial review of a prison appeals board's decision. *Billups v. Nebraska Dept. of Corr. Servs. Appeals Bd.*, 238 Neb. 39, 469 N.W.2d 120 (1991). For the sake of completeness, we note that there was historical jurisprudence which suggested that a judicial appeal from a prison disciplinary hearing could not be taken under the Administrative Procedure Act, *Reed v. Parratt*, 207 Neb. 796, 301 N.W.2d 343 (1981), but such doubts were removed in *Moore v. Black*, 220 Neb. 122, 368 N.W.2d 488 (1985).

[15] The Administrative Procedure Act controls the appeal of prison disciplinary cases, but not the conduct of the initial prison disciplinary hearing. In introducing 1988 Neb. Laws, L.B. 352, § 187, which became § 84-919, the introducer's statement of intent clearly provided that the purpose of the bill was to make uniform appeals from state agency administrative hearings which are filed in district court and specifically provided that the bill was not intended to change substantive rights. Thus, § 84-919 is limited to "judicial review" of certain decisions, and neither § 84-919 nor the Administrative Procedure Act in general has an impact on how those decisions are reached prior to the appellate stage.

Both Dailey and the district court believed that the rules of evidence applied to the prison disciplinary hearing in this case. Presumably, they were relying on § 84-914(1), which provides that the rules of evidence are to be used in administrative cases where an individual requests 3 days before the hearing that the rules of evidence be applied and sets forth his or her willingness to bear the costs associated with invocation of the rules of evidence, including court reporting services.

[16,17] There is no basis to apply § 84-914(1) to the hearings in prison disciplinary cases. As noted above, the Administrative Procedure Act applies to prison disciplinary cases only at the appellate stage. The prison disciplinary statute, § 83-4,122, provides the procedures to be employed in factfinding in prison

disciplinary cases. The specific provisions of chapter 83, the penal and correctional institution chapter, control over the general provisions of the Administrative Procedure Act. See *State v. Havorka*, 218 Neb. 367, 355 N.W.2d 343 (1984). In the instant case, the Administrative Procedure Act contains general provisions and applies only to the judicial appellate stage of the prison disciplinary case, the factfinding procedures of which are controlled by the specific provisions found in § 83-4,122. The specific statutes controlling the prison disciplinary proceedings, §§ 83-4,109 to 83-4,123, do not require the use of the rules of evidence.

[18] In rejecting a similar claim that the federal Administrative Procedure Act applied to federal prisoners subject to a prison disciplinary action, the U.S. Court of Appeals for the Ninth Circuit noted that pursuant to evolving case law, the courts, rather than the legislatures, were providing for the due process required under *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), that the weight of precedent was that the federal Administrative Procedure Act did not apply to prison disciplinary cases, and that even a casual reading of the federal Administrative Procedure Act indicated that it was not written with prison disciplinary proceedings in the forefront of the drafters' minds. *Clardy v. Levi*, 545 F.2d 1241 (9th Cir. 1976). Compare *White v. Henman*, 977 F.2d 292 (7th Cir. 1992). The *Clardy* court concluded: "The plain and simple fact is that the A[dministrative] P[rocedure] A[ct] was not written with the problems of prison discipline in mind. The safeguards erected therein when applied comprehensively will unduly inhibit prison management." 545 F.2d at 1246. We agree with the observation of the *Clardy* court. We, therefore, conclude that as a matter of law, § 84-914(1) of the Administrative Procedure Act, providing for the use of the rules of evidence, does not apply to prison disciplinary actions tried in accordance with § 83-4,122.

CONCLUSION

Based on the foregoing, it is clear that due process as explained in the federal and state cases does not require that the rules of evidence be applied in prison disciplinary hearings.

Furthermore, neither the standard of proof of "some evidence" nor the greater quantum of "substantial evidence" as required under § 83-4,122(9) requires that the rules of evidence be used in factfinding in prison disciplinary cases. Finally, following our review of relevant Nebraska statutes, we find there is no statutory requirement in either the prison disciplinary statutes or the Administrative Procedure Act that the rules of evidence be applied in prison disciplinary hearings.

In sum, neither due process, statute, nor administrative regulation required the application of the rules of evidence to the prison disciplinary hearing in this case. The district court's conclusion that Dailey was denied a fair hearing because his request for the use of the rules of evidence was denied was in error. The district court's order is reversed.

REVERSED.

JEAN M. BOYLE, APPELLANT, V. JAMES R. WELSH, APPELLEE.
578 N.W.2d 496

Filed April 28, 1998. No. A-97-249.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Evidence: Proof.** After filing a motion for summary judgment, the moving party must show facts warranting judgment as a matter of law. Thereafter, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law.
3. **Malpractice: Attorney and Client: Negligence: Proximate Cause: Proof.** In legal malpractice cases, the plaintiff must prove the following: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client.
4. **Attorney and Client: Negligence: Proof.** The negligence of counsel must affect the viability of the client's interest and be shown to do so.
5. **Negligence: Expert Witnesses: Proof.** Generally, in professional negligence cases, the issue of whether a specific professional act or service demonstrates a lack of skill or knowledge or failure to exercise reasonable care is a matter that must be proved by expert testimony.
6. **Attorney and Client: Words and Phrases.** A professional act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or

intellectual. An architect performs professional services, as do lawyers, doctors, accountants, and investment advisers.

7. **Malpractice: Attorney and Client: Expert Witnesses: Proof.** Expert testimony is generally required in order to prove a deviation from the standard of care in legal malpractice cases.
8. **Negligence: Expert Witnesses: Presumptions.** A common knowledge exception to the expert testimony requirement in professional negligence cases applies where the evidence and the circumstances are such that the recognition of the alleged negligence may be presumed to be within the comprehension of laypersons.
9. **Negligence: Expert Witnesses.** When the common knowledge exception applies, a professional's deviation from the standard of care need not be established through expert testimony.
10. **Negligence: Expert Witnesses: Attorney and Client: Limitations of Actions.** The common knowledge exception to the expert testimony requirement applies when an attorney has allowed the statute of limitations to run against his or her client's cause of action.
11. **Summary Judgment.** Summary judgment is an extreme remedy which should be used sparingly because it may deny a trial to the party against whom the motion is directed.
12. **Pleadings: Actions.** Although a petition should not leave uncertainty as to the theory on which the pleader wishes to proceed, in actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader.

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Kathy Pate Knickrehm for appellant.

James R. Welsh, of Bradford, Coenen & Welsh, pro se.

MILLER-LERMAN, Chief Judge, and IRWIN and INBODY, Judges.

IRWIN, Judge.

I. INTRODUCTION

Jean M. Boyle brought a legal malpractice case against James R. Welsh, and Welsh was granted summary judgment. The district court for Douglas County granted Welsh's motion for summary judgment because Boyle failed to offer expert evidence at the hearing on the motion to establish the requisite standard of care owed by Welsh to her and to establish a breach of that standard of care. Thereafter, Boyle timely appealed the order granting summary judgment. We affirm in part, and in part reverse, and remand for further proceedings.

II. FACTUAL BACKGROUND

The underlying facts of this case are largely undisputed. In September 1990, Boyle retained Welsh, an attorney licensed in Nebraska, to represent her regarding a medical malpractice claim. Boyle sought to establish that her treating physicians provided negligent care to her following modified radical mastectomy surgery on April 25, 1990. Following the surgery, Boyle was hospitalized for toxic shock syndrome from June 11 to July 10, 1990. Boyle's primary physician was Dr. Patrick A. Smith. After the surgery, Boyle was also seen and treated on at least one occasion by Dr. Smith's partner, Dr. John W. Monson.

On behalf of Boyle, Welsh filed suit against Dr. Smith. The case was tried to a jury in April 1994, and a verdict was rendered in favor of Dr. Smith and against Boyle. Boyle contends that she repeatedly questioned Welsh concerning adding Dr. Monson and the partnership of Drs. Smith and Monson as defendants in the above medical malpractice case. No lawsuit was ever instituted against Dr. Monson or the partnership, and the applicable statute of limitations expired.

On April 27, 1995, Boyle, pro se, filed a legal malpractice case against Welsh. Welsh generally denied the allegations in the petition. Thereafter, Welsh filed a motion for summary judgment. On February 6, 1997, a hearing was held on the motion for summary judgment. Welsh offered his own affidavit stating that in his professional opinion the legal representation he provided Boyle complied with the generally recognized standards of legal service and representation in Omaha. He also offered Boyle's answers to interrogatories indicating that she had not retained an expert to testify regarding legal negligence. In response, Boyle offered the affidavit of Dr. Thomas J. Safranek in which he opined that Drs. Monson and Smith violated the appropriate standard of medical care applicable to physicians and surgeons in Omaha in their postoperative follow-up care and treatment of Boyle and that this negligent deviation from the standard of care caused Boyle damage. Boyle also offered her own affidavit in which she stated, among other things, that Welsh declined to institute an action against Dr. Monson and the partnership, that Welsh breached his duty in allowing the statute of limitations to expire, and that Welsh failed to add Dr.

Monson and the partnership as defendants in her case against Dr. Smith. Boyle claimed that all of these failures of Welsh caused her to suffer damage. Boyle also offered the transcript and bill of exceptions from the case entitled "*Jean M. Boyle v. Patrick A. Smith, M.D.*" The court also took judicial notice of the court file in the present case.

Following receipt of the above evidence, the district court granted Welsh's motion for summary judgment. The court indicated that the motion was being granted because Boyle failed to offer expert testimony to establish the applicable standard of care in regard to Welsh's alleged negligence.

We note that throughout the proceedings in district court Boyle's daughter acted on her behalf. The transcript includes a "Power of Attorney" in which Boyle purports to appoint her daughter as her agent for the purposes of the litigation. The record does not show that Boyle's daughter is authorized to practice law and, in fact, suggests that she is not. Throughout the proceedings, Boyle's daughter was allowed to act on Boyle's behalf. There is no doubt that an individual may represent herself and participate in trials and legal proceedings on her own behalf. While we understand the temptation to grant unrepresented parties wide latitude, the law is clear that a pro se litigant is held to the same standards as one who is represented by counsel. *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994); *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993). It is equally clear that one who is not an attorney may not represent others in legal proceedings, nor may such a person practice law for others. *Waite v. Carpenter*, 1 Neb. App. 321, 496 N.W.2d 1 (1992). As such, it appears that Boyle's daughter should not have been allowed to represent Boyle, offer exhibits, or make closing arguments on Boyle's behalf.

III. ASSIGNMENT OF ERROR

Boyle assigns that the district court erred in granting Welsh's motion for summary judgment.

IV. ANALYSIS

1. Standard of Review

[1,2] Our standard of review in summary judgment cases is as follows: Summary judgment is proper only when the plead-

ings, depositions, admissions, stipulations, and affidavits in the record disclose 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. *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998); *Farmers Union Co-op Ins. Co. v. Allied Prop. & Cas.*, 253 Neb. 177, 569 N.W.2d 436 (1997). After filing a motion for summary judgment, the moving party must show facts warranting judgment as a matter of law. Thereafter, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law. *Popple, supra*; *Melick v. Schmidt*, 251 Neb. 372, 557 N.W.2d 645 (1997).

2. Parties' Arguments

On appeal, Boyle assigns that the district court erred in granting Welsh summary judgment. She contends that her petition alleged "Welsh's employment, his failure to timely file a medical malpractice action against Dr. Monson and the partnership . . . and that Welsh's failure to timely file a lawsuit against Monson and the partnership resulted in loss to Boyle." Brief for appellant at 8. She also contends that she offered sufficient evidence to establish material issues of fact to prevent summary judgment. Boyle argues that it was unnecessary for her to present expert testimony to establish "Welsh's deviation from the appropriate standard of care because an attorney's failure to file an action within the applicable statute of limitations is of such a nature that the common knowledge of laypersons is sufficient to find a departure from the required standard of care." Brief for appellant at 12.

In response, Welsh argues that this is not a case where an attorney failed to file a lawsuit within the applicable statute of limitations. Welsh points out that he did initiate a lawsuit on Boyle's medical malpractice claim in a timely fashion against Dr. Smith. He argues that the issue in this case is whether he was negligent "in failing to name the partner of the doctor whom he sued for the partner's concurrent negligence in harming the plaintiff. It is submitted that this is a matter of trial strategy and tactics, and not one involving missing the statute of limitations." (Emphasis in original.) Brief for appellee at 22.

3. Professional Malpractice

[3,4] In legal malpractice cases, the plaintiff must prove the following: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client. *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996); *Sports Courts of Omaha v. Brower*, 248 Neb. 272, 534 N.W.2d 317 (1995). The negligence of counsel must affect the viability of the client's interest and be shown to do so. *Staman v. Yeager & Yeager*, 238 Neb. 133, 469 N.W.2d 532 (1991).

[5-7] Generally, in professional negligence cases, the issue of whether a specific professional act or service demonstrates a lack of skill or knowledge or failure to exercise reasonable care is a matter that must be proved by expert testimony. See, e.g., *Vilcinskas v. Johnson*, 252 Neb. 292, 562 N.W.2d 57 (1997) (medical malpractice); *Overland Constructors v. Millard School Dist.*, 220 Neb. 220, 369 N.W.2d 69 (1985) (architectural malpractice). But see *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991) (holding that it was not necessary for plaintiff to offer expert testimony regarding standard of care where defendant attorney had testified as to standard of care and conduct that breached standard of care). Neither the Nebraska Supreme Court nor this court has expressly applied the above rule in a legal malpractice case. However, the Supreme Court has said: " 'A professional act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual . . . .' An architect performs professional services, as do lawyers, doctors, accountants, and investment advisers." *Overland Constructors*, 220 Neb. at 229, 369 N.W.2d at 75. As an attorney performs professional services, it follows that expert testimony is generally required in order to prove a deviation from the standard of care in legal malpractice cases.

[8,9] The Nebraska Supreme Court has recognized a common knowledge exception to the expert testimony requirement in professional negligence cases. Such an exception applies " 'where the evidence and the circumstances are such that the recognition of the alleged negligence may be presumed to be

within the comprehension of laymen.' " *Boyd v. Chakraborty*, 250 Neb. 575, 581, 550 N.W.2d 44, 48 (1996) (quoting *Halligan v. Cotton*, 193 Neb. 331, 227 N.W.2d 10 (1975)) (medical malpractice case). See *Overland Constructors, supra.* When the common knowledge exception applies, a professional's deviation from the standard of care need not be established through expert testimony. *Boyd, supra*; *Overland Constructors, supra.*

[10] Other jurisdictions have held that the common knowledge exception to the expert testimony requirement applies when among other situations, an attorney has allowed the statute of limitations to run against his or her client's cause of action. See, *Allyn v. McDonald*, 112 Nev. 68, 910 P.2d 263 (1996); *Stanley v. Richmond*, 35 Cal. App. 4th 1070, 41 Cal. Rptr. 2d 768 (1995); *Little v. Matthewson*, 114 N.C. App. 562, 442 S.E.2d 567 (1994); *Storm v. Golden*, 371 Pa. Super. 368, 538 A.2d 61 (1988); *Bowman v. Doherty*, 235 Kan. 870, 686 P.2d 112 (1984); *Collins v. Greenstein*, 61 Haw. 26, 595 P.2d 275 (1979); *Schmidt v. Hinshaw et al.*, 75 Ill. App. 3d 516, 394 N.E.2d 559 (1979); *George v. Caton*, 93 N.M. 370, 600 P.2d 822 (N.M. App. 1979); *Hughes v. Malone*, 146 Ga. App. 341, 247 S.E.2d 107 (1978); *Fuschetti v. Bierman*, 128 N.J. Super. 290, 319 A.2d 781 (1974). See, generally, Annot., 14 A.L.R.4th 170 (1982). It has been said:

> The most clearcut example of a legal malpractice case in which the courts have found it unnecessary to introduce expert evidence to establish the attorney's breach of his duty seems to be that in which the attorney has allowed the statute of limitations to run against his former client's cause of action. . . .

14 A.L.R.4th at 174.

4. Resolution

The resolution of this appeal turns on whether Boyle pled a cause of action which was within the common knowledge of laypersons. As discussed above, Boyle argues that she alleged in her petition that Welsh failed to file a lawsuit against Dr. Monson and the partnership within the applicable statute of limitations, whereas Welsh argues that Boyle alleged that he was

negligent in failing to add Dr. Monson as a defendant in the lawsuit Welsh filed against Dr. Smith.

[11,12] We note that summary judgment is an extreme remedy which should be used sparingly because it may deny a trial to the party against whom the motion is directed. *Bruning v. Law Offices of Ronald J. Palagi*, 250 Neb. 677, 551 N.W.2d 266 (1996); *Oliver v. Clark*, 248 Neb. 631, 537 N.W.2d 635 (1995). Summary judgment should be granted only when the issue is clear beyond all doubt. *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992). A purpose of a summary judgment is to dispose of and eliminate frivolous or baseless lawsuits that would otherwise necessitate unwarranted trials and consume valuable time, avoidable expense, and judicial resources better directed toward litigation that resolves real controversies, meritorious claims, and valid issues. *Id.* Furthermore, although a petition should not leave uncertainty as to the theory on which the pleader wishes to proceed, the Nebraska Supreme Court has held that in actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader. *Fitzpatrick v. U S West, Inc.*, 246 Neb. 225, 518 N.W.2d 107 (1994); *Hutmacher v. City of Mead*, 230 Neb. 78, 430 N.W.2d 276 (1988).

Based upon a liberal reading of Boyle's petition, we conclude that she has alleged two causes of action. First, she states a cause of action based on Welsh's failure to institute a lawsuit against Dr. Monson and the partnership and allowing the applicable statute of limitations to run. In this connection, in her petition, Boyle alleged that Welsh "failed to initiate suit against [Dr. Monson]," that the applicable statute of limitations ran, and that Welsh's "fail[ure] to file a timely suit against Dr. Monson and the partnership was a breach of Defendant's duty [of reasonable care]." Boyle also alleged causation and damage as a result of the alleged negligence. We conclude that Boyle had no obligation to offer expert testimony regarding the above cause of action because the pleadings set forth, among other things, the failure to institute suit. The common knowledge exception to the expert testimony requirement applies to Boyle's first cause of action.

Regarding Boyle's first cause of action, we further conclude that after Welsh made a prima facie showing that she was entitled to judgment as a matter of law, Boyle presented evidence showing the existence of material issues, thereby preventing judgment as a matter of law. At the summary judgment hearing, Boyle offered her own affidavit and the affidavit of a doctor, Dr. Safranek. Through these affidavits, she presented evidence of Welsh's employment and evidence that Welsh's failure to institute a lawsuit against Dr. Monson breached the standard of care and that Welsh's breach of duty caused her damage. Dr. Safranek's affidavit demonstrated that a lawsuit against Dr. Monson would have been viable. For these reasons, we conclude that the district court erred in granting Welsh's summary judgment regarding Boyle's cause of action against Welsh for failing to institute a lawsuit against Dr. Monson and the partnership.

Boyle's petition also states a second cause of action based on Welsh's failure to "add Dr. Monson and the partnership . . . as defendants in the above referenced lawsuit [against Dr. Smith]." She alleges that the failure to join Dr. Monson and the partnership "adversely impacted" her case against Dr. Smith and caused her damage. Boyle's second cause of action involves issues of joinder and trial strategy. Such issues do not fall within the common knowledge exception to the expert testimony requirement. See, e.g., *Gans v. Mundy*, 762 F.2d 338, *cert. denied* 474 U.S. 1010, 106 S. Ct. 537, 88 L. Ed. 2d 467 (1985) (holding that lawyer's failure to join transit authority in case against Amtrak was strategic decision that was not within common knowledge exception); *Koeller v. Reynolds*, 344 N.W.2d 556 (Iowa App. 1983) (holding that plaintiff, who alleged lawyer's failure to bring suit against other driver involved in collision with plaintiff, was required to present expert testimony regarding breach of legal standard of care). Expert testimony was required to establish a breach of the standard of care regarding Boyle's second cause of action. Therefore, we conclude that the district court properly granted Welsh summary judgment regarding Boyle's cause of action for failing to add Dr. Monson and the partnership in Boyle's lawsuit against Dr. Smith.

V. CONCLUSION

For the reasons stated, we affirm in part, and in part reverse, and remand for further proceedings.

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

STATE OF NEBRASKA, APPELLEE,
V. RUSSELL J. HIEMSTRA, APPELLANT.
579 N.W.2d 550

Filed May 5, 1998. No. A-97-526.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of the appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Judgments: Appeal and Error.** With regard to questions of law, an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court.
3. **Probable Cause: Appeal and Error.** Determinations of reasonable suspicion and probable cause are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
4. **Motions to Suppress: Appeal and Error.** In reviewing the trial court's ruling on a motion to suppress, an appellate court considers all the evidence from the trial as well as from the hearing on the motion.
5. **Criminal Law: Investigative Stops: Police Officers and Sheriffs: Probable Cause.** The test to determine if an investigative stop was justified is whether the police officer had a reasonable suspicion, based on articulable facts, which indicated that a crime had occurred, was occurring, or was about to occur and that the suspect might be involved.
6. **Motor Vehicles: Investigative Stops: Police Officers and Sheriffs: Probable Cause.** When an officer observes a traffic offense—however minor—he has probable cause to stop the driver of the vehicle.
7. **Criminal Law: Motor Vehicles: Police Officers and Sheriffs: Testimony: Corroboration.** When testimony regarding speed is used to establish some charge other than speeding, the officer's testimony need not be corroborated.
8. **Trial: Evidence: Blood, Breath, and Urine Tests.** The drawing of blood and the admissibility of test results are controlled by Neb. Rev. Stat. § 60-6,201 (Reissue 1993).
9. **Administrative Law: Licenses and Permits: Health Care Providers: Blood, Breath, and Urine Tests.** To be considered valid, tests of blood shall be performed according to methods approved by the Department of Health and by an individual

possessing a valid permit issued by such department for such purpose, except that a physician, registered nurse, or other trained person employed by a licensed institution or facility which is statutorily defined may withdraw blood for the purpose of a test to determine the alcohol concentration.

10. **Rules of Evidence: Witnesses: Testimony.** Pursuant to Neb. Evid. R. 602, Neb. Rev. Stat. § 27-602 (Reissue 1995), a witness may not testify to something of which the witness has no personal knowledge.
11. **Drunk Driving: Police Officers and Sheriffs: Blood, Breath, and Urine Tests.** While the police cannot hamper a motorist's efforts to obtain independent testing, they are under no duty to assist in obtaining such testing beyond allowing telephone calls to secure the test.
12. **Blood, Breath, and Urine Tests: Witnesses: Testimony.** A competent witness must establish where the NALCO calibration standard used to determine if a Breathalyzer machine is operating correctly came from, how it was received, under what conditions it was kept and preserved, and what spot checks were made to determine its validity.
13. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law; (2) the tendered instruction is warranted by the evidence; and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
14. ____: ____: ____. In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
15. **Jury Instructions: Appeal and Error.** 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.
16. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
17. **Criminal Law: Trial: Juries: Evidence: Convictions: Appeal and Error.** After a jury trial where prejudicial evidence was erroneously admitted, if sufficient evidence exists to support the conviction, the cause may be remanded for further proceedings, but if the evidence is not sufficient, the cause must be dismissed.

Appeal from the District Court for Buffalo County, JOHN P. ICENOGLE, Judge, on appeal thereto from the County Court for Buffalo County, GRATEN D. BEAVERS, Judge. Judgment of District Court affirmed in part, and in part reversed and remanded for a new trial.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellee.

HANNON, IRWIN, and MUES, Judges.

HANNON, Judge.

The appellant, Russell J. Hiemstra, was convicted following a jury trial in Buffalo County Court of driving under the influence (DUI) of an alcoholic liquor or drug. The county court sentenced Hiemstra to 6 months' probation, fined him $250, ordered him to pay court costs, suspended his driving privileges for 60 days, and ordered him to provide the court with written proof of his attendance at an alcohol education class and three Alcoholics Anonymous classes. Hiemstra appealed to the district court, which affirmed the county court's judgment of conviction. Hiemstra now appeals to this court, arguing that his constitutional rights were violated when his vehicle was stopped for speeding and that the trial court erred in admitting the results of his blood test and in instructing the jury as to the meaning of "driving under the influence." We conclude that the initial stop did not violate Hiemstra's constitutional rights and that Hiemstra was not prejudiced by the trial court's refusal to give his suggested jury instruction. However, we find that the trial court erred in admitting the blood test results. Therefore, we affirm the trial court's ruling denying Hiemstra's motion to suppress, but we reverse the conviction and remand the cause for a new trial.

I. FACTUAL BACKGROUND

The following evidence was presented at the hearing on Hiemstra's motion to suppress. At approximately 1:10 a.m. on August 25, 1996, Officer Kevin Thompson, who testified he was trained to visually estimate speed, was patrolling the downtown Kearney, Nebraska, area when he visually observed Hiemstra's vehicle going too fast. Thompson then followed Hiemstra's vehicle, and Thompson's speedometer indicated Hiemstra was driving faster than 45 miles per hour. Thompson estimated that both his and Hiemstra's vehicles were traveling approximately 20 miles per hour over the speed limit.

Thompson testified that he stopped the vehicle and that when he first made contact with Hiemstra, he detected the odor of alcohol and saw beer cans throughout the vehicle as well as two

coolers. Thompson also noticed that Hiemstra's speech was slurred. Thompson gave the following testimony:

> Q- When you first initiated the traffic stop and approached the vehicle, what did you say to the driver?
>
> A- I asked him if he knew why he was being pulled over.
>
> Q- And how did he respond?
>
> A- He just said that he was being stupid.
>
> Q- And did he say anything further?
>
> A- And I asked him if — what he meant by that and he said because he was speeding.

Both Thompson and Hiemstra returned to the police car, where Hiemstra performed several sobriety tests. Hiemstra was instructed to repeat the letters of the alphabet. Thompson testified that Hiemstra did not commit any letter errors but that there were slurs in his speech. Hiemstra was then asked to count from 20 to 39 and then from 39 back down to 20. Thompson testified there were no numerical errors from 20 to 39, just slurs in Hiemstra's speech. When counting from 39 to 20, Hiemstra stopped at 25, asked Thompson if that was sufficient, and was told to continue as instructed.

Hiemstra was then instructed to stand and raise either foot approximately 3 to 6 inches off the ground and count from 1,001 to 1,030. Thompson told Hiemstra that after completing the test, he was to put his foot down and say "stop." Thompson testified that on his first attempt, Hiemstra put his foot down on the count of 3. On his second attempt, Hiemstra put his foot down on the count of 3, continued, and then put his foot down on the count of 9. On the third attempt, Hiemstra put his foot down on the count of 12. Finally, Hiemstra was instructed to perform the walk-and-turn sobriety test. Thompson testified that Hiemstra missed three heel-to-toe steps on the first set of nine, missed seven of the second set of nine, and did not count out loud as instructed.

Thompson testified that Hiemstra smelled of alcohol and that his eyes were bloodshot, his speech was slurred at times, and his balance and mental state were impaired. Thompson testified that based on his experience as an officer, his training in DUI investigations, and his personal experience with alcohol, he

believed that Hiemstra was an impaired driver when he was stopped.

Thompson arrested Hiemstra and drove him to the Good Samaritan Hospital for a blood test. Thompson testified that he read a *Miranda* form to Hiemstra and asked him if he understood his rights, and that Hiemstra then signed the form. The court received a document showing Thompson's signature as the witnessing officer and Hiemstra's signatures indicating that he both understood and waived his *Miranda* rights. Thompson testified he asked Hiemstra how much he had to drink and Hiemstra told him he drank four to five cans of beer. Thompson also testified that Hiemstra stated "[he had] been drinking for two hours from 10 o'clock until 11 o'clock [sic]" but then stated he had his last drink at 1 o'clock.

In his motion to suppress, Hiemstra alleged that all the evidence obtained should be suppressed because the initial stop violated the 4th, 5th, and 14th Amendments to the U.S. Constitution and article I, §§ 3 and 7, of the Nebraska Constitution. Hiemstra also moved the court to suppress any statements made while he was in custody but before the *Miranda* warnings were given. Hiemstra alleged that such statements violated his Fifth Amendment guarantee against self-incrimination. Finally, Hiemstra requested that the court suppress the results of the blood test because Thompson did not have probable cause to request the test. The court overruled Hiemstra's motion.

At trial, Thompson testified to essentially the same version of the facts as during the hearing on the motion to suppress. Thompson stated that Hiemstra was under the influence when he was arrested. Thompson testified that after arresting Hiemstra, Thompson read him a postarrest chemical advisement form, which Hiemstra signed.

The court received a "Post Arrest Chemical Test Advisement" form signed by Thompson which was marked to read, "I hereby direct a test of your X blood _ breath X urine to determine the X alcohol _ drug content." Thompson testified he did not give Hiemstra a urine test or the opportunity to take a urine test. Outside the presence of the jury, Hiemstra's attorney claimed that Thompson's marks directing both a urine and a blood test were inconsistent with Nebraska statutes and asked the court to

suppress any testimony regarding the blood test. The court denied this request.

Thompson explained why he did not give Hiemstra a speeding citation: "The main reason is because I didn't have a radar lock on the defendant in this case and the second reason for not giving him a ticket is he's already — he already has a DUI pending. I didn't feel the need to hammer the guy."

Tyler Schwartz, a medical technologist employed by Good Samaritan Hospital, testified that he did not recall drawing blood from Hiemstra on August 25, 1996. However, the court received a document identified by Schwartz as a "Legal Alcohol on Body Fluid" form. Schwartz testified he signed and dated the document and wrote down a time. "Russell J. Hiemstra" is listed on the document as the "Subject Name," and the document shows that blood was obtained by Schwartz at "0150" on August 25. Additional facts regarding Schwartz' testimony will be discussed later in this opinion.

Diane Stevens, a medical technologist employed by Good Samaritan Hospital, testified that she tests blood for legal blood alcohol content using a machine called the Abbott TDx. The court received Stevens' Class A permit, which allows her to perform testing for body fluid alcohol content. Stevens testified, over objection, that Hiemstra's body fluid alcohol content was .18 of 1 gram per 100 milliliters. Additional facts regarding the blood test will be discussed later in this opinion.

Hiemstra's motions to dismiss or, in the alternative, for a directed verdict at the conclusion of the State's evidence and at the conclusion of Hiemstra's evidence were denied. Hiemstra was convicted of DUI, and he appealed to the district court. The district court for Buffalo County affirmed the trial court's judgment of conviction.

II. ASSIGNMENTS OF ERROR

Hiemstra claims the trial court erred (1) in failing to find that the stop of his vehicle violated the 4th and 14th Amendments to the U.S. Constitution and article I, §§ 3 and 7, of the Nebraska Constitution; (2) in receiving the blood test results even though the person drawing the blood was not qualified; (3) in receiving the blood test results even though the arresting officer did not

provide Hiemstra a urine test; (4) in receiving the blood test results even though the person testing his blood did not conform to title 177 (177 Neb. Admin. Code, ch. 1, § 006.04D (1990)) requirements; and (5) in instructing the jury as to the definition of "driving under the influence."

III. STANDARD OF REVIEW

[1] In reviewing a criminal conviction, it is not the province of the appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Woods*, 249 Neb. 138, 542 N.W.2d 410 (1996).

[2] With regard to questions of law, an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Champoux*, 252 Neb. 769, 566 N.W.2d 763 (1997).

IV. ANALYSIS

1. Vehicle Stop

[3,4] Hiemstra claims the trial court erred in overruling his motion to suppress. Specifically, Hiemstra contends the trial court erred in failing to find that the stop of his vehicle violated his constitutional rights. Regarding motions to suppress, the Nebraska Supreme Court has recently held that "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 the inferences drawn from those facts by the trial judge." *State v. McCleery*, 251 Neb. 940, 942, 560 N.W.2d 789, 790 (1997). In reviewing the trial court's ruling on a motion to suppress, an appellate court considers all the evidence from the trial as well as from the hearing on the motion. *State v. Case*, 4 Neb. App. 885, 553 N.W.2d 173 (1996).

[5,6] The test to determine if an investigative stop was justified is whether the police officer had a reasonable suspicion, based on articulable facts, which indicated that a crime had occurred, was occurring, or was about to occur and that the sus-

pect might be involved. See, *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996); *State v. Smith*, 4 Neb. App. 219, 540 N.W.2d 374 (1995). In addition, " '[w]hen an officer observes a traffic offense—however minor—he has probable cause to stop the driver of the vehicle.' " *State v. Chronister*, 3 Neb. App. 281, 285, 526 N.W.2d 98, 103 (1995), quoting *U.S. v. Cummins*, 920 F.2d 498 (8th Cir. 1990), *cert. denied* 502 U.S. 962, 112 S. Ct. 428, 116 L. Ed. 2d 448 (1991).

Hiemstra argues that "[a]t no time was there ever any evidence offered to show whether or not Hiemstra was in fact exceeding any speed limit or violating any law." Brief for appellant at 12. Thompson's stop was based on his visual observation that Hiemstra was traveling in excess of the speed limit. Thompson testified that the speed limit in the area ranged from 20 to 25 miles per hour. Thompson stated that when following Hiemstra, he was driving in excess of 45 miles per hour. As such, Thompson had probable cause to stop Hiemstra because Hiemstra was violating the speed limit.

[7] Hiemstra also argues that "no testimony was offered to show that Thompson's estimation was corroborated with mechanical, electronic or radio microwave devices." Brief for appellant at 13. This argument is similar to that used in *State v. Howard*, 253 Neb. 523, 571 N.W.2d 308 (1997). In *Howard*, the defendant argued the officer's testimony that the defendant was driving over 100 miles per hour had to be corroborated by a radio microwave, mechanical, or electronic speed measurement device in accordance with Neb. Rev. Stat. § 60-6,192 (Reissue 1993). Section 60-6,192 states:

> Determinations made regarding the speed of any motor vehicle based upon the visual observation of any peace officer, while being competent evidence for all other purposes, shall be corroborated by the use of a radio microwave, mechanical, or electronic speed measurement device. The results of such radio microwave, mechanical, or electronic speed measurement device may be accepted as competent evidence of the speed of such motor vehicle in any court or legal proceeding when the *speed* of the vehicle *is at issue.*

(Emphasis supplied.) The court held that when testimony regarding speed is used to establish some charge other than

speeding, the officer's testimony need not be corroborated. *State v. Howard, supra.*

As in *Howard*, the actual speed of Hiemstra's vehicle is not at issue. Hiemstra was not charged with speeding. Thompson's estimate was used to establish that he had probable cause for stopping Hiemstra. Hiemstra's first assignment of error is without merit.

2. INADMISSIBILITY OF BLOOD TEST RESULTS

Hiemstra argues the trial court erred in admitting his blood test results for three reasons. First, the person who drew Hiemstra's blood was not qualified under Neb. Rev. Stat. § 60-6,201 (Reissue 1993). Second, the arresting officer failed to provide Hiemstra a urine test. Third, the State failed to show the requirements of title 177 (177 Neb. Admin. Code, ch. 1, § 006.04D (1990)) were complied with. We will address each argument in turn.

(a) Qualifications of Person Drawing Blood

[8,9] Hiemstra argues the trial court erred in receiving Hiemstra's blood test results because the person drawing Hiemstra's blood was not qualified. The drawing of blood and the admissibility of test results are controlled by § 60-6,201, which provides in pertinent part:

> (3) To be considered valid, tests of blood . . . shall be performed according to methods approved by the Department of Health and by an individual possessing a valid permit issued by such department for such purpose, *except that a physician, registered nurse, or other trained person employed by a licensed institution or facility which is defined in section 71-2017.01* . . . may withdraw blood for the purpose of a test to determine the alcohol concentration . . . .

(Emphasis supplied.)

In the instant case, Schwartz drew Hiemstra's blood and had no valid permit to do so. Schwartz was asked the following questions: "Q- And to the best of your knowledge, is Good Samaritan Hospital a certified hospital? A- Yes. . . . Q- Do you know if the State of Nebraska requires a certification or permit for one who draws blood? A- I don't know."

[10] Pursuant to Neb. Evid. R. 602, a witness may not testify to something of which the witness has no personal knowledge. See, Neb. Rev. Stat. § 27-602 (Reissue 1995); *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997); *Sedlak Aerial Spray v. Miller*, 251 Neb. 45, 555 N.W.2d 32 (1996). Schwartz' testimony did not evidence that he possessed personal knowledge that Good Samaritan Hospital was or was not a certified hospital or that he even knew the significance of "certified." Indeed, the question was framed so that Schwartz could answer in the affirmative even if he did not know whether the hospital was licensed. As such, Schwartz' statements did not demonstrate that Good Samaritan Hospital is a licensed institution or facility as required by § 60-6,201(3).

We also note that on September 15, 1997, the State filed a "Suggestion of Remand" stating that remand to the district court for a new trial was appropriate because "the State failed to present evidence that the person drawing Hiemstra's blood was employed by a 'licensed institution or facility' as required by Neb. Rev. Stat. § 60-6,201(3) (1993)." Nonetheless, in its brief, the State argued that Hiemstra's failure "to object to Schwartz' testimony that Schwartz had drawn a blood sample from Hiemstra" was "a waiver of his right to now raise the issue on appeal." Brief for appellee at 10-11.

The argument in the State's brief is without merit. The State argues Hiemstra needed to object when Schwartz testified that he drew Hiemstra's blood. The evidence shows that Schwartz did, in fact, draw a blood sample from Hiemstra; thus, an objection at that time was unwarranted. Instead, Hiemstra objected on the basis of insufficient foundation when the blood test results were offered. Hiemstra's objection was timely.

Based on the evidence, the trial court erred in admitting the results of Hiemstra's blood test because the State failed to show that a qualified person, pursuant to § 60-6,201, drew Hiemstra's blood.

(b) Failure to Provide Urine Test

The court received a "Post Arrest Chemical Test Advisement" form which had "Russell J. Hiemstra" listed at the top. Thompson testified, and the evidence shows that he placed checkmarks on the form, causing it to read, "I hereby direct a

test of your X blood [and] X urine to determine the X alcohol . . . content." The form was signed by Thompson as the "Advising Officer" and was also signed by Hiemstra. Only Hiemstra's blood was tested. Hiemstra argues:

> Section 60-6,199 Neb. R.R.S. generally provides that an arrested person, when advised that they will have a chemical test of their blood, breath or urine test performed, may *request* a second test, and if the second test is not provided then the first test would be inadmissible. . . . Because of the failure of the arresting officer to *provide* the second test, the first test should not have been received as evidence.

(Emphasis supplied.) Brief for appellant at 23.

[11] Hiemstra notes the statute states an arrested person may *request* a second test. See Neb. Rev. Stat. § 60-6,199 (Reissue 1993). Hiemstra then argues the blood test is inadmissible because a second test was not *provided.* There is no evidence Hiemstra requested a urine test. The Supreme Court has stated that "while . . . the police cannot hamper a motorist's efforts to obtain independent testing, they are under no duty to assist in obtaining such testing beyond allowing telephone calls to secure the test." *State v. Dake*, 247 Neb. 579, 584, 529 N.W.2d 46, 49 (1995). Therefore, Thompson had no duty to *provide* a urine test for Hiemstra. In addition, the fact that no urine test was performed does not affect the admissibility of the blood test, and Hiemstra provides us with no law to the contrary. There is no evidence this error misled Hiemstra to his prejudice or somehow caused him to not request a urine test. Hiemstra's third assignment of error is without merit.

(c) Failure to Show Abbott TDx Was Working as Required by Title 177

Hiemstra argues the trial court erroneously admitted the blood test results because the requirements of title 177 (177 Neb. Admin. Code, ch. 1, § 006.04D (1990)) were not satisfied. Specifically, Hiemstra argues that "[t]he use of a known substance to obtain a low, medium and high control and the use of refrigerated reagent packs" are required by title 177. Brief for appellant at 28. Title 177 was entered into evidence and lists the following requirements under the heading "Radiative Energy Attenuation Utilizing The Abbott TDx Analyzer:"

> 006.04D1 The radiative energy attenuation method . . . must be performed in a manner to include at least the following technique:
>
> . . . .
>
> 006.04D1g Also upon completion of analysis, remove the carousel and discard its contents. If the reagent pack is not to be used immediately again, remove and store it at 2 to 8 degrees C.
>
> . . . .
>
> 006.04Dlj Each test run shall include a low, medium, and high control. If runs contain more than twelve specimens, the controls shall be placed after the last specimens for a chemical test on the carousel.

Hiemstra's argument is twofold. First, the State failed to prove the reagent pack was properly refrigerated. Second, the State failed to identify or verify the contents of the control used to demonstrate the Abbott TDx was working properly.

Stevens testified generally that she followed all of the policies and procedures of title 177. Such general testimony is a conclusion and is insufficient to show that title 177 requirements were complied with. Specifically, the State failed to question Stevens about the refrigeration of the reagent pack. Therefore, the State failed to prove that title 177 was complied with, and the trial court erred in admitting the blood test results.

Hiemstra also contends his blood test results were erroneously admitted because the State failed to verify the contents of the control used to demonstrate the Abbott TDx was working properly. Hiemstra's argument is very similar to that in *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980), *overruled on other grounds, State v. Obermier*, 241 Neb. 802, 490 N.W.2d 693 (1992). In *Gerber*, the defendant was convicted of driving under the influence and claimed the lower court erred in admitting the results of his Breathalyzer test. The officer who administered the test testified that an ampul containing an amount of ethyl alcohol, referred to as a " 'NALCO standard,' " *id.* at 79, 291 N.W.2d at 406, is used to determine if the machine is operating correctly. (An ampule, ampul, or ampoule is "a sealed glass or plastic bulb containing solutions for hypodermic injection." Webster's Encyclopedic Unabridged Dictionary of the

English Language 51 (1989).) The NALCO standard is attached to the machine, and if operating correctly, the machine registers a number that matches the number on the ampul. The officer conceded that determining whether the machine is working depends on whether the alcohol content of the NALCO standard is, in fact, as reflected on the ampul.

[12] The officer in *Gerber* testified that he did not know who prepared the NALCO standard and did not know where the NALCO standard came from or its actual alcohol content. The officer admitted he did not know if the machine was operating correctly at the time the defendant was tested. The *Gerber* court held that a competent witness must establish where the NALCO calibration standard used to determine if a Breathalyzer machine is operating correctly came from, how it was received, under what conditions it was kept and preserved, and what spot checks were made to determine its validity. The court quoted the following statement with approval:

> "The fact that the *sealed* ampoules are delivered by the manufacturer of the breathalyzer machine for exclusive use in such machine plus the additional fact of regular spot checking of the ampoules is, in our opinion, sufficient *prima facie* proof that the chemicals in any one ampoule are of the proper kind and mixed to the proper proportion."

(Emphasis in original.) 206 Neb. at 90, 291 N.W.2d at 411 (quoting *State v. Baker*, 56 Wash. 2d 846, 355 P.2d 806 (1960)). The *Gerber* court held the test inadmissible because the State failed to prove the necessary requirements were met.

In the instant case, Stevens testified that a known substance, called a control, is very important in determining whether the machine is working properly. Stevens testified that she receives a known substance, in a vial or a tube, from a manufacturer. Included with the substance is a certificate from the manufacturer stating the bottle contains a certain amount of ethanol. The bill of exceptions contains the following testimony:

> Q- . . . You get this known substance and my only question is, before you use it in the machine, what do you do to make sure that the known substance is what it purports to be?

A- Okay, the known substance has a known value on it. So I run it and if I get the known value on it, I assume that it's what it's supposed to be because I got the value they told me I would get.

Q- And that's based not upon your test, but what some piece of paper says?

A- They ran it and got this answer, I rerun it, get the same answer.

Stevens also testified that Good Samaritan Hospital did not have a policy or procedure of periodically testing blood kits to make sure that the contents of the test tubes were what they purported to be.

Based on *Gerber, supra*, we find that the trial court erred in admitting the results of Hiemstra's blood test because there was no testimony or evidence identifying the contents of the control, showing how the control was received, detailing under what conditions the control was kept and preserved, and identifying what spot checks were made to determine the validity of the control.

3. Jury Instructions

Hiemstra argues that "the definition of under the influence as given by the Court is not appropriate and is an incorrect statement of the law. The problem with the Court's instruction is that it causes the jury to try to guess at what Hiemstra's normal body or mental faculties would be." Brief for appellant at 29. Over objection, the trial court gave the following instruction defining "under the influence":

> A person is under the influence of alcoholic liquor if such person is impaired because of his or her[]consumption of alcohol in the capacity to think and act correctly and efficiently, to the extent as to have lost an appreciable degree of the normal control of his or her body or mental faculties.

Hiemstra proposed the following instruction: "The phrase 'under the influence of alcoholic liquor' means the ingestion of alcohol in an amount sufficient to impair to any appreciable degree the ability to operate a motor vehicle in a prudent and cautious manner."

[13,14] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law; (2) the tendered instruction is warranted by the evidence; and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990). In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996); *State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128 (1996).

[15] The language of Hiemstra's proposed jury instruction is very similar to that of NJI2d Civ. 7.52. We conclude that Hiemstra's proposed instruction is a correct statement of the law and note that the court's instruction seems to require evidence of the individual defendant's "normal control of his or her body," whereas the NJI2d Civ. 7.52 instruction does not contain this weakness. Hiemstra also satisfies the second requirement that the instruction must be warranted by the evidence. Since Hiemstra was charged with "driving under the influence," a jury instruction defining that term was certainly warranted. However, Hiemstra fails to establish that his rights were prejudiced by the court's failure to give the suggested jury instruction. We assume that Hiemstra is arguing his rights were prejudiced because the given jury instruction is an incorrect statement of the law. We recognize that the given jury instruction contains the weakness cited above and is therefore somewhat confusing, while the language of NJI2d Civ. 7.52 is considerably clearer. However, the Supreme Court has stated that 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. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995).

We must examine the jury instructions in their entirety. Jury instruction No. 4 generally explains the material elements of driving under the influence; specifically, that the defendant was in actual physical control of a motor vehicle while under the influence of alcohol or while having a concentration of .10 of 1

gram or more of alcohol per 100 milliliters of his blood. Jury instruction No. 5 explains that Neb. Rev. Stat. § 60-6,196 (Reissue 1993) makes it unlawful for any person to operate or be in actual physical control of a motor vehicle while under the influence of alcohol or while having a concentration of .10 of 1 gram of alcohol or more per 100 milliliters of his or her blood.

When read in their entirety, the jury instructions accurately and fairly present the law of DUI. Therefore, Hiemstra has failed to meet his burden and to demonstrate that his rights were prejudiced by the court's failure to give the suggested jury instruction. Hiemstra's final assignment of error is without merit. However, upon remand, we remind the trial court that as long as there is a Nebraska jury instruction that accurately states the law and applies to the case, it is the instruction which should be given. *State v. Jimenez*, 3 Neb. App. 421, 530 N.W.2d 257 (1995), *aff'd as modified* 248 Neb. 255, 533 N.W.2d 913.

4. Effect of Errors

[16] Hiemstra urges that the admission of the blood test results necessitates the dismissal of his case. However, in *State v. Hingst*, 251 Neb. 535, 557 N.W.2d 681 (1997), the Supreme Court reached a different conclusion in a factually similar case. In *Hingst*, the defendant was also convicted of DUI. On appeal, the court held that the trial court committed plain error when it failed to exclude the chemical test results because the defendant was not properly advised before the test was taken. However, the State argued that the record contained other evidence sufficient to sustain the conviction. On further review, the Supreme Court stated, "In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt." *Id.* at 537, 557 N.W.2d at 683. "An error is harmless when the improper admission of evidence did not materially influence the jury to reach a verdict adverse to the substantial rights of the defendant." *Id.* at 538, 557 N.W.2d at 683.

[17] The Supreme Court noted the record contained evidence that at the time of arrest, the defendant's eyes were bloodshot, he smelled of alcohol, his speech was slurred, and he failed twice to correctly recite the alphabet. However, the Supreme

Court was unable to determine which evidence the jury relied on in convicting the defendant. The Supreme Court held that after a jury trial where prejudicial evidence was erroneously admitted, if sufficient evidence exists to support the conviction, the cause may be remanded for further proceedings, but if the evidence is not sufficient, the cause must be dismissed. The Supreme Court found that sufficient evidence existed upon which a jury could, on remand, find the defendant guilty of DUI; accordingly, the Supreme Court affirmed this court's decision reversing the conviction and remanding the cause for a new trial.

V. CONCLUSION

As in *Hingst*, in this case, the trial court erred in admitting Hiemstra's blood test results, as determined above. We cannot say that this error was harmless beyond a reasonable doubt. However, the record contains independent evidence to support Hiemstra's conviction. Thompson's testimony establishes that Hiemstra was driving under the influence. Thus, we find that there is sufficient evidence to support the conviction. Accordingly, we affirm the trial court's ruling denying Hiemstra's motion to suppress, but we reverse the judgment of conviction and remand the cause for a new trial.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

US ECOLOGY, INC., APPELLANT, V. BOYD COUNTY BOARD OF EQUALIZATION, BOYD COUNTY, NEBRASKA, APPELLEE.

578 N.W.2d 877

Filed May 5, 1998. No. A-97-802.

1. **Taxation: Appeal and Error.** Any person aggrieved by a final decision in a case appealed to the Tax Equalization and Review Commission, whether the decision is affirmative or negative in form, shall be entitled to judicial review in the Nebraska Court of Appeals.
2. ____: ____. In an appeal from the Tax Equalization and Review Commission, the appellate court reviews for errors appearing on the record of the commission.
3. **Judgments: Appeal and Error.** When reviewing an order for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the

law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

4. **Taxation: Appeal and Error.** An appellate court may affirm, reverse, or modify the decision of the Tax Equalization and Review Commission or remand the cause for further proceedings.
5. **Evidence: Records: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.
6. **Taxation: Evidence: Proof: Appeal and Error.** Neb. Rev. Stat. § 77-1511 (Reissue 1996) provides that the Tax Equalization and Review Commission shall hear appeals from a county board of equalization as in equity and without a jury and determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof. The commission shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary or unless evidence is adduced establishing that the subject property was assessed too low.
7. **Taxation: Appeal and Error.** Issues not presented to a county board of equalization are not properly before the Tax Equalization and Review Commission or an appellate court.
8. **Taxation: Valuation: Proof.** The taxpayer bears the burden of proving that the value of a property has been arbitrarily or unlawfully fixed by a county board of equalization in an amount greater than its actual value.
9. **Real Estate: Valuation: Witnesses.** That a resident owner who is familiar with his property and knows its worth is permitted to testify as to its value without further foundation rests upon the owner's familiarity with the property's characteristics, its actual and potential uses, and the owner's experience in dealing with it.
10. **Taxation: Valuation.** In tax valuation cases, actual value is largely a matter of opinion and without a precise yardstick for determination with complete accuracy.
11. **Real Estate: Valuation.** The sale price and the earning capacity of a property are only factors to be considered in determining actual value or fair market value.
12. **Real Estate: Agriculture: Taxation: Valuation.** Neb. Rev. Stat. § 77-201 (Reissue 1996) provides that except as provided in subsection (2), all real property in this state, not expressly exempt therefrom, shall be subject to taxation and shall be valued at its actual value. Subsection (2) provides that agricultural land and horticultural land used solely for agricultural or horticultural purposes shall constitute a separate and distinct class of property for purposes of property taxation, shall be subject to taxation unless expressly exempt from taxation, and shall be valued at its taxable value.
13. ____: ____: ____: ____. Actual value of real property for purposes of taxation shall mean the market value of real property in the ordinary course of trade. Actual value may be determined using professionally accepted mass appraisal techniques, including, but not limited to: (1) comparison with sales of real property of known or recognized value, taking into account location, zoning, and current functional use; (2) earning capacity of the real property; and (3) reproduction cost less depreciation. Taxable value of agricultural land and horticultural land for purposes of taxation shall mean the value determined pursuant to Neb. Rev. Stat. §§ 77-1359 to 77-1365 (Reissue 1996).

14. ____: ____: ____: ____. Agricultural land which is not being used for agricultural or horticultural purposes is not entitled to the special tax treatment accorded land used solely for agricultural or horticultural purposes and is to be valued at 100 percent of its actual value.

Appeal from the Nebraska Tax Equalization and Review Commission. Reversed and remanded for further proceedings.

Steven G. Seglin, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

Carl Schuman, Boyd County Attorney, for appellee.

MILLER-LERMAN, Chief Judge, and SIEVERS and INBODY, Judges.

INBODY, Judge.

INTRODUCTION

US Ecology, Inc., appeals the July 8, 1997, decision of the Nebraska Tax Equalization and Review Commission (Commission) affirming the increase in the valuation of real property owned by US Ecology by the Boyd County Board of Equalization (Board) from $113,785 to $320,000. For the reasons set forth herein, we reverse, and remand for further proceedings.

STATEMENT OF FACTS

US Ecology is a California corporation engaged in radioactive and hazardous waste handling, processing, and disposal. An investigation was conducted by US Ecology and its subcontractors throughout Nebraska to locate an appropriate site for a low-level radioactive waste facility pursuant to US Ecology's exclusive contract with the Central Interstate Compact Commission. This investigation disclosed approximately 80 sections of land suitable for such a venture, including the approximately 320 acres of land legally described as "The East One-Half of Section Thirteen (13), Township Thirty-four (34) North, Range Fourteen (14) West of the 6th Principal Meridian, [in Boyd County, Nebraska,] [e]xcept a tract of land located in the South One-Half of the Southeast Quarter (S½SE¼) . . . ." This property will hereinafter be referred to as the "subject property."

In July 1990, US Ecology purchased the subject property. Because of the suitability of this particular property as a location for a low-level radioactive waste facility, US Ecology paid a premium for the land, slightly more than $1,000 per acre, for a total purchase price of $320,000, when similar land was selling for approximately $400 per acre.

From 1990 through 1995, the subject property had been assessed as agricultural land, with a 1995 assessed value of $113,785. However, in 1996, the Board determined that the land should no longer be assessed as agricultural land and increased its assessed value to $320,000. US Ecology timely appealed this determination to the Commission.

On July 2, 1997, a hearing was held before the Commission. The Board introduced into evidence five exhibits: the July 1990 deed transferring title of the subject property to US Ecology; the option contract between US Ecology and the seller; the minutes from the Board's July 22, 1996, meeting; and tax assessments of a licensed landfill facility in Dakota County and an up-and-running hazardous waste facility in Kimball County.

US Ecology called two witnesses at the hearing: John DeOld, project manager since the summer of 1988 for US Ecology's central interstate project, and Wayne Kubert, a real estate appraiser. DeOld testified that in July 1990, US Ecology submitted its application for the required operating license from the State of Nebraska, which set forth that only about 110 acres will be used for the actual waste disposal operation, with the remaining acres probably to be used for site-monitoring and similar purposes. The application had not been approved as of the date of the hearing, and the earliest that US Ecology could get license approval, if it was to be successful, would be the last few months of 1999. Furthermore, US Ecology does not know with any degree of certainty that it will receive a license for the proposed Boyd County facility.

DeOld testified that for the first year after US Ecology purchased the subject property, a tenant farmer already using the site continued farming the property. Since that time, US Ecology has been conducting on-site environmental monitoring activities, including ground water and atmospheric studies and measurements of soil and vegetation quality, to establish a base-

line of information showing the condition of the property with respect to any hazardous or radiological material that might be found on the site. Finally, DeOld testified that in his opinion, the reasonable market value of the property on January 1, 1996, and continuing up to the date of the hearing was approximately $450 per acre.

US Ecology's second and final witness was Kubert, a real estate appraiser. Kubert testified that because of the uncertainty regarding the acceptance of US Ecology's license application, the highest and best use of the subject property is for agricultural purposes. He performed an appraisal of the property using the market or comparative value approach. In doing so, he considered the value of a 150-square-foot concrete building which US Ecology had built on the land. Additionally, there was evidence presented that US Ecology has installed approximately 50 wells on the property for the purpose of measuring ground water flow and monitoring water quality, moved two leased mobile-home-type trailers onto the property, and built or maintained a rudimentary road system.

Kubert valued the property at $154,710 and the improvements at $11,290, for a total of $166,000. Valuing the subject property at 80 percent, which is the way agricultural land is valued, the subject property has a value of $123,710 and the improvements are valued at $11,290, with the total value at $135,000. Kubert then testified that he also analyzed the value of the subject property based upon the Boyd County Assessor's value for each type of soil type and land use to get an 80-percent land value of $102,495, plus improvements valued at $11,290, for a total value of $113,785, which was the assessed value of the subject property prior to July 22, 1996.

At the close of US Ecology's case, the Board moved to dismiss the case, alleging that US Ecology failed to adduce evidence establishing that the action taken by the Board was unreasonable or arbitrary, as required by Neb. Rev. Stat. § 77-1511 (Reissue 1996). The Commission filed a decision setting forth its findings of fact and conclusions of law as required by Neb. Rev. Stat. § 77-5018 (Supp. 1997).

Summarized, the Commission's findings of fact are as follows: US Ecology failed to present credible evidence to support

its claim that the Board's valuation of the property was unreasonable or arbitrary. The Commission found that DeOld's opinion of value of the subject property was unsupported by the evidence and that Kubert's appraisal was not credible evidence of the value of the subject property because (1) the appraisal determined that the highest and best use of the subject property was as agricultural land; (2) the subject property cannot be used as agricultural land under the provisions of Neb. Const. art. XII, § 8, and consequently cannot be valued as such; (3) the appraisal was based on the sales comparison approach, no consideration was given to the income approach, and standard appraisal practices dictate that a second approach to value is essential to support the opinion of value; and (4) US Ecology has expended more than $80 million in testing and application proceedings in order to obtain a radioactive and hazardous waste processing facility license.

Thus, the Commission granted the Board's motion for dismissal and affirmed the Board's determination, finding that there was no showing that the Board's valuation was unreasonable or arbitrary and that the evidence adduced at the hearing established that the value of the property was "at least $320,000.00." US Ecology timely appealed to this court.

ASSIGNMENTS OF ERROR

On appeal, US Ecology has identified seven assignments of error, which can be consolidated into the following two issues: (1) The Commission erred in finding that since the subject property cannot be used as agricultural land under the Nebraska Constitution, the subject property cannot be valued as agricultural land pursuant to the provisions of Neb. Rev. Stat. § 77-1343 (Reissue 1996) and related statutes, and (2) the Commission erred in finding that US Ecology failed to meet its burden of establishing that the valuation of the subject property as assessed by the Board was unreasonable or arbitrary.

STANDARD OF REVIEW

[1] Any person aggrieved by a final decision in a case appealed to the Commission, "whether the decision is affirmative or negative in form, shall be entitled to judicial review in

the [Nebraska] Court of Appeals." Neb. Rev. Stat. § 77-5019(1) (Reissue 1996).

[2-4] In an appeal from the Commission, the appellate court reviews for errors appearing on the record of the Commission. § 77-5019(5). When reviewing an order for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Harrison Square v. Sarpy Cty. Bd. of Equal.*, 6 Neb. App. 454, 574 N.W.2d 180 (1998). This court may affirm, reverse, or modify the decision of the Commission or remand the cause for further proceedings. § 77-5019(5).

ANALYSIS

Transcript of Hearing Before Board.

At the threshold, we note that the Board's brief cites to the transcript of the July 22, 1996, meeting before the Board which was attached to its answer and incorporated by reference. However, the transcript of the Board meeting is not included in the bill of exceptions.

[5] "A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered." *Huddleson v. Abramson*, 252 Neb. 286, 288, 561 N.W.2d 580, 582 (1997). See, also, *Brierly v. Federated Finance Co.*, 168 Neb. 725, 97 N.W.2d 253 (1959) (affidavit contained in transcript but not preserved in bill of exceptions cannot be considered). Accordingly, we cannot, should not, and do not further consider the transcribed testimony of that meeting.

We may, however, consider the minutes of the Board's meeting which were offered and received into evidence at the hearing before the Commission. The portion of the Board's minutes dealing with the increase in valuation of the subject property is as follows:

> The classification of the E1/2 of Sec. 13, T34, R14 was discussed. Supervisor Bentzen presented laws pertaining to assessing this property which the clerk read. Sites at Kimball and Dakota County were compared. Discussion followed on the price paid for land, how many total acres,

> acres being considered for licensing, the fact that the land is no longer farmed and if it should be considered as agriculture land. Mr. DeOld stated that although $75 to $80 million has been spent on the project, all of this money is not out on the site. Motion by Bentzen, second Mashino to set value of this parcel of land at $320,000.00. Ayes: Nelson, Mashino, Purviance, Boettcher, Luber, Bentzen. Absent: Reiser. Motion carried.

This said, we now proceed to dispose of the case before us.

Unreasonable or Arbitrary.

US Ecology assigns as error the Commission's finding that the Board's assessed valuation of the subject property was not unreasonable or arbitrary.

[6] In its review of the Board's decision to increase the valuation of the subject property, the Commission heard the appeal from the Board as in equity and without a jury and determined anew all questions raised before the Board which related to the liability of the property to assessment, or the amount thereof. See § 77-1511. See, also, Neb. Rev. Stat. § 77-5007 (Reissue 1996). The action taken by the Board was to be affirmed by the Commission unless evidence was adduced establishing that the action of the Board was unreasonable or arbitrary or unless evidence was adduced establishing that the subject property was assessed too low. See § 77-1511.

One of the reasons articulated by the Commission for its determination that the Board's valuation of the subject property at $320,000 was not unreasonable or arbitrary was that the subject property could not be used as agricultural land under the provisions of Neb. Const. art. XII, § 8, and that consequently, the land could not "be valued as agricultural land pursuant to the provisions of [§ 77-1343] and related statutes." According to the record in this case, the issue of whether the provisions of Neb. Const. art. XII, § 8, prohibit the classification of the subject property as agricultural property under § 77-1343 was not presented to the Board.

[7] A similar factual situation occurred in the recent Court of Appeals case *Harrison Square v. Sarpy Cty. Bd. of Equal.*, 6 Neb. App. 454, 574 N.W.2d 180 (1998). In *Harrison Square*,

Harrison Square Partnership appealed a decision by the Sarpy County Board of Equalization regarding the valuation of a certain commercial property owned by the partnership. One of the assigned errors on appeal was that the Commission erred in not adjusting the capitalization rate upward to give the property a lower valuation. In affirming the order of the Commission, the Court of Appeals stated:

> According to the record, the issue of the appropriate capitalization rate was not presented to the Board. Pursuant to § 77-1511, the Commission shall "determine anew all questions raised before the county board of equalization . . ." Furthermore . . . the Commission has no authority to consider questions not raised before a county board of equalization. [Citation omitted.] Because the question of the proper capitalization rate was not presented to or raised before the Board for a ruling, it was not properly before the Commission or before this court on appeal. See *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997).

Harrison Square, 6 Neb. App. at 460, 574 N.W.2d at 185.

In the case at bar, the question of the applicability of art. XII, § 8, of the Nebraska Constitution was not presented to or raised before the Board for a ruling, and thus, this issue was not properly before the Commission and the Commission had no authority to consider it. Consequently, the Commission erred when it considered the applicability of art. XII, § 8, of the Nebraska Constitution in determining whether the action of the Board was unreasonable or arbitrary.

[8] Despite the Commission's erroneous consideration of the constitutional issue, we proceed to consider whether after considering the proper evidence, the Commission erred in determining that US Ecology failed to establish that the Board's valuation of the subject property was arbitrary and capricious. In so doing, we are mindful that the appellant, US Ecology, bears the burden of proving that the value of the subject property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value. See *Future Motels, Inc. v. Custer Cty. Bd. of Equal.*, 252 Neb. 565, 563 N.W.2d 785 (1997).

The Commission disregarded the evidence presented by US Ecology at the hearing, finding that "there is no credible evidence from [US Ecology] which establishes that the value of the subject property for tax year 1996, was unreasonable or arbitrary." Instead, the Commission found that the evidence before it established that "the fair market value of the subject property as of January 1, 1996, was at least $320,000.00." This determination was apparently based upon the facts that the subject property had been purchased in 1989 for $320,000 and that US Ecology had "expended more than $80,000,000.00 in testing and application proceedings in order to obtain a radioactive and hazardous waste processing facility license." We disagree.

[9] At the hearing before the Commission, US Ecology presented opinion evidence by DeOld, the project manager, that the reasonable market value of the property on January 1, 1996, and continuing up to the date of the hearing was approximately $450 per acre. That a resident owner who is familiar with his property and knows its worth is permitted to testify as to its value without further foundation rests upon the owner's familiarity with the property's characteristics, its actual and potential uses, and the owner's experience in dealing with it. *Johnson's Apco Oil Co. v. City of Lincoln*, 204 Neb. 397, 282 N.W.2d 592 (1979).

DeOld's testimony established that he had been employed as project manager for the subject property since 1988, that he is in charge of all aspects of the project, that he was involved in the negotiations to purchase the subject property, that the subject property was located in an area which had been determined to be suitable for development of a low-level radioactive waste disposal facility, that the landowner of the subject property was willing to sell for $1,000 per acre, that US Ecology realized that it was paying a premium for the property, and that DeOld made an investigation into the market value of real estate in the area at the time and found that similar property sold for $400 per acre. DeOld then testified, without objection, that in his opinion the subject property had a market value of $450 per acre at the date of the hearing. Sufficient foundation was established setting forth DeOld's familiarity with the subject property to allow him to testify as to the market value of the subject property as

of the date of the hearing, and the Commission erred in disregarding this evidence.

[10] Furthermore, we find that the Commission erred in disregarding US Ecology's evidence and the testimony by the real estate appraiser, Kubert. In tax valuation cases, actual value is largely a matter of opinion and without a precise yardstick for determination with complete accuracy. *Dowd v. Board of Equal.*, 240 Neb. 437, 482 N.W.2d 583 (1992).

The Board stipulated that Kubert was an expert and did not object to Kubert's testimony that he valued the property at $154,710 and the improvements at $11,290, for a total of $166,000. Kubert also testified that he also analyzed the value of the subject property based upon the Boyd County Assessor's value for each type of soil type and land use to get an 80-percent land value of $102,495, plus improvements valued at $11,290, for a total value of $113,785, which was the assessed value of the subject property prior to July 22, 1996. Consequently, the Commission erred in disregarding Kubert's appraisal of the subject property.

Finally, we address the Commission's reliance upon the purchase price of the subject property. The record clearly sets forth that US Ecology paid $320,000 for the subject property, or slightly more than $1,000 per acre. The record is equally clear that US Ecology paid a premium for the subject property.

[11] The sale price and the earning capacity of a property are only factors to be considered in determining actual value or fair market value. *Potts v. Board of Equalization,* 213 Neb. 37, 328 N.W.2d 175 (1982).

In considering the relation between the 1989 purchase price of the subject property and the change in tax valuation which occurred in 1996, we find it interesting that from 1990 through 1995, the subject property was not valued at the purchase price, but instead had been valued at $113,785. In addition, we consider the 1989 $320,000 purchase price of the subject property too remote in time to be determinative of the market value of the subject property in 1996. Finally, there was no evidence of an event in the year leading up to the 1996 valuation which would establish the propriety of the nearly threefold increase in the valuation of the subject property.

Additionally, although US Ecology has expended more than $80 million in its attempt to secure a license for the low-level radioactive waste disposal facility, the fact remains that US Ecology does not know with any degree of certainty that it will receive a license for the proposed facility. Plainly and simply stated, unless and until a license has been secured, the amounts expended by US Ecology in its attempt to secure the license are not indicative of the actual or fair market value of the subject property.

In sum, we find that US Ecology met its burden to put forth sufficient evidence to establish that the Board acted arbitrarily and capriciously.

Agricultural Valuation.

US Ecology argues that the Commission erred in finding that since the subject property cannot be used as agricultural land under the Nebraska Constitution, the subject property cannot be valued as agricultural land pursuant to the provisions of § 77-1343 and related statutes.

[12] Neb. Rev. Stat. § 77-201 (Reissue 1996) provides, in pertinent part:

> (1) Except as provided in subsection (2) of this section, all real property in this state, not expressly exempt therefrom, shall be subject to taxation and shall be valued at its actual value.
>
> (2) Agricultural land and horticultural land used solely for agricultural or horticultural purposes shall constitute a separate and distinct class of property for purposes of property taxation, shall be subject to taxation, unless expressly exempt from taxation, and shall be valued at its taxable value.

US Ecology admits that it does not use the land for agriculture and thus is not entitled to the special tax treatment accorded land used solely for agricultural or horticultural purposes. Instead, US Ecology contends that the subject property is agricultural property not used for agricultural or horticultural purposes and thus, that it should be valued at 100 percent of its actual value. US Ecology contends that the correct valuation of the subject property is $166,000, which represents 100-percent actual value as agricultural land.

[13] Neb. Rev. Stat. § 77-112 (Reissue 1996) provides:

> (1) Actual value of real property for purposes of taxation shall mean the market value of real property in the ordinary course of trade. Actual value may be determined using professionally accepted mass appraisal techniques, including, but not limited to:
>
> (a) Comparison with sales of real property of known or recognized value, taking into account location, zoning, and current functional use;
>
> (b) Earning capacity of the real property; and
>
> (c) Reproduction cost less depreciation.
>
> (2) Taxable value of agricultural land and horticultural land for purposes of taxation shall mean the value determined pursuant to sections 77-1359 to 77-1365.

[14] In the instant case, the subject property is agricultural land, but it is not being used for agricultural or horticultural purposes and is not entitled to the special tax treatment accorded land used solely for agricultural or horticultural purposes. Therefore, the subject property is to be valued at 100 percent of its actual value.

CONCLUSION

US Ecology presented sufficient evidence before the Commission to establish that the Board acted arbitrarily and capriciously in valuing the subject property. Additionally, the Board erred in considering the applicability of Neb. Const. art. XII, § 8, since the issue of the applicability of the constitutional provision had not been raised before the Board. Finally, because the subject property is agricultural property, but is not being used for agricultural or horticultural purposes, the subject property is to be valued at 100 percent of its actual value. For the reasons set forth, the decision of the Commission affirming the determination by the Board is reversed, and the cause is remanded to the Commission for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. TRAVIS ALFORD, APPELLANT.

578 N.W.2d 885

Filed May 5, 1998. No. A-97-1031.

1. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
2. **Sentences: Statutes.** An indeterminate sentence is insufficient and invalid unless authorized by statute. That general rule rests upon the proposition that indeterminate sentences are not authorized at common law and may not be pronounced without specific legislative sanction.
3. **Sentences.** A sentence of imprisonment should be sufficiently certain so that in and of itself it advises the accused and those charged with its execution of its duration.
4. **Statutes: Appeal and Error.** In construing a statute, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results.
5. **Sentences.** Neb. Rev. Stat. § 29-2204 (Reissue 1995) does not authorize the imposition of an indeterminate sentence to a facility outside the jurisdiction of the Department of Correctional Services.
6. ____. A void sentence is no sentence. However, an indeterminate sentence imposed for a crime, where not authorized by statute, is erroneous but not void.
7. **Sentences: Evidence.** A sentencing court has broad discretion as to the source and type of evidence or information that it may use in determining the kind and extent of the punishment imposed. The sentencing phase is separate and apart from the trial phase, and the traditional rules of evidence may be relaxed following a conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence.
8. **Sentences: Evidence: Hearsay: Presentence Reports.** In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence. Reliance upon hearsay information in a presentence investigation is not inappropriate.
9. **Sentences.** In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, the motivation for the offense, the nature of the offense, and the amount of violence involved in the commission of the crime.

Appeal from the District Court for Scotts Bluff County: JOHN D. KNAPP, Judge. Remanded for resentencing.

Paul W. Snyder, of The Van Steenberg Firm, P.C., for appellant.

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

HANNON, IRWIN, and MUES, Judges.

MUES, Judge.

INTRODUCTION

After pleading guilty or no contest to three Class I misdemeanors, Travis Alford was sentenced by the district court to concurrent indeterminate sentences in the county jail. He appeals, arguing that the district court was without authority to impose the indeterminate sentences and that the presentence investigation report contained improper information which was considered by the trial court. We agree that the district court was without authority to sentence Alford to indeterminate sentences in the county jail, and thus, we remand for resentencing.

STATEMENT OF FACTS

On May 22, 1997, Alford was charged with four counts of first degree sexual assault, a Class II felony, each punishable by 1 to 50 years' incarceration. See Neb. Rev. Stat. §§ 28-319 and 28-105 (Reissue 1995). On July 24, 1997, as part of a plea agreement, Alford pled no contest to two counts of third degree sexual assault, a Class I misdemeanor, see Neb. Rev. Stat. § 28-320 (Reissue 1995), and guilty to one count of third degree assault, also a Class I misdemeanor, see Neb. Rev. Stat. § 28-310 (Reissue 1995). After a presentence investigation, the trial court sentenced Alford to 3 to 8 months in the county jail on each count, to be served concurrently. Alford appeals, alleging that the court was without authority to sentence him to indeterminate sentences in the county jail.

ASSIGNMENTS OF ERROR

Alford's assignments of error allege that the district court erred (1) in sentencing him to indeterminate sentences in county jail, (2) in overruling his motion to strike and his objections to the contents of the presentence investigation report, and (3) in imposing excessive sentences.

STANDARD OF REVIEW

[1] A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. An abuse of discretion takes place when the sentencing

court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Cook*, 251 Neb. 781, 559 N.W.2d 471 (1997).

DISCUSSION

Indeterminate Sentences to County Jail.

[2] In Nebraska, "[t]he general rule is that an indeterminate sentence is insufficient and invalid unless authorized by statute. That general rule rests upon the proposition that indeterminate sentences were not authorized at common law and may not be pronounced without specific legislative sanction." *State v. Laravie*, 192 Neb. 625, 628, 223 N.W.2d 435, 437 (1974). Thus, unless the district court was authorized by statute to sentence Alford to indeterminate sentences of 3 to 8 months' incarceration, the sentences are insufficient and invalid.

Alford alleges that the trial court abused its discretion in sentencing him to indeterminate sentences in the county jail, because a county jail has no mechanisms for dealing with an indeterminate sentence as are provided for parole eligibility in state institutions under Neb. Rev. Stat. § 83-1,106 et seq. (Reissue 1994 & Cum. Supp. 1996), and thus, there is no statutory procedure to determine the lengths of his sentences. The State concedes that an indeterminate sentence to a county jail is not controlled by § 83-1,110 (providing every committed offender parole eligibility when offender has served one-half minimum term of sentence), because Alford is not a "committed offender" as defined in Neb. Rev. Stat. § 83-170 (Reissue 1994) (committed offender means any person who, under any provision of law, is sentenced to facility operated by Department of Correctional Services). Alford was sentenced to three concurrent sentences of 3 to 8 months in the Scotts Bluff County Jail. He is not a committed offender under § 83-170, and thus, his release and parole eligibility are not controlled by § 83-1,106 et seq.

However, the State argues that Neb. Rev. Stat. § 29-2204 (Reissue 1995) expressly authorized the sentences imposed here. Section 29-2204 provides in pertinent part:

> (1) Except when a term of life is required by law, in imposing an indeterminate sentence upon an offender the court shall:

> (a) Fix the minimum and maximum limits of the sentence to be served within the limits provided by law . . . .
>
> (b) Advise the offender on the record the time the offender will serve on his or her minimum term before attaining parole eligibility assuming that no good time for which the offender will be eligible is lost; and
>
> (c) Advise the offender on the record the time the offender will serve on his or her maximum term before attaining mandatory release assuming that no good time for which the offender will be eligible is lost.

Section 29-2204 contains no express prohibition against sentencing a misdemeanant to an indeterminate sentence in county jail. A predecessor to § 29-2204, Neb. Rev. Stat. § 83-1,105 (Reissue 1976), was addressed by the Nebraska Supreme Court in *State v. Johnson*, 209 Neb. 308, 307 N.W.2d 525 (1981). In that case, the defendant was convicted of two counts of misdemeanor issuing a bad check. He was sentenced to 6 months to 1 year in an institution under the jurisdiction of the Department of Correctional Services on each count, to be served consecutively. The Supreme Court, in addressing Johnson's claim that his sentence was excessive, found that § 83-1,105 applied to his sentence.

> We now believe it appropriate to declare that where an individual is convicted of a misdemeanor and given an indeterminate sentence which is to be served in an institution under the jurisdiction of the Department of Correctional Services, the provisions of § 83-1,105 should apply. We emphasize, however, that the rule applies in only those misdemeanor cases in which the defendant has been given an indeterminate sentence and ordered to serve the indeterminate sentence in an institution under the jurisdiction of the Department of Correctional Services.

209 Neb. at 309, 307 N.W.2d at 526.

The Supreme Court in *Johnson* then modified the sentences because they transgressed the provision in § 83-1,105 that the minimum sentence be not more than one-third of the maximum term. Section 83-1,105 was repealed by 1993 Neb. Laws, L.B. 529, and its indeterminate sentencing provisions now appear in § 29-2204 with some changes not particularly important to the

issue addressed here. *Johnson* did not expressly address the issue of whether a court was authorized by § 83-1,105 to sentence those convicted of misdemeanors to indeterminate sentences; rather, it held that the "minimum-maximum" provision of § 83-1,105 applied to such sentences if they were to be served in a state institution under the control of the Department of Correctional Services. Certainly, *Johnson* can be read as recognizing, if not implicitly holding, that § 83-1,105 authorized indeterminate sentences for misdemeanors if the sentences were to be served in a facility controlled by the Department of Correctional Services.

As stated, § 29-2204, the successor to § 83-1,105, does not expressly limit indeterminate sentencing to inmates convicted of felonies or those sentenced to state facilities. But Alford argues there are no statutory personnel or guidelines to administer indeterminate sentences in county facilities, and specifically, that there is no parole board available to determine if a county jail inmate is ready to be returned to society. The State does not challenge this argument but merely suggests that "[t]he county perhaps would like the flexibility to experiment with its own version of parole . . . ." Brief for appellee at 4.

In the instant case, the trial court sentenced Alford "to not less than three (3) months nor more than eight (8) months in the Scotts Bluff County Jail" and explained that the sentences would run concurrently. It continued,

> [W]hen you are admitted into the County Jail, the jail personnel will explain to you the policies and rules relative to "good time," and I am not quite sure what the Scotts Bluff County Jail rules are in that regard, but I am sure, no doubt, you can earn good time.

Nowhere on the record did the trial court explain the amount of time Alford would have to serve on his minimum sentence before attaining parole eligibility or the amount of time he would have to serve on his maximum term before attaining mandatory release as required for truth in sentencing. See § 29-2204. Of course, since the policies and rules relative to good time reductions on minimum and maximum terms were not known to the court, it was not possible for it to comply with the truth in sentencing provisions, and the record before us con-

tains no indication that jail rules pertaining to how good time is credited to minimum and maximum sentences even exist, let alone what those rules are and how they are enforced.

Neb. Rev. Stat. § 47-501 et seq. (Reissue 1993) provide in pertinent part that the county board of corrections or county sheriff is responsible for implementing sentence reductions and credits for county jail inmates. A county inmate shall have his or her term reduced by 7 days for each 14 consecutive days that he or she has not committed any breach of discipline or violation of jail regulations. See § 47-502. However, we find no guidance in this statutory scheme for determining whether the sentence reduction is to be applied to the minimum or maximum term of an indeterminate sentence. It is not reasonable to construe these statutes as requiring the county board of corrections or the county sheriff to implement sentence reduction for indeterminate sentences when the statutes give no guidance on how to accomplish this goal. And, of course, with no means to administer parole, the minimum-maximum dichotomy makes no sense anyway.

We believe the trial court's inability to explain the minimum and maximum amounts of time which Alford would have to serve before being released accentuates the issue rather clearly. The judge's inability to comply with the legislative directive for truth in sentencing under § 29-2204 clearly militates against the view that indeterminate sentences to county jail were intended to be authorized by § 29-2204.

[3] As stated, the State argues that perhaps Scotts Bluff County would like to experiment with its own version of parole or release guidelines. Perhaps it would. Perhaps it would not. We find it troublesome that the sentences were imposed here without determining what Scotts Bluff County had done in that regard, if anything. Even were we to assume that the county was at liberty to create its own special parole system tailored just for that county, a matter we do not decide, its failure to do so would render Alford's *indeterminate* sentence "undeterminable." A sentence of imprisonment should be sufficiently certain so that in and of itself it advises the accused and those charged with its execution of its duration. *State v. Bensing*, 249 Neb. 900, 547 N.W.2d 464 (1996).

In *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996), the defendant was convicted of having been a minor in possession of alcohol and sentenced to 10 days in the county jail. The lower court further ordered that he be awarded a "good time" reduction of a day for a day on his sentence. In construing § 47-502 (which credits good time of 7 days for each 14 days spent in city or county jail), the Nebraska Supreme Court held that the lower court erred in sentencing the defendant. The court explained:

> [I]nmates committed to the state prison system serve longer sentences for more serious crimes and receive the benefit of many rehabilitation programs available in the state system. . . . State prison inmates also may receive maximum and minimum terms. . . . Maximum terms are used to determine discharge dates, and minimum terms are used to determine parole eligibility dates. . . . The sentence reduction provided for in § 83-1,107 applies to both terms. None of this applies to city and county jail inmates, who serve shorter sentences for less serious crimes. . . . They are ineligible for parole and have very limited access to rehabilitation programs.

250 Neb. at 322, 549 N.W.2d at 164. Based on the foregoing, the court concluded that city and county jail inmates are not situated similarly to state prison inmates for the purposes of awarding good time. The dissimilarity is seen again in Neb. Rev. Stat. § 47-401 (Reissue 1993), which allows a county inmate to seek permission to leave a jail facility to seek employment; to work; to conduct his or her own business needs, including attending to the needs of his or her family; to attend school; to seek medical treatment; and for serious illness or death in his or her immediate family. Similar flexibility in sentencing is not available to inmates in state facilities.

[4-6] In sum, it is clear that Nebraska generally affords different treatment to inmates confined in city and county facilities from that afforded to those confined to state facilities under the Department of Correctional Services. In construing a statute, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results. *Goolsby v. Anderson*, 250 Neb. 306, 549 N.W.2d 153 (1996). We con-

clude that § 29-2204 does not authorize the imposition of an indeterminate sentence to a facility outside the jurisdiction of the Department of Correctional Services. One of the circumstances which renders a sentence void is that the court lacked a legal basis to impose it. A void sentence is no sentence. However, an indeterminate sentence imposed for a crime, where not authorized by statute, is erroneous but not void. *State v. Martin*, 246 Neb. 896, 524 N.W.2d 58 (1994). Alford's concurrent sentences of 3 to 8 months in the Scotts Bluff County Jail were erroneous. Therefore, we remand this cause for resentencing.

Presentence Investigation Report.

Alford argues that the presentence investigation report contained hearsay reports of alleged victims concerning conduct that was never charged and that such information denies him the right to confront his accusers. The presentence investigation report contains police reports concerning interviews with six alleged victims of sexual assaults by Alford: A.R., P.M., L.P., Y.G., S.B., and A.K. It also contains references to harassing telephone calls to A.R. which allegedly were made by Alford or made on his behalf. Alford objects to all references to L.P., S.B., and A.K. and the telephone calls because he did not plead to any of these attacks and there is no proof that the telephone calls were made by him. While his objections and motion to strike were overruled, the judge told him that he would "only take into consideration those portions of the report that apply specifically to [A.R.], [P.M.] and [Y.G.], and I put no weight whatsoever on the fact that telephone calls were made."

[7,8] A sentencing court has broad discretion as to the source and type of evidence or information that it may use in determining the kind and extent of the punishment imposed within the limits fixed by statute. *State v. Meehan*, 6 Neb. App. 616, 576 N.W.2d 483 (1998). See, also, *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995). The sentencing phase is separate and apart from the trial phase, and the traditional rules of evidence may be relaxed following a conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence. *Id.* In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems

relevant to sentence. *Id.* Reliance upon hearsay information in a presentence investigation is not inappropriate. *State v. Ritsch*, 232 Neb. 407, 440 N.W.2d 689 (1989). A sentencing court in noncapital cases may consider a defendant's unadjudicated misconduct in determining an appropriate sentence. *State v. Meehan, supra.*

Alford had an opportunity to review the presentence investigation report and objected to the hearsay it contained. The trial court judge said that he would not rely on this information. This assignment of error is without merit.

Excessive Sentences.

[9] A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997). Alford was convicted of three separate crimes, each carrying a maximum sentence of 1 year's imprisonment. See, Neb. Rev. Stat. § 28-106 (Reissue 1995); § 28-310; § 28-320. In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, the motivation for the offense, the nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Cook*, 251 Neb. 781, 559 N.W.2d 471 (1997).

Alford argues that he is a young man with no prior record and that since none of his crimes involved serious physical bodily injury, he should have received probation rather than a jail sentence. Whether the sentence imposed is probation or incarceration is a matter within the discretion of the trial court, and a judgment denying probation will be upheld unless the trial court abuses its discretion. *State v. Stahl*, 240 Neb. 501, 482 N.W.2d 829 (1992). The officer who conducted the presentence investigation recommended that intensive supervision probation not be considered because of the aggravating circumstances in this case. Alford is an 18-year-old, single Native American male with no dependents. At the time of sentencing, he had completed the eleventh grade and was attending school in South Dakota. He was employed at a fast-food restaurant, earning $4.75 per hour, and received a character reference from his

assistant manager. The presentence investigation report includes character references from several of Alford's teachers and coaches, as well as his foster parents. It also contains letters from the victims and their parents.

The incidents which led to Alford's convictions involved forced or attempted forced sexual assaults by Alford on three teenage girls, two of which involved sexual penetration. They were violent acts by any definition of the word. After reviewing the facts and circumstances of these convictions, especially the fact that they involved random attacks against unrelated victims over the course of several months, it is clear that the trial court did not abuse its discretion in refusing to grant probation. Since we are remanding for resentencing, this assignment of error requires no further discussion.

CONCLUSION

The district court was without authority to sentence Alford to indeterminate sentences in a county facility. As such, we remand for resentencing.

REMANDED FOR RESENTENCING.

STATE OF NEBRASKA, APPELLEE, V. LATIF AL-HUSSAINI, APPELLANT.
579 N.W. 2d 561

Filed May 5, 1998. No. A-97-1129.

1. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
2. **Sentences.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.

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

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

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

HANNON, SIEVERS, and MUES, Judges.

MUES, Judge.

Latif Al-Hussaini was convicted of first degree sexual assault on a child, in violation of Neb. Rev. Stat. § 28-319 (Reissue 1995). He was sentenced to an indeterminate sentence of 4 to 6 years' imprisonment, with credit for 13 days spent in custody. The sole issue on appeal is whether or not the sentence imposed is excessive.

BACKGROUND

Al-Hussaini is a native of Iraq who escaped from his country during the Gulf War and has lived in the United States since 1995. He speaks virtually no English. On November 9, 1996, Al-Hussaini, age 34, participated in an Islamic ceremony in which he was "married" to a 13-year-old girl. There is no dispute that the victim was given away in marriage by her father. After the ceremony, the victim was taken to her new home with Al-Hussaini where intercourse immediately took place. The victim stated she did not consent to intercourse with Al-Hussaini. The victim's sister, age 14, was also "married" on the same day to another Iraqi man.

According to Al-Hussaini, he had been engaged to the girl for a month, there was a large party and celebration on the marriage day, and the girl was happy and continued to be happy. He took her to school each day until November 15, 1996, when she did not return home, and Al-Hussaini was arrested. Al-Hussaini stated that he is not angry at the girl and feels that he did not do anything wrong, as arranged marriages with young girls are customary in his religion and native country. He plans to divorce her in accordance with the Islamic religion.

Al-Hussaini has consistently claimed that his actions are legal and proper under Islamic law and that he had no idea that his actions violated the law in this country. He stated that he now understands that the marriage was not legal in the United States.

Al-Hussaini was charged with first degree sexual assault on a child, a Class II felony. § 28-319(2). He was charged with sexually penetrating a female less than 16 years of age between November 9 and November 15, 1996. On July 25, 1997, he pled guilty to the charge.

On September 23, 1997, Al-Hussaini was sentenced to an indeterminate sentence of 4 to 6 years' imprisonment, with credit for 13 days served. He timely appealed his sentence to this court.

ASSIGNMENT OF ERROR

Al-Hussaini alleges as his sole assigned error that his sentence is excessive.

STANDARD OF REVIEW

[1,2] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Thomas*, 6 Neb. App. 510, 574 N.W.2d 542 (1998). An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.*

ANALYSIS

Neb. Rev. Stat. § 28-105(1) (Reissue 1995) provides that the maximum penalty for a violation of a Class II felony is 50 years' imprisonment. Because Al-Hussaini's sentence is within the statutory limits, he must show an abuse of discretion, i.e., that the sentencing court's reasons or rulings are clearly untenable and deprive him of a substantial right and a just result.

Al-Hussaini argues that the sentencing court abused its discretion in denying him probation because probation is preferred to a sentence of incarceration. We note that Al-Hussaini's prior record is of little consequence.

The State points out that while Al-Hussaini attempts to lessen his culpability by claiming that the acts were sanctioned by his religion, there is evidence in the presentence investigation report that such a marriage would not be universally accepted in Iraq and, in fact, was highly unusual and would be considered wrong in the majority of Iraqi communities.

We recognize that this is an unusual situation. To some degree, Al-Hussaini is a victim of laws with which he has little, if any, familiarity and which are, according to him, vastly different from the customs and laws of his native country. But, as the district court observed when it imposed sentence, there is really only one victim of this crime and that is the 13-year-old

child with whom Al-Hussaini had sexual intercourse without her consent. The district court observed that putting Al-Hussaini on probation would depreciate the seriousness of the offense, promote disrespect for the law, and minimize the substantial harm the victim has suffered.

CONCLUSION

The sentence imposed on Al-Hussaini is well within statutory limits. In view of the seriousness of the offense, we conclude that the district court did not abuse its discretion in sentencing Al-Hussaini, and its judgment is therefore affirmed.

AFFIRMED.

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