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BRITTANY LEAVITT, A MINOR, BY AND THROUGH HER MOTHER AND NEXT FRIEND, SANDRA A. LEAVITT, APPELLANT, V. BERNARD MAGID, M.D., APPELLEE.

598 N.W.2d 722

Filed August 13, 1999. No. S-98-065.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
2. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.
3. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded.
4. ___: ___: ___. An improper exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection.
5. **Trial.** An appellate court will not predicate prejudicial error on the exclusion of redundant testimony of a particular witness.
6. **Motions for New Trial: Juror Misconduct.** An application for new trial may properly be based upon allegations of misconduct of the jury.
7. **Motions for New Trial: Juror Misconduct: Verdicts: Proof.** In a motion for new trial, allegations of misconduct by jurors must be substantiated by competent evidence. The misconduct complained of must relate to a disputed matter that is relevant to the issues in the case and must have influenced the jurors in arriving at the verdict.
8. **Rules of Evidence: Jurors: Words and Phrases.** A juror's intradeliberational statements, when based on personal knowledge not directly related to the litigation at issue, do not constitute extraneous information within the meaning of Neb. Rev. Stat. § 27-606(2) (Reissue 1995).
9. **Jury Misconduct: Trial.** When an allegation of juror misconduct is made, and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred.

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

Thomas A. Gleason, of Gleason & Green, for appellant.

William M. Lamson, Jr., and William R. Settles, of Lamson, Dugan & Murray, for appellee.

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

GERRARD, J.

NATURE OF CASE

Brittany Leavitt, by and through her mother and next friend, Sandra A. Leavitt, sued Dr. Bernard Magid for medical malpractice, alleging that Magid's negligent treatment while Sandra was pregnant with Brittany resulted in Brittany's permanent brain damage. Brittany appeals from a jury verdict in favor of Magid.

FACTUAL BACKGROUND

Brittany's operative amended petition alleges that Magid was responsible for the care and treatment of Sandra and Brittany during Sandra's pregnancy, including Brittany's delivery on January 17, 1988. The petition alleges that Magid failed to follow the recognized standard of care in several respects: (1) failure to perform adequate prenatal examinations to determine the size of the fetus; (2) failure to identify evidence of a condition called "intrauterine growth restriction" (IUGR); (3) failure to diagnose IUGR; (4) failure to respond to IUGR by performing ultrasound studies and fetal well-being studies; (5) failure to recognize and respond to signs of decreased fetal movement; (6) failure to initiate early delivery in order to maximize the health of the fetus; and (7) failure to initiate a controlled labor and delivery when the health of the fetus was at its optimum, rather than subjecting the fetus to the additional stress of a complicated labor and delivery.

IUGR is a condition in which the fetus, for some reason, does not grow as quickly as would otherwise be expected. In most cases, IUGR is the result of a damaged or undeveloped placenta. The placenta nourishes the fetus; when the placenta is damaged, the fetus is undernourished, and this may result in a lack of fetal growth, neurological damage, or ultimately, the death of the fetus.

The petition alleges that as a result of Magid's negligence, Brittany suffered hypoxic ischemic injuries and intracerebral hemorrhages. Because of these injuries, Brittany was placed in neonatal intensive care and underwent extensive medical care and treatment. As a further result of her injuries, Brittany con-

tinues to suffer from seizures, abnormal growth and development, and mental retardation.

At trial, Brittany presented the testimony of Dr. Thomas Easterling, an expert in perinatal care. Easterling testified generally that Magid was negligent in failing to diagnose IUGR and that Magid's failure to respond to the condition resulted in an ischemic event at some point during a 6-day period before Sandra went into labor. This ischemic event, according to Easterling, was the cause of Brittany's medical condition at birth.

Brittany attempted to elicit testimony from Easterling regarding Magid's actions during labor and delivery. At that point, Magid's counsel received permission from the trial court to voir dire Easterling, and the following exchange occurred:

> [MAGID'S COUNSEL]. Doctor, in your opinion, a delivery of this infant two to three hours earlier would have made no difference, is that correct, in the outcome?
>
> [EASTERLING]. A delivery two to three — "no" is a very absolute term. I believe the baby was seriously damaged two to three hours before delivery.
>
> Did the intervening two to three hours have a minor detriment in the condition of the baby? That's very hard to say. I can't tell you that it did not influence the baby. We have evidence that the majority of the damage was done prior to that time.

Thereafter, Magid objected to Easterling's testimony regarding Magid's actions during labor and delivery. Magid initially argued that since Easterling had testified that Brittany's injury occurred 24 to 48 hours before delivery, any subsequent breach of the standard of care was irrelevant. Brittany argued that while the majority of the damage may have been inflicted prior to labor and delivery, if even some minor injury resulted from negligence during labor and delivery, testimony regarding that negligence would still be relevant.

According to Brittany's offer of proof, she intended for Easterling to testify that Magid breached the standard of care by failing to recognize evidence of fetal distress and failing to respond by delivering the child immediately. Brittany said that Easterling would have testified that subjecting the already trau-

matized fetus to the additional stress of labor and delivery contributed to her brain injury.

Magid also argued that testimony by Easterling regarding a breach of the standard of care during labor and delivery would be outside the scope of discovery and that Easterling did not reveal his opinion regarding labor and delivery during his deposition nor did Brittany amend her answers to interrogatories regarding Easterling's opinion on labor and delivery. Brittany responded to the trial court that Easterling had discussed at his deposition the possibility of some additional injury being suffered by Brittany during labor and delivery and that this discussion was sufficient to give Magid notice of the theory.

The trial court sustained Magid's objection and refused to allow Easterling to testify to any breach of the standard of care by Magid during labor and delivery. Whether the objection was sustained on the basis of relevance or as a sanction for a violation of the rules of discovery is unclear from the record.

After a 10-to-2 verdict in favor of Magid, Brittany filed a motion for new trial. In addition to the issue of Easterling's testimony, Brittany argued that a new trial should have been granted due to juror misconduct. Brittany offered affidavits from the dissenting jurors, alleging generally that one of the majority jurors, an attorney with an Omaha law firm, had intimidated the other jury members into using a definition of proximate cause that conflicted with the jury instructions. Magid argued that the affidavits were inadmissible under Neb. Rev. Stat. § 27-606 (Reissue 1995). Magid also offered, alternatively, affidavits from the attorney-juror and another juror contradicting the accounts of the dissenting jurors.

The affidavits were not received into evidence, and the motion for new trial was overruled. Brittany appeals.

ASSIGNMENTS OF ERROR

Brittany assigns, restated, that the trial court erred in failing (1) to allow her expert witnesses to render opinions relating to the negligence of Magid during labor and delivery, (2) to admit and consider the affidavits of the two dissenting jurors, (3) to grant an evidentiary hearing and make findings on the issue of

juror misconduct, and (4) to grant her a new trial based on juror misconduct.

STANDARD OF REVIEW

[1] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Reiser v. Coburn*, 255 Neb. 655, 587 N.W.2d 336 (1998).

[2] The admissibility of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *Deuth v. Ratigan*, 256 Neb. 419, 590 N.W.2d 366 (1999).

ANALYSIS

EXCLUDED EXPERT TESTIMONY

Brittany argues on appeal that Easterling's proffered testimony regarding events during labor and delivery was relevant evidence and should have been admitted. Magid maintains on appeal that the evidence was excluded, not as irrelevant, but as a sanction pursuant to Neb. Ct. R. of Discovery 37 (rev. 1997). Magid argues that Brittany failed to amend her interrogatories to inform Magid of Easterling's opinions regarding labor and delivery and that this failure was a violation of Neb. Ct. R. of Discovery 26(e)(1)(B) (rev. 1996), warranting exclusion of Easterling's testimony on those issues. Magid further argues, in the alternative, that the proffered testimony was irrelevant and that no prejudice resulted from the exclusion because the substance of Easterling's testimony was presented by other witnesses.

[3-5] We determine that, even assuming Easterling's proffered testimony to be relevant and otherwise admissible, the exclusion of that testimony does not warrant reversal because the testimony was cumulative. To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded. *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998); *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998). An improper exclusion of evidence is ordinarily not prejudicial where sub-

stantially similar evidence is admitted without objection. See *In re Interest of Tabatha R.*, 255 Neb. 818, 587 N.W.2d 109 (1998). See, also, e.g., *Talle v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 823, 572 N.W.2d 790 (1998). An appellate court will not predicate prejudicial error on the exclusion of redundant testimony of a particular witness. See *Thacker v. State*, 193 Neb. 817, 229 N.W.2d 197 (1975).

In the instant case, Brittany made an offer of proof near the end of Magid's case in chief, stating that Easterling would have testified that

> the defendant's breach of the standard of care of obstetricians in 1988 continued throughout the labor and delivery of Sandra Leavitt; specifically in his failure to recognize evidence of late decelerations and severe fetal distress when the fetus was first hooked up to the fetal monitors;
>
> His failure to then arrange for and deliver the child immediately, thus avoiding the prolonged and extended three-and-a-half hour labor and delivery of an already compromised and stressed fetus;
>
> That as a result of that breach of the standard of care in labor and delivery, an already compromised fetus was exposed to further injury and, in fact, the trauma of the vaginal delivery contributed to the brain injury which this baby suffered . . . .

The record reveals, however, that during Brittany's rebuttal case, another expert, Dr. Kenneth Petri, gave testimony nearly identical to that contained in Brittany's offer of proof. Petri testified in the following colloquy:

> [BRITTANY'S COUNSEL]. All right. Do you have an opinion, Doctor, based upon your review of those fetal monitoring strips with respect to what the standard of care required of Dr. Magid in that labor and delivery room?
>
> [PETRI]. Standard of care required a lot more reaction on his part, at least an awareness that there was significant fetal distress going on from the very beginning. And then, you know —
>
> Q. And if you're aware of that fetal distress, what is the duty of the physician?

A. If the distress is considered to be significant, and I think in the beginning of the strip where there is a six-minute bradycardic episode, this is in the very first part of the monitor strip, that preparations for Cesarean section needs to be made at that point. Especially considering that the patient is now four to five centimeters dilated and you might assume another three or four hours, at least, of labor on the average.

Q. So from that very point where we have that six-minute period of fetal distress, it's your opinion that preparations should have been made for a C-section?

A. Yes.

. . . .

Q. . . .

. . . [C]an you tell us your opinion with respect to whether the events of labor and delivery contributed to Brittany's brain injury?

A. Yes, I think they were the likely cause.

. . . .

Q. Let me back up and ask you this question, Doctor, the same one you were asked in your deposition: "Did this labor and delivery do that baby any good?"

A. No, it was obviously at least somewhat harmful.

In addition to the testimony of Petri, two other expert witnesses, Dr. Fred Kader and Dr. Mary Kathleen Bowen, each testified during direct examination that some of Brittany's brain injury was due to trauma inflicted during labor and delivery.

Finally, the district court instructed the jury that it could find for Brittany if she proved her case with regard to any of the particular allegations of negligence contained in her petition. Instruction No. 2 included in part the following allegations:

5. Failure to provide appropriate management of a growth restricted fetus by initiating an earlier delivery of the fetus from its hostile environment in order to maximize the health of the fetus; and

6. Failure to initiate an earlier and more controlled labor and delivery on January 17, 1988, which failure resulted in the exposure of a then compromised fetus to the additional stresses of a complicated labor and delivery.

It is evident from the portions of the record excerpted above that Easterling's proposed testimony ultimately proved to be cumulative. Brittany's other expert witnesses offered essentially the same evidence as contained in Brittany's offer of proof with respect to Easterling. The jury was specifically instructed to consider Magid's alleged negligence during labor and delivery, and expert testimonial evidence was adduced on that point for Brittany to argue to the jury and for the jury to consider. We have also considered, and find significant, the substance of Easterling's opinion regarding negligence during labor and delivery when he was initially questioned on voir dire prior to Magid's objection. When compared with Petri's more definitive testimony regarding labor and delivery, it is difficult to conclude that Brittany was prejudiced by the exclusion of Easterling's less substantial and definitive opinion on the same subject. For these reasons, we determine that Brittany was not prejudiced by the exclusion of Easterling's proffered testimony on the same point.

Therefore, we need not determine if the trial court erred in excluding some of Easterling's testimony, because such error, if any, was not prejudicial to Brittany and would not warrant reversal of the judgment of the district court. Brittany's first assignment of error is without merit.

Juror Misconduct

[6,7] Brittany's remaining assignments of error all relate to the issue of alleged juror misconduct. An application for new trial may properly be based upon allegations of misconduct of the jury. See Neb. Rev. Stat. § 25-1142 (Reissue 1995). In a motion for new trial, allegations of misconduct by jurors must be substantiated by competent evidence. The misconduct complained of must relate to a disputed matter that is relevant to the issues in the case and must have influenced the jurors in arriving at the verdict. *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994).

We note initially that the allegations contained in Brittany's affidavits were directly contradicted by affidavits conditionally proffered by Magid, so that the truth of the allegations is contested. The first issue we must consider, however, is whether the

affidavits offered by Brittany were admissible evidence. Section 27-606(2) provides:

> 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.

Section 27-606(2) clearly establishes that affidavits relating to the process of jury deliberations are generally inadmissible. In order for Brittany's affidavits to be admissible evidence of misconduct, they must contain information relating to one of the two exceptions provided by the statute, i.e., (1) extraneous prejudicial information improperly brought to the jury's attention or (2) outside influence improperly brought to bear on a juror. See *id.*

Brittany does not argue that the allegations presented in her proffered affidavits relate to any outside influence on a juror. The issue to be resolved, therefore, is whether the allegations contained in Brittany's affidavits relate to extraneous prejudicial information.

[8] Brittany alleges that the legal knowledge brought into the jury deliberations by the attorney-juror constituted extraneous prejudicial information within the meaning of the statute. This court confronted a similar situation in *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). In that case, an action for intentional infliction of emotional distress, the juror accused of misconduct had related her personal knowledge to the jury regarding insurance claim practices. *Id.* We determined:

> Based on our review of the pertinent case law, we feel that the proper approach is to prohibit the use of juror affidavits which seek to impeach verdicts due to a juror's

> intradeliberational statements based on his or her personal knowledge, when that knowledge is not directly related to the litigation at issue. . . .
>
> . . . .
>
> We agree with decisions from other jurisdictions which have held that a juror's intradeliberational statements, when based on personal knowledge not directly related to the litigation at issue, do not constitute "extraneous" information within the meaning of the language of § 27-606(2).

Nichols, 243 Neb. at 829-30, 503 N.W.2d at 186.

Our holding in *Nichols v. Busse, supra*, is controlling in the present case. Brittany is attempting to claim that the legal knowledge of an attorney-juror, brought into the jury room, constitutes extraneous information within the meaning of § 27-606(2). That juror's general legal knowledge, however, is personal knowledge not directly related to the litigation at issue and is not extraneous information within the meaning of the statute.

Brittany argues, however, that the attorney-juror's knowledge did constitute extraneous information because the attorney-juror's knowledge was directly related to an issue in the litigation, i.e., proximate cause. Brittany misapprehends our rationale in *Nichols v. Busse, supra*. Information is not "directly related to the litigation at issue" merely because it relates generally to the legal issues presented. Instead, information directly relates to the litigation at issue when it is relevant to the factual circumstances of the case. In the present case, the attorney-juror's legal knowledge was general and not specific to the factual circumstances presented.

[9] Brittany also argues that she was entitled to an evidentiary hearing to investigate her allegations of juror misconduct. As support, Brittany cites *Hunt v. Methodist Hosp.*, 240 Neb. 838, 485 N.W.2d 737 (1992). In that case, this court ordered a remand for the purpose of holding an evidentiary hearing regarding jury misconduct. *Id.* We held: " 'When an allegation of misconduct is made, and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred.' " *Id.* at 849, 485 N.W.2d

at 744-45 (quoting *State v. Steinmark*, 201 Neb. 200, 266 N.W.2d 751 (1978)).

Brittany's reliance on *Hunt v. Methodist Hosp., supra*, is misplaced. In that case, we determined that the affidavits proffered by the appellant were at least in part admissible and that they sufficiently supported the appellant's allegations of misconduct. *Id.* In the present case, the district court determined that the affidavits proffered by Brittany were entirely inadmissible, and we agree with that determination. Thus, Brittany's allegations of misconduct are completely unsupported by admissible evidence, and the district court did not err in denying her an evidentiary hearing.

Brittany proffered no admissible evidence to support her allegations of juror misconduct. Brittany's assignments of error in that regard are without merit.

CONCLUSION

We, therefore, conclude that the district court did not commit reversible error during trial nor did the court abuse its discretion in denying Brittany's motion for new trial; the judgment of the district court is affirmed.

AFFIRMED.

MILLER-LERMAN, J., not participating.

IN RE INTEREST OF KANTRIL P. AND CHENELLE P., CHILDREN UNDER 18 YEARS OF AGE. CARLOTTA P., ALSO KNOWN AS CHARLOTTA P., APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

598 N.W.2d 729

Filed August 13, 1999. No. S-98-756

1. **Jurisdiction: Appeal and Error.** Where a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law which requires an appellate court to reach a conclusion independent from the lower court's decision.
2. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law on which the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
3. **Juvenile Courts: Final Orders: Appeal and Error.** On appeal of a final order of a juvenile court, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the juvenile court, but when the evi-

dence is in conflict, an appellate court considers and may give weight to the fact that the juvenile court observed the witnesses and accepted one version of the facts rather than another.

4. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
5. **Parental Rights.** The purpose of the adjudication phase of a proceeding is to protect the interests of the child. The rights of the parents are determined at the dispositional phase of the juvenile proceeding, not at the adjudication phase.
6. **Juvenile Courts: Jurisdiction.** To obtain jurisdiction over a juvenile, the court need only be concerned with whether the conditions in which the juvenile presently finds himself or herself correlate with the asserted subsection of Neb. Rev. Stat. § 43-247 (Reissue 1993).
7. **Constitutional Law: Due Process: Parental Rights.** A fundamental liberty interest protected by the 14th Amendment is implicated when the State attempts to terminate the relationship between a parent and a child. Therefore, state intervention to terminate the parent-child relationship must be accomplished by procedures meeting the requisites of the Due Process Clause.
8. **Courts: Jurisdiction.** While not a constitutional prerequisite for jurisdiction of courts of the State of Nebraska, existence of an actual case or controversy, nevertheless, is necessary for the exercise of judicial power in Nebraska.
9. **Courts: Justiciable Issues.** A court decides real controversies and determines rights actually controverted and does not address or dispose of abstract questions or issues that might arise in a hypothetical or fictitious situation or setting.
10. **Due Process: Guardians Ad Litem.** The issue of whether a guardian ad litem's actions deprived a parent of process constitutionally due him or her is an altogether different issue from whether the guardian ad litem's actions were unethical.
11. **Due Process: Notice.** 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.
12. **Due Process: Parental Rights.** The nature of process due in parental rights termination proceedings turns on a balancing of the factors specified in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).
13. **Constitutional Law: Statutes: Parental Rights: Guardians Ad Litem.** Neb. Rev. Stat. § 43-272.01(2) (Reissue 1998) is not rendered unconstitutional by its authorization for a guardian ad litem to both perform the investigatory duties of a guardian ad litem as well as bring and try a motion to terminate parental rights.
14. **Parental Rights: Evidence: Proof.** The grounds for terminating parental rights must be established by clear and convincing evidence.
15. ___:___:___. Under Neb. Rev. Stat. § 43-292(6) (Cum. Supp. 1996), when the juvenile court exercises its discretion by instituting a rehabilitation plan for the parent, the State must prove by clear and convincing evidence that the parent has failed to com-

ply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan. The State is not required to show that noncompliance with a court-ordered rehabilitation plan is willful.

16. **Parental Rights.** Where the failure of a parent to comply with a rehabilitative plan is a ground for termination of parental rights, the rehabilitative plan must be reasonably related to the objective of reuniting the parent with his or her child.
17. ___. A parent afforded a program of rehabilitation must realize that the courts will examine a pattern of parental conduct in determining an appropriate disposition for the best interests of a child.
18. ___. 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.
19. **Juvenile Courts: Parental Rights: Proof.** In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, termination of parental rights is permissible when the basis for such termination is provided by clear and convincing evidence.

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

Tracy Grinstead-Everly, of the Law Office of Susan Ann Koenig, for appellant.

Mary P. McFarland, guardian ad litem, for appellee.

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

CONNOLLY, J.

Appellant Carlotta P., also known as Charlotta P. in the record, the natural mother of Kantril P. and Chenelle P., seeks to reverse a juvenile court's order terminating her parental rights. Carlotta contends that the juvenile court did not have subject matter jurisdiction over the children and, alternatively, erred in various respects, including that the court failed to find Neb. Rev. Stat. § 43-272.01(2) (Reissue 1998) unconstitutional. We affirm.

I. ASSIGNMENTS OF ERROR

Carlotta assigns that the separate juvenile court erred in (1) failing to dismiss the petition for lack of subject matter jurisdiction; (2) failing to dismiss the motion to terminate parental rights because § 43-272.01(2) is unconstitutional; (3) terminating her parental rights because the State did not meet its burden

of proof that (a) the mother's failure to comply with the rehabilitation plan was reasonably related to the objective of reunification, (b) termination of her parental rights was in the best interests of the children, and/or (c) no reasonable alternative to termination of her parental rights existed; and (4) denying her motion for new trial.

II. BACKGROUND

1. ADJUDICATION

On September 7, 1995, Carlotta took Kantril and Chenelle, then 6 and 4, respectively, to Saint Joseph Hospital's emergency room in Omaha, Nebraska, because she thought that someone was living in their attic and might have inserted drugs into one child's rectum and possibly both children's ears. Carlotta was hospitalized for 2 days at the Saint Joseph Center for Mental Health, and the children were immediately placed in foster care. Carlotta tested positive for cocaine use, and a doctor concluded from the tests that she had ingested cocaine shortly before taking the children to the emergency room.

On September 8, 1995, the Douglas County Attorney filed a petition in separate juvenile court alleging that Kantril and Chenelle were juveniles within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) in that they were homeless or destitute, or without proper support through no fault of Carlotta, specifically that their mother was unable to provide the care, support, and nurturance required by said children due to her own special needs and circumstances.

A detention hearing was held on September 26, 1995, at which a guardian ad litem appeared for the children. The court ordered that the children remain in the temporary custody of what was then the Nebraska Department of Social Services (now the Department of Health and Human Services (DHHS)). The children were placed with their noncustodial father on October 4, and remained with him throughout most of the proceedings.

Carlotta admitted to the allegations in the petition. The county attorney offered a factual basis which included that Carlotta had been diagnosed with schizophrenia and that because of that condition, she had hallucinations, including

visions of ghosts coming from the walls and attacking her children, and had difficulty keeping track of the children. The court accepted Carlotta's admission and, in an order dated March 8, 1996, found that Kantril and Chenelle were juveniles falling within the meaning of § 43-247(3)(a) and ordered that Carlotta submit to a chemical evaluation and that DHHS and the guardian ad litem conduct a predisposition evaluation.

2. Rehabilitation Plan

Carlotta tested positive for crack cocaine in March and again in April 1996. Because of these positive test results, she was hospitalized at Hastings Regional Center from May 14 to June 7.

The court reviewed DHHS' temporary custody on July 30, 1996, and determined that it was in the children's best interests to remain in the temporary custody of DHHS. The court ordered Carlotta to: (1) visit the children 1 hour per week with supervision, contingent upon her appropriate behavior; (2) attend weekly therapy sessions to address violence issues and her mental health disorder; (3) take prescribed medication and consistently attend medication check appointments; (4) resume her drug dependency treatment; (5) obtain random drug screenings; (6) cooperate with the professionals involved with her care and treatment; (7) maintain stable and adequate housing and a legal source of income; and (8) work with a DHHS family support worker to learn home management skills, age appropriate expectations, and age appropriate discipline.

Carlotta set up a visit for individual mental health therapy but did not attend. In August 1996, after Carlotta was denied readmittance into a chemical dependency program she had participated in earlier, DHHS arranged for another assessment by another treatment service that recommended she be treated in a halfway house program. Carlotta refused to participate. In December, a DHHS caseworker referred Carlotta to the Immanuel hospital to address both her psychiatric and her chemical dependency problems. Carlotta did not participate in those services.

The court again reviewed custody on December 5, 1996, and June 5, 1997, finding on both occasions that the children's best

interests were to remain in DHHS' temporary custody and again ordered Carlotta to comply with the rehabilitation plan; although in the December 1996 order, the court did not include the provision to resume her drug dependency treatment, and in the June 1997 order, did not include either that provision or the provision to learn home management skills.

In 1997, Carlotta visited the children a total of seven times. She moved from Omaha to Tennessee in March and remained there until August, visiting her children only four times during that period. In August, a DHHS caseworker reminded Carlotta of the court-ordered rehabilitation plan's provisions. Carlotta was asked to attend Narcotics Anonymous meetings, but she refused. She told a DHHS caseworker that she would not see a psychiatrist or obtain treatment for her mental health disorder. Carlotta was told on three occasions that she needed to submit to random drug screenings and was given a referral to a service that would provide the screenings. The record indicates she did not submit to that program or any other program that would provide such screenings.

3. Termination Proceedings

On January 16, 1998, the guardian ad litem filed a motion to terminate Carlotta's parental rights. In the motion, the guardian ad litem alleged that (1) conditions under Neb. Rev. Stat. § 43-292(6) (Cum. Supp. 1996) existed in that Carlotta failed in many ways to comply with the court-ordered rehabilitation plan, and thus the conditions leading to the children's adjudication under § 43-247(3)(a) had not been corrected; (2) conditions under § 43-292(7) existed in that the children had been in out-of-home placement for more than 18 consecutive months and Carlotta had failed to correct the conditions leading to the out-of-home placement, despite services offered by the State and ordered by the court; and (3) termination of Carlotta's parental rights was in the best interests of the children.

At the termination hearing, Carlotta's counsel made an oral motion to dismiss

> on the grounds that it is violative of [Carlotta's] rights to due process that the guardian ad litem be allowed to not only investigate this case, but then based on her own case

> that she has created[,] file her own motion to terminate the parental rights and then be allowed to try the same case which she herself was allowed to put together and possibly even testify in the case.

The court overruled the motion. At the hearing, the guardian ad litem examined witnesses and presented evidence but did not testify and no guardian ad litem report was submitted into evidence. The county attorney was present but remained silent throughout much of the hearing.

Near the conclusion of the termination hearing, Carlotta's counsel again moved to dismiss the case on the ground that the court did not have subject-matter jurisdiction. The court overruled the motion.

The court found that "the minor children are within the meaning of Section 43-292 (6) and 43-292 (7) . . . by clear and convincing evidence, insofar as their mother is concerned." The court found that it was in the children's best interests and welfare that Carlotta's parental rights be terminated and in their best interests that the State retain custody for adoptive planning and placement. Carlotta's parental rights were terminated.

Carlotta moved for a new trial. She argued that the court should have granted its first motion to dismiss because her due process rights were violated when the guardian ad litem was permitted to file and argue the motion to terminate. Carlotta argued that § 43-272.01(2), which describes the powers of the guardian ad litem, is unconstitutional because it gives too much power to the guardian ad litem. Carlotta also argued that the court lacked subject-matter jurisdiction and that the evidence was insufficient to sustain the court's order. The court overruled the motion.

Carlotta appealed and filed a motion in this court to bypass the Nebraska Court of Appeals. We granted the motion to bypass because of the constitutional issue asserted in this appeal.

III. SCOPE OF REVIEW

[1] Where a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law which requires an appellate court to reach a conclusion independent from that of the inferior court. *In re Interest of Anthony G.*, 255

Neb. 442, 586 N.W.2d 427 (1998); *In re Interest of Constance G.*, 247 Neb. 629, 529 N.W.2d 534 (1995) (*Constance G. I*).

[2] Whether a statute is constitutional is a question of law on which the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *Bauers v. City of Lincoln*, 255 Neb. 572, 586 N.W.2d 452 (1998).

[3] On appeal of a final order of a juvenile court, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the juvenile court, but when the evidence is in conflict, an appellate court considers and may give weight to the fact that the juvenile court observed the witnesses and accepted one version of the facts rather than another. *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998). See, *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996); *Constance G. I, supra*.

[4] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Reiser v. Coburn*, 255 Neb. 655, 587 N.W.2d 336 (1998); *Hartwig v. Oregon Trail Eye Clinic*, 254 Neb. 777, 580 N.W.2d 86 (1998).

IV. ANALYSIS

1. Subject Matter Jurisdiction

Carlotta argues that the juvenile court never acquired jurisdiction over Kantril and Chenelle because the county attorney, in its petition, made no allegations regarding the parental fitness of the children's *noncustodial* father and that the court made no findings regarding the father in its order adjudicating that the two children fell under the status as defined in § 43-247(3)(a).

[5,6] This court resolved this jurisdictional issue in *Constance G. I, supra*, and again in *In re Interest of Amber G. et al.*, 250 Neb. at 980, 554 N.W.2d at 148, where we stated, "The purpose of the adjudication phase of the proceeding is to protect the interests of the child . . . ." The rights of the parents are determined at the dispositional phase of the juvenile proceeding, not at the adjudication phase. *Id.* To obtain jurisdiction over a juvenile, the court need only be concerned with whether the conditions in which the juvenile presently finds himself or her-

self correlate with the asserted subsection of § 43-247. See *Constance G. I, supra.*

In this case, the issue at the adjudication phase was whether Kantril and Chenelle, in their present living situation with Carlotta, were "without proper support." § 43-247(3)(a). The children's noncustodial father played no role in their living situation at the time they were taken into foster care. "[W]hether the father was fit or unfit to have custody did not arise and should not have arisen until the dispositional phase." *In re Interest of Amber G. et al.*, 250 Neb. at 981, 554 N.W.2d at 148. Carlotta's admissions to the county attorney's allegations, combined with the county attorney's proffered factual basis, sufficiently supported the court's adjudication that the children were without proper support in their present living situation and that therefore the court properly assumed jurisdiction over the children.

2. CONSTITUTIONALITY OF § 43-272.01(2); DUE PROCESS

Carlotta next asserts that the juvenile court erred in overruling her motion to dismiss in which she argued that § 43-272.01(2) is unconstitutional and deprived her of her constitutional right to due process of law. She asserts that § 43-272.01(2) is unconstitutional because it authorizes the guardian ad litem to act coextensively as both an attorney and a guardian for the children and that such a coextensive role in a termination proceeding violates a parent's constitutional due process rights. She asserts that the guardian ad litem in this case conducted an unconstitutional coextensive role, pursuant to § 43-272.01(2), by interviewing numerous individuals and filing guardian reports containing recommendations with the court while also filing the motion to terminate parental rights and presenting all the adverse evidence at the motion to terminate hearing.

[7] A fundamental liberty interest protected by the 14th Amendment is implicated when the State attempts to terminate the relationship between a parent and a child. See, *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981); *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), *disapproved on other*

grounds, O'Connor v. Kaufman, 255 Neb. 120, 582 N.W.2d 350 (1998). Therefore, as we have said, state intervention to terminate the parent-child relationship must be accomplished by procedures meeting the requisites of the Due Process Clause. See, *In re Interest of D.W.*, 249 Neb. 133, 542 N.W.2d 407 (1996); *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). Carlotta's argument presents a procedural due process question, as the argument questions the means by which a parent's rights are terminated rather than the sufficiency of the reasons for termination.

Section 43-272.01(2) provides in pertinent part:

> In the course of discharging duties as guardian ad litem, the person so appointed shall consider, but not be limited to, the criteria provided in this subsection. The guardian ad litem:
>
> (a) Is appointed to stand in lieu of a parent for a protected juvenile who is the subject of a juvenile court petition, shall be present at all hearings before the court in such matter unless expressly excused by the court, and may enter into such stipulations and agreements concerning adjudication and disposition deemed by him or her to be in the juvenile's best interests;
>
> (b) Is not appointed to defend the parents or other custodian of the protected juvenile but shall defend the legal and social interests of such juvenile. . . .
>
> . . . .
>
> (d) Shall make every reasonable effort to become familiar with the needs of the protected juvenile which . . . (ii) may include inquiry of others directly involved with the juvenile or who may have information or knowledge about the circumstances which brought the juvenile court action or related cases and the development of the juvenile, including biological parents . . . .
>
> (e) May present evidence and witnesses and cross-examine witnesses at all evidentiary hearings;
>
> (f) Shall be responsible for making recommendations to the court regarding the temporary and permanent placement of the protected juvenile and shall submit a written

> report to the court at every dispositional or review hearing . . . .
>
> . . . .
>
> (h) May file a petition in the juvenile court on behalf of the juvenile, including a supplemental petition as provided in § 43-291 [supplemental petition or motion to terminate parental rights].

[8,9] Before proceeding further, we note that Carlotta lacks standing to assert the entirety of her constitutional challenge to § 43-272.01(2). Carlotta's constitutional argument, in part, asserts that § 43-272.01(2) is unconstitutional because it permits the guardian ad litem to act as both an advocate and as a witness at the termination hearing. However, the record reflects that the guardian ad litem limited her role at the termination hearing entirely to that of an advocate. She never testified, she was never asked to testify, and neither she nor any other party offered one of her reports into evidence at the termination hearing. Therefore, Carlotta's argument, to the extent she asserts that § 43-272.01(2) is unconstitutional because it permits a guardian ad litem to act both as an advocate and as a witness at a hearing, is based upon a hypothetical rather than an actual case or controversy. While not a constitutional prerequisite for jurisdiction of courts of the State of Nebraska, existence of an actual case or controversy, nevertheless, is necessary for the exercise of judicial power in Nebraska. *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993). A court decides real controversies and determines rights actually controverted and does not address or dispose of abstract questions or issues that might arise in a hypothetical or fictitious situation or setting. *In re Petition of Anonymous 1*, 251 Neb. 424, 558 N.W.2d 784 (1997). Carlotta's argument on this assignment of error is limited to the facts of this case, which means her "coextensive role" argument is limited to the assertion that § 43-272.01(2) is unconstitutional because it authorizes the guardian ad litem to both perform investigatory duties of a guardian prior to the termination hearing and, in addition to the county attorney, perform the role of an advocate for termination of parental rights.

(a) *Betz v. Betz*

Carlotta asserts that our recent decision in *Betz v. Betz*, 254 Neb. 341, 575 N.W.2d 406 (1998), makes § 43-272.01(2) unconstitutional. In *Betz*, we stated that "the duties and responsibilities of a guardian ad litem" appointed in a divorce proceeding in which child custody is at issue "are not coextensive with those of an attorney who represents the minor." *Id.* at 347, 575 N.W.2d at 410. "One person may not serve in both capacities." *Id.* at 347-48, 575 N.W.2d at 410. Carlotta directs this court to the following passage from *Betz*:

> One can argue that the Nebraska Juvenile Code, Neb. Rev. Stat. § 43-272.01(2)(e) (Cum. Supp. 1996) allows a guardian ad litem to present evidence and witnesses and cross-examine witnesses at all evidentiary hearings. This statute, however, only applies to juvenile cases. Whether this juvenile statute is constitutional is something that we are not called upon to decide in this case.

Betz v. Betz, 254 Neb. at 347, 575 N.W.2d at 410. Carlotta argues that as a matter of constitutional law, parents in termination cases must receive at least the same safeguards as parents in custody cases such as *Betz*, and thus she contends that *Betz* "must be expanded to include juvenile cases," brief for appellant at 17, and that § 43-272.01(2) should be declared unconstitutional.

[10] Carlotta's reliance on *Betz v. Betz, supra*, is misplaced. First, the passage from *Betz* commenting on § 43-272.01(2) is dicta and carries no precedential weight. See *Farmers Union Co-op. Ins. Co. v. Allied Prop. & Cas.*, 253 Neb. 177, 569 N.W.2d 436 (1997). Second, and more importantly, no constitutional issue was before this court in *Betz*. The issue in *Betz* was whether a guardian ad litem could *ethically* perform the functions of both an attorney and a witness simultaneously. This court concluded that Canon 5, DR 5-102(A), of the Code of Professional Responsibility, mandated *on ethical grounds* a separation of the two roles, and held that one person could not serve both as a child's attorney and as a child's guardian ad litem. Whether the guardian ad litem's actions in this case were unethical is irrelevant to the determination of the constitutional issue before us. Carlotta's argument that she was denied due process

would arise only if the guardian ad litem's actions deprived the parent of process constitutionally due her, which is an altogether different issue from whether the guardian ad litem's actions were unethical. See *Newman v. Sigler*, 421 F.2d 1377 (8th Cir. 1970). Thus, our decision in *Betz* has no bearing on the disposition of the constitutional issue in this case.

(b) Fundamental Fairness

Carlotta argues that by permitting the guardian ad litem to bring termination proceedings after investigating the case, the statute authorized a violation of her due process rights by permitting the guardian ad litem to usurp the role of the county attorney. Carlotta, noting that § 43-272.01(2) authorizes the guardian ad litem to interview the parent, argues that the statute permits the guardian ad litem to "obtain potentially damaging information and admissions from them under the guise of investigation to determine the best interests of the children, and then use this information in bringing an action to terminate their parental rights." Brief for appellant at 17. She asserts that this coextensive role puts those parents who cooperate the most, through their efforts of helping their children and working toward the goal of ultimate reunification, at the highest risk of having their parental rights terminated. We read this argument as asserting that the coextensive role the guardian ad litem performed in this case is not a "fundamentally fair procedure[]" as the Constitution requires in a termination proceeding. See *Santosky v. Kramer*, 455 U.S. 745, 754, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

[11,12] In *In re Interest of L.V.*, 240 Neb. 404, 413-14, 482 N.W.2d 250, 257 (1992), a case involving the termination of parental rights, this court stated what process is due:

> 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 accusa-

> tion; representation by counsel, when such representation is required by constitution or statute; and a hearing before an impartial decisionmaker.

(Citations omitted.) Carlotta's argument does not implicate any of the procedural requirements set forth in *In re Interest of L.V., supra.* Those requirements, however, are not exclusive, and therefore we examine the issue by applying the three-factor balancing test specified in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), which includes: (1) the private interests affected by the proceeding, (2) the risk of error created by the State's chosen procedure, and (3) the countervailing governmental interest supporting use of the challenged procedure. See *Santosky v. Kramer*, 455 U.S. at 754 (stating that "the nature of the process due in parental rights termination proceedings turns on a balancing" of factors specified in *Mathews v. Eldridge*).

As to the first element of *Mathews v. Eldridge, supra*, a parent's interest at stake is profound—the possibility that he or she will be permanently deprived of his or her fundamental parental rights. See *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991). "'A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one.'" *Constance G. II*, 254 Neb. at 102, 575 N.W.2d at 138 (quoting *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981)).

[13] However, we do not discern how the risk of error (here, an erroneous termination), the second element of the *Mathews v. Eldridge* test, is increased by the guardian ad litem, instead of the county attorney, filing and arguing the case for termination. Even if the guardian ad litem was prohibited from this dual role, the guardian ad litem could conduct the same interviews and prepare a report which could be just as adverse as the testimony that the guardian ad litem in this case presented through witnesses and evidence, and the county attorney could then use that report as the basis for its own prosecution of a motion or petition to terminate parental rights. The fact that the guardian ad litem advocates and presents evidence does not reduce the necessary evidence, reduce the burden of proof, or eliminate any

procedures necessary to obtain termination. What remains then is the fact that § 43-272.01(2) provides that the guardian ad litem, instead of the county attorney, may bring and try the termination proceedings. That is constitutionally inconsequential. The guardian ad litem's actions in this case did not deprive Carlotta of due process. We conclude § 43-272.01(2) is not rendered unconstitutional by its authorization for a guardian ad litem to perform the investigatory duties of a guardian ad litem as well as bring and try a motion to terminate parental rights.

3. Sufficiency of Evidence

Carlotta contends that the evidence was, in several respects, insufficient to terminate her parental rights. The court determined that the allegations in the guardian ad litem's motion to terminate were true, that conditions described in § 43-292(6) and (7) existed insofar as Carlotta was concerned, and that termination of Carlotta's parental rights was in the best interests of the children.

(a) Statutory Requirements

[14] The grounds for terminating parental rights must be established by clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Constance G. II, supra*; *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). Section 43-292 provides that the court may terminate all parental rights when the court finds such action to be in the best interests of the juvenile, and

> (6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination; or
>
> (7) The 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 Health and Human Services or other designated agency.

[15] Under § 43-292(6), when the juvenile court exercises its discretion by instituting a rehabilitation plan for the parent, the State must prove by clear and convincing evidence that the parent has failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan. *In re Interest of Joshua M. et al., supra.* "[T]he State is not required to show that noncompliance with a court-ordered rehabilitation plan is willful . . . ." *Id.* at 631, 558 N.W.2d at 560.

[16] Carlotta first argues that even if conditions described in § 43-292(6) and (7) existed, and even if she failed to comply with reasonable, material provisions of the court-ordered rehabilitative plan, her parental rights could not be terminated. She argues that because DHHS consistently recommended to the court a permanency goal of reunification with the father and supervised visitation with Carlotta, "those orders with which [Carlotta] failed to comply were not related to reunification of the children with [her]." Brief for appellant at 19. Where the failure of a parent to comply with a rehabilitative plan is a ground for termination of parental rights, the rehabilitative plan must be reasonably related to the objective of reuniting the parent with his or her child. See, *In re Interest of Joshua M. et al., supra*; *In re Interest of C.D.C.*, 235 Neb. 496, 455 N.W.2d 801 (1990). Therefore, she argues, because the rehabilitative plan was unrelated to reunification, whether she complied with its provisions is irrelevant.

Carlotta's argument misinterprets the effect of DHHS' recommendations. The fact that DHHS recommended a permanency goal different from reunification with Carlotta had no bearing on whether the *court*-ordered rehabilitation plan properly was directed at reuniting the children with the parents. From our de novo review, we find that the rehabilitation plan's provisions such as chemical dependency treatment, psychiatric treatment, and visitation with the children were without question reasonably related to the goal of reuniting Carlotta with the children. Nothing in the record suggests that the court would not have considered reunifying the children with Carlotta had she complied with the provisions of its ordered rehabilitation plan. This argument is without merit.

(b) Best Interests of Children

Carlotta next argues that the State failed to present clear and convincing proof that terminating her parental rights was in the best interests of the children. She asserts the record reflects that a strong bond and caring relationship still exist between her and the children and notes that at no time during the pendency of this case did DHHS recommend that the court terminate Carlotta's parental rights. In our de novo review, we do not find these facts persuasive.

During all of 1997, when Carlotta was not only permitted but ordered as part of her rehabilitation plan to visit the children once per week, she visited the children only seven times. Whatever strong bond remained between Carlotta and the children remained in spite of Carlotta's lack of effort. As we said in *In re Interest of D.*, 218 Neb. 23, 28, 352 N.W.2d 566, 570 (1984), "It weighs heavily in our minds that the parents have generally failed and neglected to take advantage of opportunities to visit their child."

[17,18] Additionally, Carlotta made little effort to comply with the court-ordered rehabilitation plan from the time the court instituted the plan in July 1996 until the guardian ad litem moved to terminate Carlotta's parental rights in January 1998. During that time, she did not attend even one meeting or therapy session for either her drug dependency or mental health problems, despite DHHS' efforts. " 'A parent afforded a program of rehabilitation must realize that the courts will examine a pattern of parental conduct in determining an appropriate disposition for the best interests of a child.' " *In re Interest of V.M.*, 235 Neb. 724, 729, 457 N.W.2d 288, 292 (1990) (quoting *In re Interest of D., supra*).

> 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.

In re Interest of Joshua M. et al., 251 Neb. 614, 637, 558 N.W.2d 548, 564 (1997). See *In re Interest of C.D.C.*, 235 Neb. 496, 455 N.W.2d 801 (1990).

[19] Carlotta, however, argues that termination of her parental rights is not in the best interests of the children because a reasonable alternative exists that would better serve the children's best interests—permanent placement with and custody to their noncustodial father. She argues that the State failed to prove that no reasonable alternative exists other than termination of her rights. "In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, termination of parental rights is permissible when the basis for such termination is provided by clear and convincing evidence." *In re Interest of J.H.*, 242 Neb. 906, 916, 497 N.W.2d 346, 354 (1993). See, *In re Interest of S.B.E. et al.*, 240 Neb. 748, 484 N.W.2d 97 (1992); *In re Interest of C.K., L.K., and G.K.*, 240 Neb. 700, 484 N.W.2d 68 (1992).

Assuming without deciding that permanent placement with the father was a viable consideration at the time of the termination hearing, the record reflects such placement would not have been an *alternative* to termination of Carlotta's parental rights. The record reflects that Carlotta could not manage even supervised visitation at the time of the termination hearing. She neglected her children during much of the time that she was supposed to be rehabilitating herself as an effective mother. She wholly failed to rehabilitate herself, refusing to comply with the court's order to participate in drug dependency and mental health treatment programs. The best interests of Kantril and Chenelle require termination of Carlotta's parental rights under both § 43-292(6) and (7).

4. Motion for New Trial

Carlotta moved for a new trial on grounds that the court lacked subject-matter jurisdiction, that her constitutional due process rights were violated, and that the evidence was insufficient to permit termination of her parental rights. As we have rejected those identical arguments in this opinion, it is axiomatic that the juvenile court did not abuse its discretion in overruling Carlotta's motion for new trial.

V. CONCLUSION

We conclude that the juvenile court obtained jurisdiction over Kantril and Chenelle through a proper adjudication. We con-

clude that the guardian ad litem's actions in this case did not violate Carlotta's constitutional due process rights. Section 43-272.01(2) is not rendered unconstitutional by its authorization for a guardian ad litem to perform the investigatory duties of a guardian ad litem as well as bring and try a motion to terminate parental rights. Finally, from our de novo review and based upon clear and convincing evidence, we conclude, as did the juvenile court, that the best interests of the children require termination of Carlotta's parental rights. We affirm the juvenile court's order.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
PAMELA A. EDMONSON, APPELLANT.
598 N.W.2d 450

Filed August 13, 1999. No. S-98-937.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Judgments: 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 the determination as to factual questions, 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. However, to the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the courts below.
2. **Search Warrants: Police Officers and Sheriffs.** The test to determine the sufficiency of a search warrant's description is whether the place to be searched is described with sufficient particularity so as to enable the executing officer to find and identify the location with reasonable effort and whether there is any reasonable possibility that another site might mistakenly be searched. In making this determination, an appellate court considers whether (1) the address provided by the warrant, although incorrect, still describes the same piece of property; (2) the property intended to be searched is adjacent to that described in the search warrant and both are under the control of the defendant; (3) the incorrect address describes a place not in existence; (4) the other parts of the description which are correct limit the property to be searched to one place; and (5) the place which was intended to be searched had previously been under surveillance or was being surveilled while the warrant was obtained.
3. **Search Warrants: Affidavits: Probable Cause.** To be valid, a search warrant must be supported by an affidavit establishing 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. Among the ways in which the reliability of an informant may be established are by showing in the affidavit to obtain a search warrant 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, and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.
5. ___:___. An affidavit in support of the issuance of a search warrant must *affirmatively* set forth the circumstances from which the status of the informant can reasonably be inferred.
6. **Constitutional Law: Search Warrants: Probable Cause.** The Fourth Amendment requires a showing of probable cause when a warrant is issued, not when a warrant is executed.
7. **Search Warrants: Evidence: Police Officers and Sheriffs.** The exclusionary rule is inapplicable to evidence obtained pursuant to an invalid warrant upon which police officers acted in objectively reasonable good faith reliance.
8. **Search Warrants: Affidavits: Judges: Motions to Suppress.** Evidence obtained pursuant to an invalid search warrant should be suppressed only if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth; (2) the issuing magistrate wholly abandoned his or her judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S. Ct. 2319, 60 L. Ed. 2d 920 (1979); (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient—such as in failing to particularize the place to be searched or the things to be seized—that the executing officer cannot reasonably presume it to be valid.
9. **Search Warrants: Affidavits: Probable Cause: Case Overruled.** In determining whether a warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, an appellate court looks to the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit, to determine whether the officer, considered as a police officer with a reasonable knowledge of what the law prohibits, acted in objectively reasonable good faith in relying on the warrant. To the extent that *State v. Parmar*, 231 Neb. 687, 437 N.W.2d 503 (1989), and its progeny are inconsistent with this test, those cases are hereby overruled.

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

Susan M. Cook and Jeffery R. Kirkpatrick, of Kelley, Lehan & Hall, P.C., for appellant.

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

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

CONNOLLY, J.

The appellant, Pamela A. Edmonson, was convicted of one count of unlawful possession with intent to deliver a controlled substance. She appeals, asserting that her residence at 2616 Burdette Street was unconstitutionally searched and that the evidence obtained in the search should have been suppressed.

The warrant authorizing the search of Edmonson's residence was issued on the basis of an affidavit that was insufficient to establish probable cause. The police submitted another affidavit after the warrant was issued which, when considered with the original affidavit, would have been sufficient to support a finding of probable cause. Nonetheless, the judge did not issue a new warrant or amend the previously issued warrant. We conclude that the judge erred in failing to do so and that the Fourth Amendment rights of Edmonson were accordingly violated. However, we also conclude that the police acted in objectively reasonable good faith in executing the warrant and, therefore, that the evidence seized pursuant to the warrant need not be suppressed. We affirm.

I. BACKGROUND

On February 4, 1998, Omaha police officers Stephen W. Venteicher and Jerry Martinez submitted an affidavit and application for a search warrant to a Douglas County judge. The affidavit stated:

> That the Affiant has just and reasonable grounds to believe, and does believe, that there is concealed or kept as hereinafter described, the following property, to-wit: Cocaine and it's [sic] derivatives, which is a controlled substance, and possession of which is illegal per Nebraska State Statutes. All monies and records used to conduct an illegal narcotics operation. Venue identifying the occupants of 2622 Burdette Street, Omaha, Douglas County, Nebraska.

That said property is concealed or kept in, or about the following described place or person, to-wit: 2622 Burdette Street, Omaha, Douglas County, Nebraska, further described as the main level unit, in which access is made through the south and north main level doors, contained within a White and yellow, multi-family dwelling with a [sic] enclosed white porch with no numbers posted on the residence AND/OR the person of LAST NAME UNKNOWN, FIRST NAME "Pam", described as a Black female, approximately 5'2" tall, 140 pounds, with black hair with a red weave, 30 to 35 years of age.

That said property is under the control or custody of Suitco Sales 2030 North 104th Street.

. . . .

That the following are the grounds for issuance of a search warrant for said property and the reasons for the Affiants' belief, to-wit:

Within the past 48 hours of Wednesday 4 February 1998, Affiant Officers MARTINEZ . . . AND VENTEICHER . . . contacted a confidential and reliable informant, hereafter referred to as C/I, regarding narcotics dealing at 2622 Burdette Street, Omaha, Douglas County, Nebraska. The C/I advised that within past said 48 hours of Wednesday, 4 February 1998, he/she had occasion to be at the address of 2622 Burdette Street, Omaha, Douglas County, Nebraska. The C/I advised that he/she observed the resident, LAST NAME UNKNOWN, FIRST NAME "PAM" who he/she described as a black female, 5'2" tall, 140 pounds, with black hair with a red weave, 30 to 35 years of age, in possession of a white rock like substance which "PAM" indicated was crack cocaine. "PAM" [i]ndicated to the C/I that the crack cocaine was for sale, and that "PAM" would actively be selling the crack cocaine from 2622 Burdette Street, Omaha, Douglas County, Nebraska, during the evening hours of Wednesday, 4th February 1998.

Affiant Officer Martinez contacted the Omaha Public Power District and learned that the subscriber for services

at 2622 Burdette Street, Omaha, Douglas County, Nebraska, is Suitco Sales.

That a night-time search is requested because the C/I indicated would [sic] be selling crack cocaine from 2622 Burdette Street, Omaha, Douglas [County], Nebraska, during t[h]e night-time hour[s] of Wednesday, 4 February 1998.

. . . .

That a no-knock search warrant is requested because officers know from past experience that if they were to knock and announce their presence and purpose for being there, the crack cocaine being sought could be easily destroyed by flushing it down the toilet, sink, or by swallowing it.

Wherefore, the Affiant Officers pray that a search warrant may be issued according to law.

The judge issued a warrant based on the affidavit that same day. The warrant stated:

This matter came on for hearing on the 4th day of February 1998, upon the sworn application and affidavit for issuance of a search warrant of Omaha Nebraska Police Officer Stephen Venteicher . . . and Officer Jerry Martinez . . . and the Court, being fully advised in the premises finds as follows:

. . . .

That based upon the sworn affidavit and application for issuance of a search warrant of Omaha Police Officer Stephen Venteicher . . . and Officer Jerry Martinez . . . dated the 4th day of February 1998, that there is probable cause to believe that concealed on the premises located at 2622 Burdette Street, Omaha, Douglas County, Nebraska, further described as the main level unit, in which access is made through the south and north main level doors, contained within a white and yellow, multi-family dwelling with an enclosed white porch with no numbers posted on the residence, AND/OR the person of LAST NAME UNKNOWN, FIRST NAME "Pam" described as a black female, 30-35 years old, approximately 5'2" tall, 140

pounds with black hair with a red weave; the following described property, to-wit: cocaine, which is a controlled substance, and possession of which is illegal per Nebraska State Statutes. All monies and records used to conduct an illegal narcotics operation. Venue identifying the occupants of 2622 Burdette Street, Omaha, Douglas County, Nebraska.

. . . .

You ARE, THEREFORE, ORDERED, with the necessary and proper assistance, to search the afore described location and/or person for the purpose of seizing the afore described property, and if found, to seize and deal with the same as provided by law, and to make return of this warrant to me within 10 days after date hereof.

IT IS FURTHER ORDERED, that execution of the search warrant be forthwith during the night-time hours.

IT IS FURTHER ORDERED, that Omaha Nebraska Police Officer Stephen Venteicher . . . and Officer Jerry Martinez . . . make return of this search warrant to me within 10 days after the date hereof.

IT IS FURTHER AUTHORIZED, that a no-knock search is requested because officers know from past experiences that if they were to announce their presence and purpose for being there, the crack cocaine being sought could be easily destroyed by flushing it down the toilet, sink, or by swallowing it.

Although the no-knock warrant was to be executed at night, forthwith, it was not executed on February 4, 1998.

On February 7, 1998, before the warrant's execution, the police officers returned to the same judge with an addendum to the original affidavit and application, which the judge signed. The supplemental affidavit stated:

> The C/I that provided this information has provided reliable information to Affiant Officers. The C/I has made controlled purchases of controlled substances under direct supervision of Affiant Officers. The C/I is on no terms of probation, parole, or work release through the State of Nebraska at this time.

However, no new search warrant was issued based upon the revised affidavit with the complete information, nor was the original warrant amended.

On February 7, 1998, the search warrant was executed. While executing the warrant, the police discovered that the address of the place to be searched was actually 2616 Burdette Street and that 2622 Burdette Street, the address specified in the February 4 affidavit and warrant, is a vacant lot. However, the residence that was actually searched matched the description in the search warrant in all respects save one—the residence was numbered, but the numbers were not visible from the street.

Various items of contraband were seized during the search. Edmonson was later convicted of possession with intent to deliver a controlled substance based on the evidence seized.

II. ASSIGNMENTS OF ERROR

Edmonson asserts that the trial court erred in (1) denying her motion to suppress evidence seized under the search warrant issued on February 4, 1998; (2) failing to find insufficient probable cause for a search warrant to be issued on February 4, 1998, for Edmonson's residence; and (3) failing to suppress evidence seized under a search warrant executed on February 7, 1998, at an address different from the address on the warrant.

III. SCOPE OF REVIEW

[1] 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 the determination as to factual questions, 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. However, to the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the courts below. *State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999).

IV. ANALYSIS

1. Particularity of Warrant

Edmonson argues that the February 4, 1998, search warrant did not identify the place to be searched with sufficient particularity because it did not contain the correct street address. However, an error in the street address of the place to be searched is not per se fatal to the validity of the warrant. *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991).

[2] The test to determine the sufficiency of a search warrant's description is whether the place to be searched is described with sufficient particularity so as to enable the executing officer to find and identify the location with reasonable effort and whether there is any reasonable possibility that another site might mistakenly be searched. *Id.* In making this determination, an appellate court considers whether (1) the address provided by the warrant, although incorrect, still describes the same piece of property; (2) the property intended to be searched is adjacent to that described in the search warrant and both are under the control of the defendant; (3) the incorrect address describes a place not in existence; (4) the other parts of the description which are correct limit the property to be searched to one place; and (5) the place which was intended to be searched had previously been under surveillance or was being surveilled while the warrant was obtained. *Id.*

In the instant case, the property intended to be searched, 2616 Burdette Street, was adjacent to the property described in the search warrant, 2622 Burdette Street. In addition, 2622 Burdette Street was a vacant lot, eliminating any possibility that 2622 Burdette Street might be mistakenly searched. The warrant described 2622 Burdette Street as a main-level unit, in which access is made through the south and north main-level doors, contained within a white and yellow multifamily dwelling with an enclosed white porch and no numbers posted on the residence. This is an accurate description of 2616 Burdette Street, except for the fact that 2616 Burdette Street was actually numbered. However, those numbers were not visible from the street, and thus, the officers did not see them until they executed the

warrant. More importantly, no other house on the block matched the description of the house in the warrant.

We conclude that Edmonson failed to prove that 2616 Burdette Street could have been confused with 2622 Burdette Street or any other house or lot in the area described by the warrant. This assignment of error is without merit.

2. Probable Cause

[3] Edmonson next argues that the trial court erred in overruling her motion to suppress the evidence seized under the search warrant because the search warrant, issued on February 4, 1998, was not supported by an affidavit establishing probable cause. To be valid, a search warrant must be supported by an affidavit establishing probable cause. *State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999).

(a) February 4 Affidavit

Edmonson argues that the affidavit offered in support of the warrant issued on February 4, 1998, failed to establish probable cause because it did not contain adequate evidence of the veracity of the confidential informant.

[4,5] 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. See *State v. Lytle*, 255 Neb. 738, 587 N.W.2d 665 (1998), *disapproved in part on other grounds, State v. Johnson, supra*. Among the ways in which the reliability of an informant may be established are by showing in the affidavit to obtain a search warrant 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, and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given. *State v. Lytle, supra*. An affidavit in support of the issuance of a search

warrant must *affirmatively* set forth the circumstances from which the status of the informant can reasonably be inferred. *Id.*

Edmonson correctly notes that the only characterization of the confidential informant in the February 4, 1998, affidavit was that the informant was "reliable." There was no indication as to *why* the informant was considered reliable. Nothing in the February 4 affidavit indicates that the informant in the instant case had given reliable information in the past, that the statement was against his or her penal interest, that the police officers conducted an independent investigation establishing the informant's reliability, or that the informant was a citizen informant. See *id.* Yet, the February 4 affidavit relied entirely on the confidential informant's information to establish probable cause. If an affidavit does not establish that an informant is reliable, a search warrant issued solely upon the information supplied by the informant is invalid. See *id.*

Therefore, we conclude that the February 4, 1998, affidavit was insufficient to establish probable cause.

(b) February 7 Affidavit

The State asserts that the affidavit issued on February 7, 1998, when considered with the February 4 affidavit, provided probable cause to issue the search warrant. The question is whether the February 7 affidavit may be considered in determining whether the search warrant was validly issued on February 4.

[6] We begin our analysis with the words of the Fourth Amendment to the U.S. Constitution: "[N]o Warrants shall *issue*, but upon probable cause, supported by Oath or affirmation." (Emphasis supplied.) In unequivocal language, the Fourth Amendment requires a showing of probable cause when a warrant is *issued*, not when a warrant is *executed*. The distinction between issuance and execution " 'is no "technicality." ' " *State v. Novembrino*, 105 N.J. 95, 109, 519 A.2d 820, 828 (1987). The warrant requirement's "protection consists in requiring that those inferences [establishing probable cause] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14, 68 S. Ct.

367, 92 L. Ed. 436 (1948). The function of the magistrate or judge as a neutral and detached arbiter is usurped if the police are allowed to supplement the evidence offered in support of a search warrant after the warrant is issued, i.e., after the magistrate or judge has already made his or her findings concerning probable cause. This practice, if approved, would encourage the police to apply for warrants even when probable cause is lacking, since presumably, they could always supplement the original affidavit once additional evidence was obtained. Such a practice would erode the ability of the magistrate or judge to deliberate effectively when evaluating whether probable cause had been established.

Therefore, we conclude that the affidavit establishing probable cause for the issuance of a search warrant cannot be supplemented after the warrant has been issued.

Accordingly, this court cannot consider the February 7, 1998, affidavit in evaluating whether sufficient probable cause was established for the issuance of the search warrant on February 4. The judge, when presented with additional information establishing probable cause, should have rescinded the warrant issued on February 4 and issued a new warrant on February 7, or amended the February 4 warrant by interlineation to indicate that the February 7 affidavit was considered and findings were made thereon. See *State v. Lee*, 247 La. 553, 172 So. 2d 678 (1965).

(c) Good Faith

[7] The State also argues that even if the warrant was not supported by probable cause, the police acted in good faith in reliance upon the warrant, citing *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). In *Leon*, the Supreme Court held that the exclusionary rule is inapplicable to evidence obtained pursuant to an invalid warrant upon which police officers acted in objectively reasonable good faith reliance. See *State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999), citing *United States v. Leon, supra.*

The Court's holding was based on the rationale behind the exclusionary rule:

> First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion.
>
> Third, and most important, we discern no basis, and are offered none, for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate.

United States v. Leon, 468 U.S. at 916.

The Court stated that suppression of evidence should be ordered only in those cases in which exclusion will further the purposes of the exclusionary rule. *Id.* Suppression therefore remains an appropriate remedy if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth; (2) the issuing magistrate wholly abandoned his or her judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S. Ct. 2319, 60 L. Ed. 2d 920 (1979); (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient—such as in failing to particularize the place to be searched or the things to be seized—that the executing officer cannot reasonably presume it to be valid. *United States v. Leon, supra.* If none of the aforementioned circumstances exist, then the evidence should not be suppressed. *Id.*

This court first discussed the application of the "*Leon* good faith exception" in *State v. Pecha*, 225 Neb. 673, 676, 407 N.W.2d 760, 763 (1987), wherein we held that the application of the exclusionary rule was appropriate when the warrant, which contained a catchall " 'John and/or Jane DOE' " phrase, was so facially deficient that the executing officers could not reasonably presume it to be valid. Because the dispositive issue in *Pecha* was the facial deficiency of the warrant, this court had no reason to address what evidence may be considered in making a *Leon* good faith analysis. Likewise, we did not address the stan-

dard by which the objective reasonableness of the police would be judged.

However, in *State v. Parmar*, 231 Neb. 687, 437 N.W.2d 503 (1989), wherein we again addressed the *Leon* good faith exception, the question was whether the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Relying on *U.S. v. Hove*, 848 F.2d 137 (9th Cir. 1988), we held that in answering this question, this court could consider only the facts presented to the magistrate in the affidavit underlying the search warrant, i.e., an appellate court is limited to the four corners of the affidavit. *State v. Parmar, supra.* We also relied on *Hove*, which in turn relied on *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), in adopting a standard by which the good faith of the police would be judged, stating that the test for objectively reasonable reliance is whether the affidavit was sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause. *State v. Parmar, supra.*

An application of this court's holdings in *Parmar* to this case demonstrates certain inconsistencies between *Parmar*'s analysis and the analysis in *Leon*.

(i) Four Corners Doctrine and Leon Good Faith Exception

First, if we are limited to considering the four corners of the affidavit supporting the issuance of the February 4, 1998, search warrant, our analysis would be limited to the February 4 affidavit. As we have already determined, the February 4 affidavit did not contain any information concerning the reliability of the informant. We have previously held that a search warrant issued on the basis of an affidavit which lacks any evidence as to the reliability of the informant upon whose information it relies is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. *State v. Reeder*, 249 Neb. 207, 543 N.W.2d 429 (1996), citing with approval *State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999). See, also, *U.S. v. Wilhelm*, 80 F.3d 116 (4th Cir. 1996). Therefore, if we are to adhere to *Parmar*, we would be forced to conclude that the police did not act with good faith in this case.

Such a conclusion would not, however, be consistent with the rationale in *Leon*. A review of the totality of the circumstances surrounding the issuance and eventual execution of the warrant indicates that the Fourth Amendment violation in this case was the result of judicial error, not police error. Had the judge issued a new warrant on February 7, 1998, when presented with additional information by the police (assuming that the informant's tip was not stale by that time, an issue that was not raised and that we do not address), no Fourth Amendment violation would have occurred. "Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *United States v. Leon*, 468 U.S. at 921. Thus, courts have held that when assessing the objective reasonableness of officers' executing a warrant, an appellate court must look to the totality of the circumstances, including information that was not presented to the issuing judge. *U.S. v. Johnson*, 78 F.3d 1258 (8th Cir. 1996). See, also, *U.S. v. Taxacher*, 902 F.2d 867 (11th Cir. 1990), *cert. denied* 499 U.S. 919, 111 S. Ct. 1307, 113 L. Ed. 2d 242 (1991); *U.S. v. Martin*, 833 F.2d 752 (8th Cir. 1987).

Evaluation of the totality of the circumstances when conducting a *Leon* good faith analysis is consistent with the purposes underlying the exclusionary rule and the good faith exception. *U.S. v. Taxacher, supra.* The purpose of the *Leon* good faith exception is to limit the application of the exclusionary rule to those instances when it will most effectively serve to deter police misconduct. Because this purpose is best served by viewing all of the circumstances surrounding the issuance and execution of the warrant, we conclude that in assessing the good faith of an officer's conducting a search pursuant to a warrant, an appellate court must look to the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit.

We emphasize that this conclusion in no way conflicts with the limitations placed upon an appellate court's evaluation of *probable cause*. Whether the police acted in objectively reasonable good faith is " 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.' " *United States v. Leon*,

468 U.S. 897, 906, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), quoting *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Thus, when evaluating probable cause, we continue to adhere to the rule restricting appellate courts to the consideration of the information and circumstances contained within the four corners of the affidavit. *State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999).

(ii) Standard of Objective Reasonableness

The second inconsistency between *Leon* and *State v. Parmar*, 231 Neb. 687, 437 N.W.2d 503 (1989), involves the standard by which the good faith of the police should be judged when evaluating whether the warrant was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. The present standard in *Parmar* is whether the affidavit was sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause. Applying that standard to this case, it is clear that, standing alone, the February 4 affidavit would not create disagreement among thoughtful and competent judges as to the existence of probable cause. See *State v. Reeder*, 249 Neb. 207, 543 N.W.2d 429 (1996). Thoughtful and competent judges would know that an affidavit lacking any information concerning the credibility of a confidential informant is insufficient. Such judges would likewise know that the February 7 affidavit, although enough to establish probable cause when considered collectively with the February 4 affidavit, cannot relate back to the February 4 warrant.

This analysis is, however, merely academic. *Leon*'s analysis clearly indicates that the question is not what thoughtful and competent *judges* would know about the warrant, but, rather, what an objectively reasonable *police officer* would know.

In *U.S. v. Taxacher*, 902 F.2d 867 (11th Cir. 1990), *cert. denied* 499 U.S. 919, 111 S. Ct. 1307, 113 L. Ed. 2d 242 (1991), the 11th Circuit rejected the standard applied in *U.S. v. Hove*, 848 F.2d 137 (9th Cir. 1998), and adopted by this court in *Parmar*. The court in *Taxacher* noted that under *Leon*, the focus is on the officer, not the judge or magistrate. "The 'good-faith inquiry is confined to the objectively ascertainable question

whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization.'" *U.S. v. Taxacher*, 902 F.2d at 871, quoting *United States v. Leon, supra.* The *Taxacher* court recognized that the Court in *Leon* had opined that reasonable jurists had disagreed about whether there was probable cause on the facts in *Leon.* However, the court explained that the "reasonable jurist" language used in *Leon*

> was merely intended to bolster the Court's holding that the officer had acted reasonably under the circumstances; *Leon* did not establish a "reasonable jurist" test as the threshold. If a reasonable jurist could believe in objective good faith that there was probable cause, obviously a reasonably well-trained officer could believe likewise. However, because a reasonable jurist has more legal training than a reasonably well-trained officer, what would be reasonable for a well-trained officer is not necessarily the same as what would be reasonable for a jurist.

U.S. v. Taxacher, 902 F.2d at 872.

In other words, the fact that thoughtful and competent judges would agree that there was no probable cause to support a warrant does not necessarily mean that an objectively reasonable police officer could not execute the warrant in good faith. Likewise, it is of no great import that the judge or magistrate issued a warrant and an appellate court subsequently concludes that the warrant was not supported by probable cause. In every case in which a warrant is issued and later invalidated, there is disagreement between judicial officers. If the fact that an appellate court came to a different conclusion than the issuing judge or magistrate was dispositive of good faith, the exclusionary rule would have no force.

We conclude that when evaluating whether the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, an appellate court should address whether the officer, considered as a police officer with a reasonable knowledge of what the law prohibits, acted in objectively reasonable good faith in relying on the warrant.

(iii) Application of Law to Facts

Having set forth the appropriate *Leon* good faith analysis, we must determine whether the evidence in this case should be suppressed. In this case, there is no evidence that the judge was misled or wholly abandoned her judicial role, or that the warrant was so facially deficient that the officers could not reasonably presume it to be valid. See *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) (setting forth four circumstances when evidence should nonetheless be excluded). Thus, the only question is whether the warrant was based on information so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

In answering this question, we look to the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit, to determine whether the officer, considered as a police officer with a reasonable knowledge of what the law prohibits, acted in objectively reasonable good faith in relying on the warrant.

Clearly, an officer with a reasonable knowledge of what the law prohibits would realize that the February 4, 1998, affidavit did not establish probable cause. However, prior to executing the February 4 warrant, the officers in this case correctly realized as much and submitted the February 7 affidavit. Assuming that the information was not stale, the February 4 and 7 affidavits, considered collectively, established probable cause.

The Fourth Amendment violation in the instant case stems not from the lack of information concerning probable cause, per se, but from the issuing judge's failure to make a new probable cause finding when the information in the February 7 affidavit was presented.

Edmonson argues that the police should have requested that the judge issue a new warrant. However, "[i]n the ordinary case, an officer cannot be expected to question the magistrate's . . . judgment that the form of the warrant is technically sufficient." *United States v. Leon*, 468 U.S. at 921. Here, a sufficiently particular warrant already existed at the time the police officers presented the judge with the supplemental affidavit. All that the judge needed to do was to make a new finding of probable cause

and to either issue a new, identical warrant or amend the warrant as already issued to reflect the new finding. In the absence of direct legal precedent as to the appropriate action, and our research reveals none, a reasonable police officer could not be expected to know that the February 7 affidavit, in and of itself, could not cure the defect in the February 4 warrant.

We conclude that the police acted in objectively reasonable good faith reliance on the February 4, 1998, warrant and, therefore, that the evidence obtained pursuant thereto need not be suppressed. It may be that, having set forth the law in this opinion, a police officer with reasonable knowledge of what the law prohibits would in the future be required to ask the magistrate or judge for a new warrant. Nonetheless, there was no clear precedent to guide the police in this case, and thus, there was no bad faith. The deterrent purpose of the exclusionary rule would not be served by suppressing evidence seized pursuant to a warrant supported by probable cause that actually existed and was known by the issuing judge merely because the judge failed to make the appropriate findings. See *State v. Barrilleaux*, 620 So. 2d 1317 (La. 1993).

V. CONCLUSION

We conclude that the place to be searched was described with sufficient particularity so as to enable the executing officer to find and identify the location with reasonable effort and that there was no reasonable possibility that another site might be mistakenly searched.

[8,9] However, we also conclude that the judge committed a constitutional error by failing to issue a new search warrant based on the February 7, 1998, affidavit, or, in the alternative, amend the February 4 search warrant. Nonetheless, pursuant to *Leon*, evidence obtained pursuant to an invalid search warrant should be suppressed only if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth; (2) the issuing magistrate wholly abandoned his or her judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S. Ct. 2319, 60 L. Ed. 2d 920 (1979); (3) the warrant is based on

an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient—such as in failing to particularize the place to be searched or the things to be seized—that the executing officer cannot reasonably presume it to be valid. *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). In determining whether a warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, an appellate court looks to the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit, to determine whether the officer, considered as a police officer with a reasonable knowledge of what the law prohibits, acted in objectively reasonable good faith in relying on the warrant. To the extent that *State v. Parmar*, 231 Neb. 687, 437 N.W.2d 503 (1989), and its progeny are inconsistent with this test, those cases are hereby overruled.

Having applied the above test to the facts in this case, we conclude that, despite the constitutional violation, the officers acted in good faith when executing the February 4, 1998, warrant. Therefore, the evidence seized from Edmonson's residence need not be suppressed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
MELISSA A. MEESE, APPELLANT.
599 N.W. 2d 192

Filed August 13, 1999. No. S-98-963.

1. **Judgments: Jurisdiction: Appeal and Error.** The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusion independent from that of the trial court.
2. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
3. **Judgments: Appeal and Error.** In connection with questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

4. **Constitutional Law: Statutes: Speedy Trial.** An accused's right to a speedy trial as guaranteed by the Sixth Amendment to the U.S. Constitution and the statutory implementation of that right under Neb. Rev. Stat. § 29-1207 (Reissue 1995) exist independently of each other.
5. **Speedy Trial.** The primary burden of bringing an accused person to trial within the timeframe provided by law is upon the State, and the failure to do so entitles the defendant to an absolute discharge.
6. **Constitutional Law: Criminal Law.** The Sixth Amendment to the U.S. Constitution applies only when a criminal prosecution has begun and extends only to those persons who have been accused in the prosecution.
7. **Constitutional Law: Criminal Law: Time.** The Sixth Amendment to the U.S. Constitution affords no protection to those not yet accused, nor does this amendment require the government to discover, investigate, and accuse any person within a particular period of time.
8. **Constitutional Law: Speedy Trial: Prosecuting Attorneys.** A defendant's Sixth Amendment right to a speedy trial does not arise before there is some charge or arrest, even though the prosecuting attorneys have knowledge of the offense long before the arrest occurs.
9. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
10. **Final Orders: Appeal and Error.** If an order is interlocutory, immediate appeal from the order is disallowed so that courts may avoid piecemeal review, chaos in trial procedure, and a succession of appeals granted in the same case to secure advisory opinions to govern further actions of the trial court.
11. **Plea in Abatement: Due Process: Time.** A plea in abatement is the procedure best suited for raising a due process claim based upon preindictment delay.
12. **Final Orders: Appeal and Error.** There are three types of final orders which may be reviewed on appeal: (1) an order which affects a substantial right and 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 on summary application in an action after a judgment is rendered.
13. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
14. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.
15. **Final Orders: Speedy Trial: Appeal and Error.** The denial of a motion to discharge on speedy trial grounds affects a substantial right and, thus, is a final, appealable order.
16. **Constitutional Law: Juvenile Courts: Jurisdiction: Waiver.** The right to be tried as a juvenile is not constitutionally guaranteed, and the decision as to whether jurisdiction is waived is discretionary with the court.

Appeal from the District Court for Seward County: ALAN G. GLESS, Judge. Affirmed.

Gregory C. Damman for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

The defendant, Melissa A. Meese, appeals from an order overruling her motion to discharge. The motion was based upon alleged violations of her due process and speedy trial rights due to an excessive preindictment delay that she alleges prevented her case from being transferred to juvenile court.

SCOPE OF REVIEW

[1] The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusion independent from that of the trial court. *State v. Dvorak*, 254 Neb. 87, 574 N.W.2d 492 (1998).

[2] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Kinser*, 256 Neb. 56, 588 N.W.2d 794 (1999).

[3] In connection with questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Kratochvil v. Motor Club Ins. Assn.*, 255 Neb. 977, 588 N.W.2d 565 (1999).

FACTS

In the spring of 1996, the Nebraska State Patrol used a confidential informant to purchase marijuana from individuals in the Seward area. On April 25 and May 7, this confidential informant purchased marijuana from Meese, who was then 16 years of age. Following the May 7 transaction with Meese, the confidential informant purchased drugs from several other persons in the

community. Sixteen persons were ultimately arrested on drug charges.

In late October 1997, Meese was arrested and charged with two counts of delivery of a controlled substance, in violation of Neb. Rev. Stat. § 28-416 (Reissue 1995), a Class III felony. A complaint regarding the April 25 and May 7, 1996, transactions was then filed in Seward County Court. On November 4, Meese, who was almost 18, filed a motion in the county court to waive jurisdiction to the juvenile court.

The county court overruled the motion, concluding that because of her age, the juvenile court system did not have time to deal with Meese in an efficient manner. Also, the county court found that no evidence had been admitted which showed whether there were facilities available to the juvenile court for either the treatment or the rehabilitation of Meese. The county court stated that commitment to a youth development center was essentially a noncommitment because the centers released the juveniles after a certain period of time and that such prompt release would be detrimental to any treatment program for Meese. The county court found that for the security of the public and because the court believed Meese needed long-term treatment, Meese was not amenable to transfer to juvenile court. As provided by Neb. Rev. Stat. § 43-261 (Reissue 1998), the court's decision was not a final order for the purpose of enabling an appeal, and Meese did not appeal.

On December 19, 1997, following a preliminary hearing, the county court bound Meese over to district court for trial on both felony counts. On April 10, 1998, before the commencement of trial, Meese filed a motion to discharge in district court. She claimed that the preindictment delay violated her right to due process of law and her right to a speedy trial. The essence of her claim was that the State's delay in charging her had caused her to be tried as an adult rather than as a juvenile. After a hearing on June 23, the district court overruled the motion to discharge, and Meese appeals from this denial.

ASSIGNMENT OF ERROR

Meese claims the district court erred when it overruled her motion to discharge because her due process and speedy trial

rights were violated by the excessive delay between the alleged commission of her crimes and the filing of the charges against her.

ANALYSIS

In her motion to discharge, Meese argues that the indictment should be discharged on two grounds: (1) The State's delay after the indictment was filed violated her right to a speedy trial and (2) the preindictment delay in filing the charges against her violated her due process right to a fair trial. In overruling the motion, the district court found that Meese's constitutional right to a speedy trial had not been violated and that Meese had failed to prove a "pre-charge speedy trial violation."

[4,5] We first address Meese's claim that the State's delay after the indictment was filed violated her right to a speedy trial. An accused's right to a speedy trial as guaranteed by the Sixth Amendment to the U.S. Constitution and the statutory implementation of that right under Neb. Rev. Stat. § 29-1207 (Reissue 1995) exist independently of each other. *State v. Blackson*, 256 Neb. 104, 588 N.W.2d 827 (1999). The primary burden of bringing an accused person to trial within the timeframe provided by law is upon the State, and the failure to do so entitles the defendant to an absolute discharge. *Id.*

Section 29-1207 provides that "[e]very person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section." A companion statute, Neb. Rev. Stat. § 29-1208 (Reissue 1995), provides that "[i]f a defendant is not brought to trial before the running of [this 6 months] as extended by excluded periods, he [or she] shall be entitled to . . . absolute discharge from the offense charged and for any other offense required by law to be joined with that offense."

[6-8] The Sixth Amendment applies only when a criminal prosecution has begun and extends only to those persons who have been accused in the prosecution. *United States v. Marion*, 404 U.S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971). The Sixth Amendment affords no protection to those not yet accused, nor does this amendment require the government to discover, investigate, and accuse any person within a particular period of time.

United States v. Marion, supra. A defendant's Sixth Amendment right to a speedy trial does not arise before there is some charge or arrest, even though the prosecuting attorneys have knowledge of the offense long before the arrest occurs. *United States v. Marion, supra.*

Meese was arrested for distribution of a controlled substance on October 30, 1997. The complaint was filed the same day, and on November 4, Meese filed a motion to waive jurisdiction to the juvenile court. Following a hearing on this motion, on November 26, the motion was overruled, and Meese waived her preliminary hearing. On December 19, Meese was bound over to district court for arraignment and trial on both felony counts. An information charging Meese with two counts of delivery of a controlled substance, each a Class III felony, was filed on December 23. On April 10, 1998, Meese filed a motion to discharge in district court.

After reviewing these facts, the district court found no speedy trial violation. As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Kinser*, 256 Neb. 56, 588 N.W.2d 794 (1999). We conclude that the district court was not clearly wrong in finding no speedy trial violation. The Sixth Amendment does not apply to preindictment delays. *United States v. Marion, supra.*

As to the statutory 6-month speedy trial, it is clear that 6 months, as defined in § 29-1207, did not pass between the filing of the information on December 23, 1997, and the filing of Meese's motion to discharge on April 10, 1998. Therefore, Meese's claim that her right to a speedy trial has been violated has no merit.

We next proceed to consider whether Meese's Fifth Amendment right to due process of law was violated by the preindictment delay which allegedly prevented her case from being transferred to juvenile court. Meese claims that the preindictment delay in filing the charges against her violated her due process right to a fair trial.

[9] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has juris-

diction over the matter before it. *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998). The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusion independent from that of the trial court. *State v. Dvorak*, 254 Neb. 87, 574 N.W.2d 492 (1998).

[10] The question presented is whether the district court's denial of the motion to discharge was a final, appealable order or was interlocutory. If an order is interlocutory, immediate appeal from the order is disallowed so that courts may avoid piecemeal review, chaos in trial procedure, and a succession of appeals granted in the same case to secure advisory opinions to govern further actions of the trial court. *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997).

In *State v. Huebner*, 245 Neb. 341, 513 N.W.2d 284 (1994), *abrogated on other grounds, State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996), the defendant filed a plea in abatement, claiming that the evidence adduced at the preliminary hearing was insufficient to justify the filing of the information and that the filing of the charges against him had been unreasonably delayed and, therefore, denied him equal protection and due process of law. Neb. Rev. Stat. § 29-1807 (Reissue 1995) provides that an accused may except to an indictment by a plea in abatement. Neb. Rev. Stat. § 29-1809 (Reissue 1995) states that "[a] plea in abatement may be made when there is a defect in the record which is shown by facts extrinsic thereto."

[11] We conclude that a plea in abatement is the procedure best suited for raising a due process claim based upon preindictment delay. Therefore, we will treat that portion of Meese's motion relating to the due process claim based upon a claim of preindictment delay as if the motion to discharge was a plea in abatement.

We have not considered whether a plea in abatement would be a final, appealable order in the context of a claim for violation of due process for preindictment delay. Generally, however, pleas in abatement are not final, appealable orders. See *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975). Furthermore, other jurisdictions treat orders denying dismissals for preindictment delay as nonfinal orders. Although the issue of the appeal-

ability of such rulings has not been directly addressed, such courts have generally addressed an order denying dismissal for preindictment delay after conviction. See, e.g., *State v. Everidge*, 188 Ariz. 46, 932 P.2d 802 (Ariz. App. 1996) (addressing issue of preindictment delay on appeal from conviction); *State v. Lacy*, 187 Ariz. 340, 929 P.2d 1288 (1996) (addressing issue of preindictment delay on appeal from conviction); *People v. Thompson*, 265 Ill. App. 3d 413, 638 N.E.2d 363, 202 Ill. Dec. 717 (1994) (addressing issue of preindictment delay on appeal from conviction); *State v. Rippy*, 626 A.2d 334 (Me. 1993) (addressing issue of preindictment delay on appeal from conviction); *People v. Cooper*, 258 A.D.2d 815, 686 N.Y.S.2d 172 (1999) (addressing issue of preindictment delay on appeal from conviction); *People v. Torres*, 257 A.D.2d 772, 684 N.Y.S.2d 17 (1999) (addressing issue of preindictment delay on appeal from conviction); *People v. Brown*, 243 A.D.2d 750, 663 N.Y.S.2d 670 (1997) (addressing issue of preindictment delay on appeal from conviction); *State v. Lloyd*, No. 15927, 1999 WL 173017 (Ohio App. Mar. 31, 1999) (addressing issue of preindictment delay on appeal from conviction); *State v. Brazell*, 325 S.C. 65, 480 S.E.2d 64 (1997); *Moore v. State*, 943 S.W.2d 127 (Tex. App. 1997) (addressing issue of preindictment delay on appeal from conviction); *Hogan v. State*, 908 P.2d 925 (Wyo. 1995) (addressing issue of preindictment delay on appeal from conviction). Compare, *State v. Cole*, 384 So. 2d 374 (La. 1980) (appellate court granted writ of certiorari on denial of motion to quash indictment because of preindictment delay); *People v. Santmyer*, 255 A.D.2d 871, 680 N.Y.S.2d 367 (1998) (appeal brought by State when motion to dismiss indictment for preindictment delay was granted); *State v. Cochenour*, No. 98CA2440, 1999 WL 152127 (Ohio App. Mar. 8, 1999) (appeal brought by State when motion to dismiss indictment for preindictment delay was granted).

[12] There are three types of final orders which may be reviewed on appeal: (1) an order which affects a substantial right and 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 on summary application in an action after a judgment is ren-

dered. See *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

[13,14] All three types of final, appealable orders share the requirement that a substantial right be affected. *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997). A substantial right is an essential legal right, not a mere technical right. *Id.* A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing. *Id.*

In *State v. Huebner*, 245 Neb. 341, 513 N.W.2d 284 (1994), we noted that the Due Process Clause requires dismissal of an indictment only if the defendant shows that the prosecuting authority's delay in charging him caused substantial prejudice to his right to a fair trial. See, also, *United States v. Lovasco*, 431 U.S. 783, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977); *United States v. Marion*, 404 U.S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971). Here, we must decide whether the denial of Meese's motion based on preindictment delay affects a substantial right—that is, whether Meese's right to a fair trial can be vindicated in an appeal from the final judgment or whether her right may be protected only if she is allowed to appeal directly from the denial of her motion to discharge. See *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999).

[15] We have held that the denial of a motion to discharge on speedy trial grounds affects a substantial right and, thus, is a final, appealable order. In *Jacques*, 253 Neb. at 252, 570 N.W.2d at 335, we explained that an order denying a motion to discharge could be immediately appealed because " '[t]he rights conferred on an accused criminal by §§ 29-1207 and 29-1208 would be significantly undermined if appellate review of nonfrivolous speedy trial claims were postponed until after conviction and sentence.' "

However, the same concern is not present when a party alleges a denial of due process because the party was not tried as a juvenile. An important distinction between the facts of this case and those of *Jacques* is that criminal defendants are constitutionally guaranteed a speedy trial, and thus, it would be unjust to force a defendant to endure a trial prior to reviewing an

alleged speedy trial violation. In contrast, criminal defendants are not constitutionally guaranteed that their case will proceed in juvenile court, and so, loss of access to juvenile jurisdiction has no bearing on whether a defendant receives a fair trial. See *State v. Frazier*, 82 Wash. App. 576, 918 P.2d 964 (1996) (no constitutional right to juvenile court jurisdiction, but preaccusational delay may violate due process under narrowly described circumstances). Yet, it is this loss of access to the juvenile court about which Meese complains.

[16] Whether the State's preindictment delay may have caused Meese to lose access to juvenile court does not require that she appeal from the denial of her motion before trial. The right to be tried as a juvenile is not constitutionally guaranteed, and the decision as to whether jurisdiction is waived is discretionary with the court. See *State v. Ryan*, 226 Neb. 59, 409 N.W.2d 579 (1987). Furthermore, on several occasions, we have reviewed the denial of a transfer to juvenile court. In each case, the validity of the trial court's decision was not addressed until after conviction and sentence. See, e.g., *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996); *State v. Reynolds*, 247 Neb. 608, 529 N.W.2d 64 (1995); *State v. Nevels*, 235 Neb. 39, 453 N.W.2d 579 (1990). Therefore, we have recognized that the loss of access to juvenile court itself does not affect a substantial right. Incorporating this alleged loss into the due process argument does not affect our analysis as to whether the denial of a motion to discharge for preindictment delay affects a substantial right. Neb. Rev. Stat. §§ 29-1816 (Reissue 1995) and 43-276 (Reissue 1993) establish that in determining whether there should be a waiver of jurisdiction to the juvenile court, the practical and nonproblematic rehabilitation of the defendant is weighed against public protection and societal security. See *State v. Mantich, supra.*

The district court's finding that Meese failed to prove a due process violation for preindictment delay does not affect the subject matter of the litigation, such as diminishing a claim or defense that was available to Meese prior to the order from which the appeal is taken. The denial of this order does not affect a substantial right, and there was no final, appealable

order from which to appeal. Consequently, we do not address Meese's due process claim.

CONCLUSION

The district court found no speedy trial violation. We therefore affirm the judgment of the district court on that issue. We do not address that portion of the district court's order regarding preindictment delay, for it is not a final, appealable order.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DWAYNE TUCKER, APPELLANT.
598 N.W.2d 742

Filed August 20, 1999. No. S-98-407.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proven, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.
3. **Postconviction.** An evidentiary hearing is required if the facts alleged would justify relief, if true, or when a factual dispute arises as to whether a constitutional right is being denied.
4. ___. An evidentiary hearing is not required when a motion for postconviction relief alleges only conclusions of fact or law.
5. ___. Even with an appropriate factually alleged motion for postconviction relief, an evidentiary hearing may be denied when the records and files affirmatively show that the defendant is entitled to no relief.
6. **Postconviction: Effectiveness of Counsel: Pleas: Proof.** When a defendant in a postconviction motion alleges a violation of his or her constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney performed at least as well as a criminal lawyer with ordinary training and skill in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his or her case as a result of the attorney's actions or inactions.
7. **Effectiveness of Counsel: Proof.** To show prejudice on a claim of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.

8. ___: ___. The two prongs in an ineffective assistance of counsel claim may be addressed in either order. If it is prudent to dispose of an ineffectiveness claim on the grounds of lack of sufficient prejudice, that course should be taken.
9. **Postconviction: Judgments: Effectiveness of Counsel: Presumptions: Proof: Appeal and Error.** The appellant in a postconviction proceeding has the burden of alleging and proving prejudice. In light of all the evidence before the jury, the defendant must show that it was reasonably likely that the decision reached would have been different, absent the errors. A strong presumption exists that counsel's actions were reasonable. Even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.
10. **Postconviction.** A court is not required to grant an evidentiary hearing on a motion for postconviction relief which does not contain sufficient factual allegations concerning a denial or violation of constitutional rights.
11. **Arrests: Warrants: Probable Cause: Affidavits.** In determining whether probable cause exists for the issuance of an arrest warrant, the issuing magistrate is to make a commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity and basis of knowledge of the persons supplying the hearsay information, there is a fair probability the defendant was implicated in the crime.
12. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Judgments: 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 the determination as to factual questions, 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. However, to the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the courts below.
13. **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. This also holds true for the issuance of arrest warrants.
14. ___: ___. Among the ways in which the reliability of an informant may be established are by showing in the affidavit 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, and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.
15. **Homicide: Lesser-Included Offenses.** There is no lesser-included charge to first degree felony murder in Nebraska.
16. **Criminal Law: Trial: Jury Instructions: Proof.** In a criminal trial, the court in its instructions must delineate for the jury each material element the State is required to prove beyond a reasonable doubt to convict the defendant of the crime charged.

17. **Criminal Law: Aiding and Abetting: Intent: Liability.** When a crime requires the existence of a particular intent, an alleged aider and abettor can be held criminally liable as a principal if it is shown that the aider and abettor knew that the perpetrator of the act possessed the required intent, or that the aider and abettor himself or herself possessed the required intent.
18. **Criminal Law: Jury Instructions: Homicide: Aiding and Abetting: Intent.** In order for the court's jury instructions to be sufficient on the issue of intent in a prosecution for felony murder under an aider and abettor theory, the jury instructions must instruct the jury that the aider and abettor either personally intended that the underlying felony be committed or aided another person whom the aider knew had such an intent.
19. **Jury Instructions: Appeal and Error.** Jury instructions are not read in isolation. All the jury instructions must be read together, and if taken as a whole they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Affirmed.

Mary C. Gryva, of Frank & Gryva, P.C., for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

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

HENDRY, C.J.

INTRODUCTION

Dwayne Tucker (Tucker) appeals from the Douglas County District Court's order denying his motion for postconviction relief. Tucker was convicted of felony murder and sentenced to life imprisonment in 1982. On direct appeal, we affirmed Tucker's conviction and sentence. See *State v. Tucker*, 242 Neb. 336, 494 N.W.2d 572 (1993). Tucker then filed a motion for postconviction relief assigning several errors, namely ineffective assistance of trial and appellate counsel. The district court denied Tucker's motion. The primary issue under review is whether the district court erred in denying Tucker postconviction relief without conducting an evidentiary hearing. For the reasons stated herein, we conclude that Tucker was not entitled to an evidentiary hearing on his motion for postconviction relief, and we affirm the order of the district court.

BACKGROUND

Tucker was found guilty of first degree felony murder for aiding and abetting his half brother, Willie Tucker, in a robbery at the International House of Pancakes (IHOP) in Omaha, Nebraska, during which Willie Tucker shot and killed the cashier, Lisa Lisko. The robbery and murder occurred on December 23, 1981, when Tucker was 17 years old. On December 31, police officers arrived at Tucker's home with a search warrant and an arrest warrant for Tucker. Tucker arrived at his home after the police had begun to execute the search and was immediately placed under arrest and transported to the police station. Tucker eventually offered a confession which was recorded on tape.

Trial counsel moved to suppress the taped confession and related evidence, arguing that the arrest warrant for Tucker lacked probable cause. The motion to suppress was overruled, and at trial, counsel did not object to the admission of the confession. None of the witnesses at trial were able to identify Tucker in connection with the crime. The only evidence which identified Tucker as one of the perpetrators was his confession at the station and his own testimony at trial. On July 14, 1982, Tucker was convicted of first degree felony murder, and on July 28 he was sentenced to life imprisonment.

No direct appeal was taken of Tucker's case in 1982. On January 31, 1991, Tucker filed a motion for leave to file a direct appeal out of time. At the hearing regarding his motion, Tucker testified that he never discussed the appeal process with his trial counsel and had assumed the appeal would be automatic. Trial counsel testified that he did not recall discussing the appeal process with Tucker and had assumed that the appeal would be handled by the office of the public defender. Tucker was allowed a direct appeal and appointed counsel.

On direct appeal, Tucker argued that (1) his motion for change of venue should have been granted, (2) there was insufficient evidence to convict him, and (3) the sentence imposed was excessive. We found no merit to his assignments of error and affirmed his conviction and sentence. See *State v. Tucker, supra.*

On March 5, 1997, Tucker filed a pro se motion for postconviction relief with the Douglas County District Court. On March 25, 1998, the district court denied the motion without holding an evidentiary hearing. Tucker filed a notice of intent to appeal the district court's order denying his motion for postconviction relief and was appointed counsel for this appeal.

ASSIGNMENT OF ERROR

Tucker contends, rephrased and summarized, that the district court erred in denying his motion for postconviction relief without granting him an evidentiary hearing on his claims of ineffective assistance of counsel in the following matters: (1) Trial counsel failed to adequately address his pretrial motion to change venue and preserve it for appeal, (2) trial counsel failed to preserve the pretrial objections to the sufficiency of the arrest warrant for appeal, (3) trial counsel elicited improper prejudicial testimony regarding Tucker's juvenile record during trial, (4) trial counsel failed to object to jury instruction No. 10, and (5) counsel on direct appeal was ineffective in failing to raise the ineffectiveness of trial counsel regarding these matters.

STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Smith*, 256 Neb. 705, 592 N.W.2d 143 (1999); *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998); *State v. Ditter*, 255 Neb. 696, 587 N.W.2d 73 (1998).

ANALYSIS

[2-5] The primary issue involved in this appeal is whether the district court erred in denying Tucker's motion for postconviction relief without an evidentiary hearing. An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proven, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. *State v. Smith, supra*; *State v. Moore*, 256 Neb. 553, 591 N.W.2d 86 (1999); *State v. Silvers, supra*. That is, an evidentiary hearing is required if the facts alleged would justify relief, if true, or when a factual dispute

arises as to whether a constitutional right is being denied. *State v. Silvers, supra.* An evidentiary hearing is not required when a motion for postconviction relief alleges only conclusions of fact or law. *State v. Smith, supra*; *State v. Silvers, supra.* Even with an appropriate factually alleged motion for postconviction relief, an evidentiary hearing may be denied when the records and files affirmatively show that the defendant is entitled to no relief. *State v. Smith, supra*; *State v. Moore, supra*; *State v. Silvers, supra.*

[6-8] When a defendant in a postconviction motion alleges a violation of his or her constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney performed at least as well as a criminal lawyer with ordinary training and skill in the area. *State v. Moore, supra*; *State v. Silvers, supra.* Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his or her case as a result of the attorney's actions or inactions. *State v. Moore, supra*; *State v. Silvers, supra.* That is, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Hunt*, 254 Neb. 865, 580 N.W.2d 110 (1998); *State v. Burnett*, 254 Neb. 771, 579 N.W.2d 513 (1998); *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998). These two prongs may be addressed in either order. *State v. Smith, supra*; *State v. Hunt, supra.* If it is prudent to dispose of an ineffectiveness claim on the grounds of lack of sufficient prejudice, that course should be taken. *State v. Smith, supra*; *State v. Hunt, supra*; *State v. Marshall, supra.*

[9] The appellant in a postconviction proceeding has the burden of alleging and proving prejudice. In light of all the evidence before the jury, the defendant must show that it was reasonably likely that the decision reached would have been different, absent the errors. *State v. Hunt, supra.* A strong presumption exists that counsel's actions were reasonable. *State v. Silvers, supra* (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Even if counsel's actions were found unreasonable, the error justifies setting aside the judgment only if there was prejudice. *Id.*

We examine Tucker's claims in light of the above-stated legal principles. Tucker contends that the district court erred in denying him an evidentiary hearing on his motion for postconviction relief with regard to four matters.

Motion for Change of Venue

[10] Tucker first contends that he was denied effective assistance of counsel with regard to his pretrial motion for a change of venue. Although Tucker has assigned and argued this issue, Tucker's motion for postconviction relief does not factually or otherwise allege any matters related to a motion for change of venue. A court is not required to grant an evidentiary hearing on a motion for postconviction relief which does not contain sufficient factual allegations concerning a denial or violation of constitutional rights. *State v. Parmar*, 249 Neb. 462, 544 N.W.2d 102 (1996). Because Tucker's motion did not contain any factual allegations regarding his motion for a change in venue, he is not entitled to postconviction relief on this issue, and the district court did not err in denying him an evidentiary hearing with regard to this matter. This assignment of error is without merit.

Arrest Warrant

Tucker's second claim for ineffective assistance of counsel relates to the sufficiency of his arrest warrant. In his pro se motion, Tucker alleges that his arrest warrant failed to recite the substance of the accusation against him and did not establish sufficient probable cause. Tucker further alleges that as a result of the invalid warrant, his arrest, confinement, and custody are unlawful. One inference which can be drawn from these allegations is that evidence seized from this arrest was the only evidence of his guilt.

We find these allegations, if true, show a reasonable probability that the outcome could have been different if the evidence from the arrest was suppressed. Thus, the performance of counsel could have been deficient in failing to preserve this issue for appeal. Taken as a whole and considering that Tucker filed his motion pro se, we find that Tucker's allegations are sufficiently specific to require us to examine files and records to determine whether they affirmatively show that Tucker is not entitled to

postconviction relief. See *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). As we pointed out in *Silvers*, the question before us is not whether the defendant is entitled to postconviction relief, but whether an evidentiary hearing should be held to determine that question. We conclude, however, that Tucker is not entitled to an evidentiary hearing on this matter, because the records and files affirmatively show that he is entitled to no relief.

Tucker alleges that the issuing magistrate lacked sufficient probable cause to issue an arrest warrant. Tucker points to the complaint, the information, and the warrant itself, claiming that "[o]nly a bare bones conclusion that Appellant committed the murder during a robbery is alleged. There is nothing which established probable cause." Brief for appellant at 10.

[11,12] In determining whether probable cause exists for the issuance of an arrest warrant, the issuing magistrate is to make a commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity and basis of knowledge of the persons supplying the hearsay information, there is a fair probability the defendant was implicated in the crime. *State v. Cortis*, 237 Neb. 97, 465 N.W.2d 132 (1991). 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 the determination as to factual questions, 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. However, to the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the courts below. See *State v. Edmonson, ante* p. 468, 598 N.W.2d 450 (1999).

The records and files reveal that Tucker's trial counsel filed a motion to suppress Tucker's taped confession on the basis that Tucker's arrest warrant lacked probable cause. The record before us includes the bill of exceptions from the suppression hearing. At the suppression hearing, it was established that three

identical affidavits were given to the magistrate in support of three search warrants. These affidavits are included as exhibits within the bill of exceptions. The officer who obtained all of the warrants testified that the applications and affidavits were used to obtain both the search warrants and the arrest warrant for Tucker.

With regard to a probable cause determination for the arrest of Tucker, the affidavits recited several facts, including the following information: (1) A waitress at the IHOP had been shot during an apparent robbery; (2) two suspects were identified, suspect No. 1 being a black male, 18 to 19 years of age, 5 feet 8 inches to 5 feet 9 inches in height, 145 to 150 pounds, thin build, mustache, afro-style hair 1 to 2 inches in length, wearing a tan coat, and suspect No. 2 being a black male, 19 years of age, 5 feet 8 inches to 5 feet 9 inches in height, medium build, wearing a blue coat; and (3) a reliable confidential source had "heard a group of Black males on 24th Street mentioning that one of the suspects involved in the killing of the waitress at the [IHOP] worked at Ollie's Cleanup Shop." In another conversation with this informant, the informant

> relayed the following additional facts overheard in the conversation mentioned above: 1.) that the suspect that worked for Ollie's [Cleanup Shop] was possibly parttime and that he was younger than the second suspect; 2.) the second suspect was related to the first suspect, possibly a brother or other close relation; 3.) the second suspect drove an Oldsmobile.

The reliable confidential informant who was the source of this information had provided information to officers in the past for approximately 12 search warrants, and there were felony charges pending as a result of the information supplied by this informant. Also, (4) further investigation by officers revealed that Ollie Davis was the owner of Ollie's Cleanup Shop and the uncle of Tucker and that Tucker worked part time at Ollie's Cleanup Shop; and (5) another source of information

> stated that they heard the conversation in which Willie Tucker said that he had shot the waitress at the [IHOP] and that he had meant to shoot the girl in the arm but that the girl had turned and was struck in the chest. Willie Tucker also said that he and his brother Dwayne Tucker had done

> the robbery and that they had gotten about $60 or $62. The waitress had stalled and said the gun was not real and that if they stayed any longer, she would be able to identify them.

This informant had previously provided information in a different robbery and shooting, which information had proved true and correct and had led to two convictions.

[13,14] 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. Lytle*, 255 Neb. 738, 587 N.W.2d 665 (1998), *overruled on other grounds, State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999). This also holds true for the issuance of arrest warrants. Among the ways in which the reliability of an informant may be established are by showing in the affidavit 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, and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given. *Id.*

The affidavits supporting Tucker's arrest warrant sufficiently set out facts demonstrating the basis of the informants' knowledge and credibility. Given the totality of the circumstances set forth in the affidavits, the issuing magistrate received sufficient information on which to base a determination that there existed a fair probability that Tucker was implicated in the crime. See *State v. Cortis*, 237 Neb. 97, 465 N.W.2d 132 (1991). In our de novo review, we conclude that there was probable cause to issue the arrest warrant for Tucker. See *State v. Edmonson*, *ante* p. 468, 598 N.W.2d 450 (1999).

Even if the motion to suppress had been preserved for appeal, there is no reasonable probability that the evidence obtained from Tucker's arrest would have been suppressed. Tucker was, therefore, not prejudiced by any action or inaction of his counsel with regard to his arrest warrant. Accordingly, the district

court did not err in denying Tucker postconviction relief without an evidentiary hearing on this issue, because the records and files affirmatively show that he is entitled to no relief. See *State v. Silvers, supra.* This assignment of error is without merit.

Testimony of Juvenile Record

Tucker's third claim regarding the ineffectiveness of his counsel relates to improper elicitation of prejudicial testimony by his defense counsel during trial. The objectionable testimony, as set out in Tucker's motion, is as follows:

> Q. Now, have you ever been convicted of a felony before?
>
> A. No.
>
> Q. Have you ever been in trouble with the law before?
>
> A. Yes, juvenile.
>
> Q. And how old were you at that time?
>
> A. Thirteen.
>
> Q. What was that all about?
>
> A. Me and my brother jumped on somebody.
>
> Q. It was a fight?
>
> A. Yes.
>
> Q. Other than that have you had any trouble with law enforcement or any laws?
>
> A. No.

In his motion, Tucker alleges that the elicitation of this testimony is prohibited by Neb. Evid. R. 609(4), Neb. Rev. Stat. § 27-609(4) (Reissue 1995). Therefore, Tucker asserts that counsel was deficient by eliciting this information about his juvenile record which could not otherwise have been proffered. Tucker further alleges that

> trial counsel's conduct and trial strategies denied Mr. Tucker his right to receive a fair trial when counsel for the defense inflamed the jury with elicited testimony in violation of Neb.Rev.Stat. (Nebraska Evidence Rule), § 27-609(4) preventing the jury considerations to the lesser included jury instructions of aiding and abeding [sic] when evidence was directed and presented that Willie Tucker fired the shot that killed Lisa M. Lisko, and caused her death.

[15] It is unclear exactly what prejudice Tucker is attempting to allege. We are unable, however, to interpret this allegation in any manner that would establish prejudice amounting to a constitutional violation. Assuming Tucker is alleging that he was prejudiced by this testimony because the jury was prevented from considering a lesser-included charge, such an allegation would have no merit. No prejudice could result from the jury's failure to consider a lesser-included charge because there is no lesser-included charge to first degree felony murder in this state. See *Hopkins v. Reeves*, 524 U.S. 88, 118 S. Ct. 1895, 141 L. Ed. 2d 76 (1998), *rehearing denied* 526 U.S. 968, 119 S. Ct. 5, 141 L. Ed. 2d 766. See, also, *State v. Moore*, 256 Neb. 553, 591 N.W.2d 86 (1999).

Tucker has not alleged sufficient factual allegations of prejudice which demonstrate a reasonable probability that but for the elicited testimony, the result of the proceeding would have been different. See *State v. Hunt*, 254 Neb. 865, 580 N.W.2d 110 (1998). He has, therefore, failed to allege sufficient facts which constitute an infringement of his constitutional right to effective assistance of counsel on this issue. Accordingly, the district court was not clearly erroneous in denying Tucker postconviction relief in this matter without an evidentiary hearing.

JURY INSTRUCTION

Tucker's final claim for ineffective assistance of counsel relates to jury instruction No. 10, which instruction was fully set forth in his motion. Instruction No. 10 was given in regard to aiding and abetting. In his pro se motion, Tucker alleges that jury instruction No. 10 failed to correctly and lawfully instruct the jury that the defendant must have the intent and knowledge of the principal offender in order to be convicted as an aider and abettor. Tucker further alleges that the instruction was prejudicially defective and that the failure to properly instruct on an essential element of the offense requires reversal of the conviction. In support of his allegations, Tucker cites to *State v. Johnson*, 236 Neb. 831, 464 N.W.2d 167 (1991).

[16-18] The aiding and abetting instruction set forth in Tucker's motion, instruction No. 10, does not refer to the element of intent. In a criminal trial, the court in its instructions

must delineate for the jury each material element the State is required to prove beyond a reasonable doubt to convict the defendant of the crime charged. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified on denial of rehearing* 255 Neb. 889, 587 N.W.2d 673 (1999). When a crime requires the existence of a particular intent, an alleged aider and abettor can be held criminally liable as a principal if it is shown that the aider and abettor knew that the perpetrator of the act possessed the required intent, or that the aider and abettor himself or herself possessed the required intent. *Id.* Therefore, in order for the court's jury instructions to be sufficient on the issue of intent in a prosecution for felony murder under an aider and abettor theory, the jury instructions must instruct the jury that the aider and abettor either personally intended that the underlying felony be committed or aided another person whom the aider knew had such an intent. *Id.*; *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996).

We find that Tucker alleged sufficient facts with regard to this jury instruction. If proved true, these allegations would demonstrate that both his trial and appellate counsel performed below the standard expected of reasonable criminal defense counsel and that Tucker was prejudiced by the deficient performance. Thus, we turn to the records and files to determine whether they affirmatively show that Tucker is entitled to no relief.

Instruction No. 10 was given as follows:

> To be guilty of the crime charged, it is not necessary that the State prove that the defendant himself committed the unlawful act or acts in question.
>
> Whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal offender.
>
> If you find from the evidence beyond a reasonable doubt that the unlawful act or acts in question were committed by another person who was:
>
> 1. Engaged by the defendant to commit the unlawful act or acts; or
>
> 2. Engaged with the defendant in a common, concerted, unlawful act or acts; or

3. Incited or encouraged by the defendant to commit the unlawful act or acts,

then the defendant is as guilty as if he himself committed the unlawful act or acts, and it is your duty to find the defendant guilty.

Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary; nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient.

On the other hand, evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving the defendant guilty.

[19] Jury instructions are not read in isolation, however. All the jury instructions must be read together, and if taken as a whole they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal. *State v. Lotter, supra*; *State v. Mantich, supra.* Tucker alleges that jury instruction No. 10 did not instruct on the element of intent required under an aider and abettor theory. A review of the records and files, however, reveals that a separate instruction on intent was given at Tucker's trial.

Instruction No. 8 stated:

> Criminal intent is a material and necessary element of the crime of First Degree Murder as charged against the defendant, but the intent required is not an intent to kill Lisa M. Lisko, but is an intent to commit a robbery. Intent is a mental process, and it therefore generally remains hidden within the mind where it is conceived. It is rarely—if ever—susceptible of proof by direct evidence. It may, however, be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his conduct. But before that intent can be inferred from such circumstantial evidence alone, it must be of such character as to exclude every reasonable conclusion except that the defendant had the required intent. To determine the intent

> of the defendant in this case, you are to examine all the evidence, facts and circumstances appearing in the case which may throw light upon the alleged intent of the defendant. It is for you to determine from all the facts and circumstances in evidence whether or not the defendant committed the acts complained of and whether at such time he had the criminal intent required. If you have any reasonable doubt with respect to either, you must find the defendant not guilty.

All the jury instructions read together and taken as a whole correctly stated the law, were not misleading, and adequately covered the issues supported by the pleadings and the evidence. See, *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified on denial of rehearing* 255 Neb. 889, 587 N.W.2d 673 (1999); *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996). Read together, these instructions properly instructed the jury on the element of intent, and Tucker was not prejudiced by the absence of instruction on the element of intent in instruction No. 10. There is no prejudicial error necessitating reversal, and consequently, there is no prejudice constituting a violation of Tucker's constitutional right to effective assistance of counsel. The records and files affirmatively show that Tucker was entitled to no relief with regard to this issue, and the district court did not err in denying postconviction relief on this claim without an evidentiary hearing.

CONCLUSION

Tucker is not entitled to postconviction relief on any of his claims. The district court did not err in denying his motion without an evidentiary hearing. The order of the district court denying postconviction relief is affirmed.

AFFIRMED.

TWIN TOWERS DEVELOPMENT, INC., A NEBRASKA CORPORATION, APPELLANT, V. BUTTERNUT APARTMENTS, L.P., ALSO KNOWN AS BUTTERNUT APARTMENTS LIMITED PARTNERSHIP, APPELLEE.

599 N.W.2d 839

Filed August 20, 1999. Nos. S-98-423, S-98-653.

1. **Pleadings: Demurrer: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.
2. **Demurrer: Pleadings.** If from the facts stated in a petition it appears that a plaintiff is entitled to any relief, a general demurrer will not lie.
3. **Demurrer: Pleadings: Words and Phrases.** A statement of "facts sufficient to constitute a cause of action," as used in Neb. Rev. Stat. § 25-806(6) (Reissue 1995), means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.
4. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action must be overruled.
5. **Contracts.** The meaning of an unambiguous contract is a question of law.
6. ___. Whether a document is ambiguous is a question of law.
7. ___. A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.
8. **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.
9. **Contracts: Reformation: Intent.** The right of reformation presupposes that the instrument does not express the true intent of the parties, and the purpose of reformation is to make an erroneous instrument express the real agreement.

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

James D. Sherrets and Theodore R. Boecker, Jr., of Sherrets & Associates, for appellant.

Thomas M. White, of Welch, White & Wulff, for appellee.

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

WRIGHT, J.

NATURE OF CASE

In this consolidated appeal, Twin Towers Development, Inc., appeals from the sustaining of a demurrer to its third amended petition and dismissal of its action against Butternut Apartments, L.P., also known as Butternut Apartments Limited Partnership, on an alleged purchase agreement.

SCOPE OF REVIEW

[1,2] When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *Cotton v. Steele*, 255 Neb. 892, 587 N.W.2d 693 (1999); *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998). If from the facts stated in a petition it appears that the plaintiff is entitled to any relief, a general demurrer will not lie. *Fox v. Metromail of Delaware*, 249 Neb. 610, 544 N.W.2d 833 (1996).

FACTS

Twin Towers Development, Inc., brought an action against Butternut Apartments, L.P., also known as Butternut Apartments Limited Partnership, and Butternut Partners, Inc., seeking declaratory judgment and specific performance of an alleged purchase agreement. The district court sustained a general demurrer to Twin Towers' petition with leave to amend.

On February 10, 1998, the district court sustained a general demurrer to Twin Towers' first amended petition. The court ordered that count I of the petition be dismissed, but allowed Twin Towers to amend its petition as to count II.

On March 5, 1998, the court sustained a general demurrer to Twin Towers' second amended petition, dismissed that petition as to Butternut Partners, Inc., only, and granted leave to amend as to a theory of recovery for fraudulent representation. On April 21, the court sustained a demurrer and dismissed Twin Towers' third amended petition. Twin Towers appeals.

Twin Towers' third amended petition alleged that on or about May 20, 1997, Twin Towers entered into an agreement with

Butternut, a copy of which was attached. It was also alleged that it was intended and agreed that the purchaser, Twin Towers, would have the right to buy the property subject to the right to cancel the contract in accordance with specific terms set forth in the agreement.

Twin Towers asserted that under the agreement, it had until July 20, 1997, to notify Butternut in writing of any objections to the conditions for purchase of the property or else be deemed to have accepted the conditions, at which time both parties would be obligated to close. The closing was to occur on or about July 20, and Twin Towers alleged that time was not of the essence.

Twin Towers alleged that prior to July 20, 1997, it did not notify Butternut of any objections and intended by its silence to proceed to closing. Therefore, Twin Towers claimed that closing should have gone forward by July 20 or within a reasonable time thereafter. Twin Towers asserted that it made an oral and written demand on Butternut to close. The written demand was attached to the petition and was dated July 22, 1997. Twin Towers alleged that Butternut refused to close, resulting in damages to Twin Towers, and that without further action by the court, additional damages would be incurred. Twin Towers asserted that it was an interested party under the agreement; that its rights, status, and legal relations would be affected or determined by the construction of the agreement; and that Twin Towers was without a legal remedy at law.

The third amended petition prayed for a judgment and order from the district court (1) to declare Twin Towers' rights under the agreement; (2) to require Butternut to specifically perform their obligations under the agreement; (3) alternatively, to direct specific performance decreeing an equitable reformation of the terms of the agreement to reflect the parties' intentions of entering into a purchase agreement; (4) alternatively, to award Twin Towers all of its damages; (5) to award Twin Towers court costs and attorney fees; and (6) to grant such further relief that the court may deem just or equitable under the premises.

ASSIGNMENTS OF ERROR

Twin Towers asserts that the district court erred (1) in sustaining Butternut's demurrer to Twin Towers' third amended

petition; (2) in dismissing Twin Towers' third amended petition without granting an opportunity for further amendment; (3) in failing to pronounce what Twin Towers' rights, legal status, or relations were vis-a-vis Butternut and the subject property under the contract which is the subject of the instant action; (4) in failing to first determine whether the subject agreement was ambiguous before dismissing the third amended petition; (5) in dismissing the third amended petition and refusing to allow Twin Towers to assert a claim for reformation of the subject agreement; and (6) in dismissing the third amended petition and refusing to allow Twin Towers to assert a claim of fraudulent inducement.

ANALYSIS

[3,4] In considering whether the trial court erred in granting Butternut's demurrer to Twin Towers' third amended petition, we consider whether such petition stated a cause of action. A statement of "facts sufficient to constitute a cause of action," as used in Neb. Rev. Stat. § 25-806(6) (Reissue 1995), means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff. *Giese v. Stice*, 252 Neb. 913, 567 N.W.2d 156 (1997); *Pratt v. Nebraska Bd. of Parole*, 252 Neb. 906, 567 N.W.2d 183 (1997). In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action must be overruled. *Giese v. Stice, supra*; *Pratt v. Nebraska Bd. of Parole, supra.*

Twin Towers first asserts that its third amended petition stated a cause of action for a declaratory judgment, determining its rights under the contract with Butternut. Twin Towers asserts that the contract as written, or as interpreted if deemed to be ambiguous, is a purchase agreement. Twin Towers asserts that under the contract, in the absence of notice, it was deemed to have accepted all the conditions of the agreement and had performed all the necessary obligations and that Butternut had breached the agreement by failing to close. Alternatively, Twin Towers asserts that even if required to send notice of acceptance, time was not of the essence, and that the July 22, 1997,

written demand sent to Butternut was therefore sufficient to satisfy its obligations under the contract.

[5-7] The meaning of an unambiguous contract is a question of law. *Kropp v. Grand Island Pub. Sch. Dist. No. 2*, 246 Neb. 138, 517 N.W.2d 113 (1994). Whether a document is ambiguous is a question of law. *Stephens v. Radium Petroleum Co.*, 250 Neb. 560, 550 N.W.2d 39 (1996). A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous. *Estate of Stine v. Chambanco, Inc.*, 251 Neb. 867, 560 N.W.2d 424 (1997).

Regardless of whether the contract was an option or a purchase agreement or whether Twin Towers was obliged to send notice of acceptance, we conclude as a matter of law that the contract unambiguously sets forth the condition that closing occur no later than July 20, 1997. Paragraph 9 of the agreement states:

> 9. Closing. Closing shall be held at the offices of Investors Realty, Omaha, Nebraska, or at such other place as Seller and Purchaser may mutually otherwise agree. Provided that Purchaser has delivered timely written notice to Seller of the satisfaction or waiver of all conditions set forth in Paragraphs 4 and 5.2 above, Closing shall occur within and no later than 7 days after the date such notice is delivered to Seller, but in no event after July 20, 1997. Purchaser shall be entitled to possession as of the date of Closing.

Paragraph 12 of the agreement, entitled "Expiration," stated, "This Agreement shall expire on July 20, 1997, and Purchaser's right to purchase the Property herein described shall terminate at 5:00 p.m. on that date."

Under the plain language of paragraph 9, closing before July 20, 1997, is a concurrent condition to the contract. While in an ordinary contract for the sale of real estate, time is not of the essence, time may be made of the essence when provided for in the agreement itself or clearly manifested by the agreement construed in light of surrounding circumstances. See, *Frenzen v. Taylor*, 232 Neb. 41, 439 N.W.2d 473 (1989); *Menke v. Foote*,

199 Neb. 800, 261 N.W.2d 635 (1978). It is clear that the language of the contract provides that time is of the essence in the closing of the described real estate. Where there are concurrent conditions, neither party can sue for a nonperformance by the other unless he or she shows a performance or offer to perform. 77 Am. Jur. 2d *Vendor and Purchaser* § 75 (1997). See, also, *Johnson v. Higgins*, 77 Neb. 35, 108 N.W. 168 (1906).

However, in considering whether Twin Towers' third amended petition stated a cause of action, we rely on Neb. Rev. Stat. § 25-836 (Reissue 1995), which provides that in pleading the performance of conditions precedent in a contract, "it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance." Under § 25-836, a plaintiff is authorized to plead a general performance of all conditions precedent. If a defendant wishes to rely on the nonperformance of the contract by the plaintiff, the defendant must allege that fact in his or her answer by setting out specially the condition and the breach, thus confining the issue to be tried to such particular condition or conditions precedent as the defendant may indicate as unperformed. See *Dinkel v. Hagedorn*, 156 Neb. 419, 56 N.W.2d 464 (1953).

Here, Twin Towers generally alleged that it had performed all conditions of the contract, and Butternut has not yet filed a responsive pleading. Thus, we conclude that Twin Towers stated a cause of action under the theory of breach of contract.

[8,9] Twin Towers next contends that it stated a cause of action under the alternative theory of equitable reformation. 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). The right of reformation presupposes that the instrument does not express the true intent of the parties, and the purpose of reformation is to make an erroneous instrument express the real agreement. *Waite v. Salestrom*, 201 Neb. 224, 266 N.W.2d 908 (1978).

Construing Twin Towers' third amended petition liberally, the petition asserts that it was the intent of the parties, or, alternatively, it was Twin Towers' intention and Butternut's representation, that time was not of the essence in closing. Thus, closing was to occur within a reasonable time after July 20. Twin Towers' petition alleges that on July 22, 1997, it sent a written demand to Butternut that a time be arranged for closing.

Therefore, Twin Towers has pled facts which may warrant reformation of the agreement so as to state the parties' intent that time not be of the essence in closing. Because the petition further alleges that Twin Towers tendered performance within a reasonable time, we conclude that the third amended petition sets forth facts sufficient to state a cause of action on the theory of equitable reformation.

For the foregoing reasons, the trial court erred in sustaining the demurrer and dismissing the petition. Thus, we reverse the trial court's order sustaining the demurrer and dismissing the petition, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MINDY L. KALISEK, APPELLANT, V. ALVIN ABRAMSON, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

599 N.W.2d 834

Filed August 20, 1999. No. S-98-468.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law, with respect to which an appellate court has an obligation to reach a conclusion independent of that of the trial court.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation.** The administrative license revocation statutes are not criminal proceedings, but are civil proceedings that may result in a civil sanction.
4. **Criminal Law: Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Appeal and Error.** The administrative license revocation statutes and the criminal statutes present clearly distinct mechanisms for enforcement, adjudication, and appeal.

5. **Constitutional Law: Statutes: Standing.** Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question; to establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right.
6. **Courts: Legislature: Intent: Presumptions.** It will be presumed that the Legislature, in adopting an amendment, intended to make some change in the existing law and that the courts will endeavor to give some effect thereto.
7. **Administrative Law: Licenses and Permits: Revocation: Blood, Breath, and Urine Tests: Public Health and Welfare.** In the context of failing a chemical test, the purpose of an administrative license revocation is limited to protecting public health and safety.
8. **Administrative Law: Licenses and Permits: Revocation: Blood, Breath, and Urine Tests: Evidence.** In the context of a refusal to submit to a chemical test, an administrative license revocation serves an additional purpose of facilitating the gathering of evidence.
9. **Constitutional Law: Drunk Driving: Blood, Breath, and Urine Tests.** Neb. Rev. Stat. § 60-6,205 (Cum. Supp. 1996) does not create an unconstitutional classification between those who submit to urine tests and those who submit to blood and breath tests pursuant to that statute.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

William G. Line for appellant.

Don Stenberg, Attorney General, and Kristine D. Brenneis for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Mindy L. Kalisek appeals the order of the district court for Dodge County affirming the order of the director of the Department of Motor Vehicles (DMV), Alvin Abramson, revoking Kalisek's operator's license pursuant to the administrative license revocation (ALR) provisions, Neb. Rev. Stat. §§ 60-6,205 through 60-6,208 (Reissue 1993 & Cum. Supp. 1996). We granted Kalisek's petition to bypass the Nebraska Court of Appeals, and we now affirm.

BACKGROUND

On December 23, 1997, Kalisek was stopped by Fremont police officers John Headid and Michaela Kubat for failing to signal before making a lane change. When the officers approached Kalisek, Kubat smelled the odor of alcohol emitting from Kalisek and noticed that her speech was slurred and mumbled. Headid also smelled the odor of alcohol and noticed that Kalisek's eyes were bloodshot and watery. Kalisek admitted to both officers that she had been drinking. The officers requested Kalisek to perform field sobriety tests, and her performance on these tests indicated signs of impairment. Kubat also administered a preliminary breath test, which Kalisek failed. Kalisek was arrested for driving under the influence of alcohol (DUI), pursuant to Neb. Rev. Stat. § 60-6,196 (Reissue 1993), and was transported to the Fremont Police Department. At the police department, Kalisek was asked to submit to a chemical test of her breath, to which she complied, and the results of the test indicated that she had a breath alcohol content of .196 grams of alcohol per 210 liters of breath. Pursuant to § 60-6,205, Kubat prepared a "Notice/Sworn Report/Temporary License" (sworn report) form and Kubat and Headid both signed it in the presence of a notary public. Kubat read Kalisek the verbal notice of license revocation and gave her a copy of the sworn report and a "Petition for Administrative Hearing" form with a preaddressed envelope. The DMV received the sworn report; Kalisek filed a petition for hearing with the DMV, and a hearing was held pursuant to a notice of hearing mailed to Kalisek. Based on the hearing, the director of the DMV found that Kubat and Headid had probable cause to believe Kalisek was operating a motor vehicle in violation of § 60-6,196, and suspended Kalisek's driver's license for 90 days effective January 22, 1998. Kalisek appealed the director's decision to the district court, which stayed the revocation of Kalisek's license pending final resolution of the matter. The district court ultimately affirmed the director's decision, lifted the stay, and reinstated the revocation of Kalisek's driver's license.

ASSIGNMENTS OF ERROR

Kalisek alleges that the trial court erred in not finding (1) that § 60-6,196 was in violation of Neb. Const. art. II, § 1, the sepa-

ration of powers clause, and Neb. Const. art. IV, § 13, the commutation clause, or (2) that § 60-6,205 was in violation of Neb. Const. art. III, § 18, the prohibition against special legislation clause.

STANDARD OF REVIEW

[1,2] Whether a statute is constitutional is a question of law, with respect to which an appellate court has an obligation to reach a conclusion independent of that of the trial court. *State v. Cushman,* 256 Neb. 335, 589 N.W.2d 533 (1999); *State v. Divis,* 256 Neb. 328, 589 N.W.2d 537 (1999). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Schindler v. Department of Motor Vehicles,* 256 Neb. 782, 593 N.W.2d 295 (1999).

ANALYSIS

Separation of Powers

Kalisek alleges that § 60-6,196 violates the separation of powers clause and the commutation clause because § 60-6,196(8) provides:

> Any person who has been convicted of driving while intoxicated for the first time or any person convicted of driving while intoxicated who has never been assessed for alcohol abuse shall, during a presentence evaluation, submit to and participate in an alcohol assessment. . . . At the time of sentencing, the judge, having reviewed the assessment results, may then order the convicted person to follow through on the alcohol assessment results at the convicted person's expense *in lieu of or in addition to any penalties deemed necessary.*

(Emphasis supplied.)

Kalisek argues that this provision represents an unconstitutional delegation of legislative authority, alleging that it gives commutation powers to the judiciary.

[3,4] Section 60-6,196 is a criminal DUI statute and is not part of the statutory scheme for an ALR. The ALR statutes are not criminal proceedings, but are civil proceedings that may result in a civil sanction. See *State v. Howell,* 254 Neb. 247, 575 N.W.2d 861 (1998). The ALR statutes and the criminal statutes

present clearly distinct mechanisms for enforcement, adjudication, and appeal. *State v. Cushman, supra.* Kalisek is trying to attack a criminal statute, not in an appeal from her criminal conviction, but instead in an appeal from an ALR.

We note that Kalisek raised this issue on appeal from her criminal conviction, case No. S-98-816, which was summarily affirmed on February 10, 1999, pursuant to Neb. Ct. R. of Prac. 7A(1) (rev. 1996), based upon our decision in *State v. Divis, supra*, and *State v. Cushman, supra.*

[5] Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question; to establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right. *State v. Cushman, supra.*

While the ALR provisions and criminal prohibition against DUI relate to the same subject matter, the validity of § 60-6,196 is completely irrelevant to the instant case, which presents Kalisek's appeal from her license revocation pursuant to § 60-6,205, an ALR provision. The record in this case does not demonstrate that the operation of § 60-6,196 is depriving or is about to deprive Kalisek of any constitutionally protected right. It is clear that Kalisek lacks standing to challenge § 60-6,196 in her present appeal.

Special Legislation

Kalisek next claims that § 60-6,205 violates the prohibition on special legislation found in Neb. Const. art. III, § 18, because it creates an unconstitutional classification between those who submit to urine tests and those who submit to breath and blood tests pursuant to that statute. Section 60-6,196(1) provides:

> It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle:
>
> (a) While under the influence of alcoholic liquor or of any drug;
>
> (b) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood; or

> (c) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath.

Neb. Rev. Stat. § 60-6,197(4) (Cum. Supp. 1996) provides:

> Any person arrested as provided in this section may, upon the direction of a peace officer, be required to submit to *a chemical test or tests of his or her blood, breath, or urine* for a determination of the concentration of *alcohol or* the presence of *drugs*. If the chemical test discloses the presence of *a concentration of alcohol in violation of subsection (1) of section 60-6,196*, the person shall be subject to the administrative revocation procedures provided in sections 60-6,205 to 60-6,208 . . . .

(Emphasis supplied.)

It is further provided in § 60-6,205(3):

> If a person arrested pursuant to section 60-6,197 submits to the *chemical test of blood or breath* required by that section and the test discloses the presence of *alcohol in any of the concentrations specified in section 60-6,196*, the arresting peace officer, as agent for the director [of the DMV], shall verbally serve notice to the arrested person of the intention to immediately impound and revoke the operator's license of such person and that the revocation will be automatic thirty days after the date of arrest unless a petition for hearing is filed within ten days . . . . The arresting peace officer shall immediately forward to the director a sworn report stating (a) that the person was validly arrested pursuant to section 60-6,197 and the reasons for such arrest, (b) that the person was requested to submit to the required test, and (c) that the person submitted to a test, the type of test to which he or she submitted, and that such test revealed the presence of alcohol in a concentration specified in section 60-6,196.

(Emphasis supplied.)

Kalisek argues that § 60-6,205(3) treats persons who are found to be driving with prohibited concentrations of alcohol in the blood or breath differently from persons with a prohibited concentration of alcohol in the urine because the statute requires that results of only blood and breath tests be submitted to the

director of the DMV, and there is no such requirement for results of urine tests. In so arguing, Kalisek misunderstands the operation of the criminal DUI statutes, Neb. Rev. Stat. §§ 60-6,196 to 60-6,204 (Reissue 1993 & Cum. Supp. 1996), in conjunction with the ALR provisions found at §§ 60-6,205 to 60-6,208. The DUI statutes provide criminal penalties for those driving under the influence of either alcohol or drugs, while the ALR provisions only revoke the licenses of those driving under the influence of alcohol. See § 60-6,205(1). Furthermore, as explained below, chemical tests of blood and breath are used to test for concentrations of alcohol or drugs in the body. Now, chemical tests of urine are not used to test for concentrations of alcohol in the body, but are used to test only for the presence of drugs.

Section 60-6,197(4) states that only when the chemical test discloses the presence of a concentration of alcohol in violation of § 60-6,196(1) will the person be subject to the ALR procedures. The only concentrations of alcohol listed in § 60-6,196(1) include a concentration of .10 of 1 gram or more by weight of alcohol per 100 milliliters of his or her *blood*, and a concentration of .10 of 1 gram or more by weight of alcohol per 210 liters of his or her *breath*. There is no urine concentration listed in § 60-6,196(1), and therefore, a person who submits to a urine test is not subject to the ALR procedures.

[6] Previously, § 60-6,196(1) did contain a provision for a concentration of alcohol in urine. However, in 1992, the Legislature amended what was then Neb. Rev. Stat. § 39-669.07 (Reissue 1988) (now § 60-6,196(1)), eliminating the subsection which provided for a per se violation of the DUI statute when a person had a certain concentration of alcohol in his or her urine. Subsection 39-669.07(4) stated that it shall be unlawful to operate a motor vehicle "[w]hen such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her urine." The Legislature's removal of this subsection makes it evident that it intended to remove the urine test as a way for testing for alcohol in a person's system. It will be presumed that the Legislature, in adopting an amendment, intended to make some change in the existing law and that the courts will endeavor to give some effect

thereto. *No Frills Supermarket v. Nebraska Liq. Control Comm.*, 246 Neb. 822, 523 N.W.2d 528 (1994).

[7,8] We are aware that § 60-6,205(2) mentions urine testing. However, that subsection refers to persons who are arrested for refusing to submit to a chemical test of blood, breath, or urine. We have held that in the context of failing a chemical test, the purpose of an ALR is limited to protecting public health and safety. *Schindler v. Department of Motor Vehicles*, 256 Neb. 782, 593 N.W.2d 295 (1999). In the context of a refusal to submit to a chemical test, an ALR serves an additional purpose of facilitating the gathering of evidence. *Id.* Therefore, even though § 60-6,205(3) requires the results of only blood and breath tests to be forwarded to the director of the DMV, the inclusion of urine tests under § 60-6,205(2) is rational because in the context of a refusal to submit to a test, an ALR serves a purpose beyond the purpose it serves when a test is failed.

[9] It is evident from the text of both § 60-6,205(3) and § 60-6,197(4) that the results of urine tests are not used in the ALR process. Both statutes require the tests to show an alcohol concentration in violation of § 60-6,196 (which does not have a provision of alcohol concentration in urine) before ALR procedures apply. Therefore, one cannot be subjected to the ALR provisions from the results of a urine test and that is why § 60-6,205(3) does not require that the results of a urine test be submitted to the director of the DMV. As such, § 60-6,205 does not create an unconstitutional classification between those who submit to urine tests and those who submit to blood and breath tests pursuant to that statute. Therefore, the statute does not violate the prohibition on special legislation found in Neb. Const. art. III, § 18.

CONCLUSION

For the foregoing reasons, Kalisek's assignments of error are without merit, and the judgment of the district court is affirmed.

AFFIRMED.

GERRARD, J., concurs in the result.

DIANE D. GROSETH, NOW KNOWN AS DIANE D. REIDER, APPELLEE, V. CHARLES J. GROSETH, APPELLANT.

600 N.W.2d 159

Filed August 20, 1999. No. S-98-833.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a matter of law which an appellate court determines independent of the conclusions reached by a lower court.
2. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.
3. **Modification of Decree: Visitation: Child Support: Appeal and Error.** Issues involving the modification of a divorce decree, child visitation, and the amount of child support are initially entrusted to the discretion of the district court, whose decisions are to be reviewed on appeal de novo on the record and will be affirmed absent an abuse of discretion.
4. **Modification of Decree: Attorney Fees: Appeal and Error.** A district court's award or denial of attorney fees in a proceeding to modify a divorce decree will be upheld absent an abuse of discretion.
5. **Statutes: Legislature: Intent.** An ambiguity in a statute capable of producing more than one possible result opens the statute for construction by a court, which must apply the construction that will best achieve the purposes of the legislative enactment.
6. **States: Child Support.** The general purpose of the Uniform Interstate Family Support Act (UIFSA), according to an express provision in both Neb. Rev. Stat. § 42-751 (Reissue 1998) and the model act on which the UIFSA was patterned, is to make uniform the law with respect to the subject of the model act among states enacting it.
7. **Courts: Statutes: Intent.** Courts properly look to the official comments contained in a model act on which a Nebraska statute or series of statutes was patterned for some guidance in an effort to ascertain the intent of the legislation.
8. **States: Jurisdiction: Modification of Decree: Child Support.** Under the Uniform Interstate Family Support Act, Neb. Rev. Stat. § 42-709(a) (Reissue 1998), an issuing state loses continuing, exclusive jurisdiction to modify child support provisions of a divorce decree once both parents and all their children move away from that state.
9. ___: ___: ___: ___. Under the Uniform Interstate Family Support Act, Neb. Rev. Stat. § 42-746(a) (Reissue 1998), a responding state acquires jurisdiction to modify the child support provisions of a foreign decree once the following three conditions are met: (1) Both the parents and the children moved away from the issuing state; (2) one of the parents, who is a nonresident of the responding state, seeks modification in the responding state; and (3) the other parent becomes subject to the personal jurisdiction of the responding state.
10. ___: ___: ___: ___. Under the choice-of-law provision in the Uniform Interstate Family Support Act, Neb. Rev. Stat. § 42-739(a) (Reissue 1998), the substantive law of an issuing state applies to petitions filed in a responding state to enforce the existing child support orders of the issuing state; at the same time, the substantive law of

the issuing state does not apply to petitions filed in a responding state to modify the existing child support orders of the issuing state.

11. ___: ___: ___: ___. Under the provisions of the Uniform Interstate Family Support Act, Neb. Rev. Stat. §§ 42-716, 42-739, and 42-746 (Reissue 1998), a responding state becomes an issuing state when it assumes continuing, exclusive jurisdiction to modify a foreign child support order and must apply its own substantive law to the modification.
12. **Statutes: Presumptions: Legislature: Intent.** Courts engaged in an exercise of statutory construction must presume that the Legislature intended a sensible, rather than an absurd, result.
13. **Statutes.** When interpreting a statute, courts 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.
14. **Modification of Decree: Visitation: Appeal and Error.** The best interests of a child are a substantial concern in determining visitation, and such determinations will be reviewed de novo and affirmed absent an abuse of discretion.
15. **Courts: Jurisdiction: Property Settlement Agreements: Child Support.** The substantive law in Nebraska affords courts jurisdiction to enforce court-approved settlement agreements wherein a parent voluntarily promises to support a child beyond the age of majority.
16. **Appeal and Error.** For an appellate court to consider an assignment of error, not only must the error be assigned by the asserting party, it must also be discussed in that party's brief.
17. **Attorney Fees.** A party against whom attorney fees are charged must have prior notice of the potential for such an award and an opportunity to present evidence against the application of such an award.

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Affirmed in part, vacated in part, and in part reversed and remanded for further proceedings.

Thomas C. Emery, of Emery & Blazek, for appellant.

Thomas R. Hickey for appellee.

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

GERRARD, J.

I. NATURE OF CASE

Charles J. Groseth appeals from an order of the Douglas County District Court modifying the child support and visitation provisions of a Massachusetts divorce decree that dissolved the marriage of Charles and Diane D. Groseth, now known as Diane D. Reider. Charles argues that the district court erred in apply-

ing the substantive law of Massachusetts, increasing Charles' child support obligations, modifying the decree's visitation scheme, and awarding attorney fees to Diane. For the reasons that follow, we affirm in part, vacate in part, and reverse and remand for further proceedings consistent with this opinion.

II. PROCEDURAL HISTORY

Diane and Charles married in South Dakota on May 31, 1980, and divorced in Massachusetts on July 26, 1993. During their marriage, the parties had two children: Megan, born on June 25, 1986, and Jaclyn, born on April 11, 1989. Under the terms of a settlement agreement between the parties, which was incorporated into the divorce decree (hereinafter referred to collectively as "decree"), Diane had physical custody of the children with permission to relocate to another state and Charles enjoyed liberal visitation.

Pursuant to the terms of the decree, Charles was to pay Diane $1,740 per month in child support until any child became emancipated. By agreement of the parties, the decree defined emancipated as, among other things, reaching the age of 18 years unless the child began formal, full-time, undergraduate college education in the September following graduation from high school. If a child were to become so enrolled in college, such child would not become emancipated until abandoning such enrollment, graduating from college, or reaching the age of 22 years, whichever came first.

After their divorce, both parties remarried and moved away from New England. Diane ultimately moved to Nebraska, and Charles to Carrollton, Texas. After moving to Omaha with the children, Diane filed a complaint for modification in a Massachusetts court on August 7, 1996, asking for an increase in child support due to a material change in circumstances. Charles responded by asking the Massachusetts court to dismiss Diane's complaint as Massachusetts would be a less convenient forum than Nebraska, given that the parties were residing in Texas and Nebraska respectively.

On October 11, 1996, the Massachusetts court decided it would dismiss Diane's complaint if Charles voluntarily submitted himself to a Nebraska court to resolve the matter. Charles

complied by filing a petition in the Douglas County District Court on October 31, asking for modifications to the child support and visitation provisions of the decree. Consequently, the Massachusetts court dismissed the matter with prejudice on November 15.

On March 27, 1997, the district court ruled that Nebraska substantive law would apply to the modification dispute between Diane and Charles. Diane responded by filing a special appearance in the district court on December 2, asserting that Massachusetts had exclusive jurisdiction to modify the child support provisions of the decree. The district court overruled Diane's special appearance and took jurisdiction over the matter on January 26, 1998, but ultimately decided to apply the substantive law of Massachusetts instead of Nebraska.

The district court held a trial on February 5, 1998, and issued an order on July 28. By way of that order, the district court increased Charles' child support obligation from $1,740 per month to $2,537.16 per month pursuant to the child support guidelines of Massachusetts. The district court also made Charles' increased obligation retroactive to January 1, 1997, and ordered Charles to pay any arrearage at the rate of not less than $500 per month.

Additionally, the district court made various modifications to the visitation arrangements. Although neither party specifically prayed for attorney fees, the district court awarded fees to Diane in the amount of $3,000. Charles timely appealed. Other facts pertinent to this appeal are discussed, where appropriate, in the analysis below.

III. ASSIGNMENTS OF ERROR

Charles assigns, restated and summarized, that the district court erred in (1) applying the substantive law of Massachusetts, instead of Nebraska, to the modification of child support proceedings; (2) refusing to admit the calculations from the Nebraska Child Support Guidelines into evidence; (3) imposing an unreasonable visitation schedule; (4) failing to address specific issues raised in Charles' amended petition; (5) preserving the other provisions of the decree; and (6) awarding attorney fees to Diane.

IV. STANDARD OF REVIEW

[1] This case calls for an interpretation of certain provisions in the Uniform Interstate Family Support Act (UIFSA), Neb. Rev. Stat. §§ 42-701 through 42-751 (Reissue 1993 & Cum. Supp. 1994). Statutory interpretation presents a matter of law which an appellate court determines independent of the conclusions reached by a lower court. *In re Estate of Myers*, 256 Neb. 817, 594 N.W.2d 563 (1999).

[2] Moreover, we must determine whether the district court erred in excluding the Nebraska Child Support Guidelines from evidence. The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *Deuth v. Ratigan*, 256 Neb. 419, 590 N.W.2d 366 (1999).

[3] Generally, issues involving the modification of a divorce decree, child visitation, and the amount of child support are initially entrusted to the discretion of the district court, whose decisions are to be reviewed on appeal de novo on the record and will be affirmed absent an abuse of discretion. *Smith-Helstrom v. Yonker*, 253 Neb. 189, 569 N.W.2d 243 (1997).

[4] Similarly, a district court's award or denial of attorney fees in a proceeding to modify a divorce decree will be upheld absent an abuse of discretion. See *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994).

V. ANALYSIS

1. Nebraska Law Applies

In his first assignment of error, Charles argues that the district court should have applied the substantive law of Nebraska instead of Massachusetts. The outcome of this issue is governed by the UIFSA, particularly, §§ 42-709, 42-716, 42-739, and 42-746. The Legislature amended portions of the UIFSA by enacting 1997 Neb. Laws, L.B. 727, which amendments became operative on January 1, 1998. However, the amendments did not alter any of the statutes pertinent to this case in a way that would impact its outcome.

The UIFSA is of recent vintage, the model act only having come into existence in 1992. See Unif. Interstate Family Support Act Background Information, 9 U.L.A. 350-51 (Supp.

1999). Consequently, neither this court nor any other appellate jurisdiction has confronted the choice-of-law issue presented by the instant appeal. This choice-of-law question reveals an ambiguity in the UIFSA capable of producing more than one possible result; to be precise, the substantive law of either Nebraska or Massachusetts could potentially apply to the circumstances presented in the instant case.

[5] In a case of ambiguity, with more than one possible result, we construe the statute in a way that best achieves the purposes of the legislative enactment. See *Southeast Rur. Vol. Fire Dept. v. Neb. Dept. of Rev.*, 251 Neb. 852, 560 N.W.2d 436 (1997).

(a) Text of Controlling Statutes

Section 42-709 (Reissue 1998) reads in pertinent part:

> (a) A tribunal of this state issuing a support order consistent with the law of this state has continuing, exclusive jurisdiction over a child support order:
>
> (1) as long as this state remains the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued; or
>
> (2) until all of the parties who are individuals have filed written consents with the tribunal of this state for a tribunal of another state to modify the order and assume continuing, exclusive jurisdiction.

Meanwhile, § 42-716 (Reissue 1998) states:

> Except as otherwise provided by the Uniform Interstate Family Support Act, a responding tribunal of this state:
>
> (1) shall apply the procedural and *substantive* law, *including the rules on choice of law*, generally applicable to similar proceedings originating in this state and may exercise all powers and provide all remedies available in those proceedings; and
>
> (2) shall determine the *duty of support and the amount payable* in accordance with the support guidelines established under section 42-364.16.

(Emphasis supplied.) Section 42-739 (Reissue 1998), entitled "Choice of law," in part mandates: "(a) The law of the issuing state governs the nature, extent, amount, and duration of *current* payments and other obligations of support and the payment of

arrearages under the order." (Emphasis supplied.) Finally, § 42-746 (Reissue 1998) provides:

> (a) After a child support order issued in another state has been registered in this state, the responding tribunal of this state may modify that order only if section 42-747.01 does not apply and after notice and hearing it finds that:
>
> (1) the following requirements are met:
>
> (i) the child, the individual obligee, and the obligor do not reside in the issuing state;
>
> (ii) a petitioner who is a nonresident of this state seeks modification; and
>
> (iii) the respondent is subject to the personal jurisdiction of the tribunal of this state; or
>
> (2) the child, or a party who is an individual, is subject to the personal jurisdiction of the tribunal of this state and all of the parties who are individuals have filed written consents in the issuing tribunal for a tribunal of this state to modify the support order and assume continuing, exclusive jurisdiction over the order. However, if the issuing state is a foreign jurisdiction that has not enacted a law or established procedures substantially similar to the procedures under the Uniform Interstate Family Support Act, the consent otherwise required of an individual residing in this state is not required for the tribunal to assume jurisdiction to modify the child support order.
>
> *(b) Modification of a registered child support order is subject to the same requirements, procedures, and defenses that apply to the modification of an order issued by a tribunal of this state and the order may be enforced and satisfied in the same manner.*
>
> (c) A tribunal of this state may not modify any aspect of a child support order that may not be modified under the law of the issuing state. If two or more tribunals have issued child support orders for the same obligor and child, the order that controls and must be so recognized under section 42-711 establishes the aspects of the support order which are nonmodifiable.
>
> (d) On issuance of an order modifying a child support order issued in another state, a tribunal of this state

> becomes the tribunal having continuing, exclusive jurisdiction.

(Emphasis supplied.)

For the sake of completeness, it is worth noting that Massachusetts has also adopted the UIFSA. See Mass. Gen. Laws ch. 209D, § 1-101 et seq. (1998). Moreover, the counterpart UIFSA statutes in Massachusetts and Nebraska that are relevant to this case are, for all intents and purposes, identical. Compare § 42-709, with Mass. Gen. Laws ch. 209D, § 2-205 (1998) (establishing conditions for state to maintain continuing, exclusive jurisdiction); § 42-716, with Mass. Gen. Laws ch. 209D, § 3-303 (1998) (setting forth application of law of this state); § 42-739, with Mass. Gen. Laws ch. 209D, § 6-604 (1998) (dictating how to make choice of law); and § 42-746, with Mass. Gen. Laws ch. 209D, § 6-611 (1998) (providing procedure for modifying child support order from another state).

(b) Statutory Interpretation

[6] The Nebraska enactment of the UIFSA is patterned on the model act and follows that model nearly to the letter. Compare §§ 42-701 through 42-751 with the Unif. Interstate Family Support Act §§ 101 through 905 (amended 1996), 9 U.L.A. 361-442 (Supp. 1999). An express provision in both the model and the Nebraska enactment mandates that the UIFSA shall be construed to effectuate its general purpose to make uniform the law with respect to the subject of the act among states enacting it. § 42-751 (Reissue 1998); Unif. Interstate Family Support Act § 901, 9 U.L.A. 441 (Supp. 1999).

[7] Therefore, we properly look to the official comments contained in the model act for some guidance in an effort to ascertain the intent of the legislation. See *In re Estate of Myers*, 256 Neb. 817, 594 N.W.2d 563 (1999) (turning to comments accompanying Uniform Probate Code to construe Neb. Rev. Stat. § 30-2319 (Reissue 1995)).

In construing the relevant statutes, it is important to bear in mind that, under § 42-702(9) and (16) (Reissue 1998), Massachusetts is the "issuing state" in the instant case and Nebraska is the "responding state." See, also, Mass. Gen. Laws ch. 209D, § 1-101 (1998) (defining terms); Unif. Interstate

Family Support Act § 101, 9 U.L.A. 361 (Supp. 1999) (defining terms).

[8] With that in mind, there is no doubt that the courts of Massachusetts lost continuing, exclusive jurisdiction to modify the child support provisions of the decree under the UIFSA once Charles moved to Texas and Diane moved to Nebraska with the children. See Mass. Gen. Laws ch. 209D, § 2-205 (1998). See, also, § 42-709(1); Unif. Interstate Family Support Act § 610, comment, 9 U.L.A. 429 (Supp. 1999) (discussing conditions of continuing, exclusive jurisdiction).

[9] Moreover, under § 42-746(a)(1), the Douglas County District Court acquired jurisdiction to modify the child support provisions once the following three conditions were met: (1) Charles, Diane, and the children moved away from New England; (2) Charles, who is a resident of Texas, sought modification in Nebraska; and (3) Diane became subject to the personal jurisdiction of the district court by virtue of living in Omaha.

Even though Massachusetts lost and the district court gained jurisdiction to modify the child support provisions, the question remains as to which substantive law applies to this modification action—that of Nebraska or Massachusetts. Under § 42-716, the substantive and procedural law of Nebraska presumptively should apply; however, that section states that the Nebraska rules on choice of law apply as well.

There is a specific choice-of-law statute in both Nebraska's enactment of the UIFSA and the model act itself. Compare § 42-739(a) with Unif. Interstate Family Support Act § 604, 9 U.L.A. 422 (Supp. 1999). Under that choice-of-law provision, the substantive law of the issuing state—Massachusetts in the instant case—"governs the nature, extent, amount, and duration of *current payments* and other obligations of support and the payment of arrearages under the order." (Emphasis supplied.) § 42-739(a).

[10] It is implicit, by the use of the term "current" in § 42-739(a), that the substantive law of Massachusetts (the issuing state) applies merely to petitions to *enforce existing* orders of the issuing state and not to subsequent orders resulting from petitions to *modify* child support orders in a responding state.

Indeed, "current payments and other obligations" cease to be "current" once they are modified.

[11] Moreover, once a responding state assumes continuing, exclusive jurisdiction and modifies an issuing state's support order, the responding state becomes the issuing state. See § 42-746(d). See, also, Unif. Interstate Family Support Act § 611, comment, 9 U.L.A. 429 (Supp. 1999) (explaining that one of UIFSA's goals is to eliminate multiple support orders by establishing scheme of continuing, exclusive jurisdiction), and Unif. Interstate Family Support Act § 604, comment, 9 U.L.A. 422 (Supp. 1999) (axiomatically stating that loss of continuing, exclusive jurisdiction by issuing state and subsequent modification by responding state results in order becoming " 'order of the responding state' ").

In other words, once Nebraska assumes continuing, exclusive jurisdiction and becomes the issuing state under § 42-746, the substantive law of Nebraska "governs the nature, extent, amount, and duration of current payments and other obligations of support." § 42-739(a).

The official comment in the Unif. Interstate Family Support Act § 604, 9 U.L.A. 422 (Supp. 1999), underscores the notion that the choice-of-law language in § 42-739(a) was intended for enforcement actions and not for modification proceedings. In particular, it explains:

> This section identifies situations in which local law is inapplicable. *The basic principle of [UIFSA] is that* throughout the process the controlling order remains the order of the issuing state, and that *responding states only assist in the enforcement of that order. Absent a loss of continuing, exclusive jurisdiction and a subsequent modification of the order, the order never becomes an "order of the responding state."*

(Emphasis supplied.) Unif. Interstate Family Support Act § 604, comment, 9 U.L.A. 422 (Supp. 1999).

Meanwhile, the UIFSA statute that generally addresses the application of Nebraska law explicitly mandates that courts here apply Nebraska law and support guidelines when determining the duty and amount of child support. § 42-716(2). This interpretation is consistent with the official comment in the Unif.

Interstate Family Support Act § 303, comment, 9 U.L.A. 389 (Supp. 1999), which reads:

> Historically states have insisted that forum law be applied to support cases whenever possible. This continues as a key principle of UIFSA. In general, a responding tribunal has the same powers in an action involving interstate parties as it has in an intrastate case. This inevitably means that the Act is not self-contained; rather, it is *supplemented by the forum's statutes and procedures* governing support orders. *To* [*e*]*nsure the efficient processing of the huge number of interstate support cases, it is vital that decisionmakers apply familiar rules of local law to the maximum degree possible.* This must be accomplished in a manner consistent with the overriding principle of UIFSA that enforcement is of the issuing tribunal's order, and that the responding state does not [need to] make the order its own as a condition of enforcing it.

(Emphasis supplied.)

Similarly, the UIFSA statute on child support modification procedures states that the substantive law of the responding state (Nebraska in this case) should control. See § 42-746(b) (stating that modifications are subject to same requirements, procedures, and defenses that apply to modification of Nebraska child support order). This construction is bolstered by the official comment in Unif. Interstate Family Support Act § 610, 9 U.L.A. 428, 429-31 (Supp. 1999). That comment states:

> As long as the issuing state retains its continuing, exclusive jurisdiction over its child support order, a registering sister state is precluded from modifying that order. . . . However, *if the issuing state no longer has a sufficient interest in the modification of its order* under the factual circumstances described in this section, after registration the responding state may assume the power to modify. . . .
>
> . . . .
>
> Under UIFSA, registration is subdivided into distinct categories: registration for enforcement, for modification, or both. UIFSA is based on recognizing the truism that when a foreign support order is registered for enforcement, the rights of the parties affected have been previously liti-

> gated. Because the obligor already has had a day before an appropriate tribunal, an enforcement remedy may be summarily invoked. On the other hand, modification of an existing order presupposes a change in the rights of the parties. . . .
>
> Under UIFSA a tribunal may modify an existing child support order of another state only if certain quite limited conditions [as set out in § 42-746(a)] are met . . . . The intent [of this scheme] is to eliminate multiple support orders to the maximum extent possible consistent with the principle of continuing, exclusive jurisdiction that pervades the Act.
>
> . . . .
>
> Subsection (b) states that if the forum has modification jurisdiction because the issuing state has lost continuing, exclusive jurisdiction, the proceedings will generally follow local law with regard to modification of child support orders. However, Subsection (c) prevents the modification of any final, nonmodifiable aspect of the original order. For example, if child support was ordered through age 21 in accordance with the law of the issuing state and the law of the forum state ends the support obligation at 18, modification by the forum tribunal may not affect the duration of the support order to age 21.

(Emphasis supplied.)

Taken together, these comments and proper statutory construction direct that the substantive law of Massachusetts would apply to a proceeding for a modification of child support if Massachusetts had continuing, exclusive jurisdiction over the child support order; for instance, if one of the parties still lived in Massachusetts. However, once Nebraska assumes continuing, exclusive jurisdiction, then Nebraska's judges are to apply familiar, local rules. In doing so, Nebraska courts are to apply Nebraska's substantive law to any provision of the child support order that could have been modified under Massachusetts law; by the same token, Nebraska may not modify any aspect of the Massachusetts child support order which could not have been modified in Massachusetts. See § 42-746(b) and (c).

(c) Effect of § 42-747.01

Notwithstanding that, Diane asserts that the Legislature resolved the choice-of-law question in 1997 by passing § 42-747.01 (Reissue 1998). Section 42-747.01 expressly mandates that Nebraska's "procedural and substantive law" shall apply to the modification of another state's child support order if both parties now reside in Nebraska and the children no longer reside in the issuing state. Diane argues that the Legislature could have adopted the same explicit language in § 42-746(b) that it did in § 42-747.01 if it intended such a result. Diane points out that the Legislature instead chose to leave out such language in § 42-746(b), implying that only Nebraska *procedural* law applies to the modification of another state's child support order. Diane asserts that § 42-747.01 details the exclusive situation where the substantive law of Nebraska would apply to the modification of another state's child support order.

We do not agree. Section 42-747.01 was enacted simply because § 42-746(a) demands that a parent who files for a modification of child support in a responding state must be a nonresident of the responding state or that both parties file written consents in the issuing state. Thus, if both parents had moved to a responding state, neither parent could file for modification there under § 42-746(a) unless both parents filed written consents in the issuing state. See Unif. Interstate Family Support Act § 613, comment, 9 U.L.A. 435 (Supp. 1999) (explaining that purpose of amendment was to expressly state that which previously was thought "to be obvious; an action between two citizens of the same state [although concerning order initially issued in another state] is not a matter for interstate concern or application").

Clearly, with Charles living in Texas and Diane in Nebraska, there remains a matter of interstate concern in the instant matter—albeit not one with which Massachusetts is concerned. See § 42-709 (providing that issuing state loses continuing, exclusive jurisdiction under these circumstances); Unif. Interstate Family Support Act § 611, comment, 9 U.L.A. 429 (Supp. 1999) (stating that issuing state no longer has "sufficient interest in the modification of its order" upon losing continuing, exclusive jurisdiction).

The interstate concern here is between residents of Nebraska and Texas. Indeed, it is this interstate concern and a sense of "rough justice" that underlies the scheme of § 42-746(a)(1)—which forces Diane to litigate in Texas if she wishes to modify the child support obligations, and Charles to litigate in Nebraska if he wishes to modify the obligations. See Unif. Interstate Family Support Act § 611, comment, 9 U.L.A. 429, 430 (Supp. 1999) (discussing "rough justice" policy behind statute).

Diane also points out that § 42-746(c) precludes a Nebraska court from modifying any aspect of a child support order that may not have been modified in Massachusetts. Be that as it may, Massachusetts certainly could have modified the amount of Charles' child support obligation. See, *Bush v. Bush*, 402 Mass. 406, 523 N.E.2d 259 (1988); *Bassette v. Bartolucci*, 38 Mass. App. Ct. 732, 652 N.E.2d 623 (1995). Hence, so too can Nebraska.

(d) Conclusion

[12] In sum, we must presume that the Legislature intended a sensible, rather than an absurd, result. *State ex rel. Neb. Health Care Assn. v. Dept. of Health*, 255 Neb. 784, 587 N.W.2d 100 (1998). The most sensible approach in an action brought under § 42-746 to modify a child support order issued by another state is to apply the substantive law of the responding state. We see no persuasive reason why the law of an original issuing state should play a role in deciding the amount of a child support obligation when neither party continues to raise children or earn an income there. It is more sensible to apply the law of the state where at least one party is earning income or raising the children because that substantive law more accurately takes into account the cost of living and factors of raising children in that locale.

[13] In the final analysis, a court must look to a statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *In re Invol. Dissolution of Battle Creek State Bank*, 254 Neb. 120, 575 N.W.2d 356 (1998). Section 42-716 imposes a strong presumption that the substantive law of Nebraska applies. See, also, Neb. Rev. Stat. § 42-364.16 (Reissue 1998) (creating rebuttable presumption favoring application of

Nebraska Child Support Guidelines). Rather than insisting on explicit supporting language, we honor that presumption absent express language to the contrary. To do otherwise would defeat the purpose of § 42-716. Thus, we conclude that the district court erred in failing to apply the substantive law of Nebraska.

2. ADMISSIBILITY OF NEBRASKA CHILD SUPPORT GUIDELINES

Because the substantive law of Nebraska is applicable to this case, the district court abused its discretion in refusing to admit the relevant calculations from the Nebraska Child Support Guidelines into evidence. Thus, we determine that the district court should admit and utilize calculations from the Nebraska Child Support Guidelines on remand.

3. TERMS OF VISITATION SCHEDULE

Charles complains that certain restrictions in the visitation schedule imposed by the district court are unreasonable. The district court decided:

> As to each child, Charles shall have four (4) consecutive weeks summer visitation until such child completes the eighth grade. After each such child completes the eighth grade, Charles may have up to six (6) weeks summer vacation, subject to the following provisions: (1) After a child has completed the eighth grade, no summer visitation shall interfere with said child's summer activities, unless substantially similar activities are provided in the city of Charles' residence . . . .

Among other things, the district court also ruled:

> Whenever Charles is in Omaha, he shall have liberal visitation with the parties' minor children, to be arranged by Charles and Diane . . . . [U]nder no circumstance shall such visitation require the children to [be] away from Diane's home past 9 p.m. so long as either child has not yet reached the eighth grade.

As for the children's education, the district court ordered that "Charles may attend and participate in any regularly-scheduled school conference, but under no circumstances shall Charles initiate any other contact with the teachers of the parties' minor children." Finally, the district court allowed Charles "telephone

contact with the minor children only between the hours of 6:30 p.m. and 8:30 p.m., Central Standard or Daylight Time, for calls of not more than ten (10) minutes duration per child."

Charles asserts that these restrictions potentially preclude summer visitation after the children complete middle school because the restrictions require the children's consent to such visitation. Moreover, Charles argues that the order prevents any overnight visitation during the times that Charles is in Omaha and hinders his ability to monitor the children's education. As with all the above-noted conditions, Charles claims that the telephone restrictions are unduly restrictive and unwarranted by the evidence in this case.

However, we conclude, after a de novo review of the record, that the boundaries of Charles' visitation are reasonable given the evidence at trial. For instance, Diane testified that Charles would phone the children three to four times per day and often during the morning hours as the children prepared for school. Moreover, the same telephone restrictions apply to Diane when the children visit Charles in Texas. The evidence also revealed that Charles would occasionally remove the children early from school and have them miss their activities when Charles came to visit the children. Diane testified that Charles justified this conduct by saying that his time with the children was more important than their schooling.

[14] For good reason, issues involving the modification of child visitation are initially entrusted to the discretion of the district court, whose decisions are to be reviewed on appeal de novo on the record and will be affirmed absent an abuse of discretion. *Smith-Helstrom v. Yonker*, 253 Neb. 189, 569 N.W.2d 243 (1997). Moreover, the best interests of the children are a substantial concern in determining visitation. See *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990).

After conducting a de novo review of the record, we are persuaded that the visitation schedule, as set by the district court, furthers the best interests of the children and the secondary interests of both parents. The terms of the visitation schedule are not unreasonable, and the district court did not abuse its discretion in imposing those terms. As such, this assignment of error is without merit.

4. Failure to Address Issues Raised in Charles' Petition

Charles complains that the district court's modification order did not address issues raised in Charles' amended petition to modify; namely, reductions in child support payments for visitation periods of 4 or more weeks, reductions for visitation-related transportation costs, the amount of reduction in that obligation when the first child reaches emancipation, and the duration of Charles' child support obligation.

With regard to the duration of Charles' child support obligation, under the UIFSA, a district court cannot modify any aspect of a child support order which may not be modified under the law of the responding state. § 42-746(c). See, also, Unif. Interstate Family Support Act § 611, 9 U.L.A. 429 (Supp. 1999) (indicating that drafters specifically intended for this provision to apply to duration of child support orders when age of majority differs in issuing and responding states). Thus, if the duration of Charles' obligation could not be modified in Massachusetts then it could not be modified in Nebraska.

Although it appears that Massachusetts could have modified the duration of Charles' child support obligation, see *Manes v. Manes*, 370 Mass. 235, 347 N.E.2d 668 (1976), we note that Charles' child support obligations were established in a formal settlement agreement that became incorporated into the decree. Neither party has asserted that the settlement agreement was entered involuntarily or that the terms of the agreement were unconscionable.

[15] The substantive law in both Nebraska and Massachusetts affords courts jurisdiction to enforce court-approved settlement agreements wherein a parent voluntarily promises to support a child beyond the age of majority. Compare *Zetterman v. Zetterman*, 245 Neb. 255, 512 N.W.2d 622 (1994), with *Swenson v. Wood*, 12 Mass. App. Ct. 923, 424 N.E.2d 1140 (1981).

Thus, while the district court would have had jurisdiction to modify the duration of Charles' child support obligation, based on the evidence, we find no abuse of discretion in the district court's refusal to reduce the duration of Charles' obligation in the instant case.

With reference to the issues regarding reductions in child support for extended visitation periods and transportation costs, and

a child support reduction when the first child reaches emancipation, we point out that this cause is being remanded for further proceedings based on the provisions of the Nebraska Child Support Guidelines. These issues should properly be addressed at the trial court level on remand, based on the child support guidelines, and we decline to further address these matters on appeal.

5. Preserving Decree's Other Provisions

[16] Charles also claims that the district court erred in preserving the other provisions in the decree. However, Charles does not discuss this issue in his appellate brief. For an appellate court to consider an assignment of error, not only must the error be assigned by the asserting party, it must also be discussed in that party's brief. *Varela v. Fisher Roofing Co.*, 253 Neb. 667, 572 N.W.2d 780 (1998); *State v. Sommerfeld*, 251 Neb. 876, 560 N.W.2d 420 (1997). Thus, we do not address this issue.

6. Awarding Attorney Fees to Diane

Charles assigns error to the district court for awarding Diane $3,000 in attorney fees when Diane did not specifically request as much in her answer and cross-petition.

[17] We have recently held that a party against whom attorney fees are charged must have been given an opportunity to present evidence against the application of such an award. See *Winter v. Department of Motor Vehicles, ante* p. 28, 594 N.W.2d 642 (1999). Implicit in that holding is the need for the party against whom attorney fees are awarded to have prior notice of the potential for such an award. See *id.*

Because Diane did not specifically pray for attorney fees in her answer and cross-petition, Charles had neither prior notice of the potential for such an award nor an opportunity to present evidence against the propriety of such an award. Therefore, the award of attorney fees is vacated; the district court may revisit the issue of attorney fees on remand if requested to do so by the parties.

VI. CONCLUSION

In summary, we conclude that the district court erred in applying the substantive law of Massachusetts, instead of that of

Nebraska, in determining the financial obligations relating to child support and visitation-related transportation expenses. Moreover, we determine that the district court erred in awarding $3,000 in attorney fees to Diane, and we vacate that portion of the judgment. We do, however, affirm that portion of the district court's judgment setting forth the terms of the visitation schedule in the instant case.

Therefore, the judgment of the district court is affirmed in part, vacated in part, and in part reversed and remanded for further proceedings consistent with this opinion.

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

STEPHAN, J., not participating.

SHELBY LEIGH BLECHA, BY AND THROUGH HIS GRANDMOTHER AND NEXT FRIEND, KATHERINE RANEY, APPELLANT AND CROSS-APPELLEE, V. JOEY L. BLECHA, APPELLEE AND CROSS-APPELLANT.

599 N.W.2d 829

Filed August 20, 1999. No. S-98-1101.

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. **Paternity: Child Custody: Visitation: Jurisdiction: Equity.** In an action to establish paternity, issues of custody and visitation rights are incidental to the primary causes of action and fall within the general equity jurisdiction of the district court.
3. **Attorney Fees.** Pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1995), a court shall assess attorney fees and costs if, upon the motion of any party or the court itself, the court finds that an attorney or party brought or defended an action or any part of an action that was frivolous or that the action or any part of the action was interposed solely for delay or harassment. If the court finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct, the court shall assess attorney fees and costs.
4. **Attorney Fees: Appeal and Error.** Attorney fees can be awarded against a party bringing an appeal that is without rational argument based on law and evidence.
5. **Attorney Fees: Words and Phrases.** The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.

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

Charles J. Bentjen, of Witte and Bentjen, P.C., for appellant.

John F. Thomas, Leo A. Knowles, and Amy E. Wallace, of McGrath, North, Mullin & Kratz, P.C., for appellee.

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

MCCORMACK, J.

This case arises from the filing of a petition for determination of paternity, custody, and support of Shelby Leigh Blecha, a minor child, by and through his maternal grandmother and next friend, Katherine Raney. Appellee, Joey L. Blecha, has acknowledged paternity of Shelby and has had physical custody of Shelby since the death of Shelby's mother, Leigh Ann Jarrett, in 1997. The trial court found that Joey was Shelby's father, but granted summary judgment to Joey as regards the claims for custody and support. We removed this case to our docket under our power to regulate the caseloads of this court and the Nebraska Court of Appeals.

BACKGROUND

Two days after Shelby was born in 1992, Joey executed a written acknowledgment of paternity. Joey's paternity of Shelby has been recognized by all of the parties to this proceeding. The petition states that Joey "claims to be the natural father of Shelby Leigh Blecha, signed an acknowledgment of paternity, and allowed his name to be entered as 'father' on the minor child's birth certificate," but then alleges that "[n]either paternity nor custody has ever been established, and it is in the best interest of the minor child that both paternity and custody be established." Joey's answer stated that he is the father of Shelby.

Joey and Leigh Ann never married, nor was there ever a proceeding to establish paternity, custody, or support. Shelby lived with Leigh Ann his entire life prior to her death, although Joey lived with them for approximately 2 months during Shelby's first year. After Joey moved out, Leigh Ann and Shelby lived

continuously with either Raney or Vicki Jarrett, Leigh Ann's sister, until Leigh Ann's death in an automobile accident in 1997. Shelby was also in the accident with Leigh Ann, and he suffered injuries that hospitalized him for 4 days. Shelby was released from the hospital into the custody of Joey and has been living with Joey since that time.

Raney obtained grandparent visitation, but her attempt to be named as personal representative of Leigh Ann's estate was unsuccessful. Additionally, Raney had applied for a writ of habeas corpus aimed at obtaining custody of Shelby, but that petition was voluntarily dismissed by Raney. Raney then filed this suit as Shelby's next friend, seeking to have paternity established, custody of Shelby awarded to herself and to Vicki, and an order of support and visitation entered against Joey.

The claim for custody is based on allegations in the petition that Shelby and his mother had lived with either Raney or Vicki for nearly his entire life, that Raney was a fit and proper legal custodian of Shelby, and that Vicki was a fit and proper physical custodian of Shelby. Shelby further alleged, in response to Joey's counterclaim for interference with parental rights, that Joey refused to help pay for Shelby's birthing expenses and that Joey failed to support Shelby emotionally or financially.

The trial court found Joey to be the father of Shelby and granted summary judgment to Joey on the remainder of the claims in the petition.

ASSIGNMENTS OF ERROR

Shelby alleges that the trial court erred in (1) granting Joey's motion for summary judgment and (2) dismissing the petition for determination of custody and support of Shelby. On cross-appeal, Joey alleges that the trial court erred by failing to award him attorney fees on the ground that the suit was frivolous and vexatious.

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. *Koltes v. Visiting Nurse Assn.*, 256 Neb. 740, 591 N.W.2d 578 (1999); *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 256 Neb. 406, 591 N.W.2d 532 (1999).

ANALYSIS

This case was brought by Shelby, a minor child, through Raney, his maternal grandmother, as next friend. Under the facts of this case, we conclude that summary judgment was proper in favor of Shelby on the paternity issue and in favor of Joey on the other issues raised in the petition. Because it is unclear whether and in what amount the trial court intended to award attorney fees to Joey, we remand for determination of that issue.

Nebraska's paternity statute, Neb. Rev. Stat. § 43-1411 (Cum. Supp. 1996), allows a child, through his or her guardian or next friend, to institute a civil proceeding to establish paternity. Here, Shelby did so, and, given the absence of a factual dispute on that issue, the trial court properly granted summary judgment to Shelby as regards Joey's being his father.

[2] We have held that in an action to establish paternity, issues of custody and visitation rights are incidental to the primary causes of action and fall within the general equity jurisdiction of the district court. *Cox v. Hendricks*, 208 Neb. 23, 302 N.W.2d 35 (1981). However, *Cox v. Hendricks, supra*, involved a dispute between the two natural parents of a child, not a natural parent and a stranger to the parent-child relationship, as in this case. The court stated:

> In a paternity action where paternity has been admitted and the natural father has demonstrated a familial relationship with the child and has fulfilled parental responsibilities of support and maintenance, the fact that the child was born out of wedlock should be disregarded, and custody and visitation of minor children should be determined on the basis of the best interests of the children. In determining *with which of the natural parents the children shall remain*, the standards set out in Neb. Rev. Stat. § 42-364 (Reissue 1978) are to be applied.

(Emphasis supplied.) *Cox v. Hendricks*, 208 Neb. at 28, 302 N.W.2d at 38. Thus it appears that custody determinations pursuant to paternity actions are only appropriate when the two parties vying for custody of the child both have a legitimate claim for custody of the child. Such is the case when the paternity suit involves the natural parents or the father and the child's legal guardian.

In this case, however, Shelby is asking the court to place him in the custody of his grandmother and aunt, neither of whom are legal guardians of Shelby or have any legal right to his custody. In such a situation, absent charges of abuse or neglect, the father's natural right to the custody of his children trumps the interest of strangers to the parent-child relationship and the preferences of the child. See, *In re Interest of A.L.N.*, 223 Neb. 675, 392 N.W.2d 780 (1986); *In re Interest of M.*, 215 Neb. 383, 338 N.W.2d 764 (1983). Accordingly, a determination of custody and support under § 43-1411 is inappropriate in this case, and the trial court properly entered summary judgment in favor of Joey on those issues.

As for Shelby's claims under Neb. Rev. Stat. § 25-21,149 (Reissue 1995) of the Uniform Declaratory Judgments Act, the result is necessarily the same. The act grants courts the power "to declare rights, status, and other legal relations whether or not further relief is or could be claimed." § 25-21,149. We have held that the act is, under certain circumstances, an appropriate method for determining paternity. See *White v. Mertens*, 225 Neb. 241, 404 N.W.2d 410 (1987). However, even assuming that this case presents such circumstances, the trial court's power under the act would be limited to declaring the existing legal relationship between Shelby and Joey. The additional relief requested by Shelby is outside the scope of the act.

In sum, summary judgment was appropriate in favor of Shelby on the issue of paternity because there was no factual dispute as to Joey's paternity of Shelby. Summary judgment was proper in favor of Joey on the remaining issues because, under the facts alleged, Joey has an indisputable right to custody as Shelby's father.

CROSS-APPEAL

Joey asserts on cross-appeal that Shelby's action was frivolous, and seeks attorney fees. Neb. Rev. Stat. § 25-824 (Reissue 1995) allows a court to award attorney fees when an action is frivolous.

The trial court's order sustaining Joey's motion for summary judgment stated:

> Inasmuch as the motion for summary judgment asks that the paternity of the child be confirmed in Respondent, it is clear the action is not frivolous. . . . However, the action does appear to be frivolous as it relates to the issues of custody and support, and the . . . recitation of the factual background shown by the exhibits supports such determination.

[3] Section 25-824(4) states:

> The court shall assess attorney's fees and costs if, upon the motion of any party or the court itself, the court finds that an attorney or party brought or defended an action or any part of an action that was frivolous or that the action or any part of the action was interposed solely for delay or harassment. If the court finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct . . . the court shall assess attorney's fees and costs.

[4,5] We recently discussed attorney fees in the case of *Daily v. Board of Ed. of Morrill Cty.*, 256 Neb. 73, 588 N.W.2d 813 (1999). In *Daily*, citing *U S West Communications v. Taborski*, 253 Neb. 770, 572 N.W.2d 81 (1998), we said that attorney fees can be awarded against a party bringing an appeal that is without rational argument based on law and evidence. Citing *Behrens v. American Stores Packing Co.*, 236 Neb. 279, 460 N.W.2d 671 (1990), we also stated that the term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.

In this case, Raney first brought a habeas corpus action to contest the custody of Shelby but voluntarily dismissed that action. Raney also attempted to be named as the personal representative of Leigh Ann's estate, which was unsuccessful. Having failed in these attempts to gain custody of Shelby and/or control of Leigh Ann's estate, Raney then brought this action for paternity as next friend of Shelby. However, no one, including

Raney, disputes that Joey is the father, and Raney's present action is nothing more than a sham to try and bring the custody of Shelby into issue.

Unless there is a paternity case to be decided by the court, there is no issue of custody for the court to consider within the confines of the paternity suit. We find in our de novo review that Raney's bringing of the present suit is without a rational argument, and totally without merit.

We find that Joey's cross-appeal should be granted as to attorney fees incurred in this appeal and assess attorney fees against Raney in the sum of $2,000 for services rendered in this appeal. We remand this cause to the trial court for further proceedings to determine reasonable attorney fees to be awarded to Joey from Raney for legal services and costs incurred up to the date of the notice of appeal.

CONCLUSION

The trial court appropriately granted summary judgment to Shelby on the issue of Joey's paternity. Since there was no issue as to paternity, there was no justiciable issue as to custody. We find that Joey should prevail in his cross-appeal alleging that Raney's bringing of this suit was frivolous and award attorney fees to Joey to be paid by Raney for legal services rendered in this appeal in the sum of $2,000. We remand this cause to the trial court for further proceedings to determine the reasonable amount of attorney fees and costs that should be awarded to Joey from Raney for legal services rendered and costs incurred up until the filing of the notice of appeal.

AFFIRMED AND REMANDED
FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. KEVIN L. REINER, RESPONDENT.

599 N.W.2d 199

Filed August 20, 1999. No. S-99-751.

Original action. Judgment of disbarment.

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

PER CURIAM.

Respondent, Kevin L. Reiner, was admitted to the practice of law in the State of Nebraska on September 17, 1987.

As a result of an investigation by the Counsel for Discipline of the Nebraska State Bar Association pertaining to two complaints, respondent filed a consent to order of temporary suspension to practice law on December 18, 1998. An order suspending respondent from the practice of law until further order of the Nebraska Supreme Court was filed on December 22, 1998.

The investigation of respondent was in response to a complaint received by the Counsel for Discipline on October 14, 1998, from the Honorable Richard P. Garden, district court judge for the Seventh Judicial District in Nebraska, alleging that respondent had filed an affidavit in the case Sandstedt v. Lukken, Knox County District Court, case No. 12620, in which the signature of the notary public was forged. The investigation also examined a complaint received by the Counsel for Discipline on October 8 from attorney Frank Haverkamp, opposing counsel in Sandstedt v. Lukken, alleging that respondent had purported to settle the same case to avoid trial but that it thereafter appeared that respondent was without authority to do so.

On July 2, 1999, respondent filed a voluntary surrender of license to practice law. Therein, respondent admits that the Counsel for Discipline of the Nebraska State Bar Association received letters of complaint from Haverkamp and Judge Garden, described above, and further states that for the purpose of his voluntary surrender of license, he does not desire to contest such allegations or to participate in a formal hearing regarding such allegations.

Respondent further admits in his voluntary surrender of license that he was convicted on May 11, 1999, in the circuit court for the First Judicial Circuit in the county of Yankton, South Dakota, of the felony of making an offer of forged or fraudulent evidence and, as reflected on the exhibits attached to the voluntary surrender of license, sentenced accordingly.

Respondent states in his voluntary surrender of license that he does not desire to contest that he violated his oath of office as an attorney. Respondent has freely and voluntarily consented to the entry of an order of disbarment and has waived his right to notice, appearance, or hearing prior to entry of such an order.

On the basis of the foregoing, the Supreme Court concludes that respondent has violated his oath of office as an attorney and Canon 1, DR 1-102, and Canon 7, DR 7-102, of the Code of Professional Responsibility. The court, therefore, accepts respondent's surrender of his license to practice law and orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with Neb. Ct. R. of Discipline 16 (rev. 1996), and upon failure to do so, he shall be subject to punishment for contempt of this court.

JUDGMENT OF DISBARMENT.

MILLER-LERMAN, J., not participating.

IN RE APPLICATION OF CITY OF NORTH PLATTE, NEBRASKA. DAWSON COUNTY PUBLIC POWER DISTRICT, APPELLANT, V. CITY OF NORTH PLATTE, NEBRASKA, APPELLEE.

599 N.W.2d 218

Filed August 27, 1999. No. S-97-784.

1. **Nebraska Power Review Board: Appeal and Error.** A decision of the Nebraska Power Review Board will be affirmed if it is supported by the evidence and is not arbitrary, capricious, unreasonable, or otherwise illegal.
2. **Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach conclusions independent of the determination made below.
3. ___: ___. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

4. **Public Utilities: Electricity: Words and Phrases.** The plain meaning of existing customer under Neb. Rev. Stat. § 70-1010(2)(c) (Reissue 1996) is a customer who is purchasing or has been purchasing electricity from a supplier of electricity at the time transfer of the service area becomes imminent.
5. **Statutes.** Where statutory construction is called for, a court looks to the statute's purpose and then construes the statute in a reasonable manner that will best achieve that purpose, rather than interpreting the statute in a way that would defeat its purpose.
6. ___. To determine the purpose of the statute, a court may consider the components of a series or collection of statutes pertaining to a certain subject.
7. **Public Utilities: Electricity: Nebraska Power Review Board.** The proper date to determine valuation of the total economic impact on the selling supplier pursuant to Neb. Rev. Stat. § 70-1010 (Reissue 1996) is when a purchasing supplier firmly asserts its right to acquire the service area by filing an application with the Nebraska Power Review Board to serve the area.

Appeal from the Nebraska Power Review Board. Affirmed.

E. Bruce Smith, of Stewart & Smith, for appellant.

Douglas L. Stack, of Girard and Stack, P.C., for appellee.

Patrick W. Healey for amicus curiae Nebraska Rural Electric Association.

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

GERRARD, J.

INTRODUCTION

The City of North Platte (North Platte) filed an application with the Nebraska Power Review Board (PRB) to determine how much North Platte must compensate the Dawson County Public Power District (power district) for annexing land in the power district's service area and supplying electricity to customers there. The PRB determined that North Platte did not have to compensate the power district under Neb. Rev. Stat. § 70-1010 (Reissue 1996) for revenue that might have been generated by a potential electric customer in the power district's service area who had not yet begun purchasing electricity at the time of annexation. The power district appeals. For reasons that follow, we affirm the order of the PRB.

FACTUAL BACKGROUND

The pertinent facts are undisputed and have been agreed upon by the parties. Around the early part of May 1996, North Platte learned that a Utah partnership doing business as Flying J., Inc. (Flying J), was planning to purchase a tract of land just outside the city limits to build a truckstop and restaurant facility. The tract was within the power district's service area. North Platte believed that Flying J would begin construction on the tract in the fall of 1996 and that the restaurant and truckstop would be completed by late fall of 1997. Based on that knowledge, North Platte decided that it wanted to be the supplier of electricity to the facilities on the tract. North Platte entered into negotiations with the power district to facilitate such. Up to that time, the Nebraska Department of Roads was the only customer of electricity in the area where the tract is located. By an ordinance dated August 20, 1996, North Platte annexed the tract.

Nevertheless, the power district entered into a contract with Flying J on October 24, 1996. The contract did not require that Flying J actually purchase electricity, only that Flying J would purchase electricity from the power district at specified rates if Flying J came to have need for electricity on the tract. The contract stated that it would remain in effect for 5 years after the initial billing period for electricity used by Flying J.

Meanwhile, North Platte continued to encourage Flying J to build the facilities on the tract, offering various forms of concessions and assistance. For example, in February 1997, North Platte promised Flying J that North Platte would be at least partly responsible for bringing the tract into compliance with federal wetlands laws and would grant various water and sewer subsidies if Flying J built the facilities there. In return, Flying J promised that construction of the facilities on the tract would be completed by February 1999. Flying J became the owner of the tract on February 25, 1997.

North Platte and the power district continued to negotiate the terms of retiring the power district as the supplier of electricity to the tract and establishing North Platte as such. North Platte and the power district were able to agree on all terms but one, that being whether § 70-1010 requires North Platte to compensate the power district for the potential revenue that would have

been generated annually on the tract by the Flying J facilities. By stipulation, North Platte and the power district agreed that Flying J's facilities on the tract would have annual electric requirements similar to another Flying J facility near Gretna, Nebraska; specifically, such requirements would amount to $75,746.54 in annual revenue to the supplier of electricity.

The power district maintained that North Platte should compensate the power district for 2½ times that amount ($189,366, rounded down) pursuant to § 70-1010(2)(c), claiming that the Flying J facility should be treated as an existing customer. The power district also asserted that North Platte should be liable to the power district for the potential Flying J revenue regardless of whether Flying J is an existing customer under the statute, reasoning that the factors set forth in § 70-1010(2) are merely guidelines and not the exclusive criteria for deciding the appropriate amount of compensation.

On December 13, 1996, North Platte filed an application with the PRB for authority to serve the newly annexed area and to transfer facilities and customers. By the time the PRB held a hearing on May 9, 1997, Flying J had not yet purchased electricity from either supplier. After the hearing, the PRB determined that North Platte did not have to compensate the power district for the potential revenue generated by Flying J. The PRB reasoned that ordering such compensation would be too speculative because Flying J had not begun purchasing power at the time of annexation. As a result, the PRB ordered only that North Platte pay to the power district the sum of $11,959 for the reproduction cost of the facilities being acquired by North Platte from the power district and the sum of $7,260.12 for the taking of the power district's only customer located in the annexed area, i.e., the Nebraska Department of Roads.

ASSIGNMENT OF ERROR

The power district assigns, restated, that the PRB erred in finding that the total economic impact on the power district from transferring electric customers on the tract to North Platte's service area did not include the loss of revenue that would potentially be generated by Flying J, an identified future customer.

STANDARD OF REVIEW

[1,2] A decision of the PRB will be affirmed if it is supported by the evidence and is not arbitrary, capricious, unreasonable, or otherwise illegal. *In re Application of City of Lexington*, 244 Neb. 62, 504 N.W.2d 532 (1993). The meaning of a statute is a question of law, and a reviewing court is obligated to reach conclusions independent of the determination made below. *Id.*

ANALYSIS

Section 70-1010 requires the PRB to determine the compensation due a supplier of electricity as a consequence of a transfer of service area. We are once again called upon to interpret § 70-1010, which reads in pertinent part:

> (1) The [B]oard shall have authority upon application by a supplier at any time to modify service areas or customers to be served as previously established. . . .
>
> (2) In the event of a proposed transfer of customers and facilities from one supplier to another . . . the parties shall attempt to agree upon the value of the certified service area and distribution facilities and customers being transferred. If the parties cannot agree upon the value, then the [B]oard shall determine the total economic impact on the selling supplier and establish the price accordingly *based on, but not limited to,* the following guidelines: The supplier acquiring the certified service area, distribution facilities, and customers shall purchase the electric distribution facilities of the supplier located within the affected area, together with the supplier's rights to serve within such area, for cash consideration which shall consist of . . . (c) *an amount equal to two and one-half times the annual revenue received from power sales to existing customers of electric power within the area being transferred* . . . .

(Emphasis supplied.)

This court interpreted § 70-1010 in *In re Application of City of Lexington, supra*, when the city and the power district unsuccessfully attempted to agree upon the value of the annexed certified service area, distribution facilities, and customers of the power district being transferred to the city. The primary difference between that case and the cause presently before us is that

the power district could not identify potential future electric customers in the service area annexed by the city, whereas the power district had identified Flying J as a prospective customer in the instant case. In *In re Application of City of Lexington, supra*, we explained that the PRB may consider factors other than those specifically listed in § 70-1010 when determining the total economic impact on the power district.

Nevertheless, we held that the PRB was correct in declining to consider the value of expansion and future customers in the area annexed by the city of Lexington. *In re Application of City of Lexington, supra*. We reasoned that such considerations were too speculative given the testimony in that case, which did not specifically identify future customers. *Id.* The power district contends that by specifically identifying Flying J as a future customer prior to the date of annexation, such a consideration is not too speculative in the instant case. We do not agree.

[3,4] First, the PRB was correct in declining to treat Flying J as an existing customer under § 70-1010(2)(c). 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. *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999). The plain meaning of existing customer under § 70-1010(2)(c) is a customer who is purchasing or has been purchasing electricity from a supplier of electricity at the time transfer of the service area becomes imminent. While the power district and Flying J negotiated a contract for the potential purchase of electricity, the record reveals that no such purchase ever occurred. As such, Flying J was not an existing customer of the power district at any point.

Of course, the power district is correct in pointing out that the PRB may consider factors other than those listed in § 70-1010(2) in determining the total economic impact on the district. *In re Application of City of Lexington*, 244 Neb. 62, 504 N.W.2d 532 (1993). The question, then, is whether § 70-1010 requires the PRB to consider the revenue potentially generated by Flying J in calculating the amount of compensation North Platte must pay to the power district.

[5,6] Where statutory construction is called for, a court looks to the statute's purpose and then construes the statute in a reasonable manner that will best achieve that purpose, rather than interpreting the statute in a way that would defeat its purpose. *In re Invol. Dissolution of Battle Creek State Bank*, 254 Neb. 120, 575 N.W.2d 356 (1998). To determine the purpose of the statute, a court may consider the components of a series or collection of statutes pertaining to a certain subject. *Id.* Looking to other components of Neb. Rev. Stat. § 70-1001 et seq. (Reissue 1996), it becomes clear that the policy behind the statutes is to provide Nebraskans with adequate electric service at the lowest cost possible, to eliminate conflict and competition between power suppliers, and to avoid duplicative facilities and resources.

When North Platte annexed the tract in August 1996, North Platte was not obligated to supply electricity to the area. North Platte could have begun negotiations with the power district after annexation and then decided not to supply electricity to the tract if it became apparent that Flying J was not coming or for other economic reasons. By the same token, North Platte could have acquired the service area via a PRB determination before Flying J committed to building the facilities, only to have Flying J decline the entire venture. Under either scenario, the power district would not be entitled to the compensation it now seeks. Therefore, the PRB did not act arbitrarily or capriciously when it did not consider other factors in assessing the total economic impact on the power district where those factors addressed potential economic benefits that the power district had not yet, and may never have, realized.

[7] However, the date of annexation, as determined by the PRB, is not the key date to determine valuation for purposes of § 70-1010(2). The proper date to determine valuation of the total economic impact on the power district pursuant to § 70-1010 is when North Platte firmly asserted its right to acquire the service area by filing an application with the PRB to serve the newly annexed area. The circumstances of the instant case illustrate why the filing of an application with the PRB to serve the area triggers the date of valuation. At the date of annexation, North Platte was not obligated to become the power supplier for the annexed area, see § 70-1008(2), and North Platte did not com-

mit to acquiring the service area until it filed its application with the PRB. Thus, the date of annexation is not the accurate cutoff date. By the same token, Flying J had not actually solidified its plan to purchase the tract and build the facilities until the end of February 1997, almost 3 months after North Platte filed its application with the PRB. For various reasons, Flying J could have declined to purchase the tract after North Platte filed its application with the PRB. It thus becomes obvious that at the time of North Platte's filing of an application with the PRB on December 13, 1996, Flying J was not an existing customer of the power district as set forth in § 70-1010(2)(c), but, rather, a prospective customer.

The determination of the PRB that the Nebraska Department of Roads was the only existing customer in the area being annexed, pursuant to § 70-1010(2)(c), is supported by the evidence and is not arbitrary, capricious, unreasonable, or otherwise illegal. Even though the PRB utilized the date of annexation, rather than the date of North Platte's PRB application, in its determination that compensation to the power district for prospective customer Flying J is too speculative, the reasoning employed by the PRB leads to the same result under the circumstances of the instant case.

CONCLUSION

Accordingly, the order of the PRB is affirmed.

AFFIRMED.

MAIN STREET MOVIES, INC., A NEBRASKA CORPORATION, APPELLEE, AND TV CATS, INC., ET AL., INTERVENORS-APPELLEES, V. MICHAEL WELLMAN, COUNTY ATTORNEY, SARPY COUNTY, NEBRASKA, APPELLEE, AND STATE OF NEBRASKA EX REL. DON STENBERG, ATTORNEY GENERAL, INTERVENOR-APPELLANT.

598 N.W.2d 754

Filed August 27, 1999. No. S-98-102.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis, and whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Criminal Law: Obscenity: Appeal and Error.** When the issue presented is whether an item in question is obscene in the sense that selling or making it available for rental would violate a criminal statute, an appellate court reviews such matter as a criminal case at law.
3. **Constitutional Law: Obscenity.** Obscenity is not within the area of constitutionally protected speech, and therefore, obscene material may be prohibited or otherwise regulated without offending the First Amendment to the U.S. Constitution.
4. **Obscenity: Words and Phrases.** "Obscene" shall mean that (1) an average person applying contemporary community standards would find that the work, material, conduct, or live performance taken as a whole predominantly appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion; (2) the work, material, conduct, or live performance depicts or describes in a patently offensive way sexual conduct specifically set out in Neb. Rev. Stat. §§ 28-807 to 28-829 (Reissue 1995); and (3) the work, conduct, material, or live performance taken as a whole lacks serious literary, artistic, political, or scientific value.
5. **Obscenity: Legislature: Words and Phrases.** The Legislature has defined the sexual conduct that may be regulated in Neb. Rev. Stat. § 28-807(15) (Reissue 1995) as acts of masturbation, homosexuality, sodomy, sexual intercourse, or prolonged physical contact with a person's clothed or unclothed genitals, pubic area, or buttocks or, if such person is female, breast.
6. **Obscenity: Appeal and Error.** In an appellate court's independent review of the evidence in an obscenity case, the court's initial focus is on the substantive content of the material. If the court determines as a matter of law that the material depicts or describes patently offensive types of sexual conduct that may be regulated, the court is then concerned with whether, as a matter of fact, the material taken as a whole predominantly appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion; is patently offensive; and lacks serious literary, artistic, political, or scientific value, as set forth in Neb. Rev. Stat. § 28-807(10) (Reissue 1995).
7. **Obscenity: Declaratory Judgments: Appeal and Error.** In an appellate court's review of a trier of fact's determination that certain material appeals to the prurient interest or is patently offensive, for the purpose of declaratory judgment, the appellate court substitutes its findings for those of the trier of fact only if the appellate court concludes that the trier of fact's determination is clearly wrong.

8. **Obscenity: Appeal and Error.** In an obscenity case, the determination of the trier of fact concerning that portion of the test in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), as to whether the work taken as a whole lacks serious literary, artistic, political, or scientific value, is weighed independently by an appellate court after a de novo review of the relevant evidence.
9. ___: ___. An appellate court gives due deference to the trier of fact's findings in relation to whether certain material, taken as a whole, appeals to the prurient interest or is patently offensive, and it will reverse such findings only if they are clearly wrong.
10. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded.

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

Don Stenberg, Attorney General, and William L. Howland for appellant.

Michael A. Kelley and Christopher D. Jerram, of Kelley, Lehan & Hall, P.C., and Richard J. Dinsmore for appellee Main Street Movies and intervenors-appellees.

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

WRIGHT, J.

NATURE OF CASE

Main Street Movies, Inc. (Main Street), brought this action for declaratory judgment pursuant to Neb. Rev. Stat. § 28-801 et seq. (Reissue 1995), specifically § 28-820, against Michael Wellman, Sarpy County Attorney. Main Street sought a determination whether certain videotape movies explicitly depicting a variety of sexual acts, which movies Main Street offered for rental and sale to the public, were criminally obscene.

SCOPE OF REVIEW

[1] An action for declaratory judgment is sui generis, and whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *Main Street Movies v. Wellman*, 251 Neb. 367, 557 N.W.2d 641 (1997) (*Main Street I*).

[2] When the issue presented is whether an item in question is obscene in the sense that selling or making it available for

rental would violate a criminal statute, we review such matter as a criminal case at law. *Id.*

FACTS

Main Street is a business located in Sarpy County and engaged in the rental and sale of videotape movies. A portion of Main Street's inventory is sexually explicit and has been available for rental and sale at Main Street for approximately 15 years. The sexually explicit movies are segregated from other movies in the store so that only adults have access to them. If a movie's case depicts sexually explicit material, Main Street removes the movie from its case. Main Street contends that it has attempted to not rent movies which portray violence to women or which involve sexual activity with children.

There were few complaints with regard to the operation of Main Street's business until the spring of 1990. At that time, a group named "Omahans for Decency" began to complain to the Sarpy County Attorney about the rental and sale of these sexually explicit movies. The county attorney, however, declined to prosecute Main Street.

In the fall of 1991, Omahans for Decency contacted the office of the Nebraska Attorney General. In October 1991, the Attorney General's office sent a letter to Main Street, directing it to cease the sale and rental of all sexually explicit movies which were obscene. Main Street responded to the Attorney General and then filed a declaratory judgment action against the Sarpy County Attorney pursuant to § 28-820, seeking a determination of whether the sexually explicit movies which it offered for rental and sale were obscene.

The State of Nebraska ex rel. Don Stenberg, Attorney General, intervened as a defendant. Subsequently, the district court determined that the State had an interest in the outcome of the litigation and sustained its petition for intervention. TV Cats, Inc.; Vichaty, Inc.; and Movietime, Inc., were permitted to intervene as plaintiffs.

Following a bench trial, the district court entered a judgment declaring that some of the movies at issue were not criminally obscene. The State challenged that ruling and appealed to the Nebraska Court of Appeals. We granted the State's petition to

bypass, reversed the district court's judgment, and remanded the matter for further proceedings. See *Main Street I*.

In *Main Street I*, the Sarpy County Attorney was called as an expert witness by the plaintiffs. Over objection, the county attorney said that he had actively sought the views of Sarpy County residents concerning the rental and sale of adult movies and related matters and that the residents of Sarpy County were opposed to material depicting sexual violence and sex with children, did not want adult material available to children, did not want adult-only bookstores and theaters or other adult-only places, but did not mind if video stores sold or rented adult material as a side business. We concluded that the admission of this testimony was prejudicial error, since the county attorney did not qualify as an expert. We stated that this testimony should not have been taken as an expression of the contemporary community standard, but, instead, as merely an account of how the county attorney reached the conclusion not to prosecute those businesses selling and renting adult movies in the county. We therefore reversed the judgment and remanded the cause for further proceedings.

On remand, the evidence adduced at the first trial was reoffered and received, arguments were held, and the matter was submitted. After reviewing the movies, the district court found that exhibit 9, a movie entitled "Takin' It to the Jury," clearly had serious literary or artistic value. Exhibit 46, a movie entitled "Deep Throat III," was also found to have "serious value." As to the remainder of the videos, the court stated:

> I conclude the evidence in this case establishes beyond a reasonable doubt that Exhibits #14 and #44 are obscene material. I conclude that the evidence fails to show, beyond a reasonable doubt, that Exhibits #6, #7, #8, #9, #11, #12, #13, #15, #16, #17, #34, #35, #36, #37, and #46 are obscene.

ASSIGNMENTS OF ERROR

On appeal, the State assigns as error that the district court erred (1) in finding that the State had the burden of proving beyond a reasonable doubt that the movies were obscene, (2) in failing to find certain movies identified by the State to be

obscene, and (3) in its ruling and opinion concerning testimony offered by the State.

ANALYSIS

Section 28-820 provides:

> Any person who exhibits, sells or distributes, or is about to exhibit, sell or distribute . . . any work, material, conduct or live performance shall, if such person has genuine doubt as to the question of whether such work, material, conduct or live performance is in fact within the terms and provisions of sections 28-807 to 28-829, have the right to bring an action in the district court for declaratory judgment under the Uniform Declaratory Judgments Act . . . for a judicial determination as to whether or not such work, material, conduct or live performance is obscene.

The State asserts the district court erred in finding that the State had the burden of proving beyond a reasonable doubt that the movies are obscene. Since we review this matter as a criminal case at law, see *Main Street I*, the State is required to prove beyond a reasonable doubt that the material is obscene, see *Tipp-It, Inc. v. Conboy, ante* p. 219, 596 N.W.2d 304 (1999).

In addition, § 28-820 allows a declaratory judgment action to be consolidated with a pending action brought pursuant to §§ 28-816 to 28-818. Prosecutions based upon obscene literature or material are criminal in nature and require the State to prove beyond a reasonable doubt that the literature or material is obscene. It would be totally inconsistent with the provisions of the criminal code if the standard of proof in § 28-820 was less than the standard of proof for criminal prosecutions regarding obscenity. Thus, the State bears the burden of proving beyond a reasonable doubt all three elements of obscenity, and we find that this assignment of error is without merit.

[3] We next proceed to a determination of whether the material is obscene. The State argues that the district court erred by failing to find certain movies identified by the State to be obscene. Obscenity is not within the area of constitutionally protected speech, and therefore, obscene material may be prohibited or otherwise regulated without offending the First Amendment to the U.S. Constitution. *State v. Harrold*, 256 Neb.

829, 593 N.W.2d 299 (1999), relying on *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957).

[4] The Legislature has defined the term "obscene" in § 28-807(10) as follows:

> Obscene shall mean (a) that an average person applying contemporary community standards would find that the work, material, conduct, or live performance taken as a whole predominantly appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion, (b) the work, material, conduct, or live performance depicts or describes in a patently offensive way sexual conduct specifically set out in sections 28-807 to 28-829, and (c) the work, conduct, material, or live performance taken as a whole lacks serious literary, artistic, political, or scientific value.

This definition is coextensive with the First Amendment standard established in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). See, also, *State v. Harrold, supra.*

[5] Statutes designed to regulate materials must be carefully limited. *Miller v. California, supra.* The permissible scope of such regulation is confined to work, material, conduct, or live performances which depict or describe in a patently offensive way sexual conduct as specifically set out in §§ 28-807 to 28-829. The Legislature has defined the sexual conduct that may be regulated in § 28-807(15) as "acts of masturbation, homosexuality, sodomy, sexual intercourse, or prolonged physical contact with a person's clothed or unclothed genitals, pubic area, or buttocks or, if such person is female, breast."

We first independently review the material to determine whether the material in question depicts or describes patently offensive sexual conduct that may be regulated. The Court in *Miller* gave two plain examples of what a state statute could define for regulation: (1) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, and (2) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals. Therefore, our initial inquiry is not whether the material is obscene, but whether the material depicts or describes patently offensive sexual conduct that may

be regulated as set forth in *Miller*. If the material does not, then as a matter of law the material cannot be found to be obscene.

For purposes of our analysis, we designate this independent review "part A." Part A of the independent review conducted by an appellate court in First Amendment cases is intended " 'both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.' " *Harrold*, 256 Neb. at 842, 593 N.W.2d at 312, quoting *Bose Corp. v. Consumers Union of U. S., Inc.*, 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984).

[6] In part A of the review, our initial focus is on the substantive content of the material. If we determine as a matter of law that the material depicts or describes patently offensive types of sexual conduct that may be regulated, see *Miller v. California, supra*, then we proceed with what we designate "part B" of our analysis. Part B is concerned with whether, as a matter of fact, the material taken as a whole predominantly appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion, part B(1); is patently offensive, part B(2); and lacks serious literary, artistic, political, or scientific value, part B(3), as set forth in § 28-807(10). Part B adopts the three-prong framework announced in *Miller v. California, supra*.

[7] Part B(1) and (2) incorporates contemporary community standards. In *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999), we stated that the trier of fact is obviously better suited to determine the limits of tolerance in a particular community regarding the prurient interest test and the patently offensive test and that a reviewing court should give due deference to the findings of the trier of fact regarding these essentially factual determinations. Thus, in our review of part B(1) and (2), for the purpose of declaratory judgment, we substitute our findings for those of the trier of fact only if we conclude that the trier of fact's determination is clearly wrong. See *Woodmen of the World Life Ins. Soc. v. Yelich*, 250 Neb. 345, 549 N.W.2d 172 (1996).

[8] In part B(3), the determination of the trier of fact concerning that portion of the test in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), as to whether the

work taken as a whole lacks serious literary, artistic, political, or scientific value, is weighed independently by this court after a de novo review of the relevant evidence. *State v. Harrold, supra.* In *Smith v. United States*, 431 U.S. 291, 97 S. Ct. 1756, 52 L. Ed. 2d 324 (1977), the U.S. Supreme Court noted that this portion of the *Miller* test is more susceptible to appellate review, for the "value" of a work is not determined by reference to contemporary community standards. See *Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439 (1987). Since the appellate court possesses expertise and authority on this issue that is at least equal to those of the trier of fact, we need not give deference to the conclusions of the trier of fact on this question. Thus, the "value" of the work, part B(3), is weighed independently after a de novo review of the relevant evidence. *State v. Harrold, supra.*

Under part A of our analysis, we conclude as a matter of law that the movies in question depict or describe the types of sexual conduct that may be regulated as delineated in *Miller v. California, supra*, and § 28-807(15). The movies received in evidence by the district court involve actual or simulated sexual acts which depict or describe sexual conduct including, but not limited to, sodomy, masturbation, and sexual intercourse, which the trier of fact could find to be obscene.

We next proceed with part B. We first address part B(3), since that is the order in which the trial court considered the material. The district court determined that exhibit 9, "Takin' It to the Jury," has serious literary or artistic value and that exhibit 46, "Deep Throat III," has "serious value" and, therefore, found as a matter of law that these movies are not obscene. "Takin' It to the Jury" depicts the deliberation of a six-person jury in an obscenity case. The jurors discuss the community-standard requirements, and when they discuss specific scenes of the movie that they are reviewing for obscenity, various jurors fantasize about themselves in similar scenes.

Based on our de novo review of part B(3), we conclude that the State did not prove beyond a reasonable doubt that "Takin' It to the Jury" lacked any serious literary, artistic, political, or scientific value. The movie appears to be an attempt by the producers to instruct viewers in the basics of obscenity law with political commentary regarding the lack of validity and useful-

ness of obscenity laws. Therefore, we affirm the determination made by the district court under part B(3) as to exhibit 9.

"Deep Throat III" depicts a young woman who, upon having her first sexual encounter, discovers that her throat swells when she is sexually aroused. Seeking medical attention, she is told that she has a tumor on her larynx. It is later discovered that she is the daughter of the erotic film actress who starred in the movie entitled "Deep Throat" and that she has inherited her mother's abnormality—a clitoris in her throat. Based upon our de novo review, in which we independently weigh the relevant evidence, we conclude the district court erred in finding that exhibit 46 has serious literary, artistic, political, or scientific value. Although the movie contains a story line, we cannot conclude that the movie has any value. Nor are we persuaded by the fact that the State's expert witness testified that the movie has some serious literary or artistic value. The State's witness' testimony was equivocal.

However, our conclusion that this movie does not have serious literary, artistic, political, or scientific value does not result in a determination that the movie is obscene. Instead, we note that the district court found that the State had not proved beyond a reasonable doubt that exhibit 46 is obscene. All three prongs of the *Miller* test, which we have designated as part B(1), (2), and (3), must be proved beyond a reasonable doubt before a movie is considered obscene. *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999).

The district court found that the State had failed to prove beyond a reasonable doubt that exhibits 6, 7, 8, 9, 11, 12, 13, 15, 16, 17, 34, 35, 36, 37, and 46 are obscene. In its order, the district court, as the trier of fact, considered each of the movies presented. The court found that each movie submitted as evidence was segmented into five or six parts or vignettes. Each part or vignette contained scenes involving one or more of the following sexual activities: sexual intercourse, masturbation, lesbianism, cunnilingus, and fellatio.

The court found that

> the existing contemporary community standard in Sarpy County permits the presence of sexually explicit films for sale or rent by the plaintiffs on the following conditions:

> (1) The films do not depict violence in sexual relations; (2) The films do not depict sexual relations with children or family members; (3) The films do not depict sexual relations with animals; (4) The films are not available to minors; and (5) The films are not displayed in a manner or place where they might be viewed, in whole or in part, by non-consenting adults.

The trial court then described the movies as containing "'[u]nbridled sex, the eager, unabashed, no-holds-barred doing of raw sex — oral, manual, vaginal, anal, heterosexual, and homosexual — in multiple positions and worrisome repetition. It is a crude expression of a primitive passion, exaggerated by patently offensive full-screen close-ups of the sex parts in action.'" After describing the movies in this manner, the court stated:

> There are individual scenes in practically every film that can be described as troublesome, offensive, disgusting, and pornographic; but, in determining whether they are obscene, each film must be considered as a whole, and, in doing so, I conclude that [the appropriate] description of the scenes [is] "ridiculous" or "silly" . . . .

We are not sure whether the trial court, in relying upon the contemporary community standard which it found to exist in Sarpy County, applied this standard to the prurient interest, part B(1), or the patently offensive, part B(2), of the *Miller* test. Both parties argued at oral arguments that the trial court's finding was in regard to the prurient interest portion of the test. However, what is relevant is that applying the contemporary community standard, the court found that the State failed to prove beyond a reasonable doubt that the films are obscene.

[9] We give due deference to the trier of fact's findings in relation to part B(1) and (2), and we will reverse such findings only if they are clearly wrong. See *State v. Harrold, supra.* The district court, acting as the trier of fact, determined that the contemporary community standard accepts sexually explicit movies as long as those movies do not depict violence; sexual relations with children, family members, or animals; are not available to minors; and are displayed in such a manner that they are visible only to consenting adults. The court's findings relating to the

exposure of minors to sexually explicit movies and the manner in which these movies are displayed reflect the community's preference about accessibility of sexually explicit materials, but are not determinative of whether a given work is obscene.

Although in *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999), we affirmed the trier of fact's finding that the visual depiction of a man masturbating appealed to the prurient interest, we do not compare that finding to the finding by the trier of fact in this case. Contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community. It is not simply the jurors' own subjective reaction to the material or conduct depicted. See *Smith v. United States*, 431 U.S. 291, 97 S. Ct. 1756, 52 L. Ed. 2d 324 (1977). The trier of fact is obviously better suited to determine the limits of tolerance in a particular community regarding the prurient interest test, and for this reason, we give due deference to the trier of fact. *State v. Harrold, supra.*

Consistency in jury verdicts as to the obscenity of identical materials is not constitutionally required. *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). The same is true of verdicts as to separate materials, regardless of their similarities. *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974). A fact finder in obscenity cases is permitted to draw on knowledge of the community or vicinage from which he or she comes in deciding what conclusion " 'the average person, applying contemporary community standards,' " could reach in a given case. *Hamling v. United States*, 418 U.S. at 104. Based upon this standard, we cannot say the court, as the trier of fact, was clearly wrong.

The district court did find exhibits 14 and 44 to be obscene. Exhibits 14 and 44 portray sexual relations between family members and combine violence with sex. The court found that such behaviors offended the contemporary community standard which the trier of fact found to exist in Sarpy County. No cross-appeal was filed, and therefore, any alleged error regarding exhibits 14 and 44 is not properly before this court.

Finally, the State argues that the district court erred in considering comparable evidence. Specifically, the State argues that the court erred in admitting exhibits 18 through 23. The State

contends that the fact that sexually explicit material is available in other places does not prove that those materials comply with contemporary community standards.

At trial, Main Street proffered several items obtained from other adult-oriented stores in the state. Exhibit 18 is a large box filled with sexual paraphernalia. Exhibit 19 is a movie entitled "Colossal Combos," which advertises that it contains 48 sexual scenes. The case that holds this movie displays several still photographs of explicit sexual scenes. Exhibit 20 is a movie with a case which has numerous photographs of sexual scenes. Exhibits 21, 22, and 23 are movies which have cases with dozens of photographs of men ejaculating on women. When they were offered, the State objected to these exhibits on the ground of relevancy, and the district court took the matter under advisement. The court overruled the relevancy objection and admitted the exhibits for a limited purpose.

[10] To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded. *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998). We conclude that the admission of exhibits 18 through 23 was error. In its order, the district court noted that the exhibits were received not as evidence of the contemporary community standard, but as evidence of material that was not acceptable under the community standard of Sarpy County. An exhibit of comparable materials is not in and of itself admissible to demonstrate contemporary community standards regarding the material at issue. Availability of similar material by itself means nothing more than that other persons are engaged in similar activities. *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974). We conclude, however, that the error in admitting this evidence was harmless.

Having considered the State's assignments of error and finding that they have no merit, we affirm the judgment of the district court as modified.

AFFIRMED AS MODIFIED.

CONNOLLY, J., dissenting.

I disagree with the majority's conclusion that the trial court was not clearly wrong in finding that an average person, apply-

ing contemporary community standards, would find exhibits 6, 7, 8, 9, 11, 12, and 13 did not appeal to the prurient interest. The trial court found the above exhibits involved the visual depiction of heterosexual and homosexual cunnilingus, fellatio, masturbation, and anal and vaginal intercourse, "[a]ll, or nearly all, of [which] culminate with the male(s) involved ejaculating, usually on the pubic or facial area of the female(s) involved."

I recognize that when reviewing a finding concerning "prurient interest," an appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence; an appellate court will substitute its findings for that of the trier of fact only if the appellate court concludes that the trier of fact's determination is clearly wrong. *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999). However, there are no conflicts in the evidence or any doubt as to the credibility of the essential witnesses in the instant case. The exhibits themselves are the best "witnesses" of their content. See *Paris Adult Theatre I. v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973). Thus, in determining whether the trier of fact was clearly wrong, the only question is whether an average person applying contemporary community standards could find that these exhibits, taken as a whole, do not appeal to the prurient interest. To decide this question, the trier of fact must look at each exhibit as a whole and determine whether its dominant theme is one which goes substantially beyond customary limits of candor in appealing to a shameful or morbid interest in sex. *State v. Harrold, supra.*

Having reviewed the exhibits at issue, it is my opinion that the trier of facts' finding in the instant case was clearly wrong. I do not think the clearly wrong standard of review means that " 'juries have unbridled discretion in determining' " whether certain speech appeals to the prurient interest. *State v. Harrold*, 256 Neb. at 840, 593 N.W.2d at 310, quoting *Jenkins v. Georgia*, 418 U.S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974). As we stated in *State v. Harrold, supra*, an appellate court must make an independent review of the finder of facts' determination concerning prurient interest, the issue being whether the materials create an issue of fact as to obscenity. As in any other context, the trier of fact must make a finding that is supported by the evidence.

In *State v. Harrold, supra*, this court held that the trier of facts' finding that the visual depiction of a man masturbating appealed to the prurient interest was not clearly wrong. In the instant case, the majority again concludes that the findings of "fact" were not clearly wrong, even though the visual depictions of sex at issue herein are, without a doubt, more shameful and morbid than that in *Harrold*. I think the majority's holding in the instant case sets the standard so low as to make this court's appellate review of findings of "fact" in this context meaningless. If the exhibits in the instant case do not go substantially beyond customary limits of candor in appealing to a shameful or morbid interest in sex (prurient interest), I have difficulty imagining what does. It is difficult, in the instant case, to accept a result that renders the graphic depiction of men ejaculating on the faces of women, among other things, as being protected by the First Amendment; and yet *State v. Harrold, supra*, renders a depiction of male masturbation without ejaculation obscene and not protected by the First Amendment. Finders of "fact" are not given this type of latitude in any other context, and I see no reason to give them such latitude in this one.

I conclude that exhibits 6, 7, 8, 9, 11, 12, 13, 15, 16, 17, 34, 35, 36, 37, and 46 can be found only to appeal to the prurient interest and that the trial court's conclusion to the contrary was clearly wrong. However, because the trial court made no findings as to whether the above exhibits were patently offensive or, with the exception of exhibits 9 and 46, whether the above exhibits have some serious value, I would remand with directions for the trial court to make such findings.

McCormack, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V.
WILMA L. CASTOR, APPELLANT.
599 N.W.2d 201

Filed August 27, 1999. Nos. S-98-509, S-98-510.

1. **Motions for New Trial: Prosecuting Attorneys: Appeal and Error.** An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion of the trial court.

2. **Rules of Evidence: Appeal and Error.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by such rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence.
3. **Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
4. **Convictions: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
5. **Constitutional Law: Criminal Law: Due Process: Prosecuting Attorneys: Pretrial Procedure: Evidence: Appeal and Error.** Under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution. Favorable evidence is material, and constitutional error results from its suppression by the State, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability of a different result is accordingly shown when the State's evidentiary suppression undermines confidence in the outcome of the trial. Materiality is not determined under a sufficiency of evidence test in that a defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough evidence left to convict. In this context, materiality is to be determined by considering the suppressed evidence collectively, and once a reviewing court has found constitutional error, there is no need for further harmless-error review.
6. **Evidence: Impeachment.** Impeachment evidence, as well as exculpatory evidence, falls within the rule in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and may constitute evidence favorable to the accused.
7. **Prosecuting Attorneys: Pretrial Procedure: Evidence.** Discovery in criminal cases in Nebraska is governed by Neb. Rev. Stat. § 29-1912 (Reissue 1995), which exacts more than the constitutional minimum with respect to disclosure of exculpatory information. Under this standard, whether a prosecutor's failure to disclose such evidence results in prejudice to the accused depends on whether the information sought is material to the preparation of the defense, meaning that there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony, or assisting impeachment or rebuttal.
8. **Constitutional Law: Due Process: Evidence: Police Officers and Sheriffs.** Under certain circumstances, the Due Process Clause of the 14th Amendment to the U.S. Constitution may require that the State preserve potentially exculpatory evidence on

behalf of a defendant. To meet the standard of constitutional materiality in such circumstances, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Additionally, unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on knowledge by the police of the exculpatory value of the evidence at the time it was lost or destroyed.

9. **Trial: Witnesses: Testimony: Depositions.** Neb. Rev. Stat. § 29-1917(4) (Reissue 1995) governs the appropriate use of discovery depositions in criminal cases when the deponent is available as a testifying witness.
10. **Convictions: Forgery: Proof.** To sustain a conviction for forgery, it is not sufficient for the State to show that a signature is not that of the party whose name is used, but it must also affirmatively be shown that the signing was made without his or her authority.
11. **Prior Convictions: Collateral Attack.** A defendant cannot collaterally attack, on *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), grounds, a prior conviction that is an element of a subsequent offense.
12. **Prior Convictions: Weapons.** A prior felony conviction is an essential element of the offense of felon in possession of a firearm.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Judgment in No. S-98-509 reversed, and cause remanded for a new trial. Judgment in No. S-98-510 affirmed in part and in part reversed, and cause remanded for a new trial.

James R. Mowbray and Jerry L. Soucie, of the Nebraska Commission on Public Advocacy, for appellant.

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

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

STEPHAN, J.

In these consolidated cases, Wilma L. Castor appeals from judgments of conviction on seven separate felony counts and one misdemeanor count. Case No. S-98-510 includes Castor's appeal from her convictions on one count of first degree murder, three counts of forgery, one count of use of a deadly weapon to commit a felony, one count of being a felon in possession of a

firearm, and one count of unauthorized use of a financial transaction device. In case No. S-98-509, Castor appeals from her conviction on an additional count of forgery. In case No. S-98-509, we reverse, and remand for a new trial. In case No. S-98-510, we affirm in part, and in part reverse and remand to the district court for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

Introduction.

At approximately 6 p.m. on December 10, 1996, Tom Brown was found dead at the bottom of a roadside ditch in rural Buffalo County, northwest of Kearney, Nebraska. The body was dressed in jeans over blue sweatpants, a yellow pullover shirt, and gray socks. The victim was situated on his back, partially under a barbed wire fence, with his right arm extended over his head, which was lower than his legs because of the slope of the ditch. Dried blood extended from his nose to the lateral corner of his right eye. Brown's shirt was pulled up and twisted, and his jeans and sweatpants were pulled down. There were no shoes or coat on the body. Brown's glasses and several spots of blood were found near the edge of the ditch.

Dr. Jerry Jones performed an autopsy and determined that Brown died as the result of three .22-caliber gunshot wounds, one in the right side of the neck and two in the chest. Jones was unable to state a precise opinion as to the time of Brown's death, but testified that it could have been as early as Thanksgiving Day, which fell on November 28, 1996. Jones opined that based upon the absence of lividity in the body, Brown did not die at the site where his body was found, but, rather, died elsewhere and was subsequently moved. Dr. Robert Bux, a pathologist who testified on behalf of Castor, stated that in his opinion Brown was killed at the site where his body was found and his death could have occurred up to 3 days after Thanksgiving Day.

Relationship Between Castor and Brown.

Castor and Brown were married in 1967 and had two surviving sons, Tom Brown, Jr., and Edward Brown (Eddy). They divorced in 1975 but remained in periodic contact. Both remarried several times. Brown's last marriage was to Diane Guider,

who died in 1993. At the time of her marriage to Brown, Diane Guider had three sons and one daughter by prior marriages: Terry Anderson, Troy Guider, Todd Guider, and Tracy Person.

Following the dissolution of her marriage to Brown, Castor had two marriages which also ended in dissolution. She and Eddy eventually moved to Reno, Nevada, where they lived together. After military service, Tom Brown, Jr., resided in Kearney. He was incarcerated in Lincoln at the time of his father's death.

Castor and Eddy moved from Reno to Nebraska in 1996. Beginning in approximately July of that year, Castor lived with Brown at his home in Kearney, ostensibly for the purpose of assisting him with the repair and maintenance of his home. Castor slept in a second-floor bedroom, and Brown usually slept on the sofa in the living room on the first floor of the home. Brown's stepson Todd Guider was also living with Brown from about May to October 1996, and he occupied another second-floor bedroom. Eddy stayed at Brown's home in Kearney during 1996 except for periods when he was visiting his girl friend, who resided in Oregon.

Burglary Report.

On October 9, 1996, Castor notified the Kearney Police Department that Brown's home, where she then resided, had been burglarized. A police officer who responded to the report was unable to find signs of a forced entry. He observed that the screens in the two upstairs bedrooms where Todd Guider and Castor stayed had approximately 12-by-12 cutouts and that Castor's bedroom had been ransacked. Castor informed the responding officer that her short-barreled, .22-caliber revolver and an unknown quantity of change had been stolen from her bedroom. Castor informed the officer that she thought perhaps Todd Guider committed the burglary because on October 8, a young woman had stopped at the house and told her that Todd Guider owed money for drugs. Castor also told the officer that she had been receiving unusual telephone calls. The officer did not take any physical evidence into custody, did not take fingerprints, did not take any photographs, and did not otherwise examine the crime scene. He told Castor to tell Todd Guider that

he wanted to talk to him but made no other attempt to contact or interview Todd Guider. Later in the day, Castor reported the serial number of her missing handgun to the police. The Kearney Police Department closed the burglary investigation that same day.

Events of Thanksgiving Week 1996.

Brown had been a railroad worker for approximately 28 years prior to his death. During 1996, he normally worked away from home at a jobsite from Sunday afternoon until Thursday evening. During the week of Thanksgiving 1996, however, Brown was at home on vacation.

On Tuesday, November 26, 1996, shortly after 5 p.m., Diane Hixon of Phillips 66 in Bartlesville, Oklahoma, called Brown's residence to inquire about a past-due account. She testified at trial that the party answering the telephone identified himself as "Tom Brown" and denied having a Phillips 66 credit card. Janet Whaley, a credit analyst with Phillips 66, then made another call to Brown's residence and, at the request of a party identified as "Tom Brown," closed the account. Phillips 66's records showed that the account address when opened on September 17, 1996, was 512 West 21st Street in Kearney, which was the address of Brown's home. On September 30, the address was changed at the request of a telephone caller to a Kearney post office box utilized by Castor. On November 29, check No. 2639 was written on Brown's account to Phillips 66 for $194.08.

During a telephone conversation on November 26, 1996, Brown invited his nephew Todd Michalski and his family to have Thanksgiving dinner at his home. Michalski accepted, but circumstances prevented him from traveling from his home in Roscoe, Nebraska, to Kearney on Thanksgiving Day. Thus, the only people present at Brown's home on Thanksgiving Day were Brown, Castor, and Eddy. Eddy testified that when he went to bed that evening, Brown and Castor were watching television.

Eddy testified that when he awoke early the next morning, Castor was already awake and that he did not look for Brown. Castor and Eddy then went to a restaurant for breakfast. Castor stated that when they returned, Brown was awake and suggested that they all go Christmas shopping, which she thought to be

unusual because Brown disliked shopping. According to Castor, the three then embarked upon a shopping trip.

At 8:31 a.m. on November 29, 1996, Brown's Visa check card was used to purchase a child's comforter, tights, cigarettes, and a gasoline additive at a store in Kearney. At 9:21 a.m. on the same day, the card was used to purchase a dropcloth, toys, jeans, and a hinge hasp at another Kearney store. Later, at 11:09 a.m., the card was used to purchase insulin, toothpaste, and hand soap at a third store in Kearney. In a videotaped statement given to police on December 15, Castor said that Brown was present and authorized all the Visa transactions, although she actually signed his name. The record includes surveillance videotapes from one of the three stores, which do not positively identify the person making the purchases or those present when the purchases were made.

At 10:38 a.m. on November 29, 1996, Castor and Eddy deposited two $2,000 checks which had been written on Brown's account into their joint checking account at a Kearney bank and withdrew $300 in cash, for a net deposit of $3,700. In her statement, Castor represented that on the night before Thanksgiving Day, Brown instructed her to write the checks to herself and Eddy as gifts.

Castor stated that after the shopping trip and the visit to the bank, she, Eddy, and Brown returned to Brown's house. She stated that while she was unloading the car, she heard Brown say "I'll be a son of a bitch," and then observed him walk toward a pickup which was parked on the street in front of his house. She did not pay much attention to what he was doing, but heard him say he was going to work on the truck. She saw only the rear and side of the truck and described it as "brown with primer on it." Castor stated that after Brown got into the truck, she never saw him again. Eddy and Castor installed the hinge hasp, purchased earlier that day, on the basement door sometime that afternoon.

Angela Lauby testified that Castor was present at Kearney Keno, where they both worked, before 3 p.m. and again around 6 p.m. before Castor's shift began on November 29, 1996. Lauby testified that she and Castor were friends and that Castor had told her she hated Brown. Lauby recalled Castor telling her that Brown did not know about the Phillips 66 card. Lauby tes-

tified that on the same day Castor told her about the credit card, Castor also showed her Brown's checking account, which reflected a balance of more than $10,000, and said she was angry because he "cut her off" despite the money in his account. According to Lauby, Castor and Brown did not have an intimate relationship, and Castor was frantic when her gun, which she referred to as "her baby," was stolen.

On the night of November 29, 1996, Castor and Lauby had conversations with their shift supervisor Brian Sazama about switching shifts for the next night, but Castor changed her mind. Castor punched in for work that evening at about 6:50. Sometime after 6 p.m., Michalski arrived unexpectedly at Kearney Keno and told Castor that he had gone to Brown's house but found no one home. Michalski testified that when Castor asked him where he was staying, he replied that he and his family intended to get a motel room in Kearney. Castor told him she would pay half of the room charge, and did so. Castor told police she did not want Michalski to stay at Brown's house because Brown had previously instructed her never to permit anyone to stay there when he was not at home.

When Castor departed from Kearney Keno at 11:30 p.m., prior to the end of her normal shift, she left a note for the manager, Becky Crocker, stating that November 29, 1996, was her last day of work and leaving an address where her final paycheck could be forwarded. Castor had previously given notice that her last day would be December 6. Castor told police that after leaving work, she and Eddy went home and put several loads of her personal items in storage, finishing about 3 a.m. on November 30. Castor paid for this storage unit with a check written on Brown's account to which she signed Brown's name. According to Castor, she and Eddy then drove to Grand Island and stayed at a motel there because she needed to pay off four insufficient funds checks at a store located in Grand Island later that morning. After doing so, they returned to Brown's house in Kearney. Michalski and his wife arrived, and he helped Castor and Eddy load the rest of their belongings into their vehicle. Castor and Eddy then left Kearney around noon, driving to North Platte where they checked in to a motel room for the night. Castor and Eddy then drove on to Oregon. After staying for a

short time, Castor flew to Reno, returning several days later to retrieve her vehicle.

Police Investigation.

After the discovery of Brown's body, officers from the Kearney Police Department and the Buffalo County Sheriff's Department forced open the back door of Brown's house and entered without a warrant. After they walked through the house and determined that no one was present, one officer stayed at the residence and the others departed. Officers returned with warrants on December 11, 14, and 16, 1996, and conducted searches of the residence. On December 16, the police changed the locks on the house and seized the residence.

On or about December 18, 1996, Officer Steve Jensen of the Buffalo County Sheriff's Department observed a cleaned area on the wall behind the sofa and on half of the baseboard. Neither Jensen nor anyone else photographed this area or removed the baseboard for further examination. At trial, Jensen testified about his observations over Castor's objection.

On or about February 27, 1997, law enforcement authorities released the house to Tom Brown, Jr., who by then had been discharged from prison, without a specific authorization from the court that had issued the search warrants. Capt. Robert Winquest of the Kearney Police Department, who directed that the house be released, stated he had earlier discussed the decision to release the house with the county attorney. On June 10, Castor's attorneys went to the residence, where they were met by Officer Michael Young of the Kearney Police Department. At that time, the sofa was no longer present because Tom Brown, Jr., had given it to Todd Guider. The furniture had been moved, and the house was more disheveled than it had been on December 10, 1996. After viewing photographs provided by the State of the house and its contents, Castor stated that there were a number of items which had been in the house but had not been collected as evidence and thus were not available to the defense, including a billfold on an upstairs dresser belonging to Todd Guider, a newspaper article regarding a Nick Vasquez and Castor's stolen gun, a ledger showing who owed Brown money, and a telephone book belonging to Brown.

Castor's Arrest and Trial.

Castor and Eddy returned to Nebraska together to attend Brown's funeral on December 15, 1996. They were met by the police at the Grand Island airport and questioned, and it was at this time that Castor gave the videotaped statement which was subsequently received in evidence at her trial. Soon thereafter, Castor was arrested and charged with the offenses of which she was eventually convicted. While incarcerated in the Dawson County jail awaiting trial, Castor told a cellmate that Brown had a $25,000 life insurance policy naming Castor as a beneficiary and Castor had wondered aloud if she would be able to collect the proceeds of the policy. Other evidence established that Brown had an $18,000 life insurance policy which named Castor as the primary beneficiary.

A jury trial was held on all counts except the felon in possession count which was bifurcated for a separate bench trial. The State contended that Castor killed Brown on November 28, 1996, by shooting him three times while he was sleeping on either a sofa or a recliner in his home, and then hid his body in the basement of the house. The State also contended that Castor forged the two $2,000 checks on Brown's checking account and used his check card to make the purchases at the three Kearney stores before eventually transporting his body to the remote rural location where it was found. The jury returned verdicts of guilty on all charges. A subsequent bench trial on the bifurcated felon in possession charge also resulted in a conviction.

Posttrial Motions and Sentencing.

Following entry of judgment, Castor filed a timely motion for new trial in case No. S-98-510, which was subsequently amended. The grounds for a new trial asserted by Castor included misconduct by the prosecuting attorney, consisting of his alleged failure to disclose certain exculpatory information to the defense in response to discovery requests and orders entered prior to trial. This information included an incident report prepared by the Kearney Police Department on December 23, 1996, 13 days after the discovery of Brown's body. The report summarizes an interview of Bruce Peterson conducted by Kearney police officers during the investigation of the Brown homicide.

Peterson resided in rural Buffalo County, Nebraska, approximately 5 miles from where Brown's body was discovered. The report, written by Officer Young, states:

> Investigator Jensen and I interviewed Peterson at the Law Enforcement Center. He said that he lives on Evergreen Road in Buffalo County and that on either 11/29/96 or 11/30/96, between 5:00-6:00 p.m., he and his son were outside walking and heard three gun shots in a row. He said the shots were crystal clear and seemed to come from a north easterly direction. He did not think it sounded like a shotgun but was more like some kind of handgun. He thought this was odd as they were fired in rapid succession and it was getting dark outside.

Castor's counsel filed an affidavit stating that he was not made aware of this report or its substance until February 18, 1998, more than 2 months after Castor's trial, despite the fact that prior to trial, he advised the prosecutor that Bux would testify that in his opinion, Brown was killed at the spot where his body was found.

Castor's allegations of prosecutorial misconduct were also based in part upon a claim that the prosecutor withheld information concerning an interview conducted by Kearney police officers with Julie Berlin on December 17, 1996, 7 days after Brown's body was discovered. According to a report bearing that date, Kearney police contacted several of Brown's neighbors, including Berlin, to determine if they had any information about Brown's disappearance or death. In his report, the investigating officer wrote that Berlin reported last seeing Brown on the day before Thanksgiving, and on that same day, "she saw a turquoise, newer model, van, a newer plum Bonneville and a primered vehicle and believed all three vehicles to have been visitors to the Brown residence." Castor's counsel represented to the district court that he first became aware of Berlin's statement when he reviewed police reports contained in the presentence investigation.

The district court overruled Castor's motion for new trial and sentenced her to life imprisonment on the murder charge; 5 to 10 years' imprisonment on each of two forgery counts; 18 months' to 3 years' imprisonment on two other forgery counts; 10 to 20

years' imprisonment for using a deadly weapon in the commission of a felony; 5 to 15 years' imprisonment for being a felon in possession of a firearm; and 1 year's imprisonment on the charge of unauthorized use of a financial transaction device. Castor then perfected this appeal.

STANDARD OF REVIEW

[1] An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion of the trial court. *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998).

[2] In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by such rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence. *State v. McManus*, *ante* p. 1, 594 N.W.2d 623 (1999).

[3] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999).

[4] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Ramsay*, *ante* p. 430, 598 N.W.2d 51 (1999).

ASSIGNMENTS OF ERROR

Castor assigns, restated, that the trial court erred in (1) refusing to grant her motions for new trial based upon the State's failure to disclose exculpatory evidence in violation of court order, state statutes, and the Due Process Clause of the 14th

Amendment; (2) failing to dismiss or grant other relief when the State failed to preserve and protect exculpatory evidence seized pursuant to a search warrant in violation of the Due Process Clause of the 14th Amendment; (3) excluding the prior deposition testimony of witnesses as substantive evidence and sua sponte instructing the jury that the deposition testimony could be used only for purposes of impeachment; (4) failing to dismiss the forgery counts and unauthorized use of a financial transaction device because there was insufficient evidence as a matter of law; and (5) admitting and using a prior California felony conviction and a prior Nebraska felony conviction.

ANALYSIS

Nondisclosure of Exculpatory Evidence.

[5,6] Although Castor complains that several items of exculpatory evidence were improperly concealed from her counsel until during or subsequent to trial, we focus our analysis upon the police reports pertaining to interviews with Peterson and Berlin which defense counsel did not discover until after trial, despite several pretrial motions and orders dealing with discovery of exculpatory information. The starting point in our analysis is *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), in which the U.S. Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." "[F]avorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Kyles v. Whitley*, 514 U.S. 419, 433-34, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), quoting *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.' " *Kyles*, 514 U.S. at 434. Under *Bagley*, "materiality" is not determined under a sufficiency of evidence test in that a "defendant need not demonstrate that after discounting the

inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." 514 U.S. at 434-35. In this context, materiality is to be determined by considering the suppressed evidence collectively, and "once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review." 514 U.S. at 435. As we noted recently in *State v. Lotter*, 255 Neb. 456, 487, 586 N.W.2d 591, 617 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999), *Bagley* is also significant for its holding that impeachment evidence, as well as exculpatory evidence, falls within the *Brady* rule, and may constitute " '"evidence favorable to the accused" . . . so that, if disclosed and used effectively, it may make the difference between conviction and acquittal.' " Quoting *United States v. Bagley, supra*, quoting *Brady v. Maryland, supra.*

[7] In addition to constitutional due process requirements, discovery in criminal cases in Nebraska is governed by statute. *State v. Lotter, supra*; Neb. Rev. Stat. § 29-1912 (Reissue 1995). We have construed § 29-1912 as exacting "more than the constitutional minimum" with respect to disclosure of exculpatory information, holding that whether a prosecutor's failure to disclose such evidence results in prejudice to the accused

> depends on whether the information sought is material to the preparation of the defense, meaning that there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, *corroborating testimony, or assisting impeachment or rebuttal.*

(Emphasis supplied.) *State v. Kula*, 252 Neb. 471, 486, 562 N.W.2d 717, 727 (1997).

Castor's pretrial motions included a general motion for discovery pursuant to § 29-1912, which included a request for "[d]ocuments, papers, books, accounts, letters, photographs, objects, or other tangible things of whatsoever kind or nature which could be used as evidence by the prosecuting attorney." This motion was sustained. Castor filed a separate motion which specifically requested that the State produce police and other investigative reports and exculpatory information pursuant to its obligation to afford due process as defined in *Brady v.*

Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and *Kyles, supra*, as well as decisions of this court applying those principles. In its ruling on this motion, the district court noted the general rule that police and investigative reports are not discoverable, but noted that "[o]bviously an exception to that rule arises if the reports contained exculpatory information which would benefit the defendant." The court ordered production of reports dealing with specific subjects, including the theft of Castor's handgun, threats received by Brown prior to his death, and information placing Brown's death on or after December 1, 1996. Although this order does not specifically refer to the subject matter of the police reports summarizing interviews with Peterson and Berlin, it is clear from the record that the State was on notice of Castor's request for production of exculpatory information. A prosecutor's duty to disclose evidence in response to even a very general discovery request arises if the evidence contains obvious exculpatory characteristics. *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995).

In its summation, the State argued that after Brown fell asleep in his home on November 28, 1996, Castor killed him by firing three shots from the .22-caliber handgun which she had falsely reported stolen. The State argued that Castor initially hid Brown's body in the basement of his house, locking the basement door with the hasp purchased on the day after Thanksgiving, and then late that night, transported the body to a rural location and "dumped" it in the ditch where it was later discovered. The State argued that Castor killed Brown in order to obtain his money.

This argument was based entirely upon circumstantial evidence. The State asked the jury to draw the essential inference that Brown was not shot where his body was found, but, rather, at his home some time earlier. In this regard, the State relied heavily upon the testimony of Jones, the pathologist who performed the autopsy and gave an opinion consistent with the premise that the body was transported after death. As noted, Bux, the pathologist who testified on behalf of Castor, gave a contrary opinion. However, both pathologists agreed that Brown died as the result of three .22-caliber bullet wounds and that his death could have occurred on November 28 or 29, 1996.

Peterson's report of hearing three gunshots in rapid succession on the evening of November 28 or 29, approximately 5 miles from where Brown's body was subsequently found, was favorable to Castor in that it could have supported an inference contrary to the State's theory and consistent with the defense expert's opinion that Brown was killed at the spot where his body was found. At the hearing on the motion for new trial, the State attempted to show that this information was not exculpatory based upon a ballistics expert's testimony that .22-caliber gunshots could not be heard over a distance of 5 miles. However, this issue was not one which the trial court should have been asked to resolve in ruling on the motion for new trial. Rather, it should have been for the jury to consider along with the other circumstantial evidence upon which it was asked to render a verdict.

In presenting its case, the State also sought to discredit Castor's statement to police that she last saw Brown on November 29, 1996, when he left his home with an unidentified person in a pickup which Castor described as "brown with primer on it." Other witnesses testified that Castor had made similar statements to them. In its opening statement, the State told the jury, "[N]o one to this day knows what this brown pickup was all about." In its summation, the State argued:

> Now Wilma Castor is the one telling everybody about the brown pickup. Tom didn't get in a brown pickup. No one can figure out the brown pickup. Wilma Castor has lived there since July by her own admission, not a brown pickup that she can say anything about. This brown pickup is a made up hoax to explain why Tom's not there.
>
> . . . .
>
> She [Castor] concocts the story about the pickup to explain Tom's not being home to everybody. And not one person, family or friend, can make an association with this brown pickup. Nobody. Tom did not get into a brown pickup.

Berlin's statement that she observed an unfamiliar "primered" vehicle parked in front of Brown's residence near the time of his disappearance provides some corroboration for Castor's statements that she last saw Brown leaving his home with an uniden-

tified person in a brown pickup "with primer on it." The fact that Berlin could not positively identify the vehicle as a pickup goes to the weight of the evidence, not to its relevance.

The State was aware that its case was based entirely upon circumstantial evidence. It was also aware that Castor claimed she last saw Brown leaving his home with someone in a vehicle with primer on its exterior and that Castor's expert would testify that in his opinion, Brown was not shot at his home, but, rather, at or near the ditch where his body was found. Under these circumstances, the information provided to police by Peterson and Berlin was material to the preparation of the defense and should have been disclosed in response to discovery requests. Since this information was not discovered by defense counsel until after the trial had concluded, we are not presented with the issue of whether the nondisclosure was remediable by continuance. See *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999). The State's failure to disclose the information it obtained from Peterson and Berlin deprived Castor of a fair trial, and the district court abused its discretion in not granting her motion for a new trial on those counts charging her with first degree murder and the use of a weapon to commit a felony. Accordingly, we need not address the other alleged discovery violations asserted by Castor as grounds for a new trial. However, we repeat a principle that by this point should not require repetition: "'"[a] cat and mouse game whereby the [State] is permitted to withhold important information requested by the accused cannot be countenanced. . . ."'" *State v. Kula*, 252 Neb. 471, 488, 562 N.W.2d 717, 728 (1997), quoting *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983).

Alleged Failure to Preserve Evidence.

Castor next contends that the district court erred when it failed to dismiss or grant other relief due to the State's failing to preserve and protect exculpatory evidence it seized pursuant to a search warrant in violation of the Due Process Clause of the 14th Amendment. Specifically, she alleges that a police officer was permitted to testify over her objection that while searching the interior of Brown's home on December 18, 1996, pursuant

to a warrant, he observed a portion of the wall and baseboard behind a sofa which appeared to have been recently cleaned, but took no photographs and did not remove the wall panel and baseboard for further examination. Castor argues that this was prejudicial because the State argued that she had "cleaned" the area in question to remove evidence that she had shot Brown while he was asleep on the sofa. She also contends that the State failed to preserve various items of personal property which had been in the house prior to its search by police and which she contends would have been useful to her defense.

Castor filed a pretrial "Motion to Identify and Preserve Evidence" in which she requested that specific items of physical evidence seized from the crime scene be identified and preserved. The trial court determined that there was no issue ripe for determination because identification of the seized evidence could be accomplished by motion pursuant to § 29-1912 and because Castor was protected by Neb. Rev. Stat. § 29-1913(2) (Reissue 1995) from any destruction of evidence due to neglect or intent. The court did, however, request the State to preserve all seized evidence and not to conduct experiments on evidence that would consume the entirety of the sample being tested.

Subsequently, on August 13, 1997, Castor filed her "Motion to Dismiss or for Other Relief Based on State's Failure to Safely Preserve Evidence at 512 W. 21st St., Kearney, Nebraska." At the hearing on the motion, Castor introduced photographs of the exterior of Brown's house, the search warrants issued, and copies of photographs of the interior of Brown's house. The trial court found that Castor's motion addressed only items taken from the home by police or other items taken by police in their custody as evidentiary matters and that nothing in the motion requested the State to preserve the crime scene, the home, or any contents therein for subsequent investigation by Castor. The court found that Neb. Rev. Stat. § 29-818 (Reissue 1995) was not applicable and that there was no showing of bad faith on the part of the State to substantiate an alleged denial of due process. It therefore denied the motion.

Castor relies in part upon § 29-818, which provides:

> Property seized under a search warrant or validly seized without a warrant shall be safely kept by the officer seiz-

> ing the same unless otherwise directed by the judge or magistrate, and shall be so kept so long as necessary for the purpose of being produced as evidence in any trial . . . .

We conclude that this statute has no application in this case because Castor has not identified any item of property seized from Brown's home at the time of its search which was not properly preserved. Rather, her argument appears to be that police failed to seize and preserve certain objects from the house which she contends would be exculpatory.

[8] Under certain circumstances, the Due Process Clause of the 14th Amendment may require that the State preserve potentially exculpatory evidence on behalf of a defendant. *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). To meet the standard of constitutional materiality in such circumstances, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." 467 U.S. at 489. Additionally, it is uncontroverted that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). See *State v. Tanner*, 233 Neb. 893, 448 N.W.2d 586 (1989). The "presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Youngblood*, 488 U.S. at 57 n.*. See, also, *Tanner, supra*. We find nothing in this record which would indicate that the investigating officers acted in bad faith. Accordingly, we find no merit to this assignment of error.

Use of Deposition Testimony as Substantive Evidence.

Because our resolution of the prosecutorial misconduct issue necessitates retrial, we address Castor's contention that the trial court erred when it refused to admit the prior deposition testimony of certain witnesses as substantive evidence and then sua sponte instructed the jury that the deposition testimony could be

used only for impeachment purposes and not as substantive evidence.

Specifically, during the cross-examination of Jimmy Brown, Brown's nephew, Castor offered his inconsistent deposition testimony for "the truth of the matter asserted," claiming it was proper as a past recollection recorded. The State objected, claiming the statement was proper only for impeachment. The court sustained the objection, noting "we'll instruct the jury that the reading of the information to them is simply to be utilized in judging the credibility of the witness at this time and is not to be taken as proof of the matter that's been read to you out of that particular document." Later, during the cross-examination of George Brown, Brown's brother and Jimmy Brown's father, when Castor began questioning him about "inconsistent" statements in his deposition, the court sua sponte noted:

> I'm going to interrupt you just a minute. Ladies and gentlemen, through the course of the trial, you're probably going to hear more questioning that is predicated upon prior statements that people have made in depositions. Unless you are otherwise instructed by me, I want you to understand that when the prior statements are revealed from the deposition, that the purpose of that is to either refresh the memory of the witness or to allow you to know that there is an inconsistent statement for the purpose of judging their credibility as to what is said today. What is said in those depositions is not evidence in this case. But only to either refresh the memory of the witness or to allow you to judge the credibility of their testimony today. And that's unless I otherwise instruct you.

Neither counsel objected to the court's instruction.

Castor bases her assignment of error upon Neb. Rev. Stat. § 27-801(4)(a) (Reissue 1995), which provides that a statement is not hearsay if:

> The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . .

Castor contends that under § 27-801(4)(a), prior inconsistent statements made in depositions by certain witnesses, including Jones, Troy Guider, Jimmy Brown, and George Brown, are admissible as substantive evidence and not just to impeach, and the trial court erred in its instruction and in not allowing the evidence.

[9] Castor's argument fails to consider Neb. Rev. Stat. § 29-1917 (Reissue 1995). Section 29-1917 provides that "in a felony . . . prosecution, the prosecuting attorney or the defendant may request the court to allow the taking of a deposition of any person other than the defendant who may be a witness in the trial of the offense," and further states that "[a] deposition taken pursuant to this section may be used at the trial by any party solely for the purpose of contradicting or impeaching the testimony of the deponent as a witness," § 29-1917(4). In *State v. Allen*, 252 Neb. 187, 560 N.W.2d 829 (1997), we stated that § 29-1917(4) governs the appropriate use of discovery depositions in criminal cases when the deponent is available as a testifying witness. Because the deponents in this case were available for trial and did in fact testify, § 29-1917(4) was applicable and the trial court did not err in limiting the use of the deposition testimony to the purpose of contradicting or impeaching the testimony of the deponent as a witness.

Evidence Supporting Forgery and Unauthorized Use of Financial Device.

Castor next contends that the trial court erred when it failed to dismiss the forgery counts and unauthorized use of a financial transaction device count because there was insufficient evidence as a matter of law to establish that Castor signed Brown's name without authorization. Castor moved to dismiss the counts of forgery at the close of the State's evidence and again at the close of all the evidence when she also specifically mentioned the financial transaction device count. The motions were overruled by the court.

Castor was charged with four counts of second degree forgery, involving: check No. 2639, in the amount of $194.08, written to Phillips 66 on November 29, 1996; check No. 2638, in the amount of $2,000, written to "Edward Brown" on

November 27, 1996; check No. 2635, in the amount of $2,000, written to "Wilma Castor" on November 27, 1996; and check No. 2634, in the amount of $140, written to Self Store It Inc. on November 27, 1996. She was also charged with one count of unauthorized use of a financial device, relating to the check card purchases on November 29, 1996. Castor admits she signed Brown's name on the checks and bank card documents but contends she was authorized by Brown to do so.

[10] Nebraska case law clearly establishes that to sustain a conviction for forgery, "it is not sufficient for the State to show that the signature is not that of the party whose name is used, but it must also affirmatively be shown that the signing was made without his authority." *State v. Addison*, 191 Neb. 792, 794, 217 N.W.2d 468, 469 (1974). See, *Crawford v. State*, 164 Neb. 231, 82 N.W.2d 1 (1957); *Berg v. State*, 157 Neb. 863, 61 N.W.2d 837 (1954). The State does not contest that lack of authority is an element that it must prove, but contends that it cannot do so by direct evidence because Brown is dead, and therefore, it must rely upon circumstantial evidence. It contends further that there is sufficient circumstantial evidence to support a finding that Castor was unauthorized to make any financial transactions on Brown's accounts, including the fact that Brown was unaware of the Phillips 66 account when charges were made, that Castor had openly told her coworkers that she was "sponging" off Brown, that she owed Kearney Keno money for insufficient checks, that she told one coworker that she hated Brown, and that she was upset that he had "cut her off" despite the fact that he had considerable funds.

Under the applicable standard of review, our only inquiry is whether, construing the admissible evidence most favorably to the State, there was sufficient circumstantial evidence to establish that Castor was not authorized to sign the checks or to make the Visa check card purchases. We conclude that the circumstantial evidence supporting the State's theory that Castor killed Brown in order to gain access to his funds from which she had been "cut off" is sufficient, if believed by the jury, to establish that Brown did not authorize her use of his check card or her writing of the checks in question. Thus, Castor is not entitled to dismissal of these charges. However, because the proof of these

charges was based upon the same circumstantial evidence utilized by the State in proving the murder and weapons charges, Castor's defense was prejudiced by the State's failure to disclose the information obtained from Peterson and Berlin. Accordingly, we conclude that the district court erred in denying Castor's motion for new trial on the forgery and unauthorized use of a financial device counts.

Admission of Prior Felony Convictions.

In her fifth and sixth assignments of error, Castor contends that the trial court erred in finding her guilty of being a felon in possession of a firearm because neither the prior California conviction nor the prior Nebraska conviction relied upon by the State to prove the element of a prior felony conviction was properly admitted.

Neb. Rev. Stat. § 28-1206(1) (Reissue 1995) provides in pertinent part that "[a]ny person who possesses any firearm . . . and who has previously been convicted of a felony . . . commits the offense of possession of a deadly weapon by a felon . . . ." Section 28-1206(2) provides that the "felony conviction may have been had in any court in the United States, the several states, territories, or possessions, or the District of Columbia." The information charges Castor with committing this offense between June 1 and November 30, 1996, and alleges two predicate felonies, including a 1968 conviction in California for "Grand Theft Of A Person," and a 1969 Nebraska conviction for "No Fund Check."

Castor does not dispute being in possession of a firearm, but challenges the admission of evidence relating to both predicate felonies. This evidence includes documents showing that Castor, then known as Wilma Lee Brown, was convicted "of the crime of felony, to wit, grand theft from person" in the Superior Court of California, Kern County, and was sentenced to probation for a period of 5 years, subject to several conditions including that "she serve the first 180 days of said probationary period in the Kern County Jail or other adult detention facility as shall be determined by the County Classification Commission." She was advised by the sentencing judge:

> You are privileged under the law if you successfully complete your probationary period and comply with all the terms and conditions to come back into court at the expiration of your probationary period and have your plea of guilty to the charge withdrawn and have a plea of not guilty substituted and have your case dismissed.

Castor first argues that the court records do not establish a final judgment of conviction of a felony under California law because she received a sentence of probation, which under California law allows the retention of all civil rights. In this regard, she relies on the following language from *People v. Banks*, 53 Cal. 2d 370, 386, 348 P.2d 102, 113, 1 Cal. Rptr. 669, 680 (1959):

> [T]he defendant whose guilt has been established . . . but who has not been sentenced to prison, i.e., where probation has been granted and the proceedings have been suspended without entry of judgment, is subject to no disabilities whatsoever except those specifically declared by some other provision of law or affirmatively prescribed by the court as terms or conditions of probation. The probationer . . . still retains his ordinary civil rights, unless the court has restricted them[.]

Castor's reliance on *Banks* is misplaced. In that case, the defendant sought to set aside his conviction for being a felon in possession by arguing he was never convicted of the underlying felony. Regarding the underlying felony conviction, Banks entered a plea of guilty to an offense punishable either as a felony or as a misdemeanor. He was sentenced to probation and completed his term of probation without violation. Although Banks was entitled to have the charge dismissed upon application, he did not do so. The court noted that no judgment in the case had been pronounced, because "[a]fter the plea of guilty an order granting probation was entered and there the case rests." *Id.* at 377, 348 P.2d at 107, 1 Cal. Rptr. at 674.

After making the statements upon which Castor relies, the *Banks* court further stated:

> [The defendant] does, however, for some specific purposes—for administration of the probation law and other laws expressly made applicable to persons so situated—

> stand convicted of a felony. . . . *Here, upon his plea of guilty . . . the defendant acquired the status—not then final, and conditionally subject to expungement but nevertheless existing—of a person convicted of a felony.*

(Emphasis supplied.) *Id.* at 387, 348 P.2d at 113, 1 Cal. Rptr. at 680. The court went on to note that even full compliance with the terms of his probation did not absolve Banks of his felon status without his taking the additional step of applying to have the charge dismissed pursuant to statute, and thus it found his prior felony conviction was valid and admissible in the felon in possession case.

As in *Banks*, the record in this case does not reflect any action on the part of Castor to set aside her guilty plea based upon satisfactory completion of the terms of her probation. Thus, although just as in *Banks* there is no actual judgment appearing on the record, once Castor pled guilty, her status under *Banks* was that of a convicted felon under California law.

Castor also contends in her brief that the California court records fail to show a "knowing and intelligent waiver of [her] constitutional right to trial, trial by jury, confront[ation of] witnesses . . . and presumption of innocence." Brief for appellant at 47, citing *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). The State contends that any argument made by Castor based on *Boykin* is invalid because her felony conviction occurred in 1968, while *Boykin* was not decided until 1969. Further, the State argues that even if *Boykin* were applicable, Castor is barred from now collaterally attacking the validity of the California conviction.

[11,12] We held in *State v. Lee*, 251 Neb. 661, 558 N.W.2d 571 (1997), that a defendant cannot collaterally attack, on *Boykin* grounds, a prior conviction that is an element of a subsequent offense. A prior felony conviction is an essential element of the offense of felon in possession of a firearm. *State v. Haynes*, 192 Neb. 445, 222 N.W.2d 358 (1974). Thus, Castor may not collaterally attack her California conviction in order to prevent its use as a predicate felony under § 28-1206(1).

A single prior felony conviction is sufficient to support a conviction under § 28-1206(1). Because we conclude that the district court did not abuse its discretion in admitting Castor's

felony conviction in California, we need not reach her argument regarding the admissibility of her prior conviction in Nebraska. Because there is uncontroverted evidence that Castor was a felon in possession of a firearm prior to Brown's death, her conviction on this charge is not affected by the State's nondisclosure of exculpatory evidence and it is therefore affirmed.

CONCLUSION

There was no prejudicial error with respect to Castor's conviction on the offense of possession of a firearm by a felon, which is one of the convictions included in case No. S-98-510, and that conviction is hereby affirmed. However, all other judgments of conviction from which appeal was taken in case No. S-98-510, as well as the conviction appealed in case No. S-98-509, are reversed and remanded for a new trial because of the State's failure to disclose exculpatory information in its possession pursuant to Castor's request. Accordingly, the judgment in case No. S-98-509 is reversed and remanded for a new trial, and the judgment in case No. S-98-510 is affirmed in part, and in part reversed and remanded for a new trial.

JUDGMENT IN NO. S-98-509 REVERSED, AND CAUSE REMANDED FOR A NEW TRIAL.

JUDGMENT IN NO. S-98-510 AFFIRMED IN PART AND IN PART REVERSED, AND CAUSE REMANDED FOR A NEW TRIAL.

JAMES B. FRANKSEN, DOING BUSINESS AS J.B. FRANKSEN & ASSOCIATES, ET AL., APPELLEES, V. CROSSROADS JOINT VENTURE, APPELLANT, AND GRAFFITI EATERY, INC., ET AL., APPELLEES.

599 N.W.2d 603

Filed September 3, 1999. No. S-98-212.

1. **Mechanics' Liens: Foreclosure: Equity.** An action to foreclose a construction lien is one grounded in equity.
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 that where credible evidence is in conflict on a

material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

3. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by said rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
4. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion.
5. **Mechanics' Liens.** Where a mechanics' lien attaches only to the leasehold estate and not to the fee, termination of the leasehold estate leaves nothing upon which the mechanics' lien may operate.
6. **Landlord and Tenant: Mechanics' Liens: Merger: Title: Equity.** A tenant cannot without the authority of the landlord charge the land with a lien for materials for constructing a building thereon. However, although a mechanics' lien when filed attaches only to an equitable estate, it may be enforced against the fee after the equitable and legal titles have merged.
7. **Estates: Merger: Equity: Intent.** The general rule is that where two unequal estates vest in the same person at the same time without an intervening estate, the smaller is thereupon merged into the greater. The doctrine of merger, however, is not favored, and equity will prevent or permit a merger that will best subserve the purposes of justice and the actual and just intent of the parties, whether express or implied. As a consequence, merger does not always or necessarily result from a coinciding of two unequal estates.
8. **Merger: Equity.** In determining whether an equitable merger has taken place, a court is to consider the circumstances of the particular case in the light of equity and good conscience.
9. **Merger: Equity: Estoppel.** The conduct of a fee owner which may trigger an estoppel in the context of the doctrine of equitable merger is voluntary conduct whereby the fee owner is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct and has been led thereby to change his or her position for the worse, and who on his or her part acquires some corresponding right either of property, of contract, or of remedy.
10. ___: ___: ___. In the context of the doctrine of equitable merger, estoppel rests largely on the facts and circumstances of the particular case and will be applied where the wisdom and justice of the principle are founded upon equity, morality, and justice, in accordance with good conscience.
11. **Mechanics' Liens: Merger: Equity: Evidence.** Where evidence establishes that the fee owner has derived some benefit from the leasehold improvements which are the subject of a construction lien, the degree of certainty with which the value of that benefit is established by the evidence must be considered and weighed in light of the principles which underlie the doctrine of equitable merger.
12. **Expert Witnesses.** Admissibility of expert testimony is based on four factors: (1) whether the witness is qualified as an expert; (2) whether the testimony is relevant; (3) whether the testimony will assist the trier of fact; and (4) whether the probative

value of the testimony, even if relevant, is outweighed by the danger of unfair prejudice or other considerations.

13. ___. Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him or her to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture.

14. **Real Estate: Valuation.** Regarding the use of comparable sales by an expert in real estate appraisal, whether the properties are sufficiently similar to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the discretion of the trial court, which will not be interfered with unless abused. The exact limits, either of similarity or difference, or of nearness or remoteness in point of time, are difficult, if not impossible, to prescribe by any arbitrary rule, but must to a large extent depend on the location and the character of the property and the circumstances of the case.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Affirmed.

Patrick B. Griffin and Marcia A. Judd, of Kutak Rock, for appellant.

Martin P. Pelster, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, P.C., for appellees James B. Franksen, doing business as J.B. Franksen & Associates, et al.

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

STEPHAN, J.

This case originated as an action filed by James B. Franksen, doing business as J.B. Franksen & Associates, to foreclose a construction lien he had filed on behalf of himself and various subcontractors who supplied labor and materials for the construction of the Graffiti Eatery restaurant on premises within the Crossroads Mall in Omaha, Nebraska. The premises were leased from Crossroads Joint Venture (CJV), the owner of the property. Franksen originally appealed from an order of the district court for Douglas County denying his motion for summary judgment and granting that of CJV. In *Franksen v. Crossroads Joint Venture*, 245 Neb. 863, 515 N.W.2d 794 (1994), we reversed, and remanded for further proceedings based upon our determination that although CJV was not a "contracting owner" as defined by the Nebraska Construction Lien Act, Neb. Rev. Stat. §§ 52-125 to 52-159 (Reissue 1998), summary judgment was

inappropriate because of disputed issues of fact with respect to whether "the equitable doctrine of merger dictates that the termination of the leasehold estate caused the leasehold estate and the attached construction lien to merge into the fee simple estate, thereby making the construction lien enforceable against CJV's interest in the property." 245 Neb. at 872, 515 N.W.2d at 802.

While *Franksen, supra*, was on appeal, the subcontractors filed another action in the district court for Douglas County to foreclose separate liens they had filed against the same property. See Formcraft Corp. et al. v. Crossroads Joint Venture, Douglas County District Court, docket 913, page 59. Because these two cases arose out of the same transaction and involved the same issue, the district court consolidated them for trial. Prior to trial, the district court discharged the liens against the property and transferred them to a bond filed by CJV. Also prior to trial, Franksen assigned his interest in the claims asserted in *Franksen, supra*, to the subcontractors-plaintiffs in the second action. The consolidated actions were then tried to the district court, which determined that the equitable doctrine of merger was applicable and that the construction liens were therefore enforceable against the fee estate. Based upon this determination, the district court entered judgment against CJV in favor of each of the nine subcontractors in the total amount of $363,845.94, together with prejudgment interest. CJV commenced this appeal, which we transferred to our docket on our own motion. Based upon our de novo review of the record, we reach the same conclusion as the district court and therefore affirm its judgment.

I. BACKGROUND

Appellant CJV is the owner of the Crossroads Mall in Omaha, Nebraska. At all relevant times, Melvin Simon & Associates, Inc. (Simon), acted as an agent for CJV and a local management company managed the Crossroads Mall for Simon on behalf of CJV. Graffiti Eatery, Inc. (GEI), and Hawbaker & Associates, Inc., are entities owned by Timothy Hawbaker, who is the sole incorporator of both entities. Hawbaker & Associates was the general contractor for the construction of the Graffiti Eatery restaurant in the Crossroads Mall (the project). Franksen was the

project designer, store planner, and construction manager. Appellees Formcraft Corporation; Blair Glass Company, Inc.; Controlled Comfort Engineering, Inc.; Ancona Brothers Company, Inc.; Kehm Contractors, Inc.; Kennedy Studios, Inc.; Meehan-Radachi, Inc.; Taylor Plumbing, Inc.; and Wiedeman Electrical Service are the subcontractors who provided labor, services, and materials to the project for which they have not received compensation.

In early 1990, Hawbaker contacted Dale Kline, a leasing representative for CJV, to inquire about leasing space in the Crossroads Mall for the purpose of operating what he had initially planned to be an ice cream parlor. Negotiations between Hawbaker and Kline continued until June, at which time the concept of a full-service restaurant was developed and Hawbaker and CJV agreed to terms that were to be incorporated into a lease agreement between CJV and GEI. The terms provided for construction of leasehold improvements by GEI under a 15-year lease to be guaranteed by Timothy and Julie Hawbaker, Richard and Beverly Mulholland, and Gerald and Faye Dorwart. GEI was required to obtain a $300,000 letter of credit before commencing construction. CJV required the letter of credit in order to "solidify" its perception of Hawbaker's financial strength. The parties also agreed that GEI would supply proof of payment to the subcontractors on a continuing basis, specifically, no later than 2 weeks after completion of their specific work.

In addition, Hawbaker and Kline agreed that CJV would provide a $112,000 landlord's contribution and a loan for a $100,000 "Tenant Finish Allowance" toward construction expenses to be guaranteed personally by the Hawbakers, the Mulhollands, and the Dorwarts. GEI was to receive the contribution and loan only after the restaurant opened and lien waivers were received. CJV believed that a full-service restaurant at the Crossroads Mall would be beneficial to the mall's overall development and helped Hawbaker develop the concept of the Graffiti Eatery restaurant. Plans called for opening the restaurant before the 1990 holiday season, which each party thought would be to its benefit.

While negotiating the terms of the lease with Kline, Hawbaker contacted Franksen. In June 1990, Franksen entered into an agreement with Hawbaker pursuant to which Franksen was to act as the project designer, construction manager, and store planner. Both Hawbaker and Franksen contracted with the subcontractors to perform work on the project. The subcontractors had no contract with CJV but relied on Franksen to communicate with CJV on their behalf. Franksen testified that before construction commenced, he received and read a "Tenant Manual" regarding CJV's design criteria. The manual set out the tenant's and landlord's duties on the project. It specifically provided that all items of construction not listed in the manual were to be at the sole expense of the tenant.

The project improvements included a "pop-out," which consisted of a permanent structural modification of an existing exterior wall of the previously unused floor space. The pop-out added approximately 684 square feet to the premises, increasing the total area by approximately 15 percent.

Construction of the project commenced on September 27, 1990. At that time, Franksen knew that a lease for the premises had not been executed. On October 9, Simon sent Hawbaker a "hold harmless" letter, authorizing him to commence construction before execution of the lease. Franksen received a copy of this letter on or about October 15. The letter granted permission to commence construction, provided that (1) the final set of plans was approved by Simon, (2) the requisite permits and approvals from local boards were obtained by Hawbaker, and (3) Hawbaker provided the certificates of insurance and deposit required under the lease. Hawbaker was requested to acknowledge his agreement with these provisions by signing the letter and returning it to Simon. Simon received a signed copy of the letter from Hawbaker on October 22. The record reveals that the final drawings were not approved by Simon until November 7, and Hawbaker never provided proof of the required insurance.

Hawbaker, in his capacity as president of GEI, executed the lease agreement on October 23, 1990. However, he also deleted the names of the Mulhollands and the Dorwarts as guarantors. Because of these deletions, CJV instructed Hawbaker to either arrange for alternative financing or provide proof of other finan-

cial backing before it would execute the lease. In response, Hawbaker informed CJV that he had obtained a $250,000 Small Business Administration (SBA) loan from an Omaha bank. Kline personally confirmed the existence of the SBA loan through telephone conversations with a bank representative, but did not at that time obtain specific information from the bank regarding disposition of the loan proceeds. He assumed that the entire $250,000 would be utilized to pay construction costs.

In early November 1990, Hawbaker issued checks to Franksen and various subcontractors for partial payment of labor and materials provided for the project. The checks were dishonored because of insufficient funds in the account on which they were drawn. On November 7, Franksen discussed the dishonored checks with Rob Morse, a Simon employee in charge of the day-to-day monitoring of the project. During this same meeting, Franksen told Morse that Hawbaker had attempted to persuade him to obtain false lien waivers from the subcontractors. During the conversation, Morse called someone named "Jim" and, after hanging up, told Franksen that "Simon will pay you guys off, and we'll throw his ass out," in an apparent reference to Hawbaker. Franksen testified that while he did not consider whether Morse had the authority to bind CJV to pay construction costs, he interpreted Morse's comments to mean that Simon would "do the right thing." When Franksen spoke to Morse again the following day, Morse told him to finish the job but did not make any specific reference to payment.

CJV executed the lease on about November 20, 1990, with the knowledge that construction expenses had not been paid and before receiving written confirmation regarding the SBA loan. As executed, the lease incorporated and clarified the terms upon which Kline and Hawbaker had previously agreed. With respect to the payment obligations of CJV, the lease provided that when all construction work required of GEI had been completed, all costs had been paid in full, and satisfactory evidence of the attachment of no liens had been furnished, CJV would "pay to Tenant as Landlord's contribution, if any, for Tenant's Work the sum of $112,000.00 . . . and no more." The lease further provided that "Landlord shall contribute to Tenant the sum of One Hundred Thousand and 00,100 Dollars ($100,000.00), (herein

referred to as 'Tenant Finish Allowance')" in consideration of the tenant's paying additional rental as defined in the lease agreement and conforming to certain other provisions, notably the satisfactory completion of the construction and payment in full of all construction costs. The lease also provided, "Tenant may retain, as Landlord's Contribution to Tenant's Work, fifty percent (50%) of the Minimum Rent otherwise payable to Landlord, until such time as the total sum retained equals $28,000.00."

With regard to payments to the subcontractors, the lease provided:

> Tenant shall furnish evidence satisfactory to Landlord that each sub-contractor has been paid in full upon the completion of the work by such sub-contractor. Tenant shall pay each sub-contractor within 2 weeks following the completion of its specific work. The failure of Tenant to submit such evidence in accordance with this provisions [sic] shall constitute a default under Section 18.1 of this Lease, and, upon such failure, Landlord shall have the right to stop all Tenant's Work in the Premises.

The lease further provided, "Tenant shall not suffer any mechanics' or materialmen's lien[s] to be filed against the Premises or the Center by reason of work, labor, services or materials performed or furnished to Tenant or anyone holding any part of the Premises under Tenant." Finally, the lease provided that "[a]ny alterations, changes, additions and improvements shall immediately upon the termination of this Lease become Landlord's property, be considered part of the Premises, and not be removed at or prior to the end of the Lease Term without Landlord's written consent unless Landlord requests Tenant to remove same." The lease also restated the requirement that GEI provide the $300,000 irrevocable letter of credit in favor of CJV before commencement.

Construction was completed on November 23, 1990, and the restaurant opened on November 25. All materials and services which are the subject of the liens were delivered to the project by the subcontractors between September 27 and November 23. On December 6, Franksen filed a notice of commencement with the Douglas County register of deeds. Mark Reed, an employee of

Simon, sent letters to Franksen and the subcontractors dated December 19, 1990, stating that Simon was preparing to disburse funds for the construction of the restaurant and that lien waivers would be required. Reed testified that while he did not believe that CJV was under any obligation to pay funds directly to the subcontractors, CJV had heard "through the rumor mill" that Hawbaker had outstanding debts with some of his subcontractors, and CJV was therefore willing to disburse the landlord's contribution and loan funds jointly to GEI and the subcontractors in order to resolve the subcontractors' claims. The disbursement was conditioned upon CJV being provided with final lien waivers, but the condition was not met. Reed knew when he sent the letters that the construction debt exceeded $212,000, but the letters did not indicate Hawbaker was responsible for a portion of the payments. Various subcontractors testified that when they received the December 19 letter, they believed CJV or Simon was going to pay them in full for their services. The disbursements contemplated in Reed's letters were not made because shortly after the letters were mailed, Reed was instructed by Simon's legal and leasing departments not to proceed.

When no payment was made, Franksen filed a construction lien on the property on January 22, 1991. The lien included the amounts due to each of the subcontractors for labor, material, and services provided for the project. The subcontractors filed their respective liens on various subsequent dates, all within 120 days after the final furnishing of labor, services, and material. On June 4, 1991, GEI was served with a notice of termination of lease for violating the terms of the lease, including the failure to pay rent as due and failure to pay the construction expenses at issue in this case. GEI vacated its leased space on October 31, pursuant to court order, owing CJV rent in excess of $59,000. The eviction order contained a list of improvements which were to remain "for [the] benefit of Crossroads Joint Venture," all of which the subcontractors contend they delivered to the property.

After GEI was evicted, the property remained unused for 15 months until CJV relet it on February 2, 1993, to Robineb, Inc. Robineb leased the space for the purpose of operating a Red

Robin restaurant, but undertook extensive remodeling before commencing its restaurant operation.

Additional facts will be set forth as pertinent to our analysis.

II. STANDARD OF REVIEW

[1,2] An action to foreclose a construction lien is one grounded in equity. *Landmark Enterprises v. M.I. Harrisburg Assocs.*, 250 Neb. 882, 554 N.W.2d 119 (1996). 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 that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999).

[3,4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by said rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Seeber v. Howlette*, 255 Neb. 561, 586 N.W.2d 445 (1998); *Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 576 N.W.2d 797 (1998). A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Smith, supra.*

III. ASSIGNMENTS OF ERROR

CJV contends, restated, that the district court erred in (1) receiving the opinion evidence of the subcontractors' expert because of inadequate foundation and (2) finding that the equitable doctrine of merger was applicable, so as to permit enforcement of the construction liens against its fee estate.

IV. ANALYSIS

[5-8] Under Nebraska law, where a mechanics' lien attaches only to the leasehold estate and not to the fee, termination of the leasehold estate leaves nothing upon which the mechanics' lien may operate. See *Stevens v. Burnham*, 62 Neb. 672, 87 N.W. 546 (1901). A tenant cannot without the authority of the landlord charge the land with a lien for materials for constructing a build-

ing thereon. *Platner Lumber Co. v. Krug Park Amusement Co.*, 131 Neb. 831, 270 N.W. 473 (1936). However, although a mechanics' lien when filed attaches only to an equitable estate, it may be enforced against the fee after the equitable and legal titles have merged. *Landmark Enterprises, supra*; *Franksen v. Crossroads Joint Venture*, 245 Neb. 863, 515 N.W.2d 794 (1994). The general rule is that where two unequal estates vest in the same person at the same time without an intervening estate, the smaller is thereupon merged into the greater. *Landmark Enterprises, supra.* The doctrine of merger, however, is not favored, and equity " 'will prevent or permit a merger as will best subserve the purposes of justice and the actual and just intent of the parties, whether express or implied.' " *Id.* at 889, 554 N.W.2d at 124, quoting *Franksen, supra.* As a consequence, merger does not always or necessarily result from a coinciding of two unequal estates. *Landmark Enterprises, supra.* In determining whether an equitable merger has taken place, a court is to consider the circumstances of the particular case in the light of equity and good conscience. *Id.*; *Franksen, supra.*

Applying these principles in cases where the fee owner has retaken possession of leased premises after completion of leasehold improvements and the tenant's subsequent default, we have focused upon whether the conduct of the fee owner during the construction of leasehold improvements was such that the owner should be estopped from retaining the benefit of the improvements. For example, in *Harte v. Shukert*, 94 Neb. 210, 142 N.W. 517 (1913), Tolf Hanson leased premises in a two-story building from Gustave Shukert for a period of 10 years beginning April 1, 1908. Under the terms of the lease, failure to pay rent when due gave Shukert the right to declare the lease to be at an end and to take immediate possession of the premises. The lease also provided that any improvements to the premises made by the tenant would revert to the owner at the end of the lease. Hanson hired John Harte to make improvements to the space, with Shukert's consent. Harte began work in November 1907 and completed $70,000 worth of work before Hanson became insolvent in June 1909. When Harte attempted to assert his lien against the fee, Shukert argued that he had terminated the leasehold because on the first day of May, June, and July 1909, he

had made demand for the amount due and unpaid upon Hanson, and that on July 31, he notified Hanson in writing to vacate the premises within 3 days. The evidence established that regardless of these demands, Shukert was aware of the improvements being made to the premises for more than a year, during which time he failed to exact payment of the monthly rentals or attempt to cancel the lease. Instead, he accepted rent after the time for which it should have been paid and permitted the work to continue to the detriment of Hanson and Harte. We determined that because Shukert had not exercised his option to terminate the lease at an earlier date, even though he was aware of the tenant's financial difficulties, he was estopped from asserting the termination of the lease as to the lienholder and that the doctrine of equitable merger applied.

Similar circumstances were presented in *Waite Lumber Co., Inc. v. Masid Bros., Inc.*, 189 Neb. 10, 200 N.W.2d 119 (1972). Masid Bros., Inc. (Masid), was the fee owner of a one-story brick building. It leased half of the building to Chris Verges for use as a restaurant. The lease was for a term of 10 years and provided that all remodeling expenses would be the responsibility of Verges. Masid was to perform some of the work, including bringing utilities to the premises and enclosing open pipes in the building. Verges entered into various agreements with contractors and subcontractors, who performed work on the project. When Verges suddenly abandoned the premises after substantial improvements had been made, the claimants sought to enforce their liens against Masid, with which they had no contract. In determining that the equitable doctrine of merger applied, we noted that notwithstanding its knowledge of the construction in progress and the fact that Verges had defaulted on lease payments during the construction period, Masid did nothing to cancel the lease. Thus, because Masid was aware that Verges was unable to meet his financial obligations earlier but Masid had failed at that time to exercise its right to terminate the lease, we held that Masid was equitably estopped from asserting the termination of the leasehold estate.

We most recently considered the doctrine of equitable merger in *Landmark Enterprises v. M.I. Harrisburg Assocs.*, 250 Neb. 882, 554 N.W.2d 119 (1996). In that case, M.I. Harrisburg

Associates leased unimproved space to Darren Owen for use as a cocktail lounge. Pursuant to a contract with Owen, Landmark Enterprises, Inc. (Landmark), made leasehold improvements for which it charged Owen $73,665. After construction was completed, Owen became delinquent in his lease payments and failed to pay Landmark the remaining $11,285 due for the improvements. Landmark filed a construction lien, and Harrisburg subsequently terminated the lease and relet the premises to another tenant which operated the cocktail lounge, utilizing the leasehold improvements installed by Landmark. In rejecting Landmark's contention that the doctrine of equitable merger permitted enforcement of the lien against Harrisburg, we noted that the facts were distinguishable from *Waite Lumber Co., Inc., supra*, in that the landlord had no duty to pay for any of the improvements and that the tenant's default occurred after construction of the improvements was completed. We did not refer specifically to principles of estoppel, but concluded that while Harrisburg had been enriched by the improvements, such enrichment "is not the result of any wrongdoing on Harrisburg's part." *Landmark Enterprises*, 250 Neb. at 893, 554 N.W.2d at 126. In this context, our reference to an absence of "wrongdoing" was simply a recognition that there were no acts or omissions on the part of the landlord which would operate as an estoppel triggering the doctrine of equitable merger.

In this appeal, CJV contends that the district court erred in applying the doctrine of equitable merger for two reasons. First, it contends that its conduct during construction of the project does not support a finding of estoppel. Second, it contends that the evidence does not support a finding that it was enriched by the improvements, which contention is, in part, based upon an argument that expert testimony on this subject was erroneously admitted. In our de novo review, we will analyze these issues separately.

1. Estoppel

[9,10] In *Franksen v. Crossroads Joint Venture*, 245 Neb. 863, 874, 515 N.W.2d 794, 803 (1994), we characterized the conduct of a fee owner which may trigger an estoppel in the context of the doctrine of equitable merger as the

> voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights

> which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.

We further noted that estoppel in this context "rests largely on the facts and circumstances of the particular case and will be applied where the wisdom and justice of the principle are founded upon equity, morality, and justice in accordance with good conscience . . . ." *Id.* at 875, 515 N.W.2d at 803. We also noted in *Franksen* that although the facts in this case are distinguishable from those of *Harte v. Shukert*, 94 Neb. 210, 142 N.W. 517 (1913), and *Waite Lumber Co., Inc. v. Masid Bros., Inc.*, 189 Neb. 10, 200 N.W.2d 119 (1972), in that the improvements which are the subject of the liens were not made at a time when the tenant in possession was in default for nonpayment of rent, other facts are pertinent to the determination of whether the doctrine of equitable merger should be applied. *Franksen, supra.*

It is apparent from the record that CJV's interest in the project went beyond simply leasing vacant space in its mall. Hawbaker first proposed leasing the space for use as an ice cream parlor, but Kline, acting as an agent of CJV, considered the concept too limited and felt that a full-service restaurant would pose a better business opportunity for both Hawbaker and CJV. Kline persuaded Hawbaker of this and then assisted him in developing the concept for the Graffiti Eatery restaurant. Kline testified that the objective of having the restaurant open in time for the 1990 holiday season was for the mutual benefit of Hawbaker and CJV.

Through Simon, CJV was actively involved in the implementation of the concept which Kline assisted Hawbaker in developing. Particularly significant is the fact that CJV committed its own financial resources to the project by agreeing to lease terms which included a $112,000 "Landlord's Contribution" and a $100,000 "Tenant Finish Allowance" toward the expense of the leasehold improvement construction. As Kline explained, "[w]e loved the concept. So we wanted to find a way to make the deal."

CJV's enthusiasm for the project was further evidenced by its willingness to permit commencement of the construction of the leasehold improvements long before it had executed a lease for the premises. Although Kline testified that CJV would not have permitted construction to go forward if it had perceived a risk that Hawbaker would be unable to pay Franksen and the subcontractors, there is evidence that CJV did not enforce the provisions of its agreement with Hawbaker which were designed to provide assurance of his financial ability to complete the project and that it permitted construction to continue despite knowledge that Hawbaker's financial condition was significantly weaker than had been represented. Although CJV initially required Hawbaker to furnish evidence of $1 million in capital for the project, in part to ensure that there would be funds available to pay for the improvements, it took no steps to verify unaudited financial statements provided by Hawbaker which showed that he had a net worth of $466,600 and that the prospective investors, the Mulhollands and the Dorwarts, had a combined net worth of $888,532. CJV also did not enforce the requirement that GEI was to supply a letter of credit in the amount of $300,000 before the commencement of construction in order to ensure the financial stability of the project.

Although CJV relied heavily upon Hawbaker's representations regarding his financial ability to carry out the project, Kline admitted that "how little [Hawbaker] could do to prove [his] worth to us [w]as constantly the battle that we fought." An unequivocal indication of Hawbacker's financial shortcoming was provided by his submission of the lease that he signed on October 23, 1990, and on which he had deleted references to the Dorwarts and the Mulhollands as investors in the project. Kline described these deletions as a "major red flag," indicating that Hawbaker lacked the financial backing which CJV considered to be essential to the project. Kline described the circumstances then facing CJV as follows:

> We weighed our options, truthfully. Of — well, you know, do we call this whole thing off? Do we not sign — now we're sitting on an executed lease by the tenant. At that point in time, then, construction is well underway. And we're in a jam. In theory. So we had options. Do we stop

> the whole process and kill the deal? Or do we find a replacement for Mr. Hawbaker? Or do — you know, what do we do? Do we punt?

CJV chose not to stop construction or to inform Franksen and the subcontractors of this development with respect to Hawbaker's financial stability, which it considered to be "completely unsatisfactory" and "not the deal we made." Instead, it demanded that Hawbaker obtain additional financial backing and resolved that it would stop construction if he failed to do so. After "several weeks" of discussion, during which construction of the leasehold improvements neared completion, CJV accepted verbal assurances that Hawbaker had obtained a $250,000 SBA loan and signed the lease on or about November 20, 1990, with the knowledge that the subcontractors had not been paid for their nearly completed work.

The SBA loan documentation which CJV received on November 21, 1990, disclosed that only $74,000 of the funds was earmarked for improvement costs. The loan agreement also required that a guarantee from a "Gary M. Nachman" be obtained, although Kline testified he did not know Nachman and did not try to contact him. Additionally, the loan agreement specified that Hawbaker must provide evidence of the $212,000 payment by CJV before any loan funds would be paid. Kline did not know if the conditions had been met before the lease was executed, although he testified that had CJV believed Hawbaker lacked financial backing, it would not have let him go forward with the project. The record reflects that the SBA loan was unfunded as of December 5, although the project had been completed at that time.

Throughout the construction period, CJV's representatives were in regular contact with Franksen and periodically approved plans and specifications for the project. During construction, CJV knew or should have known that Hawbaker lacked the financial capacity to pay for the improvements. Nevertheless, CJV failed to convey this information to Franksen and the subcontractors and did not halt construction or enforce its right to a letter of credit as security for its tenant's undertakings.

These facts are similar to those of *Harte v. Shukert*, 94 Neb. 210, 142 N.W. 517 (1913), and *Waite Lumber Co., Inc. v. Masid Bros., Inc.*, 189 Neb. 10, 200 N.W.2d 119 (1972), and distinguishable from *Landmark Enterprises v. M.I. Harrisburg Assocs.*, 250 Neb. 882, 554 N.W.2d 119 (1996), in that CJV had knowledge of its tenant's financial instability during the construction of the leasehold improvement but took no action to halt construction or to alert the subcontractors to the problem. From our review of the record, it is apparent that throughout the construction period, CJV was motivated to a significant degree by a business objective of having a full-service restaurant open for business in its mall during the 1990 holiday shopping season, which could be accomplished only by keeping the subcontractors on the job. Therefore, based upon our de novo review, we conclude that the evidence is sufficient to find that CJV is estopped from retaining any benefit which it may have received from the improvements at the lienholders' expense. We therefore proceed to the question of whether the evidence establishes that CJV in fact realized such a benefit.

2. Benefit

[11] In *Franksen v. Crossroads Joint Venture*, 245 Neb. 863, 876, 515 N.W.2d 794, 804 (1994), we stated that "[w]hether or to what extent the improvements *actually* enhanced the value of the premises is also a disputed question of fact which must be resolved by the trial court." (Emphasis in original.) However, we have never held that the value of the benefit or enhancement inuring to the landlord must be proved with any degree of mathematical certainty in order for the doctrine of equitable merger to apply. Assuming that the evidence establishes that the landlord has derived some benefit from the leasehold improvements which are the subject of a construction lien, the degree of certainty with which the value of that benefit is established by the evidence must be considered and weighed in light of the principles which underlie the doctrine of equitable merger. In the present case, the subcontractors presented expert testimony as well as other evidence of the benefit to the fee estate resulting from the leasehold improvements. We consider each category of evidence separately.

(a) Expert Testimony

At trial, the subcontractors called Patrick Morrissey, MAI (a member of the Appraisal Institute), as an expert witness. Morrissey has been a real estate appraiser since 1972, with experience in the appraisal of residential and commercial properties. He is licensed in Nebraska, Iowa, and South Dakota. He testified that utilizing uniform appraisal standards and relying solely upon facts and data reasonably relied upon by other experts in his field, he determined that the value of the leasehold improvements involved in the project as of November 23, 1990, was $237,000. This opinion was received over CJV's foundational objection.

Morrissey's opinion regarding the value of the leasehold improvements consisted of two components. The first involved the value of the additional 684 square feet of floor space resulting from construction of the pop-out. Morrissey determined that the present value of the income stream which would be generated from a 5-year lease of this space, together with the reversionary value of the space at the end of that term, was $74,000. The second component in Morrissey's appraisal involved the extent to which the improvements added to the value of the premises as they existed prior to improvement, exclusive of the pop-out, which Morrissey referred to as the "dry shell." Based upon his consultation with two developers, Morrissey determined that 50 percent of the improvements could be used by a restaurant occupying the space after GEI vacated the premises. Subtracting the value which he attributed to the pop-out from the total construction costs, and applying the 50-percent reuse factor, Morrissey determined that the improvements enhanced the value of the dry shell in the amount of $163,000. Morrissey then added the value he had determined for the pop-out and the amount by which he determined that the improvements enhanced the value of the dry shell to arrive at a total of $237,000. He testified that this constituted an acceptable technique in valuing the improvements. However, he admitted on cross-examination that his method of appraisal did not reflect actual income or savings realized by CJV from the improvements.

CJV contends that Morrissey's opinions should have been excluded because (1) he utilized a 5-year lease term instead of a 15-year term in determining the income stream from the pop-out, (2) the properties which he used in determining the residual value of the pop-out were not comparable, (3) his analysis of the enhancement to the value of the dry shell did not take into consideration actual circumstances and was made without information regarding the cost of the pop-out improvements, and (4) he failed to determine the value of the improvements as of October 31, 1991, the date on which CJV regained possession of the leased premises.

[12-14] Admissibility of expert testimony is based on four factors: (1) whether the witness is qualified as an expert; (2) whether the testimony is relevant; (3) whether the testimony will assist the trier of fact; and (4) whether the probative value of the testimony, even if relevant, is outweighed by the danger of unfair prejudice or other considerations. *Phillips v. Industrial Machine, ante* p. 256, 597 N.W.2d 377 (1999); *Seeber v. Howlette*, 255 Neb. 561, 586 N.W.2d 445 (1998). Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him or her to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. *Langfeld v. Department of Roads*, 213 Neb. 15, 328 N.W.2d 452 (1982). Regarding the use of comparable sales by an expert in real estate appraisal, we have stated:

> " 'Whether the properties are sufficiently similar to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the sound discretion of the trial court, which will not be interfered with unless abused. The exact limits, either of similarity or difference, or of nearness or remoteness in point of time, is difficult, if not impossible, to prescribe by any arbitrary rule, but must to a large extent depend on the location and the character of the property and the circumstances of the case.' "

Id. at 28, 328 N.W.2d at 459, quoting *Clearwater Corp. v. City of Lincoln*, 207 Neb. 750, 301 N.W.2d 328 (1981), and 5 Nichols on Eminent Domain § 21.31 (1979).

Morrissey testified that his opinions were formulated through the use of uniform appraisal methods and based upon information and data generally relied upon by experts in his field. He stated that the use of a 15-year term would not have made a difference in his calculation of the income stream attributable to the pop-out. He further stated that the sales which he utilized as comparable were the best he could find and, in his judgment, adequate for his purpose of determining the residual value of the pop-out improvements. We conclude that Morrissey had an adequate factual basis for his opinions and that the factual discrepancies urged by CJV go to the weight to be given to those opinions both by the district court and by this court on de novo review. As noted above, the precise amount by which the value of the fee estate was enhanced by the leasehold improvements is not an ultimate issue of fact to be determined in this case. Accordingly, we conclude that the district court did not abuse its discretion in receiving Morrissey's opinions.

(b) Other Evidence of Benefit to Fee Estate

As we have noted, the leasehold improvements at issue included the pop-out, a permanent structural modification which increased the area of the premises by approximately 15 percent. As Kline described it, "[w]e grew the building." This modification was included in CJV's original design of the mall but was not carried out until 1990 as a part of the project. Thus, the pop-out was of at least some benefit to the fee.

Additionally, had the costs of the leasehold improvement construction been paid and lien waivers obtained by GEI as required by the lease, CJV would have become obligated under the lease to pay GEI $112,000 as its contribution toward the work and to loan GEI an additional $100,000. The failure of GEI to pay for the improvements and obtain lien waivers absolved CJV of that contractual obligation but did not prevent the utilization of the improvements in the Graffiti Eatery restaurant while it was situated and operating in the Crossroads Mall. When CJV took possession of the premises after GEI defaulted, it did not permit the subcontractors to enter for the purpose of salvaging materials for which they had not been paid. These facts further demonstrate some benefit to CJV.

CJV contends that the extensive remodeling undertaken by its subsequent tenant before opening the Red Robin restaurant on the leased premises demonstrates that it received no benefit from the GEI leasehold agreement. However, the record reflects that the Red Robin remodeling was made pursuant to a contract between Robineb and Lindburg Construction Co., Inc., to which CJV was not a party. The lease to Robineb provides that it accepts the premises in an "as is" condition, except that CJV agreed to modify one wall at a cost not to exceed $54,000. All other modifications were specified to be at Robineb's sole expense. The lease contains no other provision requiring CJV to contribute to the cost of the leasehold improvements, nor does it provide for a loan in the form of a "tenant finish allowance," as did the GEI lease. Thus, CJV realized a benefit in that it has a full-service restaurant operating in the space originally improved by the subcontractors at a cost significantly less than it would have incurred under the GEI lease if the subcontractors had been paid on a timely basis.

V. CONCLUSION

Based upon our de novo review, we conclude that the value of the fee estate was enhanced by labor and materials supplied by the subcontractors and that by virtue of its conduct throughout the construction period as discussed herein, CJV is estopped from asserting the termination of the lease as a defense to the subcontractors' claims. Considering, as we must, the circumstances of this particular case in light of equity and good conscience, we determine that the doctrine of equitable merger is applicable and that the property of CJV is therefore subject to the liens which are the subject of this action. The judgment of the district court is affirmed.

AFFIRMED.

MILLER-LERMAN, J., not participating.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. BRETT T. MCARTHUR, RESPONDENT.

599 N.W.2d 592

Filed September 3, 1999. No. S-98-411.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof.** The charges against an attorney in a disciplinary proceeding must be established by clear and convincing evidence.
3. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following facts: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
4. ___. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
5. ___. The determination of an appropriate penalty to be imposed on an attorney also requires consideration of any mitigating factors.
6. ___. To determine what sanction is appropriate, each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances.
7. ___. The propriety of a sanction in attorney discipline proceedings must be considered with reference to the sanctions imposed by the Nebraska Supreme Court in prior cases presenting similar circumstances.
8. **Attorney and Client.** A lawyer is responsible for adequately representing his client regardless of that client's behavior, and if that proves impossible, then the lawyer should withdraw from representation of that client.

Original action. Judgment of suspension.

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

Rolf Edward Shasteen for respondent.

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

PER CURIAM.

NATURE OF CASE

This is an attorney disciplinary case in which the Nebraska State Bar Association (NSBA), relator, seeks to discipline Brett T. McArthur, respondent.

BACKGROUND

The Committee on Inquiry of the First Disciplinary District filed formal charges against McArthur. The committee alleged that while representing a client in an eviction action in 1996 and 1997, McArthur violated Canon 1, DR 1-102(A)(1); Canon 6, DR 6-101(A)(3); and Canon 7, DR 7-101(A)(2) and (3), of the Code of Professional Responsibility. The relevant provisions of the Code of Professional Responsibility are as follows:

> DR 1-102 Misconduct.
> (A) A lawyer shall not:
> (1) Violate a Disciplinary Rule.
> . . . .
> DR 6-101 Failing to Act Competently.
> (A) A lawyer shall not:
> . . . .
> (3) Neglect a legal matter entrusted to him or her.
> . . . .
> DR 7-101 Representing a Client Zealously.
> (A) A lawyer shall not intentionally:
> . . . .
> (2) Fail to carry out a contract of employment entered into with a client for professional services, but he or she may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.
> (3) Prejudice or damage his or her client during the course of the professional relationship, except as required under DR 7-102(B).

In his answer to these charges, McArthur admitted that he violated a disciplinary rule, DR 1-102(A)(1), and that he neglected the legal matter entrusted to him, DR 6-101(A)(3), but denied any intentional act under DR 7-101(A)(2) and (3).

Pursuant to Neb. Ct. R. of Discipline 10(F) (rev. 1996), the NSBA filed additional formal charges alleging that while repre-

senting a client in a probation revocation case in 1996, McArthur violated DR 1-102(A)(1), (4), and (5) and DR 6-101(A)(3). The relevant provisions of the Code of Professional Responsibility for the additional charges, in addition to the ones set out above, are as follows: "DR 1-102 Misconduct. (A) A lawyer shall not: (1) Violate a Disciplinary Rule. . . . (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. (5) Engage in conduct that is prejudicial to the administration of justice." In his answer to the additional charges, McArthur denied violating any disciplinary rules.

This court referred the matter to a referee, pursuant to Neb. Ct. R. of Discipline 10(J) (rev. 1996). The referee conducted a formal evidentiary hearing. McArthur was present and represented by counsel. As to the original formal charges, the referee found that the actions of McArthur constituted violations of his oath of office; violated a disciplinary rule, DR 1-102(A)(1); and neglected a legal matter entrusted to him, DR 6-101(A)(3). The referee did not find that McArthur violated DR 7-101(A)(2) or (3). As to the additional formal charges, the referee found that the evidence clearly and convincingly established that McArthur violated his oath and neglected a legal matter entrusted to him, DR 6-101(A)(3). The referee did not find that McArthur violated DR 1-102(A)(4) and (5). The referee recommended that McArthur be suspended from the practice of law for 6 months.

STANDARD OF REVIEW

[1,2] A proceeding to discipline an attorney is a trial de novo on the record, in which this court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. NSBA v. Johnson*, 256 Neb. 495, 590 N.W.2d 849 (1999). The charges against an attorney must be established by clear and convincing evidence. *Id.*

ASSIGNMENTS OF ERROR

In his response to the referee's report and in his brief to this court, McArthur assigns that the referee erred (1) in finding that

McArthur neglected a matter entrusted to him by a client and (2) in recommending an excessive penalty of 6 months' suspension from practice.

ANALYSIS

A proceeding to discipline an attorney is a trial de novo on the record, in which this court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. NSBA v. Johnson, supra.* Upon our de novo review of the record, we find the following facts:

McArthur was admitted to the practice of law in the State of Nebraska on September 17, 1993. At all times relevant hereto, McArthur was engaged in the private practice of law in Lancaster County, Nebraska.

McArthur was hired by Theresa Norfolk to defend her in an eviction action brought by Sunburst Properties, Inc. McArthur and Norfolk attended the eviction trial on December 31, 1996, at which time Sunburst Properties' first cause of action for restitution of the premises was heard. The first cause of action was taken under advisement, and a hearing on the second and third causes of action for past-due rent and unlawful holdover was continued to a date to be set at a later time. On January 7, 1997, the county court entered a judgment for restitution of the premises in favor of Sunburst Properties and against Norfolk. A copy of the judgment was mailed to McArthur by the clerk of the county court, but McArthur failed to send a copy of the judgment to Norfolk or advise her of the same. McArthur denies receiving notice of the judgment for restitution. After being served with a writ of assistance by the sheriff of Lancaster County, Norfolk made arrangements to move out of her apartment. Norfolk attempted to contact McArthur by telephone, leaving a message asking why she had not been notified by McArthur of the county court's writ of restitution. McArthur failed to return the call. Norfolk subsequently received a bill from McArthur for the remainder of what she owed him, where-

upon she called McArthur's office and left another message with the receptionist saying that she was not going to pay the bill until she talked to McArthur about why he did not contact her after the judgment was entered against her. Again, Norfolk received no response from McArthur. After the trial on December 31, 1996, Norfolk did not have any direct contact or communication with McArthur.

On January 1, 1997, McArthur moved from his offices at 3601 Calvert Street to 6201 South 58th Street, Lincoln, Nebraska. McArthur put in a forwarding address request for all correspondence with the U.S. Post Office and provided cards to courts and other counsel with whom he was doing business, advising of the change of address. However, McArthur did not file a specific notice in each case in which he was involved and, specifically, did not file a notice of a change of address with the county court in the case against Norfolk. McArthur testified that he later found out a substantial amount of his mail was sent to his old address and was not immediately forwarded.

On February 11, 1997, Mark S. Dickhute, counsel for Sunburst Properties, wrote McArthur a letter and sent it to McArthur's old business address at 3601 Calvert Street. The letter included an offer to settle the remaining claims against Norfolk and to dismiss with prejudice the balance of the petition if Norfolk paid prorated rent and late charges through January 12, 1997, in the amount of $282.48, attorney fees in the amount of $250, and court costs. The letter further stated that if the offer was not amenable to Norfolk, Dickhute would certify the matter for trial. McArthur received the letter but did not forward a copy of the letter to Norfolk or advise her of its contents.

Subsequently, Dickhute filed a motion for default judgment on the two remaining causes of action against Norfolk, seeking $282.48 for past-due rent, damages for willful holdover in the amount of $2,085, and attorney fees in the amount of $245. Dickhute mailed notice of the motion, as well as a notice of a hearing on said motion scheduled for February 28, 1997, to McArthur at his old business address, 3601 Calvert Street. McArthur received notice of the motion for default judgment and the hearing, and he appeared on February 28 for the hearing on the motion. McArthur did not contact or notify Norfolk about

the default hearing. The county court denied the motion for default judgment and set the matter for trial on March 10. At the time of the hearing, Dickhute made the same offer of settlement that was previously offered in his February 11 letter. McArthur again failed to advise Norfolk of the settlement offer and failed to notify her of the March 10 trial date.

On March 5, 1997, Dickhute mailed a letter to the clerk of the county court, advising the court that he would be unavailable for trial on March 10 and requesting that the county court reschedule the trial date until sometime later in March. Dickhute also notified McArthur that he was unavailable for trial on March 10.

On March 6, 1997, the county court set the trial in the case against Norfolk for May 20 and mailed notice of that trial date to Dickhute and McArthur. Although it is unclear to what address the county court sent the notice to McArthur, it is clear that McArthur received the notice because, as discussed below, he sent his associate to court on May 20 to ensure the hearing was covered. McArthur again did not inform Norfolk of the trial date.

On May 16, 1997, the county court called the offices of both Dickhute and McArthur and advised that the county court, on its own motion, was continuing the trial date then set for May 20. The county court at that time indicated on its docket that "[o]n Court's Motion, and by agreement of the parties, this case has been continued to: JUNE 23, 1997, at 9:00 a.m. #16." Notice of this new trial date was mailed to McArthur by the clerk of the county court. It is unclear to what address the notice to McArthur was sent. McArthur admits his office received the telephone call from the county court, but says he was not the one who took the call. McArthur denies any recollection of being advised by oral or written notification that the trial had been rescheduled for June 23, and therefore, he did not notify Norfolk of the same.

On May 20, 1997, McArthur directed his associate to appear at the time and place originally set for the hearing on May 20, to ensure that the previously noticed hearing had in fact been continued. The associate appeared, but apparently did not discover the date on which trial had been rescheduled.

On June 20, 1997, Dickhute telephoned McArthur and left a message with his receptionist that he wanted to talk to McArthur

about "the Norfolk trial on June 23, 1997." Dickhute did not hear back from McArthur. On June 23, trial began in the county court on the two remaining causes of action against Norfolk. Neither McArthur nor Norfolk attended the trial, and judgment was entered pursuant to the evidence against Norfolk for past-due rent and late charges, plus a penalty of three times the monthly rental for willful holdover, for a total judgment against Norfolk in the amount of $2,612.48, plus court costs. Notice of the judgment was sent to McArthur by the clerk of the county court. Although it is unclear to what address the notice of judgment was sent to McArthur, McArthur admits that he received notice of the judgment shortly after it was entered. However, McArthur did not inform Norfolk of the judgment.

Following entry of the judgment, Sunburst Properties filed a garnishment action with Norfolk's employer. Norfolk's receipt of notice that her wages were being garnished was the first notice she received that a judgment had been entered against her. On receipt of notice of the garnishment, Norfolk immediately attempted to contact McArthur by telephone, leaving a message at his office, but she did not hear from McArthur. McArthur admits recalling that he did at some point receive a message that Norfolk had called, advising that she was moving, but the message did not request a return telephone call.

Norfolk then contacted the county court and discovered that on June 23, 1997, judgment had been entered against her for $2,612.48. Norfolk subsequently contacted attorney Paul Conley for assistance. On July 8, Conley sent McArthur a letter informing him that Norfolk had contacted him and that Norfolk's wages were being garnished following the entry of judgment against her. The letter further advised McArthur that Norfolk had informed Conley that she had not been aware of the trial date or the judgment entered against her and that she had attempted to contact McArthur without success. The letter further requested McArthur to take immediate action to quash the garnishment and to set aside the judgment.

On July 16, 1997, McArthur filed a motion to vacate the judgment entered on June 23, as well as a motion to withdraw as Norfolk's counsel. McArthur did not file an answer in which he could have raised defenses to the matter on which judgment was

made. At Dickhute's request, the hearing on both the motion to vacate the judgment and the motion to withdraw was continued until August 1. On that date, McArthur and Dickhute both appeared and argued the motions. On August 8, the county court denied McArthur's motion to vacate the judgment.

The second legal matter at issue involves McArthur's representation of Donald E. Williams. In January 1992, Williams was convicted for third-offense driving under the influence (DUI) and was placed on probation for 5 years. In January 1996, proceedings were begun in the Lancaster County Court to revoke Williams' probation due to allegations that he had consumed alcohol in violation of his probation restrictions. In May, McArthur began representing Williams in his probation revocation case. From the beginning of the professional relationship between McArthur and Williams, it is clear that McArthur was aware that because of the nature of Williams' business, his primary concern was that he not be required to go to jail during the summer months when his business was the busiest.

On August 27, 1996, McArthur represented Williams in the probation revocation hearing. The county court found that Williams had violated his probation, and on October 11, Williams was sentenced to 100 days in jail and a 15-year suspension of his driver's license. On October 14, McArthur, on behalf of Williams, filed a notice of appeal to the district court. The hearing on that appeal occurred on December 18. On December 21, McArthur wrote to Williams to inform him that he had argued the appeal in the district court and that a decision would be forthcoming. On March 31, 1997, the district court affirmed the revocation of Williams' probation by the county court. By letter dated April 2, Williams was informed by the county court that the district court had affirmed the judgment of the county court and that Williams had to report to jail on April 9 to begin serving his sentence.

On April 5, 1997, Williams met with McArthur and informed him that he wanted to appeal the district court's decision. Williams gave McArthur a check that day in the amount of $128 to cover the costs of filing an appeal. The exact content of the discussion on April 5 and several later telephone conversations McArthur recalls to have occurred are subjects of substantial

conflict in the evidence. McArthur recalls that in the April 5 or later conversations with Williams, he advised Williams that he did not believe that a direct appeal would ultimately be successful. McArthur recalls discussing with Williams two potential alternatives to avoid some or all of the results of the probation revocation, which included a motion for new trial on his original conviction for DUI, third offense, and a collateral attack to reopen the third-offense DUI conviction. McArthur recalls that in mid-April, however, he advised Williams that he thought a direct appeal was pointless because of the lack of a meritorious issue for appeal and because ultimate resolution of an appeal would likely result in Williams' beginning to serve his sentence sometime in the summer of 1998, at a time when Williams did not want to serve his sentence. McArthur testified that he told Williams that if the case was not appealed, Williams would probably be looking at going to jail sometime in September 1997. McArthur recalls that Williams simply told him to "take care of it" and that he could not afford to go to jail during the summer and to do what McArthur thought best. McArthur recalls telling Williams at some point in April that he would use the money that was to originally be used for filing an appeal and apply it toward the costs of reviewing and copying Williams' third-offense DUI file and the files on his other DUI cases, and for fees and hearings on a potential collateral attack or a motion for new trial. McArthur recalls that it was clear to him that at least at some point in mid- to late April, Williams understood that a direct appeal was not going to be filed. However, McArthur did not document this agreement in any way.

Williams reported as directed to the Lancaster County jail on April 9, 1997, with an assurance by McArthur that he would do something to get Williams out of jail and forestall further service of the sentence. McArthur contacted the bailiff of the county court, advising that Williams might appeal and that he did not think the county court should have ordered Williams to go to jail because a mandate should not have been issued from the district court as the time for filing an appeal had not yet run. A partial record of the county court, dated April 17, 1997, was received into evidence without objection by either party. The record seems to indicate that a "mandate" was received from the

district court on April 1 and that "an appeal" was filed on April 11 in the county court. The record bears a handwritten note stating that Williams' "[l]icense should not be suspended; appealed 4-11-97." It is clear, however, that no appeal had been filed at this point with the district court or the county court and in any event, an appeal at the county court level would have been ineffective. Williams was released from jail after serving approximately 3 days of his 100-day sentence.

By letter dated April 18, 1997, the Nebraska Department of Motor Vehicles (DMV) advised Williams that "we are in receipt of an amended abstract of conviction from the Lancaster County Court indicating you have appealed your . . . Driving Under the Influence-3rd offense. Therefore, the Order of Suspension of April 11, 1997 is hereby rescinded and you are eligible to drive." There is no evidence in the record and no explanation as to why the county court felt that at least some element of either Williams' third-offense DUI or the probation revocation had been appealed, or why it apparently notified the DMV that it had been appealed. As a result of the letter Williams received from the DMV, Williams apparently was of the understanding that McArthur had filed an appeal. Williams testified that he believed he had been released because an appeal had been filed. McArthur testified that in his opinion, the release occurred because the county court had ordered Williams to report to jail too early (before the time to appeal had run and before the mandate should have come down from the district court). On review of the record, it is possible that Williams' release was the result of confusion by the county court or a misunderstanding on its part that an appeal had been filed.

McArthur testified that on April 30, 1997, after business hours, he received a call from Williams, inquiring whether his appeal had been filed. McArthur testified that he told Williams that no appeal had been filed because the two of them had decided not to file an appeal. McArthur recalls Williams' responding that he wanted McArthur to keep appealing because he did not want to go to jail during the summer. McArthur testified that he told Williams that an appeal could not be filed at this point because it was too late and that he intended to file another motion instead. McArthur stated that Williams, however, told

him to go ahead and file the appeal late because that would at least delay his incarceration. McArthur testified that despite his belief that the appeal would be futile, he filed Williams' notice of appeal with the district court on May 1, 1 day after the deadline for filing an appeal.

Williams denies that any conversation occurred either on April 30, 1997, or later, in which McArthur advised that filing the appeal was too late. Williams testified that he thought an appeal had been filed because he had been released from jail and because of the letter he received from the DMV advising that his driving suspension of April 11 had been rescinded because of a pending appeal. Williams further testified that he first discovered an appeal had been filed late after he had recovered his file from McArthur and had it reviewed by new counsel. Williams testified that to his memory, McArthur had always told him his chances of an appeal were good and that McArthur had told the same thing to Williams' wife.

By letter dated June 16, 1997, the Nebraska Court of Appeals informed McArthur that Williams' appeal was dismissed because it was filed out of time. McArthur admits that he did not inform Williams that the appeal had been dismissed after he received the notification from the Court of Appeals or at any time thereafter. By letter dated July 28, 1997, the district court also informed McArthur that the appeal had been dismissed. McArthur again failed to inform Williams that the appeal had been dismissed.

On August 4, 1997, McArthur filed a motion for new trial in Williams' original third-offense DUI case in the county court. McArthur informed Williams that he filed such a motion, but again did not tell him that his appeal to the Court of Appeals had been dismissed. At some point after McArthur filed the motion for new trial, another motion for new trial that McArthur had filed in another case based on the same grounds as the motion in Williams' case was overruled. McArthur testified that he realized at that point that his motion for new trial in Williams' case was not grounded in existing law, and therefore, McArthur dismissed the motion for new trial and decided to pursue a collateral attack instead. However, McArthur did not advise Williams that he had dismissed the motion for new trial.

McArthur apparently had some discussion with Williams after August 1, 1997, that he intended to pursue a collateral attack rather than a motion for new trial and that this decision would bring about a change of an expected hearing date after McArthur had filed a new petition making his collateral attack. McArthur testified that sometime in October, he ran into Williams at the Lancaster County courthouse and in a hurried conversation, advised Williams that he was "taking care of" the collateral attack he had "anticipated filing." Williams testified that he recalls speaking with McArthur on this occasion and asking him how his case was going and was left with the impression that his case was being taken care of. Williams denied that McArthur mentioned anything about a collateral attack or the withdrawal of the motion for new trial. No collateral attack was ever filed.

By a letter dated October 9, 1997, from the county court, Williams was informed that the "Supreme Court" had affirmed the decision of the county court and that he needed to report to jail on October 15. On October 10, McArthur also wrote a letter to Williams informing him that he had to report to jail on October 15. McArthur failed to correct the errors in the county court's letter of October 9, in that it was not the "Supreme Court" but the Court of Appeals that had dismissed the appeal and that the Court of Appeals did not affirm the decision of the county court, but, rather, that the appeal had been dismissed for being filed out of time. At no time did McArthur inform Williams that the appeal had been filed late and had been dismissed for that reason.

Williams testified that he was "shocked" when he received the letter from the county court and attempted to call McArthur multiple times thereafter, but was unable to make direct contact, speaking only with a secretary, receptionist, or some other representative of McArthur's. Williams' wife also attempted several telephone calls without success. Several of these telephone calls were taken by McArthur's legal secretary, who stated that she informed McArthur of several of the telephone calls. In his conversations with the legal secretary, Williams apparently expressed concern about going to jail because of the effect it would have on his business.

On October 15, 1997, Williams reported to jail. On October 16, Williams' wife went to McArthur's office and picked up an application for a work release. On October 17, Williams' wife called McArthur's office, wanting to know whether the work release had been approved. Williams called the same day and asked about his bill and said he wanted to pick up his file.

After Williams picked up his case file, he contacted a different attorney to look into his case. Upon reviewing his case file, Williams and his new attorney discovered that Williams' appeal was never heard because it had been filed a day late and was dismissed for that reason. Williams and his new attorney also discovered that McArthur had dismissed the motion for new trial.

Disciplinary Rule Violations

After reviewing the record of the proceedings de novo, we find that the evidence clearly and convincingly shows that McArthur violated DR 1-102(A)(1) and DR 6-101(A)(3) in his representation of Norfolk, in that he neglected a legal matter entrusted to him.

As to McArthur's representation of Williams, we find the evidence clearly and convincingly shows that McArthur violated DR 1-102(A)(1) and DR 6-101(A)(3), in that he neglected a legal matter entrusted to him.

Imposition of Penalty

[3,4] We now address the appropriate disciplinary measure to be taken. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following facts: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. NSBA v. Johnson*, 256 Neb. 495, 590 N.W.2d 849 (1999); *State ex rel. NSBA v. Schleich*, 254 Neb. 872, 580 N.W.2d 108 (1998). Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case. *State ex rel. NSBA v. Johnson, supra.*

In both matters at issue, it is clear that McArthur neglected a legal matter principally in failing to keep his clients informed of deadlines, settlement offers, and court decisions and the potential consequences thereof, and in failing to keep himself adequately informed so that he could properly inform his clients. At oral argument, McArthur's counsel conceded that McArthur's actions resulted in ethical violations.

Specifically, in regard to McArthur's representation of Norfolk, he failed to keep Norfolk informed of the status of her case, failed to return telephone calls, failed to inform her of settlement offers, and failed to notify her of hearing dates and the judgment entered against her. In short, McArthur failed by neglect to adequately protect the interests of Norfolk and failed to act competently in representing Norfolk. McArthur admitted in his answer to the formal charges that he neglected a legal matter entrusted to him.

As to McArthur's representation of Williams, McArthur neglected his duty to represent Williams by failing to advise Williams that the appeal to the Court of Appeals had been dismissed as filed out of time and by failing to inform Williams that he had dismissed Williams' motion for new trial. These errors constitute a breach of McArthur's professional responsibility that warrant discipline.

[5] The determination of an appropriate penalty to be imposed on an attorney also requires consideration of any mitigating factors. *State ex rel. NSBA v. Johnson, supra*; *State ex rel. NSBA v. Schleich, supra*. McArthur has satisfied the judgment rendered against Norfolk, although it is unclear whether Norfolk has been made whole with regard to the $500 garnishment withheld from her wages and any additional attorney fees incurred. McArthur has also instituted office practices to ensure that more communication to clients is done in writing and that clients are sent informational copies of correspondence, orders, and journal entries. In addition, deadlines are now kept track of in his office by a particular person who is given authority to respond with follow-up information to inquiries from clients. We also note that at the time these violations occurred, McArthur had been in practice only for approximately 3½ years.

However, a proceeding to discipline an attorney is a trial de novo on the record, in which this court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. See *State ex rel. NSBA v. Johnson*, 256 Neb. 495, 590 N.W.2d 849 (1999). Thus, while we may consider the recommendation of a referee regarding the appropriate sanction to be imposed, the referee's recommendation regarding a sanction receives less deference from this court than do his or her findings on matters of disputed fact.

[6,7] To determine what sanction is appropriate, each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances. *State ex rel. NSBA v. Bruckner*, 249 Neb. 361, 543 N.W.2d 451 (1996); *State ex rel. NSBA v. Gleason*, 248 Neb. 1003, 540 N.W.2d 359 (1995). This determination does not occur in a vacuum, however, and the propriety of a sanction must be considered with reference to the sanctions imposed by this court in prior cases presenting similar circumstances. Our prior decisions reveal that neglect of the kind presented in the instant case has previously been punished by a suspension of no less than 1 year.

Most recently, we decided *State ex rel. NSBA v. Aupperle*, 256 Neb. 953, 594 N.W.2d 602 (1999). In that case, the respondent was charged with several counts of failing to act upon cases entrusted to him and failing to communicate with his clients regarding those cases. *Id.* The respondent admitted to the charges and presented evidence that he had been suffering from alcoholism, had voluntarily ceased the practice of law when he realized the degree to which alcohol had been affecting his practice, and had taken steps to control his alcohol problem. *Id.* We recognized those mitigating circumstances, yet still imposed an indeterminate suspension of no less than 2 years, to be followed by a 2-year period of probation, and conditioned reinstatement upon payment of the costs of the disciplinary proceeding, a showing of continued participation in alcohol treatment, and the submission of a plan for supervised probation. *Id.*

In the present case, there are similar allegations of neglect, and no comparable admission of responsibility on the part of McArthur, yet the penalty recommended by the referee to be imposed is significantly less severe.

In *State ex rel. NSBA v. Calinger*, 248 Neb. 903, 539 N.W.2d 846 (1995), the respondent was charged with a single count of neglect, the result of which was the dismissal of the client's workers' compensation petition. In that case, there was no indication of prior charges, yet we imposed a 1-year suspension from the practice of law. *Id.*

Similarly, in *State ex rel. NSBA v. Schmeling*, 247 Neb. 735, 529 N.W.2d 799 (1995), the respondent was charged with a single count of neglect due to his failure to timely file a chapter 13 bankruptcy plan. The respondent also failed to discuss the revised bankruptcy plan with his clients or to inform them when the bankruptcy petition was dismissed. *Id.* We suspended the respondent from the practice of law for a period of 1 year. *Id.*

In *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989), the respondent was disbarred not only for his neglect of his clients' interests but also for his conduct in the course of defending himself against the disciplinary charges. Among the excuses offered by the respondent was that the complaining witness, a beneficiary of the estate for which the respondent was responsible, was elderly and confused. *Id.* We found this defense to be without merit, stating:

> A lawyer, with the great responsibilities that that position requires, should not disparage his clients or those for whose benefit he is purportedly acting, and hide behind their alleged faults to excuse his own ineptitude. Not only is such an approach unmannerly and unseemly, it is not recognized as a defense to disciplinary matters. If a lawyer accepts a case, that case must be handled professionally. If, due to personal relationship problems, the lawyer cannot handle his responsibility, the lawyer must withdraw and turn the matter over to a lawyer who has the competence and integrity to conclude the legal matter properly.

Id. at 474, 441 N.W.2d at 178.

[8] Similarly, in the present case, McArthur has sought in part to blame his misconduct in the Williams case on the alleged ine-

briation and confusion of his client. McArthur's argument presents a fundamental misunderstanding of his duty as a lawyer. As noted in *State ex rel. NSBA v. Kirshen, supra*, a lawyer is responsible for adequately representing his client regardless of that client's behavior, and if that proves impossible, then the lawyer should withdraw from representation of that client.

If McArthur's client was indeed confused about the legal posture of his case, then it was McArthur's responsibility to ensure that his client was properly advised regarding his legal rights and that appropriate actions were taken to secure those rights. Instead, McArthur evidently left his client ignorant of the posture of the case and ultimately filed an untimely appeal in lieu of a promised "collateral attack" that never materialized. If McArthur's client was indeed ignorant or confused regarding his legal rights, it was McArthur's place to correct that condition and not to rely upon it as an excuse for his own neglect.

In *State ex rel. NSBA v. Rasmussen*, 232 Neb. 53, 439 N.W.2d 481 (1989), the respondent was charged with failing to attend to a client's discrimination claim. Specifically, the respondent failed to appear for a pretrial conference, failed to respond to a motion for summary judgment even after he asked for and was granted additional time to file a response, and failed to notify his client when summary judgment was entered against her. *Id.* There was no indication of prior discipline of the respondent, yet this court entered a judgment of disbarment. *Id.*

In *State ex rel. Nebraska State Bar Association v. Walsh*, 206 Neb. 737, 294 N.W.2d 873 (1980), the respondent was charged with misconduct in his representation in a workers' compensation action, as well as his issuance of an insufficient-funds check in another matter. In the workers' compensation action, we noted that the respondent knew that his clients did not understand the lack of merit to their claim, yet he continued to prepare groundless pleadings in an effort to mollify them. *Id.* With reference to the preparation of groundless pleadings, we said that "nothing can be said to excuse such conduct." *Id.* at 747, 294 N.W.2d at 878. We ordered that the respondent be disbarred. *Id.*

Similarly, in the present case, McArthur has claimed that he knowingly filed an untimely appeal in the Williams case in order to satisfy the demands of his client. Even if this questionable

explanation were true, it does little to mitigate the charge against McArthur. As in *State ex rel. Nebraska State Bar Association v. Walsh, supra*, McArthur prepared and filed a frivolous appeal solely to satisfy the unreasonable demands of his client. If that is true, McArthur's filing of an appeal he knew to be frivolous, solely for the purpose of delaying the administration of justice, could independently constitute a violation of Canon 7, DR 7-102, of the Code of Professional Responsibility.

In short, the discipline recommended to be imposed in this case is inadequate and inconsistent with our prior cases. The record presents none of the mitigating circumstances that this court has previously considered when determining the appropriate discipline to be imposed and actually evidences behavior by McArthur that we have in the past specifically condemned. For the misconduct with which McArthur was charged, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, *and primarily* the general lack of responsibility taken by McArthur for his acts, we hereby suspend McArthur from the practice of law for a period of 1 year.

CONCLUSION

Therefore, we find in our de novo review that McArthur should be suspended from the practice of law for a period of 1 year, effective immediately.

JUDGMENT OF SUSPENSION.

MILLER-LERMAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
MICHAEL W. RYAN, APPELLANT.
601 N.W.2d 473

Filed September 10, 1999. No. S-97-1035.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.

2. **Postconviction: Proof: Constitutional Law.** A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the state or federal Constitution.
3. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
4. **Postconviction: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.
5. ___: ___. A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal.
6. ___: ___. An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion.
7. **Postconviction.** Once a motion for postconviction relief has been judicially determined, any subsequent motion for such relief from the same conviction and sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the prior motion was filed.
8. ___. Postconviction proceedings are not a tool whereby a defendant can continue to bring successive motions for relief.
9. ___. The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.
10. ___. A defendant is entitled to bring a second proceeding for postconviction relief only if the grounds relied upon did not exist at the time the first motion was filed.
11. **Postconviction: Effectiveness of Counsel: Appeal and Error.** If a defendant brings a motion for postconviction relief based on ineffective assistance of trial or direct appeal counsel which could not have been raised earlier, this is a basis for relief that did not exist at the time of the prior proceeding.
12. **Postconviction: Appeal and Error.** If a defendant brings a successive motion for postconviction relief based on newly discovered evidence that was not available at the time the prior motion was filed, this is a basis for relief that did not exist at the time of the prior proceeding because it was not available to the defendant.
13. **Evidence: Words and Phrases.** Newly discovered evidence is evidence material to the defense that could not with reasonable diligence have been discovered and produced in the prior proceedings.
14. **Trial: Judges: Words and Phrases.** An ex parte communication occurs when a judge communicates with any person concerning a pending or impending proceeding without notice to an adverse party.
15. **Due Process: Sentences.** The sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause.
16. **Trial: Judges: Witnesses.** The judge presiding at a trial may not testify in that trial as a witness.
17. **Trial: Judges: Recusal.** A judge who initiates or invites and receives an ex parte communication concerning a pending or impending proceeding must recuse himself or herself from the proceedings when a litigant requests such recusal.
18. **Postconviction: Constitutional Law.** Postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations.

19. **Constitutional Law: Judges: Recusal.** The recusal rule as set forth in *State v. Barker*, 227 Neb. 842, 420 N.W.2d 695 (1988), is not a constitutional right in and of itself.
20. ___: ___: ___. The requirement in *State v. Barker*, 227 Neb. 842, 420 N.W.2d 695 (1988), that a judge who has participated in an ex parte communication must recuse himself or herself upon request is based upon Nebraska law, and not upon federal constitutional grounds.
21. **Constitutional Law: Due Process: Trial: Judges.** The right to an impartial judge is guaranteed under the Due Process Clause of the 14th Amendment to the U.S. Constitution and under the due process clause of the Nebraska Constitution. This right extends to both the trial and the sentencing hearing. The parameters of this right are coextensive under the federal and Nebraska Constitutions.
22. ___: ___: ___: ___. Subjecting a defendant to a trial before a judge having a direct personal pecuniary interest in convicting the defendant causes a denial of due process in violation of the 14th Amendment.
23. **Criminal Law: Appeal and Error.** Structural error analysis is required when the error complained of deprives the defendant of basic protections without which the criminal trial process cannot reliably serve its function as a vehicle for determination of guilt or innocence, or when the error affects the entire framework of the proceedings. All other types of errors which occur within the trial and sentencing process itself are subject to harmless error review.
24. **Constitutional Law: Judges: Sentences.** It is constitutionally permissible for a judge to consider as part of the sentencing process the impact of the crime on a victim's family.
25. **Constitutional Law: Judges: Recusal: Proof.** A defendant must show that an instance of actual bias on the part of the trial court occurred in order to indicate a constitutional violation of the right to an impartial judge.
26. **Constitutional Law: Effectiveness of Counsel: Proof.** In order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and Neb. Const. art. I, § 11, the test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), requires that a 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.
27. **Effectiveness of Counsel: Proof.** If it is more appropriate to dispose of an ineffectiveness claim due to a lack of sufficient prejudice, that course should be followed.
28. ___: ___. The prejudice component of the ineffective assistance of counsel test focuses on whether counsel's performance rendered the results of the proceeding unreliable or fundamentally unfair by depriving a defendant of a substantive or procedural right.
29. ___: ___. A defendant has the burden to show how an attorney's actions or inactions prejudiced the defendant.

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

Steven E. Achelpohl and Michael A. Nelsen, of Hillman, Forman, Nelsen, Childers, Lingo & McCormack, for appellant.

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

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

HENDRY, C.J.

I. INTRODUCTION

Michael W. Ryan (Ryan) appeals the denial of his second motion for postconviction relief, wherein the district court found that Ryan was not entitled to any relief regarding his conviction and sentence of death for the murder of James Thimm. Ryan's postconviction claims involve two primary issues: (1) an alleged ex parte communication between his sentencing judge and Thimm family members prior to the judge imposing sentence and (2) newly asserted allegations that Ryan was incompetent to stand trial for Thimm's murder. For the reasons set forth in this opinion, we affirm the judgment of the district court and deny Ryan's motion for postconviction relief.

II. BACKGROUND

In 1986, Ryan was convicted of murder in the deaths of Thimm and Luke Stice. Ryan's second motion for postconviction relief concerns his trial and sentence of death for the first degree murder of Thimm, as did his direct appeal and first motion for postconviction relief. The details surrounding this case are fully set forth in our opinion rendered in Ryan's direct appeal, *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989), *cert. denied* 498 U.S. 881, 111 S. Ct. 216, 112 L. Ed. 2d 176 (1990) (*Ryan I*), and the appeal of his first motion for postconviction relief, *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995) (*Ryan II*). For purposes of Ryan's present appeal, the pertinent facts are as follows:

In April 1986, after a trial by jury, Ryan was found guilty of first degree murder in the death of Thimm. The sentencing hearing for this crime did not begin until September 15, 1986. The Honorable Robert T. Finn presided over Ryan's trial and sen-

tencing for Thimm's murder, as well as Ryan's plea and sentencing for Stice's murder. Judge Finn also presided over the proceedings for the other members of a cult formed by Ryan for their part in the murders, including the trial and sentencing of Ryan's son, Dennis Ryan.

On July 28, 1986, Ryan pled no contest to a charge of second degree murder for the death of Stice and was found guilty. On August 28, Ryan's sentencing hearing for Stice's murder was held. On August 28, after Ryan's sentencing hearing for Stice's murder ended, Judge Finn met with members of the Stice family. During this meeting, Stice family members questioned Judge Finn and the attorney prosecuting the Stice case about the implications of Ryan's plea of no contest to the second degree murder of Stice.

On September 10, 1986, Richard Goos, one of the trial attorneys for Ryan, filed a motion asking Judge Finn to disqualify himself from Ryan's upcoming sentencing hearing regarding Thimm's murder. This motion was based on the fact that Goos had learned of the August meeting with the Stice family and believed that this ex parte conversation required the judge to recuse himself from sentencing Ryan for Thimm's murder.

On September 15, 1986, prior to the sentencing hearing for Thimm's murder, Judge Finn took up Goos' motion to disqualify himself. Goos was concerned about the possibility that the Thimm case had been discussed at the August meeting, and Goos questioned Judge Finn about the content of the discussion between Judge Finn and the Stice family. Judge Finn stated that the meeting "was just to answer questions about the proceedings that went on pertaining to that [Stice] case. There was absolutely no discussion about any other cases other than that [Stice] case." Judge Finn also stated that he generally asked family members at the conclusion of each case if they would like to visit with the court to ask questions about the legal proceedings and that usually families did want to do so. Thereafter, Judge Finn overruled the motion to disqualify himself and proceeded with the sentencing hearing. The sentencing hearing took 2 days, concluding on September 16. On October 16, Judge Finn sentenced Ryan to death for the murder of Thimm.

Ryan then took a direct appeal from his conviction and sentence for Thimm's murder. Among his 60 assignments of error, Ryan asserted that the trial court erred in refusing to disqualify itself from presiding over the September sentencing hearing and that Ryan was denied an impartial judge at trial and during the sentencing hearing, in violation of due process. In part, these assignments were based on the assertion that Judge Finn met ex parte with members of the Stice family in August prior to sentencing Ryan to death, that members of the Thimm family were also present at the Stice meeting, and that the conversation at the Stice meeting had a prejudicial impact on Ryan. In *Ryan I*, we found no merit to any of the assigned errors. In particular, we noted that there was no evidence that Judge Finn met with members of the Thimm family. We also noted that the August 1986 Stice meeting could not have affected Ryan's sentence for Thimm's murder because Judge Finn expressly excluded the Stice murder as a factor in the sentencing process. In his direct appeal, Ryan did not raise any issues regarding his competency to stand trial for Thimm's murder.

In 1991, Ryan filed his first motion for postconviction relief. In preparing for the evidentiary hearing on this motion, Ryan's appointed attorney, Robert Creager, investigated the issue of possible ex parte meetings between Judge Finn and members of the Thimm family. Creager visited with Judge Finn on the telephone to determine if any such meetings took place. Judge Finn told Creager that he had not had any ex parte meetings with the Thimm family and signed an affidavit on April 27, 1993, to that effect. In his affidavit, Judge Finn stated that "no members of the Thimm family were present at the [Stice] meeting; nor did your Affiant have any contacts with members of the Thimm family during the course of the proceedings involving Michael Ryan prior to and including the time of his sentencing."

The district court denied Ryan any relief based on his first motion for postconviction relief. Ryan appealed this decision in *Ryan II*. In his appeal, Ryan assigned 14 errors and 37 additional issues. Ryan again asserted that his due process rights were violated by Judge Finn's refusal to disqualify himself from the September sentencing hearing. In addition, Ryan asserted that he had been deprived of his right to effective assistance of coun-

sel in that his trial counsel had failed to properly raise the issue of judicial misconduct regarding Judge Finn's ex parte communication with the Stice family. We affirmed the district court's decision, noting that Ryan was not prejudiced by the ex parte meeting with the Stice family. We also noted that the due process issues regarding the ex parte meeting with the Stice family had been dealt with on direct appeal and that Ryan was not entitled to relitigate the same issues in a postconviction proceeding. In his first motion for postconviction relief, Ryan did not raise any issues regarding his competency to stand trial for Thimm's murder.

In November 1995, Ryan filed a pro se writ of habeas corpus and stay of execution in federal court. The court appointed counsel to represent Ryan during the habeas proceedings. In the spring of 1996, appointed counsel made a request to amend the habeas complaint to include allegations of an ex parte contact between Judge Finn and Thimm family members. During a deposition taken by Ryan's appointed counsel, Daneda Heppner, Thimm's foster cousin, testified that she and another member of the Thimm family met with Judge Finn in May 1986, after Dennis Ryan was sentenced for his part in Thimm's murder. Heppner is a niece of Carl and Hilda Schmidt, Thimm's foster parents, and considered herself to be Thimm's cousin even though they were not related by blood.

Heppner's information was corroborated by a letter she wrote on May 12, 1986. The letter, in part, discussed a meeting which had occurred on May 9, 1986, between Heppner, Judge Finn, Karen Schmidt (the Schmidts' daughter), and Garnetta Butrick (Stice's grandmother).

Heppner attended the trials for Ryan and other members of Ryan's cult regarding Thimm's murder. She wrote this letter to her family to inform them of the proceedings regarding Dennis Ryan, Ryan's son. In May 1986, Heppner sent the letter to her family, along with some related newspaper clippings. Heppner's father later returned the newspaper clippings and the letter to her.

The letter described in a fairly detailed fashion the meeting on May 9, 1986, between Judge Finn, Heppner, Karen Schmidt, and Butrick. In particular, the letter noted that after Judge Finn pronounced Dennis Ryan's sentence, Judge Finn's bailiff came

over to them and invited them to meet with the judge if they had any questions about the proceedings. The bailiff also asked Dennis Ryan's mother if she would like to meet with the judge, but she declined.

The letter detailed the following information about their conversation: Judge Finn discussed the costs of the various trials and his feelings that the defense attorney fees were excessive. They discussed their religious beliefs and wondered how Ryan could exert such power over the other cult members. Karen Schmidt said that Thimm had not been raised to believe in the kinds of things practiced by the cult. Butrick asked why they did not charge some cult members for their actions and why more was not done to protect her grandson, Stice, from harm. Judge Finn opined that none of the defendants seemed truly sorry for their actions. Judge Finn also explained that a life sentence usually meant that a defendant served about 14 to 15 years before becoming eligible for parole. They discussed the idea that someone should write a book about the case, and Judge Finn offered to make the public record available to Karen Schmidt if she decided to write about it.

The federal court dismissed Ryan's habeas complaint without prejudice, finding that any claim regarding a meeting between Finn and members of the Thimm family must first be properly exhausted under state remedies. The federal court noted that the Nebraska Supreme Court had not had the opportunity to apply due process principles to the claim of an ex parte meeting with members of the Thimm family, since the court had addressed only the meeting with the Stice family in *Ryan I* and *Ryan II*.

Accordingly, in 1997, Ryan filed a second motion for postconviction relief in the district court for Richardson County. The Honorable Gerald E. Moran was appointed to hear the motion. On May 12 through 16, 1997, Judge Moran held an evidentiary hearing at which Heppner, Karen Schmidt, Judge Finn, Goos, and Creager, among others, testified. Judge Finn testified that he had no recollection of the May 9, 1986, meeting with Heppner, Karen Schmidt, and Butrick. However, Judge Finn agreed that based on the Heppner letter such a meeting did occur. Judge Finn also testified that he had no recollection of the May 9 meet-

ing when he overruled the motion to disqualify himself on September 15, 1986.

Heppner testified that she remembered meeting with Judge Finn on May 9, 1986, at the bailiff's invitation. She also testified that while her letter contained some inaccuracies and dramatic license, it was essentially accurate. Karen Schmidt also testified that the May 9 meeting had taken place.

Goos testified that he had no knowledge during the trial or afterward of a meeting between Judge Finn and members of the Thimm family. His motion to disqualify Judge Finn was based on the ex parte meeting with the Stice family in August. Goos also testified that he believed Ryan had been competent to stand trial for Thimm's murder based on his interaction with Ryan and Ryan's ability to meaningfully participate in his defense throughout the trial. In particular, Goos noted that "what delusions [Ryan] had about Yahweh . . . never seemed to interfere with our conversations or his understanding of the case or what was at stake."

Creager testified that he also had no indication of any meetings between Judge Finn and Thimm family members based on his conversation with Judge Finn and the previously discussed affidavit. Creager further testified that he considered the issue of Ryan's competency to stand trial in preparing for the first motion for postconviction relief. However, he believed that the competency issue was a weak claim and inconsistent with other issues he needed to address.

At the conclusion of the evidentiary hearing, the district court denied Ryan relief on all of his claims. In particular, Judge Moran found that an improper ex parte meeting did occur on May 9, 1986, between Judge Finn and Thimm family members. However, Judge Moran found that any claims related to the May 9 meeting were procedurally barred because Ryan and his counsel knew or reasonably should have known about the May 9 meeting during the direct appeal and the first postconviction proceedings. Judge Moran went on to determine that even if the ex parte meeting between Judge Finn and Thimm family members was not procedurally barred, there was no violation of *State v. Barker*, 227 Neb. 842, 420 N.W.2d 695 (1988), and that Ryan suffered no prejudice as a result of the meeting.

Further, Judge Moran found that Ryan was not prejudiced by Judge Finn's refusal to recuse himself. Specifically, Judge Moran found that the content of the May 9, 1986, meeting revealed no bias on the part of Judge Finn regarding Ryan's sentence and that Judge Finn was given no new or additional information regarding Thimm's murder. Because there was no actual prejudice to Ryan, Judge Moran concluded that Ryan's constitutional rights were not violated.

Additionally, Judge Moran found that claims related to Ryan's competency to stand trial were procedurally barred because Ryan could have raised this issue previously and failed to do so in either *Ryan I* or *Ryan II*. Judge Moran further determined that even if such claims were not barred, claims related to competency did not entitle Ryan to relief because Ryan was clearly competent during his trial for Thimm's murder. Finally, Judge Moran found that all claims related to the ineffective assistance of counsel also failed because such claims were procedurally barred or, alternatively, because Ryan was not prejudiced by trial counsels' actions.

III. ASSIGNMENTS OF ERROR

Ryan assigns 34 legal and factual errors in the district court's order. We rephrase and summarize these errors below.

First, Ryan contends, regarding the ex parte communication between Judge Finn and members of the Thimm family, that the district court erred in (1) its legal conclusion that the May 9, 1986, meeting between Judge Finn and members of the Thimm family did not violate *State v. Barker, supra*, or Ryan's due process rights regarding sentencing; (2) its legal conclusion that any claim arising out of the May 9 meeting was procedurally barred and that the May 9 meeting did not require that Ryan be resentenced; (3) its factual finding that Ryan and his lawyers knew about the May 9 meeting during trial and during subsequent appeals; (4) not finding that Judge Finn attempted to conceal the May 9 meeting; (5) finding that trial evidence was not discussed at the May 9 meeting and that the Thimm family did not discuss their feelings about the possible sentences to be imposed on Ryan; (6) finding that statements made by Judge Finn at the May 9 meeting did not reflect prejudice and bias on Judge

Finn's part; and (7) finding that the presumption of prejudice raised by the May 9 meeting was rebutted beyond a reasonable doubt by the State.

Regarding the cumulative effect of the ex parte conversation, Ryan contends that the trial court also erred in (8) its conclusion that the cumulative effect of Judge Finn's misconduct, in particular, turning his back on Ryan, did not violate Ryan's due process rights; (9) finding that the letter regarding the May 9, 1986, meeting was not new evidence; (10) concluding that it was not plain error for Judge Finn to turn his back on Ryan while Ryan was testifying; and (11) finding that Ryan was not prejudiced by the May 9 meeting.

Ryan also contends that the trial court erred in (12) concluding that a claim for ineffective assistance of counsel regarding the ex parte meeting was procedurally barred; (13) finding that the grounds for this claim, i.e., the letter regarding the May 9, 1986, meeting, were known or discoverable prior to 1996; (14) finding that Ryan was not prejudiced by trial counsel's failure to properly investigate the facts regarding the alleged ex parte meetings; and (15) failing to consider whether trial counsel's failure to investigate the ex parte conversations more fully rendered trial counsel's performance constitutionally deficient.

Regarding the issue of competency, Ryan contends that the trial court erred in (16) its legal conclusion that trial counsel's failure to request a competency hearing did not violate Ryan's right to effective assistance of counsel; (17) concluding that the issue regarding failure to request a competency hearing claim was procedurally defaulted by Ryan's failure to address this in his direct appeal or first postconviction appeal; (18) concluding that it was not plain error for trial counsel not to have requested a competency hearing; (19) finding that Ryan's psychiatrist did not timely disclose his opinion that Ryan was incompetent to stand trial, or timely disclose serious reservations about his competency to stand trial; (20) finding that trial counsel did not observe anything which would cause them to suspect Ryan's incompetence, report this to the judge, and request a competency hearing; (21) its legal conclusion that the failure of the trial judge to order a competency hearing sua sponte did not violate Ryan's due process rights; (22) its conclusion that the claim

that the judge should have ordered a competency hearing was procedurally defaulted; (23) its conclusion that failure of the judge to order sua sponte a competency hearing was not plain error; (24) its conclusion that the facts as presented to Judge Finn did not establish sufficient doubt as to Ryan's competency, requiring him to order a competency hearing; (25) its conclusion that the trial of Ryan did not violate substantive due process because Ryan was not incompetent at the time of trial; (26) its conclusion that it was not plain error to allow Ryan to stand trial while incompetent; (27) its conclusion that the substantive due process claim regarding competency was procedurally defaulted; and (28) its factual finding that Ryan was in fact competent at the time of trial.

IV. STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Tucker, ante* p. 496, 598 N.W.2d 742; *State v. Smith*, 256 Neb. 705, 592 N.W.2d 143 (1999); *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

[2] A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the state or federal Constitution. *State v. Smith, supra*; *State v. Silvers, supra.*

[3] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Louthan, ante* p. 174, 595 N.W.2d 917 (1999); *State v. Spotts, ante* p. 44, 595 N.W.2d 259 (1999).

[4] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. See, *State v. Bennett*, 256 Neb. 747, 591 N.W.2d 779 (1999); *State v. Moore*, 256 Neb. 553, 591 N.W.2d 86 (1999).

V. ANALYSIS

1. MAY 9, 1986, MEETING

[5-7] Ryan claims the district court erred in finding that any claims with regard to the May 9, 1986, meeting are procedurally barred. A motion for postconviction relief cannot be used to

secure review of issues which were known to the defendant and could have been litigated on direct appeal. *State v. Moore, supra*; *State v. Dandridge*, 255 Neb. 364, 585 N.W.2d 433 (1998). Additionally, an appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion. *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). Once a motion for postconviction relief has been judicially determined, any subsequent motion for such relief from the same conviction and sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the prior motion was filed. *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994).

[8,9] These procedural rules are necessary because postconviction proceedings are not a tool whereby a defendant can continue to bring successive motions for relief. See, *State v. Fletcher*, 253 Neb. 1029, 573 N.W.2d 752 (1998); *State v. Thieszen*, 252 Neb. 208, 560 N.W.2d 800 (1997); *State v. Whitmore*, 238 Neb. 125, 469 N.W.2d 527 (1991) (purpose of affording postconviction relief is not to permit defendant endless appeals on matters already decided). The postconviction process exists to correct prejudicial constitutional error in criminal proceedings. See Neb. Rev. Stat. § 29-3001 (Reissue 1995). The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity. See *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991). A criminal defendant cannot wait to see if some appellate claims will succeed and, when they do not, dust off other claims and subsequently attempt to litigate them. See, *State v. Fletcher, supra*; *State v. Thieszen, supra; State v. Whitmore, supra.*

[10-12] A defendant is entitled to bring a second proceeding for postconviction relief only if the grounds relied upon did not exist at the time the first motion was filed. *State v. Otey, supra.* We have recognized two circumstances which provide a new ground for relief constituting an exception to the procedural bar in postconviction proceedings. First, if a defendant brings a motion for postconviction relief based on ineffective assistance

of trial or direct appeal counsel which could not have been raised earlier, this is a basis for relief that did not exist at the time of the prior proceeding. *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993). Second, if a defendant brings a successive motion for postconviction relief based on newly discovered evidence that was not available at the time the prior motion was filed, this is a basis for relief that did not exist at the time of the prior proceeding because it was not available to the defendant. See, *State v. Keithley*, 247 Neb. 638, 529 N.W.2d 541 (1995); *State v. Lindsay, supra*. Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. See, *State v. Bennett*, 256 Neb. 747, 591 N.W.2d 779 (1999); *State v. Moore*, 256 Neb. 553, 591 N.W.2d 86 (1999).

(a) Ex Parte Communication

[13] Ryan asserts that the Heppner letter is newly discovered evidence establishing that Judge Finn met ex parte with the Thimm family and that, therefore, his claims regarding this meeting are not procedurally barred. Generally, newly discovered evidence is evidence material to the defense that could not with reasonable diligence have been discovered and produced in the prior proceedings. See *State v. Perez*, 235 Neb. 796, 457 N.W.2d 448 (1990).

[14] As a threshold matter, we must first determine whether the meeting described in Heppner's letter was ex parte. An ex parte communication occurs when a judge communicates with any person concerning a pending or impending proceeding without notice to an adverse party. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998). In this case, Judge Moran found that as described in Heppner's letter, Judge Finn had met with members of the Thimm family on May 9, 1986, while Ryan's sentencing for Thimm's murder was a proceeding pending before the court. No notice of the May 9 meeting was given to Ryan or Ryan's counsel. Further, the Heppner letter and Heppner's testimony regarding the meeting describe some discussion of Thimm and the religious beliefs of the cult members who participated in his murder. There was also discussion about Ryan's control over the other members of the cult. The only persons present at the meeting were Karen Schmidt, Heppner, Butrick, and Judge Finn.

Neither Ryan nor his counsel were present. We therefore determine that because the May 9 meeting described in Heppner's letter concerned some issues tangentially related to Thimm's murder (which was the focus of Ryan's upcoming sentencing hearing), and did not include Ryan or his counsel, it was ex parte. See *State v. Lotter, supra.*

(b) Ex Parte Meeting Procedural Bar

The State contends, and Judge Moran so found, that any issue relating to the May 9, 1986, ex parte contact was procedurally barred. We cannot agree. On his direct appeal, Ryan alleged that Judge Finn had an improper ex parte communication with the Thimm family. We concluded there was no evidence in that record supporting such an allegation. Although during Ryan's sentencing hearing Judge Finn had acknowledged that he generally invited family members to meet with him after the proceedings to ask any questions, we determined that there was simply nothing in the record indicating that Judge Finn had ever met with the Thimm family. Thus, we did not address the impact of an ex parte meeting with the Thimm family.

As we noted in *Ryan I*, the record indicated that Judge Finn had met with the Stice family but "[t]he record [did] not show, however, that the trial judge met with the James Thimm family . . . ." 233 Neb. at 121, 444 N.W.2d at 640. We further noted that "[J]udge [Finn] affirmatively stated, 'There was absolutely no discussion about any other cases than that [Luke Stice] case.' There is nothing in the record indicating anything to the contrary." *Id.* Since this court was unable to find anything in the record on direct appeal indicating that an ex parte meeting occurred with the Thimm family, we certainly would not expect the same record to procedurally bar Ryan from asserting that claim now, in light of new evidence indicating that such a meeting did occur.

Likewise, during Ryan's first postconviction proceeding, his postconviction counsel investigated the possibility that Judge Finn had in fact met ex parte with the Thimm family. Creager interviewed Judge Finn and asked if he had met with the Thimm family at any time prior to Ryan's sentencing. Judge Finn denied any such meeting and signed an affidavit to that effect. Creager

thereafter ended the investigation. Based on Finn's affidavit, this court concludes that the basis Ryan relies upon for relief in this second postconviction proceeding was not available at the time his first postconviction motion was filed.

If we were to determine that the Heppner letter was available to Ryan during his prior postconviction proceeding, we would essentially be requiring Creager to continue the investigation beyond Judge Finn's affidavit. This we are not prepared to do. Once Creager obtained the signed affidavit from Judge Finn swearing that no such meeting had occurred, Creager was entitled to rely upon that information and end his investigation.

Accordingly, we find that the Heppner letter falls into the second circumstance we have recognized as a new ground for relief. The letter is newly discovered evidence which was not available in the prior proceedings. See *State v. Keithley*, 247 Neb. 638, 529 N.W.2d 541 (1995). The Heppner letter was not available to Ryan during either his direct appeal or his first postconviction motion, and there was no other evidence of an ex parte meeting between Judge Finn and the Thimm family. We therefore determine that the meeting between Finn and the Thimm family was not procedurally barred and was appropriately raised in this, Ryan's second postconviction proceeding.

Having determined that issues arising from the ex parte meeting between Judge Finn and the Thimm family are not procedurally barred, we now turn to Ryan's claims.

(c) *State v. Barker* Analysis

As noted earlier, Judge Moran determined that even if the ex parte meeting between Judge Finn and the Thimm family was not procedurally barred, there was no violation of *State v. Barker*, 227 Neb. 842, 420 N.W.2d 695 (1988), and that, in any event, Ryan suffered no prejudice as a result of the meeting.

Ryan, however, contends that *State v. Barker, supra*, was violated and that an automatic remand was required once the ex parte meeting was factually determined to have occurred. Further, Ryan contends that the ex parte meeting violated his constitutional due process rights and that he was prejudiced as a result.

In *State v. Barker, supra*, Barker was charged with second degree murder but was convicted of the lesser-included offense

of manslaughter. On direct appeal, Barker's sole assignment of error was that the sentencing judge failed to recuse himself, as requested by Barker, after the judge had met ex parte with the victim's family prior to sentencing. In response to Barker's motion for recusal, the sentencing judge recounted what had transpired during the ex parte meeting, found that the court was in no way prejudiced by the meeting, and refused to recuse himself. In remanding Barker's case for a new sentencing hearing to be conducted by a different judge, we fashioned a recusal rule based upon the evidentiary concerns regarding judicial testimony.

[15-17] We expressly did not reach the constitutional dimensions of Barker's claim regarding ex parte communications because it was unnecessary to the disposition of Barker's direct appeal. We did not analyze the parameters of Barker's due process rights, although we noted that " 'the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause.' " *State v. Barker*, 227 Neb. at 844, 420 N.W.2d at 697 (quoting *Gardner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977)). Rather, we focused on the ethical and evidentiary concerns that arise when a judge is asked to recuse himself because of an ex parte communication. We therefore announced a recusal rule based on the rationale of Neb. Evid. R. 605, that " '[t]he judge presiding at the trial may not testify in that trial as a witness.' " *State v. Barker*, 227 Neb. at 848, 420 N.W.2d at 699. The *Barker* recusal rule states that "a judge, who initiates or invites and receives an ex parte communication concerning a pending or impending proceeding, must recuse himself or herself from the proceedings when a litigant requests such recusal." *Id.* at 847, 420 N.W.2d at 699.

The evidentiary dilemma which *State v. Barker, supra*, addresses simply does not exist in this postconviction proceeding. In the case before us, Ryan has supplemented his record with Judge Finn's testimony taken in a proceeding over which Judge Finn was not presiding and at which he was, therefore, not incompetent to testify pursuant to Neb. Evid. R. 605. Thus, there is no need to fashion a remedy for an alleged *Barker* violation when we have the presiding judge's properly obtained testimony

before us. The evidentiary concerns that prompted the *Barker* rule do not exist with regard to Ryan's claims in this proceeding.

[18,19] Further, postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations. The defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the *state or federal Constitution*. *State v. Smith*, 256 Neb. 705, 592 N.W.2d 143 (1999); *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). The recusal rule fashioned in *State v. Barker*, 227 Neb. 842, 420 N.W.2d 695 (1988), is premised on evidentiary principles and judicial ethics. Although these underlying concerns promote due process and efficiency in the legal process, they are separate and distinct from constitutional rights. The *Barker* rule is not a constitutional right in and of itself.

We have never implied or treated *State v. Barker, supra*, as conferring constitutional protection. In *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), Lotter brought a direct appeal asserting error, in part, because of an ex parte meeting between the prosecutor and the presiding judge. We concluded that Lotter, by failing to make a motion for the judge to recuse himself at the time of the proceedings, had waived the *Barker* rule. If the *Barker* rule were a constitutional right, Lotter's failure to motion for recusal would not have been sufficient by itself to waive his right to the judge's recusal. Waiver would be sufficient only if Lotter had been "personally apprised of the ex parte communication at issue." *State v. Lotter*, 255 Neb. 889, 891, 587 N.W.2d 673, 674 (1999) (supplemental opinion).

[20] In our supplemental opinion to *State v. Lotter*, we noted:

> "The requirement in *Barker* that a judge who has participated in an ex parte communication must recuse himself or herself upon request was based upon *Nebraska law*, and not upon federal constitutional grounds. Thus, *Barker* and its progeny do not dispose of Lotter's claim that the ex parte communication in this case presented a threat to the impartiality of the trial court and violated his rights under the Due Process Clause of the 14th Amendment to the U.S. Constitution."

(Emphasis supplied.) 255 Neb. at 890, 587 N.W.2d at 674.

Simply put, *State v. Barker, supra*, is not premised on federal or Nebraska constitutional law and in no way expands due process protection in Nebraska. To hold otherwise would be inconsistent with our holding in *State v. Lotter.* Finding *Barker* itself inapplicable to Ryan's postconviction claims, we turn to the underlying constitutional issue of whether Ryan's due process rights were violated by the May 9, 1986, ex parte meeting.

(d) Due Process

Ryan contends that his due process rights were violated because he was sentenced for Thimm's murder by Judge Finn after Judge Finn had engaged in an improper ex parte contact with Thimm family members. Ryan asserts that this ex parte meeting biased Judge Finn and denied Ryan his right to an impartial judge and that, therefore, Judge Moran's findings to the contrary are clearly erroneous.

[21] The right to an impartial judge is guaranteed under the Due Process Clause of the 14th Amendment to the U.S. Constitution, *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972), and under the due process clause of Neb. Const. art. I, § 3. See *State v. Lotter, supra* (supplemental opinion). This right extends to both the trial and the sentencing hearing. *Gardner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). The parameters of this right are coextensive under the federal and Nebraska Constitutions. See *State v. Lotter, supra* (supplemental opinion).

In our supplemental opinion to *State v. Lotter*, we analyzed a defendant's due process right to an impartial judge. We considered the claim that Lotter's due process right to an impartial judge was violated because the presiding judge conducted an ex parte meeting with the prosecutor during the proceedings. We concluded that Lotter's due process rights were not violated, using the approach enunciated by the Eighth Circuit in *Dyas v. Lockhart*, 705 F.2d 993 (8th Cir. 1983) (*Dyas I*), *cert. denied* 464 U.S. 982, 104 S. Ct. 424, 78 L. Ed. 2d 359. See, also, *Dyas v. Lockhart*, 771 F.2d 1144 (8th Cir. 1985) (*Dyas II*) (appeal after remand), *Dyas v. Lockhart*, 878 F.2d 1105 (8th Cir. 1989) (*Dyas III*) (second appeal after remand).

In *Dyas I*, the defendant was convicted of capital felony murder and sentenced to life imprisonment without the possibility of parole by the State of Arkansas. The impartiality of the presiding judge was questioned in federal habeas proceedings in part because the judge was the uncle of the prosecuting attorney, and respectively the brother and father of two deputy prosecuting attorneys who participated in the case.

[22] The *Dyas I* court first looked to the U.S. Supreme Court's standard as set out in *Ward v. Village of Monroeville, supra.* In *Ward*, the Supreme Court reiterated its previously announced standard that subjecting a defendant to a trial before a judge having a direct personal pecuniary interest in convicting the defendant caused a denial of due process in violation of the 14th Amendment. See, also, *Connally v. Georgia*, 429 U.S. 245, 97 S. Ct. 546, 50 L. Ed. 2d 444 (1977). *Ward* dealt with a situation where the judge also served as mayor. The Court found that the judge had a direct pecuniary interest in convicting the defendant because a conviction would result in a fine, which would enhance the municipality's revenue.

[23] The Court did not require the defendant in *Ward* to prove actual bias. Rather, the test was whether the defendant could show that the judge was put in a situation which might lead him " 'not to hold the balance nice, clear and true between the State and the accused . . . .' " 409 U.S. at 60. When the defendant can meet this standard, it is considered structural error, which requires "automatic reversal." *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 1833, 144 L. Ed. 2d 35 (1999). Structural error analysis is required when the error complained of deprives the defendant of basic protections without which the criminal trial process cannot reliably serve its function as a vehicle for determination of guilt or innocence, or when the error affects the entire framework of the proceedings. *Id.* All other types of errors which occur within the trial and sentencing process itself are subject to harmless error review. *Id.*

(i) Structural Error

In *Dyas I*, the Eighth Circuit declined to apply the structural error standard. The court found that the facts of the case did not show that the judge was "unable to hold the proper balance

between the state and the accused." *Dyas I*, 705 F.2d at 997, citing *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927). Instead, the *Dyas* court required that the defendant show actual bias on the part of the judge to be entitled to any relief. The court then remanded the cause for an evidentiary hearing where Dyas could attempt to show actual bias.

Similarly, in the supplemental opinion to *State v. Lotter*, we first considered the structural error standard by addressing the claim that the ex parte contact with the prosecutor showed that the judge " 'had such a strong personal or financial interest in the outcome of the trial that he was unable to hold the proper balance between the state and the accused.' " 255 Neb. 889, 892, 587 N.W.2d 673, 675 (1999), quoting *Dyas I*. We concluded that the facts in Lotter's case did not meet the structural error standard.

Ryan contends, as did Lotter, that his due process right to an impartial judge was violated because of an ex parte contact. We note that because this ex parte meeting occurred after Ryan's trial for Thimm's murder was concluded, it could not have affected the judge's impartiality during the jury trial.

As in the supplemental opinion to *State v. Lotter*, we conclude that Judge Finn's ex parte meeting with the Thimm family was "not sufficient, under the Due Process Clause, to suggest that the trial judge 'had such a strong personal or financial interest in the outcome of the trial that he was unable to hold the proper balance between the state and the accused.' " 255 Neb. at 892, 587 N.W.2d at 675. This ex parte meeting did not place Judge Finn in an inherently conflicting role, as set out in *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972), because the record does not show that Judge Finn had a direct personal pecuniary interest in the outcome of the case. Admittedly, some of Judge Finn's comments do evidence a kind of pecuniary interest in discussing the cost of the trials and defense attorney fees. However, this is not the type of direct pecuniary interest found in *Ward*, where a judge could enhance his or her own salary by a finding of guilt.

[24] Also, it is constitutionally permissible for a judge to consider as part of the sentencing process the impact of the crime on a victim's family. *Payne v. Tennessee*, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) (overruling *Booth v.*

Maryland, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987)). While such consideration should take place at the sentencing hearing, the fact that such information is not inherently prejudicial to the defendant weighs against adopting the structural error standard concerning ex parte contacts with victims' families. See *id.*

Accordingly, we decline to apply the structural error standard to Ryan's claims. The fact that Judge Finn met ex parte with Thimm family members prior to sentencing Ryan for Thimm's murder does not require automatic reversal. Judge Finn was not placed in a situation where he was unable to properly hold the balance between the State and the accused during Ryan's sentencing hearing. See *Ward v. Village of Monroeville, supra.*

(ii) Actual Prejudice

[25] Since we conclude that the structural error standard is not applicable to Ryan's claim, we must next decide whether the district court erred in finding that the Thimm ex parte meeting resulted in no actual prejudice to Ryan. As we held in our supplemental opinion to *State v. Lotter*, a defendant must show that "an instance of actual bias on the part of the trial court" occurred in order to indicate a constitutional violation of the right to an impartial judge. 255 Neb. at 892, 587 N.W.2d at 675, citing *Dyas III, supra.* Applying the Lotter actual bias test, we determine the finding of Judge Moran that the May 9, 1986, meeting did not bias Judge Finn is not clearly erroneous.

While Judge Finn's behavior in conducting the May 9, 1986, meeting was ethically improper, Judge Moran found that Judge Finn's "idle musing" did not indicate a bias such that Judge Finn would impose Ryan's sentence out of prejudice rather than on the law and facts of the case. Based on all the evidence presented, Judge Moran found that there was no discussion of Ryan's upcoming sentencing for Thimm's murder at the May 9 meeting.

Judge Moran also found that while Thimm was mentioned in the conversation, this was clearly not the focus of the conversation. The conversation "centered around Dennis Ryan and other co-defendants who turned state's evidence." Judge Moran also found that the May 9, 1986, meeting did not provide Judge Finn with any information that had not already been presented to

Judge Finn at Ryan's trial. Finally, Judge Moran determined that Judge Finn's sentencing order was based upon documented evidence and the record before the trial court at the time of sentencing. These findings are not clearly erroneous. See *State v. Tucker, supra.*

Further, Judge Moran found no evidence that Judge Finn deliberately concealed the ex parte meeting with the Thimm family. Rather, Judge Finn's testimony before Judge Moran was that by the time the motion to disqualify was filed, Judge Finn had forgotten the May 9, 1986, meeting. We note that the May 9 meeting took place after Dennis Ryan's sentencing, not after a proceeding involving Ryan and that further, it occurred 4 months before Goos filed his motion to disqualify.

The record shows that the concern during the September 15, 1986, hearing on the motion to disqualify was the August meeting with the Stice family, after Ryan's sentencing hearing for Stice's murder. Goos testified before Judge Moran that he specifically asked Judge Finn if the Thimm murder was discussed at the Stice meeting and was assured that the Stice meeting was about only the Stice murder. There is nothing in this record, or the record from either *Ryan I* or *Ryan II,* to indicate otherwise about the Stice meeting.

Judge Finn's admission in 1986, while considering the motion to disqualify, that he generally met with victims' families, supports the conclusion that Judge Finn did not deliberately conceal the May 9, 1986, meeting. Judge Finn would not have forthrightly told counsel about generally meeting with victims' families if his intent were to conceal the May 9 meeting. The district court was not clearly erroneous in failing to find that Judge Finn deliberately concealed the May 9 meeting.

Judge Finn's actions do not show actual bias, but, rather, a lack of judicial professionalism. Judge Finn met privately with Thimm family members at the conclusion of Dennis Ryan's sentencing for Thimm's murder, while separate proceedings involving Ryan's sentencing for Thimm's murder were still pending. The May 9, 1986, meeting was improper because Ryan's sentencing for Thimm's murder was still pending before Judge Finn when the meeting took place, but the content of the May 9 meet-

ing does not show actual bias on the part of Judge Finn. See *State v. Lotter*, 255 Neb. 889, 587 N.W.2d 673 (1999) (supplemental opinion).

We determine that the district court's finding that the May 9, 1986, meeting resulted in no actual prejudice to Ryan is not clearly erroneous. See *State v. Tucker, ante* p. 496, 598 N.W.2d 742 (1999). While Judge Finn erred in participating in the May 9 meeting, such error was harmless because there is no indication from the record that an instance of actual bias on the part of Judge Finn occurred. See, *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (noting that structural error standard is limited to very narrow class of cases); *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (death penalty case where court applied harmless error analysis to defendant's coerced confession); *State v. Lotter, supra* (supplemental opinion) (applying harmless error standard). Thus, Ryan's due process right to an impartial judge was not violated under the state or federal Constitution at his sentencing hearing for Thimm's murder. See, *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972); *State v. Lotter, supra* (supplemental opinion).

(e) Cumulative Judicial Misconduct

Ryan also contends that the cumulative effect of the May 9, 1986, meeting shows that Judge Finn did not meet the constitutional standard of impartiality. Ryan cannot raise the issues that counsel litigated on direct appeal concerning the impact of Judge Finn's turning his back during Ryan's testimony simply by rephrasing this as being cumulative judicial misconduct. See *State v. Ditter*, 255 Neb. 696, 587 N.W.2d 73 (1998). In *Ryan I*, we found that Ryan was not prejudiced by the fact that Judge Finn turned his back during Ryan's testimony. Further, Ryan was not prejudiced by the ex parte contact with Thimm family members. Even considering these two incidents together, they do not indicate an instance of actual bias on the part of Judge Finn at Ryan's sentencing hearing. See *State v. Lotter, supra* (supplemental opinion). Thus, considered cumulatively, the May 9 meeting did not violate Ryan's right to an impartial judge.

(f) Ineffective Assistance of Counsel

Ryan further contends that his constitutional right to effective assistance of counsel was denied in that trial counsel failed to discover the May 9, 1986, meeting. Ryan did raise ineffectiveness of counsel in both his direct appeal and his first motion for postconviction relief regarding the ex parte meeting in August with the Stice family. However, the basis he now relies on for relief, namely, the May 9 meeting with the Thimm family, was not available to him in these prior proceedings. We find that Ryan's claim of ineffective counsel as it relates to the May 9 meeting is therefore not procedurally barred. See *State v. Keithley*, 247 Neb. 638, 529 N.W.2d 541 (1995). Because this claim is not procedurally barred, we turn to the issue of whether Ryan was denied effective assistance of counsel.

[26-29] In order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and Neb. Const. art. I, § 11, the test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), requires that a 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. Tucker, ante* p. 496, 598 N.W.2d 742 (1999); *State v. Hunt*, 254 Neb. 865, 580 N.W.2d 110 (1998). The two prongs of this test may be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to a lack of sufficient prejudice, that course should be followed. *State v. Tucker, supra*; *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998). The prejudice component of the test focuses on whether counsel's performance rendered the results of the proceeding unreliable or fundamentally unfair by depriving a defendant of a substantive or procedural right. *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995). A defendant has the burden to show how an attorney's actions or inactions prejudiced the defendant. *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998); *State v. Williams, supra.*

Ryan has assigned two errors regarding ineffective assistance of counsel. First, Ryan asserts that the trial court erred in con-

cluding that a claim for ineffectiveness of counsel was procedurally barred. In his brief, Ryan argues that if the court were to find that all claims related to the ex parte meeting with the Thimm family were procedurally barred, this procedural bar would be the direct result of trial counsel's ineffectiveness. Because we have determined that there is no procedural bar against claims related to the May 9, 1986, meeting, Ryan has not been prejudiced in this manner.

Second, Ryan contends that the court erred in finding that trial counsel's failure to properly investigate the facts regarding possible ex parte meetings did not prejudice Ryan. We determine that Ryan has failed to show prejudice on this issue also. Ryan has not shown that the result of his sentencing hearing was rendered unreliable or fundamentally unfair by the failure of trial counsel to discover the May 9, 1986, meeting. As previously discussed, the May 9 meeting with Judge Finn and Thimm family members was not structural error; that is, Ryan was not constitutionally entitled to an automatic resentencing based on the fact that the May 9 meeting occurred. See *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

In retrospect, if the information concerning the May 9, 1986, meeting with the Thimm family had been available on direct appeal, the language of *Ryan I* implies that Ryan would have received a new sentencing hearing based on *State v. Barker*, 227 Neb. 842, 420 N.W.2d 695 (1988). However, the loss of the *Barker* rule did not render Ryan's sentencing hearing before Judge Finn fundamentally unfair or unreliable in its result. As Judge Moran determined, and we concur, Judge Finn was not biased by the May 9 meeting. Thus, whether or not trial counsel's performance was deficient, Ryan has failed to show any prejudice that resulted because trial counsel did not discover the May 9 meeting. An impartial judge sentenced Ryan to death, a judge who properly followed the laws of this state regarding the death penalty. The sentencing hearing was not fundamentally unfair to Ryan, nor was it rendered unreliable by the May 9 meeting which occurred 4 months prior to the hearing.

Judge Moran's finding that Ryan suffered no prejudice as a result of trial counsels' actions is amply supported by the record and, thus, is not clearly erroneous. What the record does show,

as set out in *Ryan I*, are the circumstances of Thimm's agonizing torture and death. Suffice it to say that Ryan and other cult members horribly tortured Thimm for 3 days and that Ryan finally stomped on Thimm's chest until he died. In their brief and at oral argument, Ryan's counsel conceded that the point of a new sentencing hearing was not that the result of the hearing would be different, but that the alleged bias of Judge Finn would be removed from the process. However, Judge Moran found that the ex parte communication did not result in actual bias on the part of Judge Finn, a finding which we determine not to be clearly erroneous. Thus, the "prejudice" element of the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), is not met regardless whether counsels' performance in not discovering the communication was deficient. Ryan has not been prejudiced by trial counsels' action or inaction regarding the May 9, 1986, meeting. Thus, this claim is without merit.

Accordingly, we find that all of Ryan's claims related to the May 9, 1986, ex parte meeting do not entitle Ryan to any relief regarding his trial or sentencing.

2. Competency

Finally, we turn to the issue of Ryan's competency to stand trial for Thimm's murder. Unlike the claims related to the ex parte meeting with the Thimm family, these claims are not based on any newly discovered evidence. Because Ryan has failed to raise this issue in either *Ryan I* or *Ryan II*, the claims related to Ryan's competency to stand trial are procedurally barred unless Ryan can meet the aforementioned exception to the procedural bar rule. *State v. Fincher*, 191 Neb. 446, 216 N.W.2d 172 (1974). See, also, *State v. Keithley*, 247 Neb. 638, 529 N.W.2d 541 (1995); *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993). That is, Ryan must affirmatively show that the basis he now relies upon for relief was unavailable when prior motions were filed. See, *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998); *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994).

The facts concerning Ryan's mental state at the time of trial were available at the time of his first motion for postconviction relief and at the time of his direct appeal. The reports on Ryan's

mental condition, prepared before Ryan's trial for Thimm's murder, were fully available to Ryan and his counsel at all times. There has been no newly discovered evidence on this issue. The testimony of the medical experts at the evidentiary hearing before Judge Moran was based solely on a review of the original reports prepared in 1986. Further, the issue of competency was considered and discarded by counsel in Ryan's first postconviction proceeding as a weak claim for relief.

Because Ryan's competency to stand trial was not raised in either *Ryan I* or *Ryan II* and because Ryan alleges no new basis for relief on the issue of his competency, we find that all claims related to Ryan's competency to stand trial are procedurally barred. Allowing Ryan to first raise the issue of competency after more than 10 years of appellate litigation during which Ryan chose not to raise the issue would make a mockery of the finality of the judicial process. See *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991).

We note that Ryan also raises the claim of ineffectiveness of trial counsel regarding his competency to stand trial. This is procedurally barred along with the other competency claims. See *State v. Stewart, supra.* Ineffectiveness of counsel regarding the issue of competency could have been addressed by postconviction counsel in *Ryan II* and was deliberately not raised.

VI. CONCLUSION

The district court erred in finding that Ryan and his lawyers knew or reasonably should have known about the May 9, 1986, meeting during direct appeal and the first postconviction proceedings. The district court also erred in its conclusion that any claims arising out of the May 9 meeting were procedurally barred. However, the district court correctly determined that the meeting between Judge Finn and members of the Thimm family did not violate Ryan's constitutional right to due process or effective assistance of counsel in that Ryan suffered no actual prejudice from the May 9 meeting. The district court also correctly determined that all claims related to the issue of Ryan's competency at the time of trial are procedurally barred.

Having considered all of Ryan's assignments of error, we conclude that Ryan is entitled to no relief. Ryan has failed to

show that his constitutional rights were violated. Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

IN RE ESTATE OF DONALD A. POACH, DECEASED. DANIEL L. POACH AND DERICIA L. HAUGH, OBJECTORS-APPELLANTS, V. MARY ELLEN POACH, PERSONAL REPRESENTATIVE OF THE ESTATE OF DONALD A. POACH, DECEASED, APPELLEE.

600 N.W.2d 172

Filed September 10, 1999. No. S-98-494.

1. **Summary Judgment: Appeal and Error.** In reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
4. **Decedents' Estates: Wills: Gifts: Words and Phrases.** There are two types of ademption; one involves satisfaction of the devise, while the other involves an implied revocation.
5. **Decedents' Estates: Wills: Gifts.** An ademption by satisfaction occurs when a testator, prior to death, conveys to the beneficiary the property that was specifically devised to that beneficiary.
6. **Decedents' Estates: Wills: Gifts: Stock.** The doctrine of ademption by satisfaction is not applicable where a testator contractually grants the beneficiary and a nonbeneficiary an option to purchase devised stock and the nonbeneficiary ultimately exercises the option after the death of the testator.
7. ___: ___: ___: ___. Under Neb. Rev. Stat. § 30-2350 (Reissue 1995), an ademption by satisfaction does not operate unless the testator declares in writing that the lifetime sale of devised stock is in satisfaction of the devise.
8. **Decedents' Estates: Wills: Gifts: Words and Phrases.** The term "ademption by implied revocation" most commonly describes an act by which a devise of specific property becomes inoperative by the sale or extinction of the property during the testator's lifetime.
9. **Decedents' Estates: Wills: Gifts: Intent: Presumptions.** The doctrine of ademption by implied revocation is based upon a presumed alteration of intention arising from

the changed condition and circumstances of the testator, or on the presumption that the will would have been different had it been executed under the altered circumstances.

10. **Decedents' Estates: Wills: Gifts: Intent.** In deciding whether an ademption has occurred, the object is to discover and give effect to the intention of the testator.
11. **Decedents' Estates: Wills: Gifts: Revocation.** Courts should not hold that a devise has been adeemed by implied revocation except in a clear case.
12. **Decedents' Estates: Wills: Gifts: Intent.** Under Neb. Rev. Stat. § 30-2345(a) (Reissue 1995), a specific devisee of certain securities is entitled only to as much of the devised securities as are part of the estate at the time of the testator's death when the testator intended a specific devise of certain securities rather than the equivalent value thereof.

Appeal from the County Court for Douglas County: LAWRENCE BARRETT, Judge. Reversed and remanded for further proceedings.

Robert C. McGowan, Jr., of McGowan & McGowan, for appellants.

John C. Brownrigg, of Erickson & Sederstrom, P.C., for appellee.

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

GERRARD, J.

INTRODUCTION

This is a probate case wherein two adult children of Donald A. Poach (the testator) appeal from the county court's award of summary judgment in favor of Mary Ellen Poach, widow of the testator and personal representative of the testator's estate. The two children, Daniel L. Poach and Dericia L. Haugh (collectively the appellants), claim that there are genuine issues of material fact in dispute concerning their interest in 380 shares of common stock devised to their brother, Dart L. Poach, and that Mary Ellen was not entitled to judgment as a matter of law. For the reasons that follow, we reverse, and remand for further proceedings.

FACTUAL BACKGROUND

The following facts are not in dispute: The testator had three children from a previous marriage—Dart, Daniel, and Dericia—when he married Mary Ellen in May 1986. The testator's last

will, executed in Douglas County on November 13, 1989, appointed Mary Ellen as personal representative and devised the residuary of the estate to her.

Article III of the will devised all stock that the testator owned at death in Don's Leather Cleaning, Inc. (DLC), a closely held Minnesota corporation, to his son Dart. However, as a condition and provision for taking under article III, the will set forth that Dart must execute two promissory notes—one to Daniel and one to Dericia—for $90,000 each, with specific payment schedules to conclude within 30 months of the testator's death. In the event that Mary Ellen survived the testator, the will devised nothing else to any of the testator's children.

At the time of the will's execution in November 1989, the testator owned 640 shares in DLC, Dart owned 200 shares, and the appellants owned 80 shares each. The appellants' shares, however, were canceled a week after the execution of the will, leaving Dart and the testator as the only shareholders in DLC. Through various transactions, Dart came to be the majority shareholder in DLC, holding 460 shares, with the testator holding 380 shares at his death on January 2, 1997.

Approximately 53 months after executing the will, the testator entered into a "Stock Redemption Agreement" (Redemption Agreement) with DLC and Dart on April 1, 1994. The Redemption Agreement operated as an option contract, granting DLC and Dart the right of first refusal to purchase the balance of the testator's DLC stock should the testator attempt to transfer those shares in life or by operation of law upon death.

The Redemption Agreement required DLC to deliver a written election to the personal representative of the testator's estate within 60 days of the personal representative's appointment in order to exercise the purchase option successfully. Likewise, to the extent that DLC did not opt to purchase all of the testator's shares at that point, the Redemption Agreement required Dart to deliver a written election to the personal representative within 120 days of appointment in order to exercise his purchase option as to the balance of the outstanding shares.

For the purpose of establishing the purchase price at which DLC or Dart would obtain the testator's shares by exercise of the option, the Redemption Agreement recited that the value of each

share of stock was $375. The Redemption Agreement also called on DLC's shareholders to reevaluate the stock's value for this purpose within 90 days of the end of each fiscal year. The record contains no evidence that any such reappraisal ever occurred.

Mary Ellen accepted the appointment as personal representative of the testator's estate on January 30, 1997. By way of a letter to the personal representative, dated February 26, 1997, DLC purported to exercise its purchase option as to all of the testator's shares under the Redemption Agreement. DLC also tendered a check for $10,000 and a promissory note for $132,500.

Through her attorney, Mary Ellen, acting as the personal representative, returned the check and promissory note to DLC on March 3, 1997, and refused to confirm her acceptance of the terms and the conditions as outlined in DLC's letter. In so doing, Mary Ellen (1) indicated reservations in light of her elective-share rights as a widow under Neb. Rev. Stat. § 30-2313 (Reissue 1995), (2) articulated her authority and intention to vote the testator's DLC shares until their ultimate distribution, (3) expressed concerns about the validity of the Redemption Agreement, (4) questioned whether DLC's tender had complied adequately with the terms of the Redemption Agreement, and (5) insisted that Dart promise to indemnify the testator's estate for any tax liability incurred from complying with the Redemption Agreement.

After further negotiations, Mary Ellen and DLC reached an agreement on October 28, 1997, wherein DLC purchased the testator's stock from the estate at $539.47 per share (for a total of $205,000) with a $75,000 downpayment.

The appellants did not become aware of the Redemption Agreement between DLC, Dart, and the testator or of the ultimate agreement between Mary Ellen and DLC until November 10, 1997. On that date, the appellants also learned for the first time that Mary Ellen, in her capacity as the personal representative, was taking the position that the proceeds from the sale of the testator's stock fell within the residuary estate and belonged to Mary Ellen.

As personal representative, Mary Ellen filed a formal petition for complete settlement of the testator's estate in the county court on November 26, 1997. In response, the appellants filed an

objection, claiming that they were specific devisees of the testator's estate and that they had a charged interest in the DLC stock.

Mary Ellen moved for summary judgment, which the county court granted on April 14, 1998. The county court specifically found that the testator's execution of the Redemption Agreement, combined with DLC's exercise of the purchase option, adeemed the devise to Dart in article III of the will. The effect of the county court's determination was that the appellants' charge on the devise to Dart had been extinguished as well.

ASSIGNMENTS OF ERROR

The appellants claim that the county court erred in granting summary judgment to Mary Ellen. The appellants argue, restated, that there were genuine issues of material fact in dispute regarding (1) whether DLC had complied adequately with the notice requirements of the Redemption Agreement, (2) whether DLC and Mary Ellen had abandoned the Redemption Agreement, and (3) whether Mary Ellen, as the personal representative, had authority to negotiate a higher price for the stock in the manner she did. Moreover, the appellants assert that Mary Ellen was not entitled to judgment as a matter of law in any event because the Redemption Agreement did not operate as an ademption to article III in the will.

STANDARD OF REVIEW

[1] In reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from the evidence. *Fackler v. Genetzky, ante* p. 130, 595 N.W.2d 884 (1999).

[2] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Id.*

[3] To the extent that this appeal calls for statutory interpretation or presents questions of law, this court must reach an

independent, correct conclusion irrespective of the determination made by the court below. See, *Miller v. M.F.S. York/Stormor, ante* p. 100, 595 N.W.2d 878 (1999); *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999).

ANALYSIS

The dispositive question in this appeal is whether the Redemption Agreement operated to adeem the devise to Dart as a matter of law. We conclude that the Redemption Agreement did not adeem the devise and that the county court erred in granting summary judgment in favor of Mary Ellen.

[4] Only a handful of Nebraska cases have analyzed the doctrine of ademption. A review of these cases, particularly *Reed v. McClow*, 205 Neb. 739, 290 N.W.2d 186 (1980), and *Austin v. Austin*, 147 Neb. 109, 22 N.W.2d 560 (1946), reveals that there are two types of ademption; one involves satisfaction of the devise, while the other involves an implied revocation. See, also, Restatement (Third) of Property §§ 5.2 and 5.4 (1998); 96 C.J.S. *Wills* §§ 1172 and 1178 (1957); 80 Am. Jur. 2d *Wills* § 1701 (1975).

[5] An ademption by satisfaction occurs when the testator, prior to death, conveys to the beneficiary the property that was specifically devised to that beneficiary. Neb. Rev. Stat. § 30-2350 (Reissue 1995); *Reed v. McClow, supra.*

[6,7] Despite Mary Ellen's assertions, the doctrine of ademption by satisfaction is not applicable to the 380 shares of DLC that the testator held at death. While the testator contractually granted Dart (the beneficiary under the will) and DLC (a nonbeneficiary) an option to purchase the stock, DLC exercised the option; hence, the shares ultimately were conveyed to DLC, not to the beneficiary. Moreover, there is no indication in the record that the testator declared in writing, as required by § 30-2350, that the sale of the DLC stock was in satisfaction of the devise. See *In re Estate of Soule*, 248 Neb. 878, 540 N.W.2d 118 (1995).

[8] Confining our analysis, then, to ademption by implied revocation, this type of ademption most commonly describes an "act by which a devise . . . of specific property becomes inoperative by the sale or extinction of the property *during the testa-*

tor's lifetime." (Emphasis supplied.) *Reed v. McClow*, 205 Neb. at 740, 290 N.W.2d at 188.

[9] We have explained that the doctrine of ademption by implied revocation is "based upon a presumed alteration of intention arising from the changed condition and circumstances of the testator, or on the presumption that the will would have been different had it been executed under the altered circumstances." *Baacke v. Baacke*, 50 Neb. 18, 23, 69 N.W. 303, 304 (1896).

According to Mary Ellen, the Redemption Agreement demonstrated the testator's implied intent to revoke the devise of DLC stock to Dart and, therefore, the Redemption Agreement adeemed the devise. We do not agree.

[10] In deciding whether an ademption has occurred, "the object is to discover and give effect to the intention of the testator." *In re Estate of Kulp*, 122 Neb. 157, 161, 239 N.W. 636, 637-38 (1931). See, also, *Bennett v. Blue Mound Cemetery Assn.*, 162 Neb. 636, 77 N.W.2d 158 (1956); *Austin v. Austin, supra.* See, also, generally, the Restatement, *supra*, § 5.2, comment *b*.

[11] While "it is the underlying principle of justice which supports the [doctrine of ademption]," *In re Estate of Bartlett*, 108 Neb. 691, 695, 190 N.W. 869, 870 (1922), courts should not hold that a devise has been adeemed by implied revocation "except in a clear case," *In re Estate of Bartlett*, 108 Neb. 681, 689, 189 N.W. 390, 393 (1922), *modified, In re Estate of Bartlett*, 108 Neb. 691, 190 N.W.2d 869.

We first note that the purchase option became effective only upon the death of the testator, such that there was no sale or extinction of the devised property within the testator's lifetime. See *Reed v. McClow*, 205 Neb. 739, 290 N.W.2d 186 (1980). Moreover, we cannot conclude that the Redemption Agreement clearly indicates an intent on the part of the testator to revoke the devise of the DLC stock to Dart.

To the contrary, the devise and the Redemption Agreement, taken together, indicate that the testator's primary concern was that Dart retain control of DLC. The Redemption Agreement simply provided a different mechanism by which Dart could retain control of the corporation. Under the devise, Dart received the DLC stock subject to the appellants' charge. Under the Redemption Agreement, Dart could purchase the stock per-

sonally, or DLC—of which Dart was the majority shareholder—could purchase the stock. Under all of these circumstances, Dart was to retain control of DLC.

As Dart's retention of control over DLC was the common goal of both the Redemption Agreement and the devise, it cannot be said that the Redemption Agreement clearly evidences some intent on the part of the testator that is inconsistent with the devise. The Redemption Agreement simply granted DLC and Dart options to purchase, which they were in no way obliged to exercise. In short, the Redemption Agreement did not implicitly revoke the devise and, consequently, does not support a finding of ademption.

[12] Given that, we are mindful of Neb. Rev. Stat. § 30-2345(a) (Reissue 1995), which provides: "If the testator intended a specific devise of certain securities rather than the equivalent value thereof, the specific devisee is entitled only to: (1) as much of the devised securities as is a part of the estate at the time of the testator's death . . . ."

The testator in this case definitely intended a specific devise of certain securities; specifically, whatever DLC shares the testator held upon death would be granted to Dart. Compare Neb. Rev. Stat. § 30-2209 (Reissue 1995) (defining securities, for purposes of Nebraska Probate Code, to include any stock), with *In re Estate of Lewis*, 148 Neb. 592, 28 N.W.2d 427 (1947) (distinguishing between specific and demonstrative legacies). Moreover, because DLC did not attempt to exercise its purchase option until nearly 8 weeks after the testator's death, the 380 shares of DLC became part of the estate at the time of the testator's death. Thus, Dart was entitled to those shares subject to the appellants' charge under the devise.

The record indicates, however, that Dart did not receive the shares under the devise and that they were instead sold to DLC. Other courts, facing circumstances in which an option regarding devised property has been exercised following the death of the testator, have held that the option may be exercised, but does not result in ademption, and that the devisee is consequently entitled to the proceeds of the option purchase. See, *Eddington vs. Turner, et al.*, 27 Del. Ch. 411, 38 A.2d 738 (1944); *Blass v. Sperling Pork Store, Inc.*, 27 Misc. 2d 50, 205 N.Y.S.2d 604

(1960); *Matter of Becher*, 204 Misc. 523, 123 N.Y.S.2d 589 (1953); *Partridge v. Pidgeon*, 166 Ohio St. 496, 143 N.E.2d 840 (1957).

For example, in *Matter of Becher, supra*, an option contract for the purchase of stock was executed subsequent to the death of the owner of the stock, who had specifically devised it in his will. The court determined that the devisee took the stock under the will, but subject to the infirmity of the option contract. *Id.* In other words, when the contractual option was exercised, the devisee under the will was entitled to the proceeds of the sale. *Id.*

We find this reasoning to be persuasive. In the present case, Dart was the devisee under the will, and since Dart's devised property was sold under the Redemption Agreement, Dart is entitled to the proceeds of the sale. Of course, to accept the benefits of the devise, Dart is also obliged to satisfy the condition attached to that devise; specifically, the payment to the appellants required by the will.

CONCLUSION

The Redemption Agreement did not adeem the devise to Dart provided in article III of the will, and the county court erred in so finding. Instead, Dart was entitled to the devise subject to the infirmity of the Redemption Agreement. Since a purchase under the Redemption Agreement has already been completed, Dart is entitled to the proceeds of the sale, provided that he executes promissory notes to the appellants as required by the charge on the devise.

Consequently, we reverse the judgment of the county court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

Connolly, J., not participating.

MICHAEL SACCO, APPELLANT, V. GARY CAROTHERS, DOING BUSINESS AS THE ROUND TABLE, APPELLEE.

601 N.W.2d 493

Filed September 17, 1999. No. S-98-163.

1. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for abuse of discretion when the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding relevancy will not be reversed absent an abuse of discretion.
2. **Negligence.** In order for negligence to exist, a defendant must have a legal duty to protect a plaintiff from injury, the defendant must fail to discharge that duty, and the plaintiff must suffer damage proximately caused by the defendant's failure to satisfy the duty.
3. **Negligence: Proof.** A factor in establishing the defendant's duty is the foreseeability of risk.
4. **Negligence: Rules of Evidence.** Police reports regarding disturbances at a defendant's place of business, upon proper foundation, may be admissible as business records and may be relevant to the issue of whether the defendant owes a duty to a plaintiff to protect the plaintiff from injury.
5. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded.
6. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
7. **Trial: Negligence: Evidence: Appeal and Error.** A trial court's exclusion of evidence relevant to the issue of the breadth of a defendant's duty to protect a plaintiff from injury substantially prejudices the plaintiff's rights at trial and is reversible error, as such evidence would have assisted the jury in evaluating the scope of the defendant's duty.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Reversed and remanded for a new trial.

Vincent M. Powers for appellant.

J. Arthur Curtiss and David D. Zwart, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Michael Sacco (Sacco) sustained injuries in a fight in the parking lot outside of the Round Table tavern in Grand Island, Nebraska, on December 24, 1991. Sacco sued Gary Carothers, the owner of the Round Table, alleging that Sacco was injured as a result of various acts of Carothers' negligence. Sacco appeals from a jury verdict entered in favor of Carothers.

Sacco assigns 12 errors. We conclude that one assignment of error requires reversal and that the remainder are without merit. Specifically, we conclude that the trial court erred in refusing to admit into evidence certain police reports and that the exclusion of this evidence unfairly prejudiced Sacco's substantial rights at trial. We reverse, and remand for a new trial.

STATEMENT OF FACTS

In an earlier appeal in this same case, we ruled that the trial court erred in separately instructing the jury regarding efficient intervening cause, and we reversed the judgment and remanded the cause for a new trial. *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997). In *Sacco*, we set forth in detail the factual background of the case, and we repeat here only the facts relevant to the instant appeal.

Around noon on December 24, 1991, Sacco and his brother, Dominic Sacco, went to the Round Table, where they stayed into the evening, playing pool and drinking alcoholic beverages. Perry Roeber arrived at the Round Table at approximately 5:30 or 6 p.m. and, like the Sacco brothers, Roeber played pool and drank. Dominic Sacco left the bar at approximately 9 p.m., and during his absence, Sacco and Roeber got into a dispute which escalated into a physical scuffle over the payment of a pool bet. It is undisputed that at the time the subsequent fight in the parking lot erupted, Sacco had been drinking heavily, having consumed several pitchers of beer and approximately seven shots of Jack Daniels whiskey.

On December 24, 1991, one bartender, Jeanette Zahm, was on duty at the Round Table after approximately 8:30 p.m., and she was responsible for serving the 50 to 70 people in the bar that evening. Zahm testified that in the 2 years she had worked at the

Round Table there had been less than five fights and that she believed she had a duty to keep fights from occurring in the bar but that that duty did not extend to the parking lot. Zahm also stated that she was aware that persons who drink alcohol excessively can become hostile and get into fights.

The Round Table did not employ any particular person to act as "security" or as a bouncer. When disagreements erupted in the bar, one or two regular patrons would often intervene to break up the fight. On this particular evening, Frank Matthews, a frequent customer of the Round Table, separated Sacco and Roeber, telling them to take their fight outside. Zahm also told Sacco and Roeber that if they were going to fight, they had to take it outside or she would call the police.

Carothers testified that if Matthews was present in the bar while an argument was developing, Matthews "would say not in here, knock it off, or leave, or something like that. He would generally try to control that type of thing." When testifying about fights at the bar, Carothers stated that fights in the bar "didn't happen very often." Carothers further testified that Zahm had been instructed that if an argument did not stop, she should call the police "[a]nytime"; that he did not want people fighting in the parking lot; and that he understood that his responsibility as owner "did not end at the back door." With respect to how often the police had been called to the Round Table as a result of fights or disturbances, Carothers stated that "it wasn't that often."

At trial, Sacco offered exhibits 1 and 30, which were collectively 30 police reports reflecting police responses to numerous, sometimes violent, incidents and disturbances at the Round Table. The trial court sustained Carothers' objection to the police reports based on relevancy.

The evidence at trial shows that on the night in question, Roeber left the bar by the back door, which provided access from the bar to a parking lot. Before he left, Roeber told Sacco he would be outside if Sacco wanted to finish the fight. Removing his shirt, Sacco followed Roeber outside. Matthews also went outside with Sacco and Roeber. Matthews testified that his purpose in so doing was to make sure that no one else became involved in the fight. Once outside, Sacco approached Roeber and struck him in the shoulder or chest. Roeber swung

back, hitting Sacco in the face or jaw. Both men then fell on ice in the parking lot, and Sacco hit his head on the ground.

Matthews told Roeber the fight was over, and Roeber left the parking lot. Initially, Matthews told Zahm not to call the 911 emergency dispatch service, and Sacco was left lying unconscious in the parking lot. Approximately 10 or 15 minutes later, Matthews told Zahm to call 911, but before Zahm did so, Dominic Sacco returned to the bar. Dominic Sacco said that he would take care of Sacco and that 911 should not be called. Dominic Sacco took Sacco to his apartment. He did not call an ambulance until later that night when he noticed blood coming from Sacco's mouth. As a result of injuries he sustained in the fight, Sacco suffered permanent disabilities.

ASSIGNMENTS OF ERROR

On appeal, Sacco raises 12 assignments of error. We conclude that one assigned error requires reversal and that the remainder are without merit. Accordingly, we discuss only the assigned error that the district court erred in excluding from evidence certain police reports offered by Sacco.

STANDARD OF REVIEW

[1] The admissibility of evidence is reviewed for abuse of discretion when the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *Deuth v. Ratigan*, 256 Neb. 419, 590 N.W.2d 366 (1999). The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding relevancy will not be reversed absent an abuse of discretion. *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996).

ANALYSIS

Sacco claims that the trial court erred in excluding exhibits 1 and 30, police reports regarding incidents at or near the Round Table. In his brief, Sacco argues the police reports were relevant because they went to "Carothers' knowledge of incidents," brief for appellant at 30, thereby establishing that disturbances or fights were foreseeable, thereby giving rise to a duty by Carothers. Sacco also indicates that the police reports were relevant to establish the breadth of Carothers' duty and further that

fights in the parking lot could be anticipated and that, thus, the reports were relevant to the issue of proximate cause. Sacco claims the exclusion of these exhibits was prejudicial error.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *State v. McBride, supra*; Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995). All relevant evidence normally is admissible, and conversely, evidence which is not relevant is not admissible. *State v. McBride, supra.* The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding relevancy will not be reversed absent an abuse of discretion. *Id.* A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *State v. Vogel*, 247 Neb. 209, 526 N.W.2d 80 (1995). Error may not be based upon a ruling excluding evidence unless a substantial right is affected and "the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked." Neb. Evid. R. 103(1)(b), Neb. Rev. Stat. § 27-103(1)(b) (Reissue 1995). See, also, *Deuth v. Ratigan, supra.*

In the instant case, Sacco claims the trial court erred when it excluded from evidence Sacco's proffered exhibits 1 and 30. Exhibit 1 offered by Sacco is a 16-page compilation, most pages of which contain copies of two police incident reports. The reports are written on "Departmental Correspondence" forms, apparently from the Grand Island Police Department. Each departmental correspondence form has a space for the date; "Subject," "To," and "From" lines; and a blank area at the bottom of the form for a narrative of the incident reported thereon. The forms comprising exhibit 1 are completed and are addressed, with minor distinctions, to Chief E. Watson, identified in certain of the forms as the "Chief of Police." Each form contains narration of an incident. Exhibit 30 is a single page consisting of copies of two police reports on the departmental

correspondence forms, also addressed to Chief Watson and also containing narration. Exhibit 30 is duplicated on page 11 of exhibit 1.

At the outset of our review, we observe that the record regarding exhibit 1 is less than clear. In their briefs, the parties refer to exhibits 1 and 30 as having been the subject of a motion in limine which was granted and, thereafter, the subject of an offer at trial which was denied. The motion in limine, the reasons therefor, and a detailed ruling thereon are not in the record. The compilation exhibit, "exhibit 1" in the record, bears an exhibit sticker dated "9-18-95," the date of the original trial which was the subject of reversal on appeal in *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997). Exhibit 30 bears an exhibit sticker dated "1-12-98," the date of the retrial. The colloquy with the court regarding the identification and admissibility of exhibit 1 at the retrial of the case suggests that the court and parties were considering the admissibility of exhibit 1 from the first trial, although they failed to separately mark or identify it. The parties refer freely in their briefs to "exhibit 1," identifying it as "police reports." There is a ruling excluding exhibit 1. Accordingly, we review for admissibility the police reports compiled in exhibit 1, bearing the exhibit sticker dated "9-18-95," as they pertain to Carothers' assignment of error based on the trial court's evidentiary ruling at the retrial. Because our conclusion regarding exhibit 1 encompasses the admissibility of exhibit 30, we do not discuss exhibit 30 separately.

[2,3] In order for negligence to exist, a defendant must have a legal duty to protect a plaintiff from injury, the defendant must fail to discharge that duty, and the plaintiff must suffer damage proximately caused by the defendant's failure to satisfy the duty. *Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999); *Gans v. Parkview Plaza Partnership*, 253 Neb. 373, 571 N.W.2d 261 (1997). " ' "[D]uty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk.' " *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 786, 515 N.W.2d 756, 763 (1994) (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts

§ 53 (5th ed. 1984)). See, also, *Doe v. Gunny's Ltd. Partnership, supra.* A factor in establishing the defendant's duty is the foreseeability of risk. *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995).

We have repeatedly stated that the owner of a business is not an insurer of a patron's safety but does owe a patron a duty of reasonable care. See, e.g., *Ratigan v. K.D.L., Inc.*, 253 Neb. 640, 573 N.W.2d 739 (1998); *Hulett v. Ranch Bowl of Omaha*, 251 Neb. 189, 556 N.W.2d 23 (1996). The duty owed by the business owner is not absolute but is graduated according to the danger attendant upon the activities of the business pursued and depends upon the facts and circumstances surrounding each particular case. *Hulett v. Ranch Bowl of Omaha, supra.* Whether a business proprietor of a restaurant, tavern, or similar establishment is liable for the adverse actions of a third party against a lawful visitor depends primarily upon whether those actions were reasonably foreseeable to the proprietor. *Ratigan v. K.D.L., Inc., supra.*

Based on the record, we understand that Sacco claimed that the police reports in exhibit 1 were relevant, inter alia, to foreseeability as it pertains to duty because they show that given past incidents in and near the Round Table, the risk of a fight or some other kind of disturbance at the Round Table was foreseeable and that, therefore, Carothers owed Sacco a duty to conform to the legal standards of reasonable conduct in light of the apparent risk. On appeal, Sacco indicates that the police reports were also relevant to the issues of the scope of Carothers' duty and, arguably, proximate cause. At trial, Carothers objected to exhibit 1 on relevance grounds, and the trial court excluded the exhibit.

In *Doe v. Gunny's Ltd. Partnership, supra*, this court has recently discussed the admissibility and relevance of police reports in a related area involving landlord negligence. In *Doe v. Gunny's Ltd. Partnership, supra*, after the plaintiff was assaulted in the lobby of a building owned by the defendant, the plaintiff sued the defendant, alleging the defendant was negligent in failing to use reasonable care to protect business visitors from assaults by third parties. The defendant appealed an adverse jury verdict, claiming the plaintiff failed to offer any evidence of criminal activity at or near the building and there-

fore failed to establish foreseeability and a consequent duty on the part of the defendant to protect her. At trial, the plaintiff had offered a multipage data compilation of police dispatch calls to the eight-block area around the defendant's building. The defendant successfully objected to the plaintiff's offer of the police reports, claiming the reports were irrelevant and were inadmissible hearsay.

On appeal, we held that the trial court erred in excluding the evidence of police reports. We stated that for the plaintiff to establish the defendant's "duty of reasonable conduct in light of the apparent risk, [the plaintiff] had to present evidence of prior criminal activity which would give notice to the [defendant] of the risk that criminal conduct might occur in or around the . . . building." *Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 660, 593 N.W.2d 284, 290 (1999). Finding the reports admissible under the business records exception to the hearsay rule, we stated the reports were relevant as evidence of criminal activity at or near the defendant's building. We determined that the trial court committed error in excluding the evidence and that taking into consideration the proffered police reports, there was sufficient evidence of prior criminal activity to establish the defendant's duty to the plaintiff.

In the present case, Carothers objected to exhibit 1 during the trial as irrelevant and immaterial. The trial court sustained the objection and excluded the exhibit.

As we have noted above, "[r]elevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Doe v. Gunny's Ltd. Partnership*, 256 Neb. at 663, 593 N.W.2d at 291. Exhibit 1 consists of 30 police reports describing police calls to the Round Table and the surrounding area starting on July 3, 1988, and periodically thereafter including November 21, 1991. More than half of the 30 incidents reported pertained to fights or disturbances. The disturbances described on the forms include separating patrons who were "shoving and pushing," removing "drunken" persons from the bar, and breaking up fights in or near the tavern. The reports reflect such incidents as a "male in the parking lot with a gun," an individual stabbed in

the leg in the alley behind the Round Table, and an indication on May 16, 1990, that an officer was "told by employees from the Round Table that they have had an increased incidence of problems since Razzy's burned down and the clientele moved to the Round Table." Certain of the incidents were noticed by officers on patrol. Certain of the police calls were in response to citizen reports and thereafter brought to the attention of management. The reports indicate that certain police calls were specifically made at the request of the management of the Round Table.

[4] The calls to which the police responded were relevant as evidence regarding fights and disturbances in and near the Round Table, and thus, the foreseeability of fights and disturbances in or outside the tavern related to foreseeability as it pertained to Carothers' duty. The police reports in exhibit 1, upon proper foundation, were admissible as business records, Neb. Evid. R. 803(5), Neb. Rev. Stat. § 27-803(5) (Reissue 1995), and were relevant to the issue of Carothers' duty to Sacco to protect Sacco from injury from third persons. See, *Ratigan v. K.D.L., Inc.*, 253 Neb. 640, 573 N.W.2d 739 (1998); *Hulett v. Ranch Bowl of Omaha*, 251 Neb. 189, 556 N.W.2d 23 (1996). The police reports were also relevant as they pertained to the breadth of the duty Carothers owed patrons. Because Carothers owed Sacco a duty of reasonable care in light of the circumstances, the information in the police reports would be useful in defining the scope of the duty owed by Carothers by more fully developing the record as to the context in which the duty was to be performed. The police reports were also relevant as they may have pertained to proximate cause. In this regard, we note that there is authority for the proposition that the foreseeability of criminal activity is a factor in determining causation. See, e.g., *Ten Associates v. McCutchen*, 398 So. 2d 860 (Fla. App. 1981). For these reasons, the police reports were admissible, and the trial court erred when it excluded exhibit 1.

[5] The conclusion that the trial court erred in excluding exhibit 1 does not end our inquiry. To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded. *Deuth v. Ratigan*, 256

Neb. 419, 590 N.W.2d 366 (1999); *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998).

At trial, exhibit 1 was offered to show that prior disturbances had occurred at or near the Round Table, that Carothers knew of these incidents, that an incident such as that which occurred on December 24, 1991, was foreseeable, and that Carothers therefore had a duty to conform to the legal standard of reasonable care.

[6] Exhibit 1 was offered in part to establish duty. Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998). A review of the record in the instant case shows that, notwithstanding the exclusion of exhibit 1, the trial court nevertheless concluded that Carothers owed Sacco a duty of care, and it submitted the case to the jury. At trial, Carothers moved for a directed verdict at the end of Sacco's case and at the conclusion of the evidence. The motions were denied. Implicit in the denials was the trial court's conclusion that, as a matter of law, duty had been established and that the case should therefore be submitted to the jury. In view of the fact that the trial court concluded that Sacco established the existence of a duty of Carothers without exhibit 1, the exclusion of exhibit 1, although erroneous, did not unfairly prejudice Sacco's substantial right at trial to establish the element of duty, and a reversal is not required on this basis.

[7] Exhibit 1 was also relevant to the issue of the breadth of Carothers' duty. As we have noted, duty is graduated according to the danger attendant upon the activities of a business and the circumstances surrounding each particular case. *Hulett v. Ranch Bowl of Omaha, supra.* Its admission would have added facts regarding the historical profile of the Round Table and would have assisted the jury in evaluating what steps an owner of a bar with a certain character should take to protect the bar's lawful visitors from the acts of third persons. Specifically, exhibit 1 was relevant and probative of whether Carothers breached his duty to Sacco, an issue to be decided by the jury. There is no other evidence in the record comparable to exhibit 1. Carothers' and Zahm's comments regarding past disturbances at the bar, alone, did not provide the jury with the context in which to eval-

uate whether or not Carothers exercised reasonable care under the circumstances to protect Sacco against harm from other persons. Exhibit 1 detailed numerous disturbances and fights in or near the Round Table and would have assisted the jury in determining whether or not Carothers met the standard of reasonable care. The exclusion of exhibit 1 substantially prejudiced Sacco's rights at trial, and its exclusion was reversible error. For this reason, the judgment is reversed, and the cause is remanded for a new trial.

CONCLUSION

On the basis of the record before us, we conclude that exhibit 1 was relevant and otherwise admissible, that its exclusion was error, and that a substantial right of Sacco was prejudiced by the exclusion of exhibit 1, requiring a decision to reverse and remand for a new trial. We have reviewed the remainder of Sacco's assignments of error and find them to be without merit.

REVERSED AND REMANDED FOR A NEW TRIAL.

SHARON A. RYAN, APPELLANT, V. HOWARD M. RYAN, APPELLEE.

600 N.W. 2d 739

Filed September 17, 1999. No. S-98-280.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, in which case the appellate court must reach a conclusion independent from the lower court's decision.
2. **Res Judicata: Judgments: Appeal and Error.** The applicability of res judicata presents a question of law, requiring an appellate court to reach a conclusion independent of that of the lower court.
3. **Actions: Accounting: Motions for New Trial: Attorney Fees: Appeal and Error.** Regardless of whether a case is viewed as a domestic relations case or a general civil action for an accounting and recovery of amounts owed, the denial of motions for new trial and attorney fees will be upheld absent an abuse of discretion.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
5. **Res Judicata: Judgments.** The doctrine of res judicata normally bars future litigation of points upon which the court in the original proceeding was required by the parties

to form an opinion, as well as of every point which the parties could have brought forward in the original proceeding had they exercised reasonable diligence.

6. ___: ___. Res judicata will not preclude a second suit between the same parties if the forum in which the first action was brought did not have jurisdiction to adjudicate the action.
7. **Judgments: Jurisdiction: Collateral Attack.** Judgments entered by a court without subject matter jurisdiction are void and subject to collateral attack.
8. **Judgments: Collateral Attack.** A void judgment may be attacked at any time in any proceeding.
9. **Jurisdiction.** A district court has the power to question sua sponte at any time its statutory authority to exercise subject matter jurisdiction.
10. ___. The question of a court's subject matter jurisdiction does not turn solely on the court's authority to hear a certain class of cases; it also involves determining whether a court is authorized to address a particular question that it assumes to decide or to grant the particular relief requested.
11. **Federal Acts: Property Division: Armed Forces: Pensions.** Military retirement benefits cannot constitute divisible marital property except to the extent permitted by the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1401 et seq. (1982).
12. **Divorce: Jurisdiction.** Federal law precludes a state court, in a dissolution proceeding, from exercising subject matter jurisdiction over Veterans' Administration disability benefits.
13. **Judgments.** A judgment can be vacated in part and upheld in part in the interests of justice when a void portion of that judgment is severable from the valid portion.
14. **Judgments: Words and Phrases.** As used in the context of upholding a valid portion of a judgment and vacating a void portion of the same judgment, the term "severable" means that the valid and void portions are not inextricably intertwined with each other; in other words, the valid portion does not have to depend or rely on the void portion in any way to stand on its own or to be carried out.
15. **Attorney Fees.** Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.
16. ___. Customarily, attorney fees and costs are awarded only to prevailing parties or assessed against those who file frivolous suits.
17. **Motions for New Trial: Appeal and Error.** A motion for new trial is to be granted only when an error prejudicial to the rights of the unsuccessful party has occurred.

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

Michael N. Schirber, of Schirber Law Offices, P.C., for appellant.

Carll J. Kretsinger, P.C., for appellee.

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

GERRARD, J.

I. NATURE OF CASE

Sharon A. Ryan filed a petition in the Sarpy County District Court for an accounting to determine how much her ex-husband, Howard M. Ryan, owed her in arrearage pursuant to the terms of the parties' divorce decree. The district court found that a portion of the decree was void insofar as it ordered a division of Howard's military disability pension. Given that, the district court determined that Howard did not owe Sharon any sum of money and canceled any such arrearage in previous orders. Sharon appeals, and we affirm.

II. PROCEDURAL HISTORY

1. TERMS OF ORIGINAL DIVORCE DECREE

The parties married on July 10, 1965, in Council Bluffs, Iowa, and were divorced by order of the Sarpy County District Court on April 4, 1986. At the time of their divorce, the parties had three children, the oldest two of whom were at or very near the age of majority. By the terms of the divorce decree, Sharon had custody of the parties' youngest child, subject to reasonable visitation by Howard. The decree also ordered Howard to pay varying amounts of child support until the youngest child reached the age of majority.

In a paragraph separate from the child support order, the decree mandated that Howard pay Sharon one-half of his disability income from the Veterans' Administration (VA) so long as he received such income (VA disability income). Should the amount of Howard's VA disability income ever decrease, this provision of the decree required Howard to furnish a copy of any VA check showing such a reduction to the clerk of the district court so that an adjustment could be made to the actual sum payable to Sharon in the order. At the time, Howard's monthly VA disability income was $433, of which the district court ordered Howard to pay Sharon $216.50. In separate paragraphs, the decree divided the balance of the parties' property and ordered Howard to pay Sharon alimony.

Howard filed a motion for new trial on April 10, 1986, asserting that the district court erred in, among other things, awarding Sharon one-half of Howard's VA disability income. By way of a journal entry, the district court overruled Howard's motion for new trial on April 18. The district court subsequently issued orders to withhold and transmit funds from Howard's regular wages due to arrearages in Howard's obligations under the decree.

By May 16, 1988, Howard's child support and alimony arrearages had been fully satisfied via the garnishment of Howard's wages. However, the district court determined that Howard's obligation to pay Sharon one-half of his VA disability income was $4,489.50 in arrears. Nevertheless, the district court did not garnish Howard's wages further to settle the arrearage, finding that Howard had no funds available to accommodate such an order. Instead, the district court ordered Howard's wages to remain garnished in the amount of $216.50 per month so that the VA disability income arrearage would not continue to increase.

2. Modification

On September 2, 1988, the district court found that, including interest, Howard was in arrears $311.19 on his child support obligation, $380.96 on his alimony obligation, and $5,434.79 on his obligation to split his VA disability income with Sharon, as well as other miscellaneous items.

The district court ordered that of the $8,087.49 on deposit with the court, $6,701.91 be remitted to Sharon to remedy those arrearages and $1,385.58 be remitted to Howard. Howard filed a petition with the district court to modify the decree's alimony and child support provisions on September 20, 1988, alleging a material change in circumstances.

After a hearing held February 7, 1989, the district court found that Sharon had remarried and that she was earning an increased income. As such, the district court retroactively terminated Howard's alimony obligation and ordered a slight reduction in Howard's child support obligation, to be triggered in the event that Sharon were to claim the parties' youngest child as a tax deduction.

The district court also found that Howard's VA disability income had been reduced to $403 per month. Consequently, the district court set Howard's monthly obligation on that matter at $201.50 beginning March 1, 1989, and ordered that Howard's wages remain garnished in that amount. The district court continued that garnishment order on April 21.

3. Voiding Division of VA Disability Income

On August 6, 1997, Sharon filed a motion to show cause why Howard should not be held in contempt for refusing to comply with the provision in the decree directing Howard to pay one-half of his VA disability income to Sharon. The district court granted Sharon's motion to show cause and ordered Howard to appear. Howard filed a responsive pleading asserting that the decree's provision ordering Howard to split his VA disability income with Sharon was preempted by federal law and, thus, unenforceable.

Sharon responded by filing a petition for accounting on September 17, 1997, alleging that Howard was approximately $7,000 in arrears in his obligation to split the VA disability income with Sharon under the provisions of the decree. Howard answered by admitting that the decree as modified ordered Howard to pay Sharon $201.50 per month so long as he receives VA disability income. However, Howard denied that he was $7,000 in arrears by failing to comply with the order.

The district court held a hearing on January 29, 1998. At the close of evidence, the district court informed counsel that it intended to treat the matter as an application to determine amounts due under the decree and not an accounting action. On February 13, the district court concluded that Howard did not owe Sharon any arrearage under the terms of the decree pertaining to Howard's VA disability income.

III. ASSIGNMENTS OF ERROR

Sharon claims, restated, that the district court erred in (1) finding that Howard did not owe Sharon anything and canceling Howard's arrearage with respect to the provision in the decree dividing Howard's VA disability income, (2) denying Sharon's

motion for attorney fees and court costs, and (3) overruling Sharon's motion for new trial.

IV. STANDARD OF REVIEW

[1] Sharon asserts, without challenging any of the underlying facts or procedural history of this case, that the doctrine of res judicata foreclosed the district court's jurisdiction to cancel Howard's obligation to share his VA disability income with Sharon. A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, in which case the appellate court must reach a conclusion independent from the lower court's decision. *Bonge v. County of Madison*, 253 Neb. 903, 573 N.W.2d 448 (1998).

[2] Similarly, the applicability of res judicata presents a question of law, requiring an appellate court to reach a conclusion independent of that of the lower court. *Vann v. Norwest Bank Neb.*, 256 Neb. 623, 591 N.W.2d 574 (1999).

[3] Regardless of whether a case is viewed as a domestic relations case or a general civil action for an accounting and recovery of amounts owed, the denial of motions for new trial and attorney fees will be upheld absent an abuse of discretion. See, *Barnett v. Peters*, 254 Neb. 74, 574 N.W.2d 487 (1998); *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997); *Shockley v. Shockley*, 251 Neb. 896, 560 N.W.2d 777 (1997).

V. ANALYSIS

1. Division of VA Disability Income

[4] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. See *Bonge v. County of Madison, supra.* Therefore, we first address Sharon's claim that the lower court lacked jurisdiction to cancel Howard's obligation.

(a) Inapplicability of Res Judicata

Sharon advances her lack-of-jurisdiction argument by asserting that the doctrine of res judicata barred Howard from relitigating the division of his VA disability income, because that issue was litigated in prior proceedings between the parties.

[5] It is true that the doctrine of res judicata normally bars future litigation of points upon which the court in the original proceeding was required by the parties to form an opinion, as well as of every point which the parties could have brought forward in the original divorce proceeding had they exercised reasonable diligence. See, *Vann v. Norwest Bank Neb., supra*; *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997).

In support of her position, Sharon points out that the parties required the district court to form an opinion on the division of Howard's VA disability income in the initial divorce proceeding—albeit without asserting federal preemption. Even if the parties did not actually litigate the issue of federal preemption in the original divorce proceeding, Sharon notes that Howard could have asserted it at any of the various hearings that compose the record in this case.

Moreover, the original divorce action and the subsequent proceedings clearly reached final judgment on the merits in a court of competent jurisdiction—which would usually operate as a bar to future litigation of issues that were or could have been litigated between Howard and Sharon. See *Swift v. Dairyland Ins. Co.*, 250 Neb. 31, 547 N.W.2d 147 (1996).

[6,7] Nevertheless, res judicata will not preclude a second suit between the same parties if the forum in which the first action was brought did not have jurisdiction to adjudicate the action; stated another way, judgments entered by a court without subject matter jurisdiction are void and subject to collateral attack. See, *Marshall v. Marshall*, 240 Neb. 322, 482 N.W.2d 1 (1992) (applying this rule in action to enforce void dissolution of marriage judgment); *Zenker v. Zenker*, 161 Neb. 200, 72 N.W.2d 809 (1955) (holding that divorce decree issued by court without subject matter jurisdiction was not res judicata as to any issue purported to have been raised therein); *Koch v. County of Dakota*, 151 Neb. 506, 38 N.W.2d 397 (1949) (holding that judgment entered without subject matter jurisdiction may not be used as basis of application of res judicata). See, also, 50 C.J.S. *Judgment* § 702 (1997).

[8,9] In keeping with that, the longstanding rule in Nebraska is that a void judgment may be attacked at any time in any proceeding. *Kuhlmann v. City of Omaha*, 251 Neb. 176, 556 N.W.2d

15 (1996). Likewise, a district court has the power to question sua sponte at any time its statutory authority to exercise subject matter jurisdiction. See, *County of Sherman v. Evans*, 252 Neb. 612, 564 N.W.2d 256 (1997); *In re Adoption of Kassandra B. & Nicholas B.*, 248 Neb. 912, 540 N.W.2d 554 (1995).

(b) No Jurisdiction to Divide VA Disability Income

Because res judicata does not bar collateral attacks on void judgments, the outcome of this issue hinges on whether the district court had subject matter jurisdiction to divide Howard's VA disability income. As illustrated by our foregoing analysis, if the district court lacked subject matter jurisdiction to divide the VA disability income, then that portion of the order dividing such income was void and subject to collateral attack in any subsequent enforcement action.

[10] The question of a court's subject matter jurisdiction does not turn solely on the court's authority to hear a certain class of cases, such as dissolutions of marriage or accounting actions; it also involves determining whether a court is authorized to address a particular question that it assumes to decide or to grant the particular relief requested. Compare, *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994) (focusing on particular question lower court assumed to decide); *Lewin v. Lewin*, 174 Neb. 596, 119 N.W.2d 96 (1962) (indicating that court must have subject matter jurisdiction to address particular question it assumes to decide).

[11] It is well established that military retirement benefits cannot constitute divisible marital property except to the extent permitted by the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1401 et seq. (1982). *Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997). Disability benefits, such as Howard's, are not divisible marital property under the USFSPA. See *id.*

The question whether the decree is subject to collateral attack, therefore, turns on an examination of the nature of the federal law on this point. Specifically, we must determine if federal law operates to preclude state courts from exercising subject matter jurisdiction over disability-based military retirement benefits.

Our analysis begins with the U.S. Supreme Court's decision in *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981). In that case, the Supreme Court addressed whether military retirement benefits could be included in the marital estate for distribution in divorce proceedings, or " 'whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition.' " 453 U.S. at 221, quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979).

The Court ultimately determined that the distribution of military retirement benefits in dissolution proceedings frustrated significant federal objectives, particularly in the area of national security, and that the application of state law relating to divorce " 'interfere[s] directly with a legitimate exercise of the power of the Federal Government.' " *McCarty v. McCarty*, 453 U.S. at 235, quoting *Free v. Bland*, 369 U.S. 663, 82 S. Ct. 1089, 8 L. Ed. 2d 180 (1962). Thus, the Court concluded that the Supremacy Clause of the U.S. Constitution demanded that state law be overridden. See *McCarty v. McCarty, supra.*

Congress enacted the USFSPA as a direct response to the U.S. Supreme Court's decision in *McCarty v. McCarty*. See *Kramer v. Kramer, supra.* The effect of the USFSPA was addressed by the U.S. Supreme Court in *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989). In that case, the Court confronted the question whether disability benefits were among those that Congress had intended to make distributable under the USFSPA. See *id.*

The Court noted:

> Because pre-existing federal law, as construed by this Court, completely pre-empted the application of state community property law to military retirement pay, Congress could overcome the *McCarty* decision only by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property.

Mansell v. Mansell, 490 U.S. at 588. The Court concluded that the USFSPA had a preemptive effect of its own and held that "the Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon divorce military

retirement pay that has been waived to receive veterans' disability benefits." 490 U.S. at 594-95.

[12] Based on the preemptive effect of the USFSPA, we conclude that federal law precludes a state court, in a dissolution proceeding, from exercising subject matter jurisdiction over VA disability benefits. Therefore, in the instant case, that portion of the decree purporting to divide Howard's VA disability income is void for want of jurisdiction. Sharon's assignment of error on this point is without merit.

(c) Severability of Partially Void Order

Although the parties did not address the issue, we are presented with the following question: What becomes of a judgment, such as the divorce decree in this case, when part of it is void (division of the VA disability income) and part of it is valid (the balance of the decree)?

Under early common law, a judgment was considered an indivisible entity which could not be vacated only in part. *Weems v. Boillot*, 259 Ark. 611, 535 S.W.2d 817 (1976). See, also, *Capital Bond & Investment Co. v. Hood*, 218 Cal. 729, 24 P.2d 765 (1933) (holding that entire judgment must be vacated when any part of it is void).

However, many jurisdictions began abandoning this rigid rule after the U.S. Supreme Court did so in *Semmes v. United States*, 91 U.S. 21, 23 L. Ed. 193 (1875). See, *Reed v. Scott*, 820 P.2d 445 (Okla. 1991); *Blair v. State*, 640 S.W.2d 867 (Tex. 1982); *Wood v. Wood*, 100 Idaho 387, 597 P.2d 1077 (1979); *In re Marriage of Maskel*, 225 N.W.2d 115 (Iowa 1975); *Aldrich v. Aldrich*, 147 W. Va. 269, 127 S.E.2d 385 (1962), *reversed on other grounds* 378 U.S. 540, 84 S. Ct. 1687, 12 L. Ed. 2d 1020 (1964); *Road Material & Equip. Co. v. McGowan*, 229 Miss. 611, 91 So. 2d 554 (1956); *State ex rel. Pub. Serv. Comm. v. Johnson Cir. Ct.*, 232 Ind. 501, 112 N.E.2d 429 (1953); *Little v. Mann*, 302 Ky. 661, 195 S.W.2d 321 (1946); *Smith v. District Court*, 63 Nev. 249, 167 P.2d 648 (1946); *Lane v. Becton*, 225 N.C. 457, 35 S.E.2d 334 (1945); *State ex rel. Lang v. Civil Court*, 228 Wis. 411, 280 N.W. 347 (1938); *Spencer v. Franks*, 173 Md. 73, 195 A. 306 (1937); *French v. Credit Co.*, 99 Colo. 447, 64 P.2d 127 (1936); *Gaylor v. Miller*, 166 Tenn. 45, 59

S.W.2d 502 (1933); *Jane Doe v. Fife Municipal Court*, 74 Wash. App. 444, 874 P.2d 182 (1994), *rev. denied* 125 Wash. 2d 1024, 890 P.2d 464 (1995).

While this court has never explicitly said that the valid part of a judgment may be upheld when a void part of it is severable, we have implied as much. See *State, ex. rel. Nebraska State Bar Ass'n, v. Merten*, 142 Neb. 780, 7 N.W.2d 874 (1943) (upholding valid portion of district court judgment ordering trustee defendant to make proper application of trust funds, and vacating invalid portion of same judgment that reversed lower court order discharging trustee as administrator).

After considering such an approach, we find it persuasive for two overlapping reasons. First, it tends to further the interests of judicial economy by not forcing parties to relitigate that portion of a judgment that was rightly decided. Second, it promotes fairness insofar as it does not deprive the parties of a just result simply because a different and independent portion of the judgment was void.

[13,14] In view of that, we now hold that a judgment can be vacated in part and upheld in part when a void portion of that judgment is severable from the valid portion. We understand the term "severable" to mean that the valid and void portions are not inextricably intertwined with each other; in other words, the valid portion does not have to depend or rely on the void portion in any way to stand on its own or to be carried out.

In so doing, we also find that the balance of the divorce decree in the instant case is valid and severable from that portion that is void for dividing the VA disability income. Thus, the district court did not err in voiding the division of the VA disability income without vacating the balance of the divorce decree.

2. Attorney Fees

Sharon claims that the district court erred in refusing to award her attorney fees and costs. In addition to attorney fees, Sharon asserts that she incurred costs in making transcripts of the previous proceedings between herself and Howard available to the district court. In other words, Sharon alleges that she incurred these costs "for the benefit of the [district] court." Brief for appellant at 13.

We determine that the district court did not abuse its discretion in denying Sharon an award of attorney fees and costs.

[15,16] Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. *Rapp v. Rapp*, 252 Neb. 341, 562 N.W.2d 359 (1997); *Sid Dillon Chevrolet v. Sullivan*, 251 Neb. 722, 559 N.W.2d 740 (1997). Customarily, attorney fees and costs are awarded only to prevailing parties, *Brodersen v. Traders Ins. Co.*, 246 Neb. 688, 523 N.W.2d 24 (1994), or assessed against those who file frivolous suits, Neb. Rev. Stat. § 25-824 (Reissue 1995).

In the instant case, Sharon did not prevail on any issue and it certainly cannot be said that Howard's defense was frivolous. Therefore, this assignment of error is also without merit.

3. Motion for New Trial

[17] A motion for new trial is to be granted only when an error prejudicial to the rights of the unsuccessful party has occurred. *Heye Farms, Inc. v. State*, 251 Neb. 639, 558 N.W.2d 306 (1997); *Farmers & Merchants Bank v. Grams*, 250 Neb. 191, 548 N.W.2d 764 (1996). The foregoing analysis reveals that the district court did not commit any prejudicial error in the instant case.

VI. CONCLUSION

Because each of Sharon's assignments of error is without merit, we affirm the judgment of the district court.

Affirmed.

State of Nebraska, appellee, v. Arvell Cook, appellant.

601 N.W.2d 501

Filed September 17, 1999. No. S-98-1128.

1. **Postconviction: Evidence: Witnesses.** In an evidentiary hearing at a bench trial provided by Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995) for postconviction relief, the postconviction trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given to a witness' testimony.

2. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly wrong.
3. **Postconviction: Constitutional Law: Proof.** 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 U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
4. **Constitutional Law: Effectiveness of Counsel: Proof.** In order 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, a 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.
5. **Effectiveness of Counsel.** In any effectiveness of counsel case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.
6. **Criminal Law: Intent: Intoxication.** Ordinarily, voluntary intoxication does not justify or excuse a crime unless an accused is intoxicated to an extent or degree that the accused is incapable of forming the intent required as an element of the crime charged.

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

John J. Reefe III for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

The appellant, Arvell Cook, is currently in custody and serving a sentence for first degree murder and use of a firearm to commit a felony. Cook petitioned the Douglas County District Court for postconviction relief on the basis that he had received ineffective assistance of counsel. The district court denied his petition, and Cook appeals.

SCOPE OF REVIEW

[1] In an evidentiary hearing at a bench trial provided by Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995) for postconviction

relief, the postconviction trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given to a witness' testimony. *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995).

[2] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly wrong. *State v. Ditter*, 255 Neb. 696, 587 N.W.2d 73 (1998).

FACTS

The facts of this case are set forth in more detail in *State v. Cook*, 244 Neb. 751, 509 N.W.2d 200 (1993), in which this court affirmed Cook's convictions of first degree murder and use of a firearm to commit a felony. Thus, we set forth only those facts which are necessary for our opinion.

On February 29, 1992, Nebraska Morrow (Morrow) was working at M & G Enterprises, a package liquor and general store in Omaha. At approximately 8 or 8:30 p.m., Cook arrived at the store and began talking to Morrow. When Cook attempted to raise the countertop to go behind it, another employee, Bolden Hooper, saw Morrow hit Cook once on the head with a wooden stick. Cook fell to the ground and was bleeding from the head.

After Cook got up, he repeatedly asked Morrow to come out from behind the counter to fight him. Cook then walked out the door, came back in, and said, "Nebraska, you're dead," three times before leaving the store. Morrow called his brother, Napoleon Morrow, after the incident and told him that he had hit a man named "Cooks." Napoleon Morrow identified Cook as the man known as Cooks.

At approximately midnight, Kiesha Jackman, Tiffany Pogue, Tyrone Watson, and three other persons arrived at the store to buy beer. Jackman testified that she was driving her mother's car and that she backed into the parking lot. Pogue stated that some members of the group went into the store while others waited in the car. While Pogue was in the car, she saw a man walking "catty-corner across the parking lot." Jackman told Pogue that the man had a gun, and Pogue saw a gun by the side of the man's leg. Pogue identified the man as Cook. She testified that Cook was alone, and she saw him walk up to the front door of the

store, stop for 20 or 30 seconds to look around, and then walk inside. About 1½ to 2 minutes later, she heard a shot, and she saw two women run out of the store. She then observed Cook, still carrying the gun, walk out of the store and back across the parking lot. She said that his eyes were "glazed over a little bit" and that he had what looked like a sore on his head.

Four other witnesses testified to seeing Cook enter the store and shoot Morrow, who died as a result of the shotgun blast. The murder weapon was not recovered, but a search of Cook's residence the morning after the shooting produced a spent .410 shotgun shell. Cook was convicted of first degree murder and use of a firearm to commit a felony, and he was sentenced to life in prison for the murder conviction and 10 years' imprisonment for the firearm conviction. His convictions and sentences were affirmed on appeal.

In his motion for postconviction relief, Cook claims that his trial counsel was ineffective because, even though there was clear evidence that Cook was an alcoholic and that he had been drinking large quantities of alcohol throughout the day and evening of the murder, his trial counsel did not investigate any of the circumstances concerning his alcoholism. The petition alleges that there was evidence which showed that Cook was taking medication which would have adverse effects on Cook when consumed with alcohol. Cook alleges that his trial counsel did not sufficiently explore the benefits of presenting evidence regarding these prescribed drugs and the effect they would have had upon him.

Cook further alleges that his trial counsel failed to conduct any investigation whatsoever as to whether he suffered from severe trauma as a result of being struck in the head with a wooden stick prior to the murder. Cook claims that had his trial counsel not been ineffective, the result of the proceeding would have been different.

At the hearing on the motion for postconviction relief, trial counsel admitted that the strategy he pursued in the investigation was the defense of diminished capacity to form the necessary intent of premeditated first degree murder due to the effects of having suffered a blow to the head prior to the shooting and

due to the fact that Cook was intoxicated at the time of the shooting.

The postconviction record shows that evidence of Cook's injury and intoxication was admitted at trial. Charles Bailey testified that he and Cook had consumed beer and liquor on the day of the murder and that the men had started drinking at 2 p.m. and then purchased more beer at 6:30 p.m. Bailey stated that the two men met up with friends and continued drinking together until approximately 7:30 or 8 p.m., when he left to go home. Cook entered the liquor store at approximately 8 or 8:30 p.m.

Napoleon Morrow, Morrow's brother, testified at trial that Morrow had told him that Morrow hit Cook with a stick. Hooper also testified that Cook had been hit with a stick and that Cook fell as a result of the blow and was bleeding from the head when he left the store.

At the hearing on the motion for postconviction relief, Cook's trial counsel acknowledged that he did not call all the witnesses he could have and that he did not elicit all the relevant testimony from the one witness he did call. Trial counsel testified he called Bailey to testify that Bailey and Cook were drinking beer on the day of the murder, but Bailey was not asked any questions regarding the specific quantity of alcohol consumed. In addition, he was not questioned about Cook's demeanor or appearance.

A police officer testified at the postconviction hearing that he had noted in his report that Cook emitted a strong odor of alcohol the morning after the shooting. This evidence, however, was not elicited at trial. Other police reports contained witness accounts which indicated that Cook seemed drunk about the time of the shooting. This testimony was also not presented at trial.

In denying Cook's motion for postconviction relief, the district court stated:

> The record reflects that Defendant and his trial counsel . . . met several times prior to trial to discuss trial strategy. Witnesses testified at the 7-27-98 hearing that were either not called to testify at trial or failed to respond to a subpoena to testify at trial. The Court finds that the testimony of these individuals would not likely have changed the outcome at trial.

> Defendant further claims that trial counsel was ineffective in that he did not pursue the defense of intoxication. . . . [T]he Court finds that trial counsel did attempt to pursue the intoxication defense by having Dr. Bruce Gutnik interview the Defendant. . . . Unfortunately for the Defendant, it was Dr. Gutnik's opinion that the intoxication defense was not a viable defense.
>
> Trial counsel is not required to exhaust the field of experts until he is able to find one that is willing to testify as the Defendant would want him to. The fact that Defendant now has an expert that opines that the Defendant could not have formed intent or weighed the consequences of his actions does not mean that the Defendant's trial counsel did not subject the prosecution's case to a meaningful adversarial testing. . . .
>
> The Court, therefore, finds that given the weight of the evidence which the State had against the Defendant and the fact that Dr. Gutnik's opinion would not have been useful to the Defendant's defense of intoxication, it cannot be said that trial counsel's decision not to call Dr. Gutnik and Defendant's wife as witnesses at his trial prejudiced him . . . .

Subsequently, Cook timely filed a notice of appeal. Pursuant to our power to regulate the caseload of the appellate courts of this state, we moved this case to our docket.

ASSIGNMENT OF ERROR

In summary, Cook argues that the district court erred in not granting him postconviction relief because his trial counsel was ineffective.

ANALYSIS

[3] 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 U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. See, *State v. Ditter*, 255 Neb. 696, 587 N.W.2d 73 (1998); *State v. Williams*, 253 Neb. 111, 568 N.W.2d 246 (1997). A criminal

defendant seeking postconviction relief has the burden of establishing the basis for such relief. *State v. Ditter, supra.*

[4] In order 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, a 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. Hunt*, 254 Neb. 865, 580 N.W.2d 110 (1998), relying on *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The first prong of the *Strickland* test is satisfied if the defendant shows that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *State v. Ditter, supra.* The second prong is satisfied if the defendant shows how he was prejudiced in the defense of his case as the result of the attorney's actions. See *State v. Rehbein*, 235 Neb. 536, 455 N.W.2d 821 (1990). To prove prejudice, the defendant must demonstrate by a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. See *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993).

We begin by addressing the first prong of the *Strickland* test. Cook argues that trial counsel was ineffective in not pursuing the defense of intoxication. Cook claims that because his trial counsel did not call Dr. Bruce Gutnik to testify regarding Cook's alcoholism or call Cook's wife to testify regarding the medication which he was taking on the day of the murder, counsel was ineffective. In denying Cook's motion for postconviction relief, the district court found that trial counsel's decision not to call Dr. Gutnik and not to call Cook's wife could not have prejudiced Cook's defense. We agree with the district court's conclusion, but also conclude that trial counsel was not ineffective.

Cook argues that his counsel should have called an expert to testify regarding his alcoholism. We addressed a similar claim in *State v. Nielsen, supra*, in which the defendant argued that his trial counsel should have called an expert to testify regarding the

effects of his alcoholism. In *Nielsen*, the witness was not called, but the attorney, instead, elected to elicit evidence of the defendant's intoxication by cross-examining the State's expert witness. We held that the defense attorney's strategy to call, or not to call, a particular witness will not, without more, sustain a finding of ineffectiveness of counsel. We stated that the court will not second-guess the reasonable strategic decisions made by defense counsel.

Here, Cook's attorney decided not to call Dr. Gutnik because he had opined that Cook was not sufficiently intoxicated at the time of the murder so as to negate intent. Therefore, Dr. Gutnik's statement would not have helped Cook's defense, and thus, trial counsel had reasonable grounds for not calling Dr. Gutnik as a witness.

Cook suggests that trial counsel should have found an expert who would have testified that he was sufficiently intoxicated so as not to be able to formulate an intent to commit first degree murder. We agree with the district court's determination that trial counsel is not required to "shop" for an expert who will testify as the defendant wants him to. Once Dr. Gutnik opined that Cook was able to formulate intent, trial counsel had no reasonable basis to conclude that another expert would opine differently. Therefore, trial counsel was not deficient in failing to call this expert or any other expert on this issue.

Cook also alleges that trial counsel was ineffective for not calling Cook's wife to testify regarding the medication he was taking on the day of the murder. The district court concluded that counsel was justified in not calling Cook's wife, and we agree. Trial counsel explained at the evidentiary hearing that he was afraid that if the wife was called, the State would bring out the fact that Cook told his wife he had killed someone when he returned home after the shooting. This testimony would undermine Cook's claim that he did not remember anything about the murder. A strategic decision to call, or not to call, a particular witness will not, without more, sustain a finding of ineffectiveness. *State v. Nielsen, supra.*

Cook also asserts that trial counsel was ineffective for not calling Enice Prince, Jr., to testify. Prince allegedly could have testified regarding Cook's drunkenness at the time of the mur-

der. At the hearing on the motion for postconviction relief, Prince claimed that if he had been called to testify at the murder trial, he would have informed the jury that he had spoken with Cook after the murder. Prince claims that he ran into Cook at an "after-hours" party on the night of the murder between midnight and 1 a.m. and that Cook greeted Prince as if it was the first time the men had seen each other all day even though they had been drinking together earlier in the night. Prince said that he also overheard conversations between Cook and Bailey in which it appeared that Cook did not remember shooting anyone. Prince was not certain, but he thought that Bailey informed Cook of the murder at that time. Cook claims that had this testimony been presented to the jury, it might have lent credibility to his claim that he was in an alcohol-induced blackout at the time of the murder.

[5] At the postconviction hearing, trial counsel acknowledged that Cook had given him Prince's name as a possible witness. Trial counsel claimed, however, that his attempts to contact Prince had been unsuccessful. Trial counsel did not interview Prince regarding the after-hours party and did not know what testimony Prince would have given. The State also subpoenaed Prince, but he did not appear at trial. However, trial counsel did have an opportunity to meet and interview Bailey regarding the events of the night, and at no time during the interview did Bailey inform counsel that Cook did not remember committing the murder or that Bailey was the one who informed Cook of what he had done. In other words, Bailey, who did testify at trial, provided no testimony on the matters alleged by Prince. In any effectiveness of counsel case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. *State v. Escamilla*, 245 Neb. 13, 511 N.W.2d 58 (1994). In light of the fact that neither Bailey nor apparently Cook informed trial counsel of the alleged content of Prince's testimony, we conclude that trial counsel was not ineffective for failing to find and interview Prince regarding the after-hours party.

[6] Moreover, Cook has not been prejudiced by trial counsel's failure to call the above witnesses or to investigate further into

his intoxication defense. Ordinarily, voluntary intoxication does not justify or excuse a crime unless an accused is intoxicated to an extent or degree that the accused is incapable of forming the intent required as an element of the crime charged. *State v. Lixey*, 238 Neb. 540, 471 N.W.2d 444 (1991).

After reviewing the entire record from Cook's trial and all the evidence submitted at the hearing on the motion for postconviction relief, we conclude that the district court was not clearly wrong in determining that Cook had not sustained his burden of showing that the result would otherwise have been different had trial counsel called different witnesses. Even if all the evidence about which Cook complains had been presented to the jury, it would not have proved intoxication of a sufficient severity to negate his intent to commit murder. Several witnesses testified at trial that Cook was acting coherently at the time of the murder. Cook was coherent enough to say to the victim, "Nebraska, you're dead," obtain a gun, walk back into the store, and shoot the victim in the chest with a shotgun at close range.

Cook has failed to prove that his trial counsel's performance was deficient and has failed to prove that he was prejudiced in any manner by the actions of trial counsel. The district court's denial of postconviction relief was not clearly wrong, and we therefore affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES JESS PALMER, ALSO KNOWN AS CHARLES TINSLEY, ALSO KNOWN AS J.R. KIRKPATRICK, APPELLANT.

600 N.W.2d 756

Filed September 24, 1999. No. S-95-1293.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Homicide: Aggravating and Mitigating Circumstances.** Exceptional depravity is present when it is shown beyond a reasonable doubt that the following circumstances, either separately or collectively, exist in reference to a first degree murder: (1) apparent relishing of the murder by the killer, (2) infliction of gratuitous violence on the

victim, (3) needless mutilation of the victim, (4) senselessness of the crime, or (5) helplessness of the victim.

3. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased.
4. **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.
5. **Criminal Law: Statutes: Words and Phrases.** A bill of attainder is a legislative act which applies to named individuals or to easily ascertained members of a group in such a way as to inflict punishment on them without a judicial trial.
6. **Criminal Law: Statutes.** In order for a legislative enactment to be deemed a bill of attainder, it must (1) specify the affected persons, (2) inflict punishment, and (3) lack a judicial trial.
7. ___: ___. The singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons.
8. **Criminal Law: Statutes: Words and Phrases.** When past activity serves as a point of reference for the ascertainment of particular persons ineluctably designated by a legislature for punishment, the legislative enactment may be an attainder.
9. **Constitutional Law: Statutes: Aggravating and Mitigating Circumstances: Sentences: Notice.** Whether a person has sufficient notice of the scope of an aggravating circumstance which may be applied at a sentencing hearing is a two-part consideration. The notice requirement of the 14th Amendment to the U.S. Constitution states that (1) the language of the statute and previous constructions of it in existence at the time of the sentencing hearing must provide reasonable notice to a person of ordinary intelligence of the scope of criminal behavior reached by the aggravating circumstance and (2) any new construction of the aggravating circumstance which occurs after the hearing does not increase the scope of the behavior considered under that particular aggravating circumstance.
10. **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, a 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.
11. **Effectiveness of Counsel.** A counsel's duty to investigate is the duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.
12. **Indictments and Informations: Statutes.** An information which alleges the commission of a crime using the language of the statute defining that crime or terms equivalent to such statutory definition is sufficient.

13. **Indictments and Informations: Complaints.** An information or complaint is sufficient unless it is so defective that by no construction can it be said to charge the offense of which the accused was convicted.
14. **New Trial: Appeal and Error.** If a convicted defendant obtains a reversal and remand for a new trial on appeal, the State may reprosecute.
15. **Convictions: New Trial.** When there is a reversal of a conviction, the original conviction has been wholly nullified and the slate wiped clean. This principle is colloquially referred to as the "clean slate rule."
16. **Trial: Evidence: Convictions: Appeal and Error.** An exception to the "clean slate rule" occurs when the petitioner's conviction is set aside on the ground that there was insufficient evidence presented at trial to support the verdict.
17. **Trial: Evidence: Appeal and Error.** Reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the State has failed to prove its case.
18. **Double Jeopardy: Evidence: Appeal and Error.** The Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient.
19. **Trial: Convictions: Sentences: Appeal and Error.** When there is a reversal of a conviction, the "clean slate rule" and its exception also apply to the sentencing phase of a retrial.
20. **Trial: Convictions: Juries: Proof: Appeal and Error.** The "clean slate rule" is inapplicable whenever a jury agrees or an appellate court decides that the prosecution has not proved its case.
21. **Trial: Sentences: Proof.** It is usually impossible to conclude that a sentence less than the statutory maximum constitutes a decision to the effect that the State has failed to prove its case.
22. **Trial: Sentences: Death Penalty: Juries: Proof.** When a state enacts a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, such a procedure explicitly requires the jury to determine whether the prosecution has proved its case.
23. **Double Jeopardy: Sentences: Death Penalty: Juries.** A jury determination that a particular defendant should be given a life sentence rather than a death sentence should be treated as an acquittal of the death sentence for purposes of the Double Jeopardy Clause.
24. **Double Jeopardy: Sentences: Death Penalty: Juries: Appeal and Error.** A defendant sentenced to life imprisonment by a capital sentencing jury is protected by the Double Jeopardy Clause from imposition of the death penalty in the event that the defendant obtains reversal of the conviction and is retried and convicted.
25. **Double Jeopardy: Trial: Sentences: Death Penalty.** Nebraska's capital sentencing procedures have the characteristics which the U.S. Supreme Court found to resemble a trial in *Bullington v. Missouri*, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981), and double jeopardy concerns attach at a capital sentencing hearing in Nebraska.
26. **Double Jeopardy: Evidence: Appeal and Error.** A reviewing court must consider all of the evidence admitted by the trial court in deciding whether retrial is permissible under the Double Jeopardy Clause.

27. **Judgments: Evidence: Appeal and Error.** A reversal for insufficiency of the evidence should be treated no differently than a trial court's granting a judgment of acquittal at the close of all the evidence. A trial court, in passing on such a motion, considers all of the evidence it has admitted, and to make the analogy complete, it must be this same quantum of evidence which is considered by the reviewing court.
28. **Homicide: Aggravating and Mitigating Circumstances: Sentences.** The plain language of Neb. Rev. Stat. § 29-2523(1)(b) (Reissue 1995) clearly provides that a sentencer may find aggravating circumstance (1)(b) to apply where the sentencer finds that the murder was committed in an apparent effort to conceal the commission of a crime or to conceal the identity of the perpetrator of a crime.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed.

Gerard A. Piccolo, Hall County Public Defender, and Robert Lindemeier, Lincoln County Public Defender, for appellant.

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

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

WRIGHT, J.

I. STATEMENT OF CASE

Charles Jess Palmer (Palmer) has been tried and convicted three times for the crime of felony murder, and he has been sentenced to death after each conviction. The convictions and sentences from the first two trials have been reversed. See, *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981) (*Palmer I*); *State v. Palmer*, 215 Neb. 273, 338 N.W.2d 281 (1983) (*Palmer II*). The third conviction and sentence were affirmed by this court in *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986) (*Palmer III*). Palmer brought this postconviction action pursuant to Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995), requesting that his conviction and death sentence be vacated and set aside.

II. SCOPE OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Dandridge*, 255 Neb. 364, 585 N.W.2d 433 (1998).

III. FACTS

1. BACKGROUND

The victim, Eugene Zimmerman (Zimmerman), operated a coin shop in his home in Grand Island, Nebraska. Palmer and his wife, Cherie Palmer, first contacted Zimmerman in October 1978 for the purpose of selling coins and silver objects to him. On March 6, 1979, the Palmers arrived at Zimmerman's house between 3 and 3:30 p.m. Zimmerman told the Palmers that he would buy certain rings from them if a test proved that the rings were in fact gold. According to Cherie Palmer, as Zimmerman rose from his desk and turned around, Palmer lunged at Zimmerman and struck him on the side of the head. The two men struggled, and Zimmerman was thrown to the floor. Palmer then demanded money.

At the time, Palmer was 40 years old, stood 6 feet 7 inches tall, and weighed approximately 245 pounds. Zimmerman was 59 years old, stood 5 feet 11 inches tall, and weighed approximately 135 pounds. Palmer bound Zimmerman's hands, lifted him to his feet, and forced him upstairs. Palmer remained alone with Zimmerman for a few minutes before Cherie Palmer went upstairs. Upon entering the bedroom, Cherie Palmer saw Zimmerman lying on the bed, his hands and feet bound. Palmer told his wife to watch Zimmerman while he searched the upstairs. Palmer then went downstairs and remained there for about 20 minutes. During that time, Zimmerman complained to Cherie Palmer of stomach pain and asked, "[W]hy are you doing this to me[?]" Zimmerman then asked Cherie Palmer to get him some medicine from the bathroom, which she did.

Palmer went back upstairs wearing gloves and sent Cherie Palmer downstairs, where she waited for 15 minutes. She stated that during this time, she heard noises: "There was a — a lot of thumping noises. Thump, thump, thump, thump, and there was some kind of a — a guttural noise. I kept hearing a — a low, monotonous, almost a chant-like sound. A very deep and very throaty guttural type over and over, again." Palmer returned downstairs around 4:30 p.m., and the Palmers left approximately 1 hour after they arrived at Zimmerman's residence.

Zimmerman's body was discovered by his wife, Monica Zimmerman, when she returned home around 5 p.m. on March 6, 1979. Zimmerman had an electrical cord tied tightly around his neck. His windpipe and voice box were broken, and his face was bruised and cut. The cause of death was determined to be strangulation, and the time of death was fixed at 4:30 p.m.

About 2 weeks after Zimmerman's death, the Palmers left Nebraska for Austin, Texas. Cherie Palmer testified that the items stolen from the coin shop were taken with them to Texas. In Texas, Palmer, using the name "J.R. Kirkpatrick," contacted a coin dealer named "Jesse Garza" and sold him coins and jewelry. A few days later, Garza read a trade journal which covered Zimmerman's robbery and murder, and cataloged the stolen items. Garza recognized several of the items he had purchased from Palmer, and he called the police.

Following Palmer's third trial and conviction, the sentencing panel found that no mitigating circumstances existed which would affect Palmer's sentence and found beyond a reasonable doubt that two statutory aggravating circumstances existed: (1) The murder was committed in an apparent effort to conceal Palmer's identity as the perpetrator of the robbery and (2) while the murder was not especially heinous, atrocious, or cruel, it manifested exceptional depravity by ordinary standards of morality and intelligence. See Neb. Rev. Stat. § 29-2523(1)(b) and (d) (Reissue 1995).

2. *PALMER I*

Prior to his first trial, Palmer filed a motion to suppress the items seized from his person at the time of his arrest. He also filed a motion and an amended motion in limine to suppress all testimony from Monica Zimmerman, Deanna Klintworth, and Jim Mracek, upon the ground that the testimony was obtained by the State under hypnosis at a pretrial hypnotic interview. The trial court denied the motions, but the court excluded any testimony by the three witnesses which was given while under hypnosis. The trial court's rulings on these motions constituted the basic assignments of error asserted by Palmer on appeal. We held that the testimony of the three witnesses concerning the subject matter adduced at their respective pretrial hypnotic

interviews was inadmissible and was clearly prejudicial, and we reversed the judgment of conviction and remanded the cause for a new trial.

3. *PALMER II*

Palmer was retried, convicted, and again sentenced to death. In *Palmer II*, we did not consider all 26 of the errors Palmer alleged, because we determined that Cherie Palmer was still Palmer's wife on June 8, 1982, when she testified against Palmer and that the trial court committed prejudicial error in permitting her to so testify in violation of Neb. Rev. Stat. § 27-505(2) (Reissue 1979). We again reversed the judgment of conviction and remanded the cause for a new trial.

4. *PALMER III*

Following our opinion in *Palmer II*, but before the third trial, § 27-505 was amended so that in criminal cases involving crimes of violence, one spouse could testify against another. See 1984 Neb. Laws, L.B. 696. In *Palmer III*, we concluded, inter alia, that the amendment of § 27-505 did not create an ex post facto law and that the State's decision to try Palmer a third time did not violate the Double Jeopardy Clause of the state and federal Constitutions. We also found that the victim was murdered in an effort to conceal Palmer's identity, that the murder " 'manifested exceptional depravity,' " *Palmer III*, 224 Neb. at 287, 399 N.W.2d at 713, and that the aggravating circumstances were established beyond a reasonable doubt.

[2] We held that exceptional depravity is present when it is shown beyond a reasonable doubt that the following circumstances, either separately or collectively, exist in reference to a first degree murder: (1) apparent relishing of the murder by the killer, (2) infliction of gratuitous violence on the victim, (3) needless mutilation of the victim, (4) senselessness of the crime, or (5) helplessness of the victim. We stated that where one or more of these five factors are present, there may be a finding of exceptional depravity. We found that in Palmer's case the sentence of death was neither excessive nor disproportionate to the penalty imposed in earlier cases, and we affirmed the judgment of conviction and sentence of death. After reviewing Palmer's

assigned errors, we found that the evidence against Palmer was more than sufficient to justify the case being submitted to the jury and to find Palmer guilty of felony murder.

5. Federal Appeals

During the pendency of his various appeals in state courts, Palmer also sought habeas corpus relief in the federal courts. After our reversal in *Palmer II*, but before the third trial, Palmer filed a petition for writ of habeas corpus in the U.S. District Court for the District of Nebraska (District Court). The petition asserted that Palmer's second trial had subjected him to double jeopardy and that his third trial would also subject him to double jeopardy because the properly admitted evidence in Palmer's first two trials—the evidence that remained after the erroneously admitted evidence obtained by hypnosis had been thrown out—was legally insufficient to convict him. The District Court dismissed Palmer's petition as premature, finding that Palmer had not exhausted his state remedies because he could either petition this court before his third trial or pursue other avenues of relief if convicted. See *Palmer v. Drum*, No. CV84-L-144 (D. Neb. Mar. 1, 1984).

Palmer appealed the dismissal of his habeas petition to the U.S. Court of Appeals for the Eighth Circuit (Court of Appeals), which remanded the cause to the District Court for further consideration. See *Palmer v. Drum*, No. 84-8041 (8th Cir. May 10, 1984). On remand, the District Court dismissed Palmer's claim as meritless, ruling that the Double Jeopardy Clause is not violated by a retrial where a conviction is reversed based on errors in admission of evidence rather than on the basis that the evidence was insufficient to convict. The District Court also denied Palmer's motion to amend his petition to set forth in greater clarity his double jeopardy claims and the bases thereof. After rejecting Palmer's request that the District Court determine the sufficiency of the remaining evidence admitted during his second trial, the Court of Appeals stated: " 'In light of the nature of the claim asserted and the restrictive nature of the double jeopardy clause, I fail to perceive how the petition could be amended to state a nonfrivolous double jeopardy claim. . . . Therefore, the motion for leave to amend the petition will be denied.' " *Palmer*

v. Grammer, 863 F.2d 588, 590 (8th Cir. 1988), quoting *Palmer v. Grammer*, No. CV84-L-144, slip op. (D. Neb. May 22, 1984).

Palmer appealed the dismissal of this petition to the Court of Appeals, which held the matter in abeyance pending resolution of all proceedings in the Nebraska state courts. See *Palmer v. Drum*, No. 84-1689 (8th Cir. June 8, 1984). After we affirmed Palmer's conviction and death sentence in *Palmer III*, Palmer's habeas appeal was decided by the Court of Appeals. See *Palmer v. Grammer, supra*. The Court of Appeals affirmed the District Court's decision that the habeas petition lacked merit, but granted Palmer leave to amend his petition. *Id.*

On March 9, 1989, Palmer filed his amended habeas petition in the District Court, asserting that his imprisonment before the third trial violated the Double Jeopardy Clause and denied Palmer due process. He contended that the totality of the evidence at each of his first two trials was insufficient to convict him and that the District Court should not consider Cherie Palmer's testimony when reviewing the sufficiency of the evidence at his second trial because the testimony was obtained through judicial and prosecutorial misconduct. Palmer contended that the prosecutor and the judge knew that Cherie Palmer's testimony was inadmissible, but offered it anyway, knowing that Palmer could be retried if this conviction was reversed based upon admission of Cherie Palmer's testimony.

A magistrate judge originally granted Palmer's request to depose both the prosecutor and the trial judge who had presided at Palmer's second trial. After the State sought a protective order, the magistrate judge canceled the depositions and declined to consider Palmer's misconduct argument because the magistrate judge believed it was beyond the Court of Appeals' remand order and thus was not properly before the District Court. In reviewing all the evidence in each of the first two trials, including the improperly admitted evidence, the magistrate judge concluded that sufficient evidence supported Palmer's first two convictions. The District Court adopted the magistrate judge's recommendation and denied Palmer's petition.

Palmer appealed, and the Court of Appeals found that although a jury convicted Palmer a third time while his habeas petition was pending, his pretrial double jeopardy challenge to

his third trial was not moot, and that Palmer could raise constitutional challenges to his third conviction and sentence in a later habeas petition. See *Palmer v. Clarke*, 961 F.2d 771 (8th Cir. 1992). The Court of Appeals noted that the District Court had not considered whether it should exclude Cherie Palmer's testimony based on Palmer's misconduct claim because the District Court believed it was beyond the scope of the Court of Appeals' order on remand. The Court of Appeals found, however, that because Palmer's misconduct claim was a part of his sufficiency of the evidence argument, the District Court should consider it. The determination of the sufficiency of the evidence at Palmer's second trial was remanded to the District Court. The conclusion by the District Court that the evidence at the first trial was sufficient to convict Palmer and the dismissal of Palmer's double jeopardy challenge to his second trial were affirmed by the Court of Appeals. The Court of Appeals therefore remanded Palmer's double jeopardy challenge to his third trial.

Upon remand, after conducting an evidentiary hearing, the District Court found there was no misconduct by the prosecutor or the trial judge because neither the prosecutor nor the judge knew that the testimony of Cherie Palmer was inadmissible. The District Court concluded that the testimony of Cherie Palmer should be considered when reviewing the sufficiency of the evidence at Palmer's second trial and that the evidence was sufficient to support Palmer's second conviction. The District Court found that Palmer's third trial did not violate the Double Jeopardy Clause, and the Court of Appeals affirmed. See *Palmer v. Clarke*, 12 F.3d 781 (8th Cir. 1993).

Subsequently, Palmer filed a motion for postconviction relief in the Hall County District Court, which denied his request for relief. Palmer then timely filed this appeal.

IV. ASSIGNMENTS OF ERROR

Palmer makes the following assignments of error, which we have renumbered and restated: (1) The lower court erred by not engaging in a comparative review analysis and erred in not finding Palmer's sentence to be disproportionate; (2) the lower court erred in not finding Palmer's sentence to be arbitrary and capricious; (3) the lower court erred in finding the Nebraska death

penalty statutes to be constitutional as applied; (4) the lower court erred in not granting postconviction relief based on a violation of the ex post facto provisions of the U.S. and Nebraska Constitutions; (5) the lower court erred in not granting postconviction relief based on the trial court's not giving a lesser-included offense instruction on manslaughter and second degree murder; (6) the lower court erred in not granting postconviction relief based on the unconstitutional and/or illegal arrest of Palmer in Texas; (7) the lower court erred in holding that the presentence investigation used in Palmer's case was sufficient to justify imposition of the death penalty; (8) the lower court erred in not granting postconviction relief based on a violation of the bill of attainder provision in the U.S. and Nebraska Constitutions; (9) the lower court erred in not granting postconviction relief because Nebraska's felony murder statute is unconstitutional; (10) the lower court erred in not granting postconviction relief based on a jury instruction given in Palmer's third trial which confused and misled the jury; (11) the lower court erred in not finding the "exceptional depravity" language in § 29-2523(1)(d) to be unconstitutional and in holding that regardless of the exceptional depravity language, the death penalty was appropriate because the trial court found a § 29-2523(1)(b) aggravating circumstance to support the death penalty; (12) the lower court erred in not granting postconviction relief on the basis that Palmer received ineffective assistance of counsel because his counsel performed an incomplete investigation of the aggravating and mitigating circumstances; (13) the lower court erred in not granting postconviction relief on the basis that Palmer received ineffective assistance of counsel because his counsel gave inadequate appellate argument concerning the ex post facto issue; (14) the lower court erred in not granting postconviction relief on the basis that Palmer received ineffective assistance of counsel because his counsel gave inadequate appellate argument concerning the bill of attainder issue; (15) the lower court erred in not granting postconviction relief on the basis that Palmer received ineffective assistance of counsel because his trial counsel failed to challenge the sufficiency of the information; (16) the lower court erred in not granting

postconviction relief on the basis that Palmer received ineffective assistance of counsel in the sentencing phase of his first trial because his counsel did not object to the use of Cherie Palmer's testimony at sentencing on the ground that it was privileged; (17) the lower court erred in not granting postconviction relief on the basis that Palmer received ineffective assistance of counsel in his first appeal because his counsel did not raise the improper use of Cherie Palmer's statement at sentencing; (18) the lower court erred in not granting postconviction relief on the basis that Palmer received ineffective assistance of counsel in the sentencing phase of his first trial because his counsel conceded the existence of aggravating circumstance (1)(b); (19) the lower court erred in not granting postconviction relief on the basis that Palmer received ineffective assistance of counsel because of the failure of his appellate counsel in his first appeal to argue sufficiency of the evidence once the hypnotic evidence was excluded; (20) the lower court erred in not granting postconviction relief on the basis that Palmer received ineffective assistance of counsel because his trial counsel in his second trial failed to file a plea in bar; and (21) the lower court erred in not granting postconviction relief on the theory that the information in Palmer's third trial was defective.

V. ANALYSIS

With the factual and procedural background set forth, we now consider Palmer's assignments of error. These assignments can be divided into four categories and will be addressed accordingly: (1) errors previously addressed by this court, (2) errors procedurally defaulted by Palmer, (3) errors Palmer requests this court to address as plain error, and (4) errors not addressed previously by this court and not procedurally defaulted by Palmer.

1. Errors Previously Addressed by This Court (Assignments of Error Nos. 1 Through 6)

Several of the errors assigned by Palmer were raised and addressed by this court in *Palmer III*. These assignments of error include the following: (1) The lower court erred by not engaging in a comparative review analysis and thereby finding Palmer's sentence to be disproportionate, (2) the lower court

erred in not finding Palmer's sentence to be arbitrary and capricious, (3) the lower court erred in finding the Nebraska death penalty statutes to be constitutional as applied, (4) the lower court erred in not granting postconviction relief based on a violation of the ex post facto provisions of the U.S. and Nebraska Constitutions, (5) the lower court erred in not granting postconviction relief based on the trial court's not giving a lesser-included offense instruction on manslaughter and second degree murder, and (6) the lower court erred in not granting postconviction relief based on the unconstitutional and/or illegal arrest of Palmer in Texas.

[3] Palmer requests reconsideration of each of these issues. However, we have clearly established that " '[a] motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased.' " *State v. Otey*, 236 Neb. 915, 926, 464 N.W.2d 352, 360 (1991). Therefore, we decline to reconsider these issues, and we do not address assignments of error Nos. 1 through 6.

2. Errors Procedurally Defaulted by Palmer (Assignments of Error Nos. 7 and 21)

We also decline to address two assignments of error, as they were not raised in Palmer's direct appeal and are therefore procedurally barred from consideration in a motion for postconviction relief. A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal. *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995). See, also, *State v. Keithley*, 247 Neb. 638, 529 N.W.2d 541 (1995).

Palmer could have raised each of the following assignments of error in his direct appeal, but he did not: (7) The lower court erred in holding that the presentence investigation report used in Palmer's case was sufficient to justify imposition of the death penalty and (21) the lower court erred in not granting postconviction relief on the theory that the information in Palmer's third trial was defective.

3. Errors Palmer Requests This Court to Address as Plain Error (Assignment of Error No. 10)

Palmer argues that the Hall County District Court erred in not granting postconviction relief based on an allegedly misleading jury instruction given by the trial court in the third trial. During deliberations, the jury sent a note to the judge requesting that he define the term "inference." The judge responded by sending the jury a definition of the term "inference" taken from a dictionary: "An inference is a conclusion drawn from premises or evidence; a deduction." Palmer now claims that this response was confusing because it used the term "premises." Palmer argues that the term " '[p]remise' is defined variously, but the relevant definition includes the concept of an 'assumption' from which reasoning proceeds." Brief for appellant at 23. Palmer insists that this definition of "premise" directly conflicts with another jury instruction which instructed the jury not to speculate or assume anything. Palmer states that these instructions are inconsistent and therefore were confusing or misleading to the jury.

[4] This issue was not raised at Palmer's third trial or on the appeal therefrom. Although such error is procedurally barred, Palmer requests that we review the issue as "plain error." However, Palmer misunderstands our use of plain error review. 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. See, *State v. Williams*, 247 Neb. 878, 530 N.W.2d 904 (1995); *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995).

Palmer's complaint regarding the supplemental jury instruction's use of the term "premises" is not an error plainly evident from the record, if it is error at all. Therefore, we refuse to address this assigned error.

4. Errors Not Addressed Previously by This Court and Not Procedurally Defaulted by Palmer

We now address assignments of error Nos. 8, 9, and 11 through 20. These assignments of error were raised by Palmer in

his motion for postconviction relief. They were not addressed in *Palmer III*, and they have not been waived by Palmer.

(a) Felony Murder
(Assignment of Error No. 9)

Palmer argues that permitting a homicide conviction to be established under a felony murder theory is unconstitutional because it violates the constitutional prohibition against conclusive presumptions in criminal cases. Palmer complains that the felony murder statute permits the prosecution to establish the required element of intent for the homicide by merely proving the intent required to commit the underlying felony. This argument was raised by Palmer in his direct appeal following his third trial. However, *Palmer III* does not clearly reveal whether the court addressed this argument. Therefore, we will address this assignment of error.

As the Hall County District Court held, it is clearly established that a person may be convicted of first degree murder under a felony murder theory without violating his 8th or 14th Amendment rights. See *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986). Therefore, this assignment of error has no merit.

(b) Bill of Attainder
(Assignments of Error Nos. 8 and 14)

Palmer argues that Cherie Palmer was permitted to testify against him at his third trial and during sentencing as the result of an unconstitutional bill of attainder and that, therefore, a new trial is warranted. In a related assignment of error, Palmer argues that his counsel in the appeal of his third trial was ineffective in presenting his bill of attainder argument and that, as a result, Palmer was not granted a new trial.

In *Palmer II*, we held that § 27-505 prohibited Cherie Palmer from testifying against him in his second trial. At that time, § 27-505 stated:

> (1) Neither husband nor wife can be examined in any case as to any confidential communication made by one to the other while married, nor shall they after the marriage relation ceases to be [be] permitted to reveal in testimony any such communication while the marriage subsisted

except as otherwise provided by law. This privilege may be waived only with the consent of both spouses. After the death of one, it may be waived by the survivor.

(2) During the existence of the marriage, a husband and wife can in no criminal case be a witness against the other. This privilege may be waived only with the consent of both spouses.

(3) These privileges may not be claimed:

(a) In any criminal case where the crime charged is rape, adultery, bigamy, incest . . . .

Following *Palmer II* and before Palmer's third trial, the Nebraska Legislature enacted 1984 Neb. Laws, L.B. 696, which amended § 27-505(3) to read as follows: "These privileges may not be claimed: (a) In any criminal case where the crime charged is a *crime of violence*, bigamy, incest . . . ." (Emphasis supplied.) See § 27-505(3) (Reissue 1995).

The amendment of § 27-505 broadened the category of crimes to which the spousal privilege would not apply to include a "crime of violence." See 1984 Neb. Laws, L.B. 696. Palmer argues that the passage of this amendment between his second and third trials amounts to a legislative bill of attainder against him and that the use of the amended spousal privilege in his third trial to permit Cherie Palmer to testify warrants a new trial. This argument fails.

[5] Article I, § 10, of the U.S. Constitution provides: "No State shall . . . pass any Bill of Attainder . . . ." The bill of attainder provision prohibits trials by a legislature, and it forbids the imposition of punishment by the legislature on specific persons. *United States v. Brown*, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965). A bill of attainder is a legislative act which applies to named individuals or to easily ascertained members of a group in such a way as to inflict punishment on them without a judicial trial. *Id.* The prohibition on such acts proscribes legislation which singles out disfavored persons and carries out summary punishment for past conduct. *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).

[6] The passage of 1984 Neb. Laws, L.B. 696, and the subsequent use of Cherie Palmer's testimony against Palmer in his

third trial did not amount to a bill of attainder against him. In order for a legislative enactment to be deemed a bill of attainder, it must (1) specify the affected persons, (2) inflict punishment, and (3) lack a judicial trial. *Selective Service v. Minn. Public Int. Res. Gp.*, 468 U.S. 841, 104 S. Ct. 3348, 82 L. Ed. 2d 632 (1984).

The first prong of bill of attainder analysis provides that for a legislative enactment to be deemed a bill of attainder, it must specify the affected persons. The Legislature's modification of the spousal privilege fails this prong of the analysis.

[7,8] Historically, bills of attainder specifically designated persons or groups by name for punishment. See *United States v. Brown, supra.* However, "[t]he singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons." *Communist Party v. Control Board*, 367 U.S. 1, 86, 81 S. Ct. 1357, 6 L. Ed. 2d 625 (1961). "When past activity serves as 'a point of reference for the ascertainment of particular persons ineluctably designated by the legislature' for punishment . . . the Act may be an attainder." *Selective Service*, 468 U.S. at 847.

The change in the § 27-505 spousal privilege did not specify persons to be punished. The privilege, as amended, neither names specific persons or groups to be punished nor isolates past activity by which persons can later be designated as appropriate candidates for punishment. The amended spousal privilege is not concerned with distinguishing between persons, but between crimes. The amendment allowed spousal testimony to be admitted in future trials for violent crimes. Therefore, the amendment of § 27-505 was not a bill of attainder against Palmer. Accordingly, Palmer was not prejudiced by a lack of argument by his appellate counsel on this issue.

(c) Exceptional Depravity
(Assignment of Error No. 11)

Palmer argues that he is entitled to a new sentencing hearing because this court found that the exceptional depravity aggravating circumstance in § 29-2523(1)(d) applied to his case.

Palmer points out that the Court of Appeals, in *Moore v. Clarke*, 904 F.2d 1226 (8th Cir. 1990), held that the exceptional depravity aggravating circumstance is unconstitutionally vague for purposes of the Eighth Amendment. Palmer therefore argues that his sentence was based on the application of an unconstitutionally vague aggravating circumstance.

However, the Court of Appeals has since stated that the exceptional depravity definition under § 29-2523(1)(d), as we narrowed it in *Palmer III*, is constitutional. See *Joubert v. Hopkins*, 75 F.3d 1232 (8th Cir. 1996). As a result, this argument has no merit.

Palmer suggests that even if our reformulation of the exceptional depravity aggravating circumstance rendered the definition of exceptional depravity constitutional for purposes of the Eighth Amendment, he was not provided notice at the time of his sentencing hearing of the manner in which this court would reformulate the aggravating circumstance. Palmer insists that he was therefore denied his due process rights under the 14th Amendment to notice and an opportunity to be heard on that aggravating circumstance.

[9] In *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), we addressed a similar question. We held that whether a person has sufficient notice of the scope of an aggravating circumstance which may be applied at the sentencing hearing is a two-part consideration. The 14th Amendment notice requirement states that (1) the language of the statute and previous constructions of it in existence at the time of the sentencing hearing must provide reasonable notice to a person of ordinary intelligence of the scope of criminal behavior reached by the aggravating circumstance and (2) any new construction of the aggravating circumstance which occurs after the hearing does not increase the scope of the behavior considered under that particular aggravating circumstance. See, *State v. Moore, supra*, citing *Maynard v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988); *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); *Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).

At the time of his sentencing hearing, Palmer had notice of the language of § 29-2523(1)(d) and the various fact patterns

that this court described as "clear-cut, specific examples which demonstrate the meaning of the phrase 'exceptional depravity.' " See *Palmer III*, 224 Neb. at 318, 399 N.W.2d at 731. This statutory language and our previous constructions of it were sufficient to place Palmer on notice that these fact patterns would bear on his sentencing. Indeed, as we held in *Palmer III*, a comparison of each of the five factors we adopted from *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983), to the facts of Palmer's case could be found in our earlier constructions of the exceptional depravity prong of § 29-2523(1)(d).

Our adoption of the five factors which we applied to the facts of Palmer's case did not increase the scope of behavior that Palmer should have been prepared to address at the sentencing hearing. As noted above, we specifically recognized that each of the factors we adopted was derived from one of the fact patterns in our previous case law applying the exceptional depravity aggravating circumstance. Our rearticulation of those factors in *Palmer III*, then, did not expand the range of behavior which Palmer was prompted to address at the sentencing hearing. Rather, our adoption of the *Gretzler* factors was a more precise articulation of the scope of the exceptional depravity prong of the § 29-2523(1)(d) aggravating circumstance.

Our application of the narrowed definition of the exceptional depravity aggravating circumstance articulated in *Palmer III* to Palmer did not violate his due process rights under the 14th Amendment.

(d) Ineffective Assistance of Counsel
on Appeal From Palmer's Third Trial
(Assignment of Error No. 12)

[10] Palmer raises several claims alleging that he was denied effective assistance of counsel.

> "[T]o 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, a 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. Hunt, 254 Neb. 865, 869, 580 N.W.2d 110, 113 (1998).

First, Palmer raises specific objections to the manner in which his counsel prepared for the sentencing phase of his third trial: (1) Trial counsel did not do any investigation into the applicability of aggravating circumstance (1)(b) (murder committed to conceal identity of perpetrator of another crime) to Palmer; (2) in general, counsel did not request that the probation officer investigate any aspect of Palmer's case when preparing the presentence investigation report; and (3) counsel failed to interview Cherie Palmer prior to the sentencing hearing, despite the fact that her testimony was used by the sentencing panel to establish the two aggravating circumstances that were the basis for Palmer's death sentence.

[11] The gravamen of these assignments of error is that Palmer's counsel failed to undertake particular investigations and introduce the results of those investigations at Palmer's sentencing. In *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the U.S. Supreme Court stated that a counsel's duty to investigate is the "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." " ' "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." ' " *Burger v. Kemp*, 483 U.S. 776, 795, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987) (quoting *Strickland v. Washington, supra*). See, also, *State v. Painter*, 229 Neb. 278, 426 N.W.2d 513 (1988).

While Palmer asserts that the failure of his counsel to undertake these investigations is ineffective assistance of counsel, Palmer does not argue how any of these actions by counsel would have made a difference in Palmer's sentencing. In order to establish that one has been denied effective assistance of counsel in violation of the Sixth Amendment, it is not sufficient to show that the defendant's previous counsel was deficient. Palmer must also show that " ' "such deficient performance prejudiced the defense, that is, a demonstration of reasonable prob-

ability that, but for counsel's deficient performance, the result of the proceeding would have been different.'" See *State v. Dixon*, 237 Neb. 630, 633, 467 N.W.2d 397, 401 (1991).

Palmer and his counsel were aware of the evidence in the case that determined whether aggravating circumstance (1)(b) applied. In addition, Palmer and his counsel were aware prior to the sentencing hearing of the general nature and subject matter of the testimony of Cherie Palmer regarding the applicability of aggravating circumstances (1)(b) and (1)(d). In view of these circumstances, we cannot say that Palmer's counsel's decision not to undertake the particular investigations and interviews was deficient.

Moreover, if a presentencing interview or investigation would have revealed any additional probative information regarding the aggravating and mitigating circumstances applicable to Palmer, he has not argued what such information was or how it would have, with a reasonable probability, altered the outcome of his sentencing. In *State v. Painter, supra*, the defendant argued on postconviction that his counsel had failed to investigate a number of witnesses prior to advising the defendant regarding the plea the defendant should enter. We noted that in raising the allegation, the defendant had not alleged what outcome-altering facts or evidence would likely have been discovered by his counsel had counsel undertaken the various investigations. We held that mere allegations that investigations should have been conducted will not, in and of themselves, establish a basis for postconviction relief.

> [The defendant] bore the burden in these proceedings of setting forth factual allegations that could have been discovered by these independent interviews which would have altered his decision to plead guilty and led him to insist on a trial. [The defendant] has merely set forth a conclusionary allegation that his counsel failed to adequately delve into a "number of inconsistencies between [witnesses]." Nowhere has [the defendant] set forth the substance of these alleged inconsistencies. It is therefore impossible to determine whether there is a reasonable probability that his decision to plead would have been different.

Painter, 229 Neb. at 282, 426 N.W.2d at 516.

Instead, we held that because the defendant's counsel reasonably believed that further investigation and extensive witness interviews would not lead to any unknown or exculpatory facts, his decision not to undertake the various investigations that the defendant insisted should have been made was not ineffective assistance of counsel. As in *State v. Painter, supra*, Palmer has not asserted any additional exculpatory facts that his counsel would have uncovered through additional investigations. Palmer merely alleges that the additional investigations should have been conducted. We have no basis for determining whether the investigations and interviews that Palmer insists should have taken place would have uncovered any evidence which would have led to a different sentence for Palmer. As such, these allegations are insufficient to support postconviction relief.

Related to his claim of ineffective assistance of counsel, Palmer complains that prior to his third sentencing hearing, his counsel instructed him not to talk to the probation officer and that his counsel did not provide the probation officer with any witnesses or records regarding Palmer's personal history. Without addressing whether such advice and action by Palmer's counsel was deficient performance, we reject this assignment of error. Even if Palmer's counsel's performance was deficient, this behavior would not establish a claim of ineffective assistance of counsel.

Any information Palmer would have given to the probation officer regarding his personal history could have been raised by Palmer at the sentencing hearing, either through witnesses or through the introduction of other evidence. Palmer has not demonstrated, and indeed cannot demonstrate, that had his counsel given him different advice with respect to the probation officer's investigation, such advice would have, with a reasonable probability, produced a different result in Palmer's sentencing.

(e) Inadequate Appellate Argument Regarding Ex Post Facto Issue (Assignment of Error No. 13)

Palmer complains that his counsel in the appeal of his third trial did not adequately argue that the application of § 27-505 as amended was a violation of the ex post facto provision of the

U.S. Constitution. Palmer concedes that his counsel raised an ex post facto argument regarding this statute. Palmer argues, however, that his counsel should have been more effective in the manner in which he argued. In particular, Palmer insists that his counsel failed to raise a particular argument from *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798), and *Kring v. Missouri*, 107 U.S. 221, 2 S. Ct. 443, 27 L. Ed. 506 (1883), *overruled, Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990), to distinguish a line of cases relied on by this court in *Palmer III* to find that the admissibility of Cherie Palmer's testimony under § 27-505 (Reissue 1995) was not an ex post facto application of the law against Palmer.

The ex post facto issue and the cases referred to above were thoroughly addressed by this court in Palmer's direct appeal. See *Palmer III*. Palmer now apparently seeks to use the claim of ineffective assistance of counsel to reopen our decision on this issue in *Palmer III*. This is not a proper basis for postconviction relief. A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased. *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991). Therefore, we decline to reopen the ex post facto issue in the present appeal.

(f) Failure to Challenge Sufficiency of Information (Assignment of Error No. 15)

Palmer insists that trial counsel in each of his trials should have argued that because the information failed to provide a specific listing of the elements of the underlying felony supporting the allegation of felony murder, it was defective, and that, therefore, Palmer is entitled to a new trial. Palmer now insists that the failure to raise this issue in any of his trials was ineffective assistance of counsel.

We reversed Palmer's first two convictions, and remanded for new trials. Thus, this assignment of error is moot with respect to those two trials. Palmer's assignment of error is thus reduced to an allegation that trial counsel in his third trial was ineffective in failing to challenge the sufficiency of the information by a plea in abatement. This assignment of error has no merit.

[12] It is well established that an information which alleges the commission of a crime using the language of the statute defining that crime or terms equivalent to such statutory definition is sufficient. *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993); *State v. Spiegel*, 239 Neb. 233, 474 N.W.2d 873 (1991). Here, Palmer was charged with first degree murder under a felony murder theory. Neb. Rev. Stat. § 28-303 (Reissue 1995) states: "A person commits murder in the first degree if he kills another person . . . (2) in the perpetration of or attempt to perpetrate any . . . robbery . . . ."

The information filed against Palmer alleged that "Charles Jess Palmer . . . in the perpetration of a robbery of Eugene William Zimmerman, did kill Eugene William Zimmerman." This allegation is a nearly verbatim recitation of the language of § 28-303. As such, it was a sufficient information upon which to charge and convict Palmer.

[13] As we held in *State v. Bowen, supra*, an information or complaint is sufficient unless it is so defective that by no construction can it be said to charge the offense of which the accused was convicted. The information in the present case stated the charge Palmer was required to defend against in the language of the statute. The information instructed Palmer that the underlying felony which would be alleged at trial was that of robbery. We find that this charge in the information was a fair means of informing Palmer of the charge he would have to defend against. Therefore, this assignment of error has no merit.

(g) Ineffective Assistance of Counsel in Palmer's First Trial (Assignments of Error Nos. 16 Through 20)

Palmer assigns a series of errors alleging that his counsel was ineffective during both the trial and the sentencing phases of his first trial. Palmer argues that this is the first opportunity for reviewing the errors of counsel in his first trial because Palmer utilized the same counsel until the present motion for postconviction relief. Consequently, Palmer requests that this court review the effectiveness of his counsel in the trial and sentencing phases of his first trial. The State insists that because Palmer's first conviction and sentence were overturned and Palmer received a new trial, his first trial is a nullity and has no

relevance to the present action. In response, Palmer argues that the errors which he raises regarding his first trial are not nullities, but have been preserved for review in light of *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

[14,15] The U.S. Supreme Court has long held that if a convicted defendant obtains a reversal and remand for a new trial on appeal, the State may reprosecute. See *United States v. Ball*, 163 U.S. 662, 16 S. Ct. 1192, 41 L. Ed. 300 (1896). As the Court explained in *North Carolina v. Pearce*, 395 U.S. 711, 721, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds, Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989), when there is a reversal of a conviction, "the original conviction has . . . been wholly nullified and the slate wiped clean." This principle is colloquially referred to as the "clean slate rule."

[16-18] An exception to this rule occurs when the petitioner's conviction is set aside on the ground that there was insufficient evidence presented at trial to support the verdict. *Burks v. United States, supra.* In *Burks v. United States, supra*, the Court of Appeals found the evidence was insufficient and ordered the case remanded to the District Court for a determination of whether a new trial should be ordered or a directed verdict of acquittal entered. The Court reversed, stating:

> In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. . . .
>
> The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been submitted to the jury. Since we necessarily afford absolute finality to a jury's verdict of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a

> matter of law that the jury could not properly have returned a verdict of guilty.

(Emphasis omitted.) 437 U.S. at 15-16. In summary, *Burks v. United States, supra*, stands for the proposition that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient.

[19-24] The clean slate rule and its exception also apply to the sentencing phase of a retrial. In *Bullington v. Missouri*, 451 U.S. 430, 443, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981), the Court noted that decisions since *North Carolina v. Pearce, supra*, have developed an exception to the clean slate rule: "[T]he 'clean slate' rationale . . . is inapplicable whenever a jury agrees or an appellate court decides that the prosecution has not proved its case." The Court explained in *Bullington v. Missouri, supra*, that it is usually "impossible to conclude that a sentence less than the statutory maximum 'constitute[s] a decision to the effect that the government has failed to prove its case.' " 451 U.S. at 443. Nevertheless, the Court held that when a state enacts "a capital sentencing procedure that resembles a trial on the issue of guilt or innocence [such a procedure] explicitly requires the jury to determine whether the prosecution has 'proved its case.' " (Emphasis omitted.) 451 U.S. at 444. Thus, the Court held that a jury determination that a particular defendant should be given a life sentence rather than a death sentence should be treated as an acquittal of the death sentence for purposes of the Double Jeopardy Clause. As a result, *Bullington v. Missouri, supra*, held that a defendant sentenced to life imprisonment by a capital sentencing jury is protected by the Double Jeopardy Clause from imposition of the death penalty in the event that the defendant obtains reversal of the conviction and is retried and convicted.

[25] In *State v. Rust*, 247 Neb. 503, 528 N.W.2d 320 (1995), citing *Arizona v. Rumsey*, 467 U.S. 203, 104 S. Ct. 2305, 81 L. Ed. 2d 164 (1984), we held that Nebraska's capital sentencing procedures have the characteristics which the U.S. Supreme Court found in *Bullington v. Missouri, supra*, to resemble a trial and that double jeopardy concerns attach at a capital sentencing hearing in Nebraska.

Our examination of Palmer's assignments of error regarding the first trial will be limited to whether the evidence in the first trial was sufficient to sustain the conviction and sentence. Thus, the retrial of Palmer corrected those errors not assigned as to the sufficiency of the evidence. For the purpose of determining the sufficiency of the evidence in the first trial, we limit our review of the record to that evidence which was introduced at the first trial and first sentencing hearing. As this court has never specifically addressed whether the State presented sufficient evidence to sustain Palmer's conviction and sentence of death in his first trial, we now address those issues.

Palmer argues that after *Palmer I* excluded all evidence obtained via hypnosis, the State failed to present sufficient evidence to convict him and, thus, pursuant to the reasoning of *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978), and *Bullington v. Missouri, supra*, his second and third trials offend double jeopardy. Palmer's argument that there was insufficient evidence to convict him is unpersuasive in light of *Lockhart v. Nelson*, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988).

[26,27] In *Lockhart v. Nelson, supra*, the trial court erroneously admitted certain evidence at a sentence enhancement without which the remaining evidence was insufficient to support the judgment of conviction. The defendant argued that if the remaining evidence was insufficient to convict him, then the Double Jeopardy Clause barred his retrial. However, the U.S. Supreme Court rejected this argument. The Court explained:

> It is quite clear from our opinion in *Burks* that a reviewing court must consider all of the evidence admitted by the trial court in deciding whether retrial is permissible under the Double Jeopardy Clause—indeed, that was the *ratio decidendi* of *Burks*, see 437 U.S., at 16-17—and the overwhelming majority of appellate courts considering the question have agreed. The basis for the *Burks* exception to the general rule is that a reversal for insufficiency of the evidence should be treated no differently than a trial court's granting a judgment of acquittal at the close of all the evidence. A trial court in passing on such a motion considers all of the evidence it has admitted, and to make the

> analogy complete it must be this same quantum of evidence which is considered by the reviewing court.

Lockhart, 488 U.S. at 40-42.

Therefore, in our evaluation of the sufficiency of the evidence, we consider all evidence admitted in the first trial in order to decide whether there was sufficient evidence to sustain both the conviction and the imposition of a death sentence.

There was sufficient evidence to convict Palmer of murder in his first trial. The State proved that several items were stolen from the victim's shop and that Palmer sold these items in Texas after the murder. An eyewitness saw a tall man and a woman leaving the victim's shop near the time of the murder. The man was carrying a baby. Monica Zimmerman, Zimmerman's wife, testified that Palmer, Cherie Palmer, and the baby had been to the Zimmermans' house on several occasions prior to March 6, 1979, to transact business with Zimmerman. On these occasions, Palmer had sold coins to Zimmerman. Monica Zimmerman described and identified the items missing from the Zimmerman home on the day of the murder. Items seized from Palmer at the time of his arrest in Austin, Texas, as well as items sold to Garza in Texas, were identified as the items stolen from Zimmerman at the time of the murder.

Moreover, the federal courts explicitly addressed the issue of whether the State presented sufficient evidence to convict Palmer and have concluded that the State had met its burden of proof. In *Palmer v. Grammer*, 863 F.2d 588 (8th Cir. 1988), Palmer questioned the sufficiency of the evidence in his first trial. However, Palmer argued that only that evidence remaining after this court had excluded all evidence obtained via hypnosis should be considered in the evaluation of the sufficiency of the evidence. The Court of Appeals noted that neither *Palmer I* nor *Palmer II* had addressed whether the evidence was sufficient to sustain the conviction and sentence. The District Court dismissed this habeas corpus petition as premature, and the Court of Appeals remanded the cause for further consideration. On remand, the District Court dismissed the claim as meritless, and the Court of Appeals held the matter in abeyance pending resolution of all proceedings in the Nebraska courts.

Thereafter, in *Palmer III*, we affirmed Palmer's conviction and death sentence. The Court of Appeals affirmed the District Court's decision that Palmer's habeas petition lacked merit, but found that Palmer should be granted leave to amend his petition so as to set forth in greater clarity his double jeopardy claim.

Upon remand, the District Court again denied relief, and the Court of Appeals again remanded. See *Palmer v. Clarke*, 961 F.2d 771 (8th Cir. 1992). In his amended petition, Palmer contended that the totality of the evidence at each of his first two trials was insufficient to convict him. Reviewing all the evidence in each of the first two trials, including the improperly admitted evidence, the magistrate judge concluded that sufficient evidence supported Palmer's first two convictions, and the District Court adopted the magistrate judge's recommendation and denied Palmer's petition. In remanding, the Court of Appeals agreed with the District Court's conclusion that the totality of the evidence at Palmer's first trial was sufficient to convict him and that, therefore, Palmer's second trial did not violate the Double Jeopardy Clause. Therefore, the U.S. District Court, as affirmed by the Court of Appeals, concluded that the evidence at Palmer's first trial was sufficient to sustain the conviction. The Court of Appeals remanded the issue of the sufficiency of the evidence of Palmer's second trial to the District Court. The District Court denied relief, and Palmer appealed. In *Palmer v. Clarke*, 12 F.3d 781 (8th Cir. 1993), the Court of Appeals concluded that the evidence at Palmer's second trial, including Cherie Palmer's testimony, was sufficient to convict him. Upon our independent analysis of the evidence, we also conclude that there was sufficient evidence to convict Palmer in his first trial.

Likewise, there was sufficient evidence to sentence Palmer to death. In *Palmer III*, 224 Neb. at 320, 399 N.W.2d at 731-32, we held that for purposes of § 29-2523(1)(d) as an aggravating circumstance, exceptional depravity is present where it is shown beyond a reasonable doubt that one of the following exists in reference to a first degree murder: "(1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; or (5) helplessness of the victim." We explained that these five factors are disjunctive, and therefore, where one

or more of the factors are present, there may be a finding of exceptional depravity pursuant to § 29-2523(1)(d). Applying the factors set forth under § 29-2523(1)(d) to determine the aggravating circumstances, it is clear that infliction of gratuitous violence upon Zimmerman and the helplessness of Zimmerman were present beyond a reasonable doubt.

The gratuitous violence was evidenced by the injuries described by the pathologist who testified. The pathologist stated that Zimmerman's voice box and windpipe were broken, that his head was congested with entrapped blood, and that there were many bruises and cuts on his face. The pathologist opined that these injuries had preceded death. The time of death was fixed at 4:30 p.m., and the cause of death was strangulation. The evidence also showed that Zimmerman had been hit on the head several times with an unknown object and that his wrists had been tied behind his back.

The helplessness of Zimmerman was evidenced by the fact that Zimmerman was immediately bound and could not have prevented the robbery. Zimmerman was bound and lay helpless on the bed before he was beaten and strangled by Palmer. Thus, there was sufficient evidence of the manner in which Zimmerman died to support a finding that aggravating circumstance (1)(d) existed beyond a reasonable doubt.

[28] Additionally, the plain language of § 29-2523 clearly provides that a sentencer may find aggravating circumstance (1)(b) to apply where the sentencer finds that the murder was committed "in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime." Zimmerman knew both Palmer and Cherie Palmer for several months prior to the robbery. Therefore, absent the murder, Zimmerman would have been fully capable of reporting the robbery and identifying Palmer and Cherie Palmer as the perpetrators. From this, the sentencing panel concluded that one motive for the murder could have been Palmer's desire to conceal his identity and the identity of Cherie Palmer as perpetrators of the robbery.

In contrast to Palmer's argument, the fact that Cherie Palmer was also present during the robbery does not undermine the basis for this aggravating circumstance. At the time of the rob-

bery, Palmer could have believed that Cherie Palmer was a coperpetrator in the robbery and would, to promote her own interests, conceal the couple's identity. Palmer also had an interest in protecting the identity of Cherie Palmer because she was a person who might later be found to be a coperpetrator and be pressured to testify against him. Palmer might also have viewed Cherie Palmer as a compliant spouse who would not testify against him.

Whatever the case, Palmer clearly could have considered Zimmerman to be a witness to the crime, and the plain language of § 29-2523(1)(b) applies to the murder of such a witness where the evidence supports a finding that the murder was committed in an apparent effort to conceal the identity of the perpetrator. As such, there was sufficient evidence to support this finding beyond a reasonable doubt.

We emphasize that our examination of the sentencing phase of *Palmer I* goes only to the sufficiency of the evidence to sustain the sentence of death that was imposed. Obviously, had Palmer been sentenced to life imprisonment and not to death, the evidence would have been insufficient to support the death penalty. See *Bullington v. Missouri*, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981). Based upon our review of this issue, we conclude there was sufficient evidence in the first trial to support the finding beyond a reasonable doubt that Palmer should be sentenced to death.

In assignment of error No. 19, Palmer claims that his counsel was ineffective when counsel failed to argue in his first appeal that the evidence was insufficient to convict once this court found that the hypnotic evidence had been wrongfully admitted. Similarly, in assignment of error No. 20, Palmer asserts that his counsel was ineffective for not filing a plea in bar prior to the second trial, challenging the sufficiency of the evidence to convict him in the first trial. We need not address these assignments of error, for we conclude that the State presented sufficient evidence in the first trial to convict Palmer of felony murder and to sentence him to death. Having so concluded, we find the clean slate rule applies and the exception announced in *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978), is inapplicable.

All errors pertaining to the first trial and sentencing were corrected by the retrial and, thus, are not considered by this court. Once it has been determined that the evidence was sufficient to sustain the conviction and sentence, then the slate is wiped clean, and Palmer is not permitted to raise issues regarding his assistance of counsel at his first trial. Palmer's new trial after *Palmer I* was all the relief to which he was entitled. Accordingly, assignments of error Nos. 16 through 20 are without merit.

VI. CONCLUSION

Having considered all of Palmer's assignments of error, we find that his claims are without merit, and the judgment of the Hall County District Court is affirmed.

AFFIRMED.

STEPHAN, J., not participating.

CONNOLLY, J., concurring

In assignments of error Nos. 16 through 19, Palmer contends that he received ineffective assistance of counsel in his first trial and on his first direct appeal. He argues that if he had received effective assistance of counsel, the evidence would have been insufficient to support his conviction and sentence and that this court would therefore have dismissed the charges. Therefore, Palmer first asks this court to address whether his counsel was ineffective, and second, had counsel been effective, would the evidence have been sufficient to support his conviction and sentence.

The majority opinion concludes that Palmer's retrial corrected any errors resulting from the ineffectiveness of counsel and that this court's review of the sufficiency of the evidence considers all the evidence admitted in the first trial, citing *Lockhart v. Nelson*, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988). Thus, the majority does not address whether Palmer's counsel was effective or whether the evidence would have been sufficient to support the conviction and sentence had counsel been effective. Although I agree with the majority's conclusion, I believe additional analysis is warranted.

In *Lockhart*, the Court considered "whether the Double Jeopardy Clause allows retrial when a reviewing court determines that a defendant's conviction must be reversed because

evidence was erroneously admitted against him, and also concludes that without the inadmissible evidence there was insufficient evidence to support a conviction . . . ." 488 U.S. at 40. Thus, the concern in *Lockhart* was the effect of the erroneous admission of evidence in and of itself, not the erroneous admission of evidence resulting from the ineffective assistance of counsel. The erroneous, prejudicial admission of evidence does not necessarily render the assistance provided by counsel ineffective. It must also be shown that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The guarantee of counsel is rooted in the Sixth Amendment, which "recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strickland v. Washington*, 466 U.S. at 685. *Lockhart* did not purport to examine the relationship between the Double Jeopardy Clause and the Sixth Amendment, and thus, *Lockhart* does not directly address the circumstances at issue herein. Palmer is alleging more than a prejudicial error in the admission of evidence—he is alleging that his Sixth Amendment right to counsel was violated. Thus, the question presented is whether the holding in *Lockhart* extends to ineffective assistance of counsel claims.

An examination of the Sixth Amendment right to counsel reveals that the rationale underlying *Lockhart* is indeed applicable to ineffective assistance of counsel claims. In *Lockhart*, the Court distinguished actual insufficiency of the evidence from "trial errors":

> While the former is in effect a finding "that the government has failed to prove its case" against the defendant, the latter "implies nothing with respect to the guilt or innocence of the defendant," but is simply "a determination that [he] has been convicted through a judicial *process* which is defective in some fundamental respect."

Lockhart v. Nelson, 488 U.S. 33, 40, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988), quoting *Burks v. United States*, 437 U.S.1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978). The Court noted that an error in admitting a particular piece of evidence was a "trial error,"

which implied nothing with respect to the defendant's guilt or innocence. Indeed, as the Court recognized, had the trial court in *Lockhart* made the appropriate ruling concerning the disputed evidence, "the trial judge would presumably have allowed the prosecutor an opportunity to offer [additional] evidence." 488 U.S. at 42. Thus, the Court's holding that retrial is permitted merely "recreates the situation that would have been obtained if the trial court had excluded the evidence." *Id.*

Despite the Court's use of the term "trial error," it is clear that *Lockhart* focuses on the distinction between error in the trial *process* and error in considering whether the quantum of evidence was sufficient to support the conviction and sentence (which is also a "trial error," but of a different kind). Although ineffective assistance of counsel is of fundamental importance, counsel's failure to render effective assistance nevertheless results in an error in the trial process, see *Strickland v. Washington, supra*, not an error in judgment concerning the quantum of evidence needed to convict and sentence. Insofar as the Double Jeopardy Clause is concerned, it makes little difference whether the prejudicial error in the trial process was merely the result of an error in the admission of evidence or due to the ineffectiveness of counsel. Indeed, had counsel been effective, the State would have had an opportunity to offer other evidence. Were we to address Palmer's ineffectiveness/sufficiency concerns now, without having given the State such an opportunity (as was provided the State in Palmer's subsequent trials), we would put Palmer in a better position than if his counsel had been effective. That result is clearly not required by the Double Jeopardy Clause or by the Sixth Amendment.

Because I conclude that the holding in *Lockhart v. Nelson, supra*, applies to ineffective assistance of counsel claims, I concur.

IN RE INTEREST OF JEREMY T., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, DOUGLAS COUNTY, APPELLEE, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT.

600 N.W.2d 747

Filed September 24, 1999. No. S-98-066.

1. **Judgments: Statutes: Appeal and Error.** Questions of law and statutory interpretation require an appellate court to reach a conclusion independent of the decision made by the court below.
2. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning absent anything to the contrary; thus, an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
3. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
4. **Statutes: Appeal and Error.** Appellate courts must, as far as practicable, give effect to the language of a statute and reconcile the different provisions of it so that they are consistent, harmonious, and sensible.
5. **Juvenile Courts: Legislature: Intent.** The legislative intent behind the Nebraska Juvenile Code, Neb. Rev. Stat. ch. 43, art. 2 (Reissue 1998)—subordinate to advancing the best interests of children—was to provide for the most equitable use and availability of public money.
6. **Juvenile Courts: Child Custody.** Under the provisions of the Nebraska Juvenile Code, Neb. Rev. Stat. ch. 43, art. 2 (Reissue 1998), the Nebraska Department of Health and Human Services is responsible for the costs of caring for and placing juveniles within its custody regardless of whether a juvenile is adjudged to be under § 43-247(1) or § 43-247(3)(a).
7. ___: ___. Dual custody is not statutorily authorized in Nebraska; thus, a juvenile cannot be placed in the custody of two separate agencies simultaneously.
8. **Juvenile Courts: Words and Phrases.** The terms "supervision" and "custody" as used in Neb. Rev. Stat. § 43-286(1)(a)(iii) (Reissue 1998) are not synonymous.
9. ___: ___. The terms "care" and "custody" as used in Neb. Rev. Stat. §§ 43-284 and 43-285 (Reissue 1998) are not synonymous.
10. **Juvenile Courts: Jurisdiction: Child Custody.** The Nebraska Juvenile Code, Neb. Rev. Stat. ch. 43, art. 2 (Reissue 1998), authorizes a juvenile court to place a juvenile under the supervision of a probation officer, but does not authorize a juvenile court to award custody of a juvenile to a probation officer.
11. **Jurisdiction: Words and Phrases.** Jurisdiction of the subject matter means the authority to hear and determine both the class of actions to which the action before the court belongs and the particular question which it assumes to decide.
12. **Juvenile Courts: Final Orders.** An order determining where a juvenile will be placed is a dispositional order.

13. **Juvenile Courts: Final Orders: Appeal and Error.** Dispositional orders are final and appealable orders.
14. **Juvenile Courts: Final Orders: Waiver: Appeal and Error.** A party who fails to appeal from a final order of a juvenile court waives the grounds for such an appeal.

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

Don Stenberg, Attorney General, Royce N. Harper, and Karen A. Anderson, Special Assistant Attorney General, for appellant.

James S. Jansen, Douglas County Attorney, and Patrick R. Guinan for appellee.

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

GERRARD, J.

NATURE OF CASE

This case presents one primary question: Should the Nebraska Department of Health and Human Services (the Department) be ordered to reimburse Douglas County for the costs of placing and caring for a particular juvenile when the separate juvenile court of Douglas County (juvenile court) issued a set of orders under one docket placing the juvenile in the custody of the Department and another order under a different docket placing the juvenile at Clarinda Academy and in the custody of the Douglas County Separate Juvenile Court Chief Probation Officer? The juvenile court answered this question in the affirmative, and the Department appeals. For the reasons that follow, we affirm the juvenile court's order, as modified.

FACTUAL BACKGROUND

On November 23, 1994, the Douglas County Attorney's office (county attorney) filed a petition with the juvenile court, alleging that two brothers, Jeremy T. and Christopher T., were neglected juveniles pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993). This petition created docket 90, No. 331, at the juvenile court, which will hereinafter be referred to as the "neglect docket." The juvenile court held a detention hearing on the neglect docket and ordered that both juveniles be placed into

the temporary custody of the Department for appropriate care and placement on December 8. The juvenile court found that Jeremy and Christopher were juveniles within § 43-247(3)(a) and continued the December 8 order at a pretrial hearing on December 21, a disposition hearing on February 17, 1995, and review hearings on April 17 and August 10.

On January 8, 1996, the county attorney filed another petition with the juvenile court alleging that Jeremy had committed a number of criminal acts that brought him within § 43-247(1). This petition created docket 93, No. 236, at the juvenile court, which will hereinafter be referred to as the "delinquency docket." Based on an ex parte motion for immediate custody filed by the county attorney and a letter by a case manager at the Department, the juvenile court ruled on the delinquency docket that Jeremy was a danger to himself and others as well as a flight risk. As such, the juvenile court ordered that the Douglas County sheriff detain and place Jeremy at the Douglas County Youth Center (Youth Center) on February 9.

After a simultaneous neglect docket and delinquency docket review hearing on February 23, 1996, the juvenile court reissued the delinquency docket order that Jeremy be placed at the Youth Center. Moreover, the juvenile court ordered that a previous neglect docket order of August 10, 1995 (continuing the Department's custody of Jeremy), remain "in full force and effect." On February 28, 1996, the juvenile court held a first hearing on the delinquency docket, wherein Jeremy admitted to various charges against him. The juvenile court simultaneously held a detention hearing on the neglect docket. The juvenile court ordered that Jeremy remain at the Youth Center under both the delinquency and neglect dockets.

Pursuant to the delinquency docket, the juvenile court ordered Jeremy into the custody of the Office of Juvenile Services on April 18, 1996. The juvenile court also ordered that Jeremy be transferred to the Youth Rehabilitation and Treatment Center (Rehabilitation Center) in Geneva, Nebraska, for an evaluation. Additionally, the juvenile court ordered that the cost of Jeremy's care be borne by the State of Nebraska to the extent that it is not covered by Jeremy's parent's insurance. Finally, the juvenile court ordered that Jeremy be returned to the custody of

the juvenile court when released from the Rehabilitation Center. Jeremy was released from the Rehabilitation Center and returned to the Youth Center on May 1. On May 14, the juvenile court issued an order that Jeremy remain in detention at the Youth Center and that "probation . . . make application to Clarinda Academy," located in Clarinda, Iowa.

At a hearing on the delinquency docket on June 6, 1996, the juvenile court placed Jeremy in the temporary custody of the Douglas County Separate Juvenile Court Chief Probation Officer (Douglas County CPO) and ordered Jeremy placed at the Clarinda Academy. Moreover, the juvenile court ordered that the cost of Jeremy's care and placement—to the extent that it is not covered by medicaid or another state or federal fund, or by his parent's insurance or ability to pay—be borne by the Douglas County General Assistance Fund. No representative of the Department was present at this hearing. Nevertheless, on August 23, the juvenile court issued an order on the neglect docket, with a representative from the Department present, placing Jeremy "in the temporary custody of [the Department] for continued appropriate care and placement."

On December 5, 1996, the juvenile court held a delinquency docket hearing, again with a Department caseworker present, wherein it ordered that Jeremy "remain as placed." Then, on February 25, 1997, the juvenile court again issued a neglect docket order that Jeremy "remain in the temporary custody of [the Department] for continued appropriate care and placement."

The county attorney filed a motion for support in the juvenile court against Jeremy's mother on March 31, 1997; however, the county attorney withdrew the motion to pursue a different avenue of reimbursement on May 1. On May 14, the county attorney filed another motion for support in the trial court, this time against the Department. After a delinquency docket hearing on June 5, the juvenile court ordered that Jeremy be placed on probation for 90 days, released from the Clarinda Academy on June 13, and returned to his father's home. At a hearing on the neglect docket on August 25, the juvenile court terminated the Department's custody of Jeremy.

In orders filed on December 12, 1997, the juvenile court terminated its jurisdiction over Jeremy under the delinquency

docket. Moreover, the juvenile court sustained Douglas County's motion for reimbursement and ordered the Department to pay Douglas County for the costs of Jeremy's stays at the Youth Center and the Clarinda Academy. It is from the second order that the Department timely appeals.

ASSIGNMENTS OF ERROR

The Department asserts that the juvenile court erred in (1) finding that the Department must reimburse Douglas County for the costs of placing and caring for Jeremy, (2) failing to explicitly relieve the Department of its custodial responsibilities for Jeremy, and (3) entering an order for the specific placement of Jeremy.

In other words, the Department claims that the Nebraska Juvenile Code, Neb. Rev. Stat. ch. 43, art. 2 (Reissue 1993, Cum. Supp. 1994 & Supp. 1995) (now found at ch. 43, art. 2 (Reissue 1998)), does not allow for "dual custody," and that the juvenile court should have terminated the Department's custody over Jeremy and relieved the Department of its obligations upon placing Jeremy at the Clarinda Academy and into the custody of the Douglas County CPO.

SCOPE OF REVIEW

[1] Questions of law and statutory interpretation require an appellate court to reach a conclusion independent of the decision made by the court below. *Schmidt v. State*, 255 Neb. 551, 586 N.W.2d 148 (1998).

ANALYSIS

As noted above, the trial court found that Jeremy was a neglected juvenile within § 43-247(3)(a) on December 21, 1994. Then, on February 9, 1996, the juvenile court adjudged Jeremy to be a juvenile under § 43-247(1). These rulings, taken together, present some confusion as to which statute controls in this matter—be it § 43-290, § 43-284, or § 43-286. Because we are aware that some of the subsections of the foregoing statutes have recently changed while the controlling text has not, we will cite to the current subsections for the sake of simplicity and con-

venience. As such, those statutes are set out here, in pertinent part, as follows:

Under § 43-247:

> The juvenile court in each county as herein provided shall have jurisdiction of:
>
> (1) Any juvenile who has committed an act . . . which would constitute a misdemeanor or an infraction under the laws of this state . . . .
>
> . . . .
>
> (3) Any juvenile (a) . . . who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian; whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile; whose parent, guardian, or custodian is unable to provide or neglects or refuses to provide special care made necessary by the mental condition of the juvenile; or who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile . . . .

Next, § 43-290 states:

> *It is the purpose of this section* to promote parental responsibility and *to provide for the most equitable use and availability of public money.*
>
> Pursuant to the petition filed by the county . . . in accordance with section 43-274, whenever the care or custody of a juvenile is given by the court to someone other than his or her parent, which shall include placement with a state agency . . . the court shall make a determination of support to be paid by a parent for the juvenile . . . .
>
> . . . .
>
> *If the juvenile has been committed to the care and custody of the Department . . . , the [D]epartment shall pay the costs for the support, study, or treatment of the juvenile which are not otherwise paid by the juvenile's parent.*
>
> If no provision is otherwise made by law for the support or payment for the study or treatment of the juvenile, compensation for the study or treatment shall be paid, when

> approved by an order of the court, out of a fund which shall be appropriated by the county in which the petition is filed.

(Emphasis supplied.)

Moreover, § 43-284 provides:

> When any juvenile is adjudged to be under subdivision (3) . . . of section 43-247, the court may permit such juvenile to remain in his or her own home subject to supervision or may make an order committing the juvenile to (1) the care of some suitable institution . . . or (6) the care and custody of [the Department].
>
> Under subdivision (1) [*but not subdivision (6)*] of this section, *upon a determination by the court that there are no parental, private, or other public funds available* for the care, custody, education, and maintenance of a juvenile, *the court may order a reasonable sum* for the care, custody, education, and maintenance of the juvenile *to be paid out of a fund which shall be appropriated annually by the county where the petition is filed* until suitable provisions may be made for the juvenile without such payment.

(Emphasis supplied.)

Finally, § 43-286 mandates:

> (1) When any juvenile is adjudicated to be a juvenile described in subdivision (1) . . . of section 43-247:
>
> (a) The court may continue the dispositional portion of the hearing, from time to time upon such terms and conditions as the court may prescribe . . . and, subject to the further order of the court, may:
>
> . . . .
>
> (iii) 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 . . . , [then] the [D]epartment shall pay the costs of the suitable family home or institution* which are not otherwise paid by the juvenile's parents.
>
> Under subdivision (1)(a) of this section, upon a determination by the court that there are no parental, private, or other public funds available for the care, custody, and maintenance of a juvenile, the court may order a reason-

> able sum for the care, custody, and maintenance of the juvenile to be paid out of a fund which shall be appropriated annually by the county where the petition is filed until a suitable provision may be made for the juvenile without such payment.

(Emphasis supplied.)

[2] Of course, statutory language is to be given its plain and ordinary meaning absent anything to the contrary; thus, an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998).

[3,4] The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *In re Invol. Dissolution of Battle Creek State Bank*, 254 Neb. 120, 575 N.W.2d 356 (1998). This court must, as far as practicable, give effect to the language of a statute and reconcile the different provisions of it so that they are consistent, harmonious, and sensible. *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998).

[5,6] It is clear that the legislative intent behind the foregoing statutes—subordinate, of course, to advancing the best interests of children contemplated by the Nebraska Juvenile Code—was to "provide for the most equitable use and availability of public money." See § 43-290. See, also, § 43-246 (specifying how Nebraska Juvenile Code shall be construed). Moreover, a conjunctive reading of these statutes reveals a consistent, harmonious scheme of making the Department responsible for the costs of caring for and placing juveniles within its custody. Compare, § 43-290 (making Department responsible for such costs, and counties responsible only where no state moneys are available); § 43-284 (allowing courts to hold counties financially responsible only in situations where Department does not have custody); § 42-286 (making Department financially responsible for juveniles in its custody and allowing counties to be liable only where there are no state moneys available).

This scheme is consistent regardless of whether a juvenile is adjudged to be under § 43-247(1) or § 43-247(3)(a)—the

Department remains responsible for the costs of placing and caring for juveniles within its custody. See, § 43-290 (calling for that result when juveniles are found to be within any section of § 43-247); § 43-284 (calling for juveniles within § 43-247(3)(a) to be placed in custody of Department, and for counties to be financially responsible only in cases where juvenile is not in custody of Department); § 43-286 (calling for Department to be financially responsible for juveniles in its custody who are adjudged to be within § 43-247(1)).

The Department does not claim that state moneys are not available in the instant case. Thus, the Department can escape responsibility for the costs of placing and caring for Jeremy only during times that Jeremy was not in the custody of the Department. Indeed, the Department concedes and argues as much in assigning error to the juvenile court's failure to relieve the Department of its custodial responsibilities when it placed Jeremy in the custody of the Douglas County CPO on June 6, 1996.

[7] In support of this position, the Department asserts, and Douglas County agrees, that two state agencies cannot have "dual custody" of a juvenile. The term "dual custody" is not used in any Nebraska case or statute. Because the statutes and cases do not mention, much less authorize, a "dual custody" situation, we hold that a juvenile cannot be placed in the custody of two separate agencies simultaneously. As such, the outcome of this case is determined by the effect given to the juvenile court's order awarding custody of Jeremy to the Douglas County CPO and placing Jeremy at the Clarinda Academy on June 6, 1996.

[8] Section 43-286(1)(a)(iii) allows for courts to place juveniles in an "institution, subject to the *supervision* of the probation officer," or in the "*custody*" of the Department. (Emphasis supplied.) Insofar as the statute uses both terms in the same subsection, we cannot think of a reason why the Legislature would use the term "supervision" unless it meant something other than "custody." Giving statutory language its plain and ordinary meaning as we must, we determine that the term "supervision" is not synonymous with the term "custody" in § 43-286(1)(a)(iii).

The only other possible authority for placing Jeremy in the custody of the Douglas County CPO is found in §§ 43-284 and 43-285. Those statutes permit a juvenile court to award or commit a juvenile to the "care" of the Department, an association, a suitable institution, or an individual. However, the terms "association," "institution," and "individual" are not defined in the statutes. Hence, it is difficult to know whether the office of the Douglas County CPO would qualify as an individual, an institution, or an association.

[9,10] Still, we note that those statues delineate between the terms "care" and "custody." See, § 43-285 (permitting those individuals or associations with "care" of juvenile to acquire "guardianship" of juvenile); § 43-284 (allowing for juveniles to be placed in "*care*" of suitable institution or family, reputable citizen, association, or "*care and custody*" of Department (emphasis supplied)). Thus, we conclude that the juvenile court lacked statutory authority to place Jeremy in the custody of the Douglas County CPO.

The Department, however, did not perfect a timely appeal from the June 6, 1996, order, nor can that order be collaterally attacked in the present appeal. The error committed by the trial court was an error in the exercise of jurisdiction, but it was not outside the subject matter jurisdiction of the court. See, *Mayfield v. Hartmann*, 221 Neb. 122, 375 N.W.2d 146 (1985); *Schilke v. School Dist. No. 107*, 207 Neb. 448, 299 N.W.2d 527 (1980) (distinguishing between want of jurisdiction and error in exercise of jurisdiction).

[11] Jurisdiction of the subject matter means the authority to hear and determine both the class of actions to which the action before the court belongs and the particular question which it assumes to decide. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994). The trial court in the instant case was authorized to hear the class of actions of the action before the court—juvenile dispositions—and to decide the particular question assumed—the custody of Jeremy. As jurisdiction in the trial court had properly attached, the June 6, 1996, order placing custody in the Douglas County CPO was in error, but it is not void. See *Mayfield v. Hartmann, supra* (judgments valid and

binding for all purposes where jurisdiction has once attached). Custody of Jeremy was removed from the Department on June 6.

The result of our holding is that the Department is not responsible for the costs of caring for Jeremy from June 6 through August 23, 1996. See, *In re Interest of Todd T.*, 249 Neb. 738, 545 N.W.2d 711 (1996) (holding that Department cannot be held responsible for costs when juvenile is not in custody of Department); *In re Interest of G.B., M.B., and T.B.*, 227 Neb. 512, 418 N.W.2d 258 (1988) (explaining that county in which petition was filed is responsible for costs of care and placement of juvenile when juvenile court orders specific placement of juvenile). However, that holding does not extend to periods after the juvenile court's order on August 23, wherein Jeremy was placed back into the custody of the Department while he remained at the Clarinda Academy.

[12,13] A Department representative assigned to Jeremy's case was present on August 23, 1996, when the juvenile court placed Jeremy in the Department's custody. The Department could have discovered immediately that Jeremy had been placed and was located at the Clarinda Academy. If the Department thought that simultaneously placing Jeremy at the Clarinda Academy and in the Department's custody was inappropriate or unauthorized, it could have appealed that order to a juvenile review panel or to an appellate court. See, §§ 43-287.01 through 43-287.06 (setting forth expedited review procedure for juvenile court placement orders that differ from plan prepared by Department); § 43-2,106.01 (stating that Department may appeal any final order or judgment entered by juvenile court to courts of appeals). Compare, *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991) (holding that order determining where juvenile will be placed is dispositional order), *disapproved on other grounds, O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998); *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987) (holding that dispositional orders are final and appealable orders), *overruled on other grounds, State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993).

[14] The Department chose not to appeal the August 23, 1996, order, which was repeated on December 6, 1996, and again on February 25, 1997. Instead, the Department

appealed only the order entered on December 12, 1997 (sustaining Douglas County's motion for reimbursement). By not appealing from such final orders of the juvenile court, the Department waived the grounds for bringing such an appeal. See, *In re Interest of C.D.C.*, 235 Neb. 496, 455 N.W.2d 801 (1990); *In re Interest of L.B., A.B., and A.T.*, 235 Neb. 134, 454 N.W.2d 285 (1990); *In re Interest of M.B. and J.B.*, 233 Neb. 368, 445 N.W.2d 618 (1989).

CONCLUSION

In sum, while the trial court erred in placing custody of Jeremy with the Douglas County CPO in its order of June 6, 1996, such error was not jurisdictional and was waived by the failure to prosecute a timely appeal. Consequently, we modify the juvenile court's order of December 12, 1997, inasmuch as we relieve the Department of responsibility for the costs of placing and caring for Jeremy between June 6 and August 23, 1996. In all other respects, we affirm the December 12, 1997, judgment insofar as it holds the Department responsible for such costs at all other times.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLANT, V.
FRANCIS L. SEBERGER, APPELLEE.
601 N.W. 2d 229

Filed September 24, 1999. No. S-98-931.

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: Judgments: Appeal and Error.** In the absence of specific statutory authorization, the State has no right to appeal an adverse ruling in a criminal case.
3. **Statutes: Legislature: Intent.** Under principles of statutory construction, the components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
4. **Statutes.** Special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes so far as there is a conflict.

5. **Statutes: Death Penalty: Appeal and Error.** Neb. Rev. Stat. § 29-2320 (Reissue 1995) does not provide the State with authority to appeal the sentence of a defendant who has been acquitted of the death penalty and sentenced to life imprisonment.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Appeal dismissed.

Don Stenberg, Attorney General, Michael L. Munch, Sarpy County Attorney, and Patricia J. Bramhall for appellant.

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

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

CONNOLLY, J.

This case presents the question whether the State may appeal as excessively lenient the decision of a three-judge panel that sentenced Francis L. Seberger to life imprisonment rather than death. Seberger was convicted of first degree murder and was subsequently sentenced to life imprisonment. The State appeals pursuant to Neb. Rev. Stat. § 29-2320 (Reissue 1995), asserting that the sentence was excessively lenient and requesting that the matter be remanded for further evaluation. We conclude that the State does not have statutory authority to appeal this decision. Therefore, we dismiss the appeal.

BACKGROUND

On July 1, 1997, Debra Seberger died as a result of burns she sustained when Seberger poured gasoline on or near her and the gasoline ignited. Seberger was subsequently charged with first degree murder and arson in the first degree. Following a bench trial, the district court found Seberger guilty on the count of first degree murder and not guilty on the arson count. Pursuant to Neb. Rev. Stat. §§ 29-2519 to 29-2546 (Reissue 1995), a three-judge panel was convened to determine sentencing, and a hearing was held. Following the hearing, the panel sentenced Seberger to incarceration for a term of his natural life. The State appeals under § 29-2320, contending that the decision of the

panel to sentence Seberger to life imprisonment rather than to death was excessively lenient.

ASSIGNMENTS OF ERROR

The State provides six assignments of error. Its combined assertion is that the district court erred as a matter of law and fact in failing to find the presence of certain aggravating circumstances and in finding that certain mitigating circumstances existed. In addition, the State asserts that the district court erred in the manner in which it weighed an aggravator found to be present in the case.

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. *Miller v. M.F.S. York/Stormor, ante* p. 100, 595 N.W.2d 878 (1999); *In re Estate of Myers*, 256 Neb. 817, 594 N.W.2d 563 (1999).

ANALYSIS

The State contends that it has authority to appeal the decision pursuant to § 29-2320, which states:

> Whenever a defendant is found guilty of a felony following a trial or the entry of a plea of guilty or tendering a plea of nolo contendere, the county attorney charged with the prosecution of such defendant may appeal the sentence imposed if such attorney reasonably believes, based on all of the facts and circumstances of the particular case, that the sentence is excessively lenient.

This provision is located in article 23 of the criminal procedure statutes, which is the statutory section devoted to review of judgments in criminal cases. See Neb. Rev. Stat. §§ 29-2301 to 29-2325 (Reissue 1995).

Seberger, however, contends that § 29-2320 does not apply when a three-judge panel sentences a defendant to life imprisonment rather than death. In support of this contention, Seberger argues that the specific statutory scheme that provides for special procedures in cases of first degree murder does not allow a prosecutor to appeal as excessively lenient the imposition of a

life sentence instead of a death sentence. Seberger further argues that even if a prosecutor could perfect an appeal of a life sentence under § 29-2320, principles of double jeopardy apply, and thus, he cannot be resentenced to death because the three-judge panel already acquitted him of the death penalty.

[2] In *State v. Rust*, 247 Neb. 503, 528 N.W.2d 320 (1995), *cert. denied* 516 U.S. 905, 116 S. Ct. 271, 133 L. Ed. 2d 193 (1995), we held that the imposition of a life sentence acted to acquit the defendant of the harsher death sentence and that the protections of the Double Jeopardy Clause were applicable to the capital sentencing procedures governing the convening of a three-judge panel. See Neb. Rev. Stat. §§ 29-2520 to 29-2523 (Reissue 1995). As a result, we concluded that double jeopardy principles prevented the State from challenging a life sentence as excessively lenient. We did not, however, discuss in *Rust* the initial question whether the State has statutory authorization to file an appeal that challenges the imposition of a life sentence as excessively lenient. In general, in the absence of specific statutory authorization, the State has no right to appeal an adverse ruling in a criminal case. *State v. Rust, supra.*

[3,4] Under principles of statutory construction, the components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *In re Estate of Myers, supra*; *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999). Special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes so far as there is a conflict. *State v. Wood*, 245 Neb. 63, 511 N.W.2d 90 (1994).

The State brought this appeal pursuant to § 29-2320, which generally provides circumstances under which prosecutors may appeal sentences imposed in felony cases. However, article 25 of the criminal procedure statutes, §§ 29-2519 to 29-2546, provides special procedures to be applied in cases of first degree murder, including the use of a three-judge panel and the application of aggravating and mitigating circumstances in order to reach a determination of whether the death penalty should be imposed. It is the application of aggravating and mitigating cir-

cumstances under § 29-2523 of which the State complains in the instant case. However, §§ 29-2519 to 29-2546 do not contain a provision such as that found in § 29-2320 whereby a prosecutor could appeal the imposition of a life sentence rather than a sentence of death.

[5] Considering the statutory provisions conjunctively and applying the more specific provisions over the general, we conclude that § 29-2320 does not provide the State with authority to appeal the sentence of a defendant who has been acquitted of the death penalty and sentenced to life imprisonment. Because there is no specific statutory authorization in §§ 29-2519 to 29-2546 for the State to appeal the imposition of a life sentence, the State is without statutory authority to appeal in the instant case. Accordingly, the appeal is dismissed.

APPEAL DISMISSED.

BLUE VALLEY COOPERATIVE, A COOPERATIVE CORPORATION, APPELLEE, V. NATIONAL FARMERS ORGANIZATION, AN IOWA CORPORATION, APPELLANT.

600 N.W.2d 786

Filed October 1, 1999. No. S-97-1006.

1. **Statutes: Appeal and Error.** Questions of statutory interpretation require an appellate court to reach a conclusion independent of the decision made by the court below.
2. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the wrongful admission of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted.
3. **Prejudgment Interest: Appeal and Error.** Awards of prejudgment interest are reviewed de novo on appeal.
4. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning absent anything to the contrary; thus, an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Uniform Commercial Code.** Although official comments to the Uniform Commercial Code, Neb. U.C.C. §§ 1-101 through 10-104 (Reissue 1992 & Supp. 1993), are not binding, they are persuasive in matters of interpretation.
6. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.

7. **Uniform Commercial Code: Legislature: Intent: Liability: Negligence: Warehousers.** Taken together, provisions of the Uniform Commercial Code, particularly Neb. U.C.C. §§ 1-102 and 7-202(3) (Reissue 1992) and the official comments to Neb. U.C.C. § 7-204 (Reissue 1992), demonstrate that the legislative intent behind § 7-204 was to provide the sole mechanism by which a warehouse keeper could contractually diminish exposure to liability or limit damages for negligence.
8. **Uniform Commercial Code: Contracts: Damages: Liability: Warehousers.** A warehouse contract may reasonably limit a warehouse keeper's damages by setting forth a specific liability per article, item, or unit of weight, but may not disclaim or waive liability entirely under Neb. U.C.C. § 7-204 (Reissue 1992).
9. **Trial: Waiver: Appeal and Error.** A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal.
10. ___: ___: ___. A litigant must specify the grounds for an objection at trial to preserve the issue for appeal.
11. **Trial: Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
12. ___: ___: ___. The erroneous admission of evidence which unfairly prejudices a substantial right of the complaining litigant constitutes reversible error.
13. **Rules of Evidence.** Under Neb. Rev. Stat. § 27-402 (Reissue 1995), all relevant evidence is admissible unless there is some specific constitutional or statutory reason to exclude such evidence.
14. **Rules of Evidence: Words and Phrases.** Relevant evidence, as defined by Neb. Rev. Stat. § 27-401 (Reissue 1995), is that which tends to make the existence of any fact of consequence more or less probable than it would be without the evidence.
15. **Trial: Evidence: Appeal and Error.** Where it cannot be gleaned from the record that evidence wrongfully admitted did not affect the result of the trial unfavorably to the party against whom such evidence was admitted, reception of that evidence must be considered prejudicial error.
16. **New Trial: Appeal and Error.** Partial retrials are permissible if it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice.
17. **Prejudgment Interest: Claims: Words and Phrases.** Liquidated claims are those where there is no reasonable controversy as to the plaintiff's right to recover or as to the amount of such recovery.
18. ___: ___: ___. Unliquidated claims are those where the plaintiff's right to recover or the amount of such recovery is subject to a reasonable controversy.

Appeal from the District Court for Seward County: ALAN G. GLESS, Judge. Affirmed in part, and in part reversed and remanded.

Robert L. Nefsky and Timothy L. Moll, of Rembolt Ludtke & Berger, for appellant.

David A. Jarecke, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee.

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

GERRARD, J.

I. NATURE OF CASE

Blue Valley Cooperative (BVC) sued National Farmers Organization (NFO) to recover contractual costs of storing and handling NFO's white corn. NFO counterclaimed that BVC's negligence had damaged NFO's white corn and that BVC had breached an oral contract to reimburse NFO for that damage. After a jury found in favor of BVC on the written contract cause of action and against NFO on NFO's counterclaims, the trial court awarded BVC prejudgment interest. NFO appeals the judgment entered pursuant to the jury's verdict and the court's award of prejudgment interest. For the reasons that follow, we affirm in part, and in part reverse and remand for a new trial on the negligence counterclaim. We also reverse the trial court's award of prejudgment interest.

II. FACTUAL BACKGROUND

After a windstorm damaged grain bins that stored white corn belonging to certain NFO member-producers in 1993, NFO representatives contacted BVC to arrange for delivery and storage of the white corn at BVC's facility in Seward County. On July 9, 1993, BVC and NFO entered into a written agreement to facilitate such storage. The agreement stated that BVC was to receive and store NFO's white corn. The agreement recited that the white corn would be grade No. 2 with a moisture content of 15 percent. If any of the white corn received by BVC was off-grade or had a higher moisture content, the agreement called upon BVC to reject the load unless instructed otherwise by a representative of NFO.

The agreement also contained a waiver clause stating, "Quality liability will be waived if Blue Valley Cooperative is instructed to receive lesser than grade #2 corn and moisture content higher than 15.0%." Under the agreement, NFO was to arrange for the white corn to be shipped out of BVC's facility by

August 31, 1993. BVC was to load the grain onto railcars when the time came for the white corn to be shipped. The agreement placed the responsibility for railcar delay (demurrage) charges on NFO. Shortly after the parties entered into the agreement, NFO member-producers delivered approximately 115,000 bushels of their white corn to BVC.

Despite the agreement to remove the white corn from BVC by August 31, 1993, railcars were not dispatched to do so until January 21, 1994. On that day, a 54-car train arrived to haul the white corn to buyers in Mexico. NFO member-producers delivered more white corn from their farms to be commingled with the white corn stored at BVC and loaded onto the train. After BVC had loaded roughly 27 railcars with the NFO's commingled white corn, the Lincoln Inspection Service reported that the white corn was below grade No. 2 and had excessive damage. As such, BVC personnel unloaded the train and placed all the white corn back into BVC's storage facility.

BVC and NFO offered conflicting reasons at trial for the low grade of the corn. In particular, BVC presented testimony and exhibits suggesting that the white corn delivered by NFO had been infected with blue-eye mold. BVC witnesses testified that the blue-eye mold, as opposed to any negligent handling or storage, had caused the corn to deteriorate while warehoused at BVC and to ultimately rate below grade No. 2. Meanwhile, NFO witnesses asserted that heat had damaged the corn while stored at BVC's facility, which damage resulted from BVC's failure to keep the white corn cool and at a low moisture content.

After BVC unloaded the damaged white corn from the railcars, NFO member-producers delivered nearly 190,000 bushels of grade No. 2 white corn to fill the train on January 26, 1994. The railcars departed with the corn on February 9. BVC acknowledged that part of the reason for the railcar delay was having to load, unload, and reload the white corn. Burlington Northern Railroad billed BVC $15,120 for the demurrage on March 24, with a due date of April 8. BVC paid Burlington Northern Railroad, but remained confused about which of BVC's clients should be held accountable for the demurrage. For some reason, BVC agents thought the demurrage should be charged to Harvest States (a different BVC client) and did not

realize that the demurrage was NFO's responsibility until sometime in March 1995.

On March 1, 1994, representatives from NFO and BVC met to discuss how the remaining white corn would be disposed of and how costs and damages would be apportioned. At trial, the parties disputed what was orally agreed upon at that meeting. After the meeting, NFO paid BVC storage charges of $18,566.69 for storing the original 115,000 bushels of white corn from July 1993 to January 1994. NFO also paid BVC $19,058.59 for handling the 190,000 bushels of white corn delivered by NFO and loaded directly on railcars in January 1994. Finally, NFO paid BVC $2,566.82 for handling 25,668 bushels of the damaged white corn that NFO sold after January 1994. The remaining white corn was removed from BVC's facility by October 1994.

Thereafter, BVC initiated the instant suit claiming that NFO still owed BVC $8,843.03 in storage and handling costs (after discounting 2 cents per point on each bushel with damaged kernels) pursuant to the alleged oral agreement of March 1, 1994, and $15,120 in demurrage charges pursuant to the original written agreement. In response, NFO asserted counterclaims that BVC had negligently damaged NFO's white corn and breached an oral contract to reimburse NFO for that damage. NFO alleged damages in the amount of $77,398 by calculating the difference between the $3.05 per bushel the corn would have brought if it were grade No. 2 in January 1994 and the $2.60 per bushel for which it was actually sold.

On the morning of trial, NFO filed a motion in limine to exclude the waiver clause. NFO argued that the waiver clause was void and unenforceable under Neb. U.C.C. § 7-204 (Reissue 1992) and, therefore, irrelevant. The trial court overruled NFO's motion. After the jurors were sworn but before any evidence was admitted, NFO objected to admission of the waiver clause. Again, the trial court overruled NFO's objection.

When BVC attempted to adduce testimony from BVC representative Robert H. Kohtz regarding the waiver clause, NFO objected and was again overruled. At that point, NFO requested a continuing objection, which the trial court noted. In so doing, the trial court stated that NFO's continuing objection "continues

to be overruled." The entire written contract containing the waiver clause and a facsimile copy of it were both admitted into evidence.

Kohtz briefly described the waiver clause in the contract and said it was included because BVC had reason to believe that the white corn delivered by NFO had been exposed to rain. Kohtz explained that storing corn with a moisture content in excess of 15 percent can lead to problems and that BVC wanted to protect against that with the waiver clause. BVC also adduced testimony regarding the waiver clause while cross-examining Edwin Tvrdy, a representative of NFO.

In discussing the jury instructions with counsel for both parties, the trial court indicated that instruction No. 10 "took care of the limitation on liability" by paraphrasing § 7-204. Instruction No. 10 defined negligence and res ipsa loquitur, outlined the elements of those theories and the standard of proof, and explained that BVC could be held liable for failing to exercise care that a reasonably prudent person would under similar circumstances. Neither BVC nor NFO objected, so instruction No. 10 was submitted to the jury.

The jury returned a verdict in favor of BVC on the written contract cause of action for demurrage charges (in the sum of $15,120) and against NFO on NFO's counterclaim for negligence. The jury found against each party's breach-of-an-oral-contract claim. The trial court entered judgment on the jury's verdict and, without explaining its rationale, awarded BVC prejudgment interest from May 8, 1994. NFO timely appealed.

III. ASSIGNMENTS OF ERROR

NFO assigns two errors. First, NFO claims that the contractual waiver of "quality liability" (waiver clause) is void and unenforceable under § 7-204; thus, it was reversible error to allow the jury to learn of it. Second, NFO argues that its dispute with BVC was unliquidated and that therefore, prejudgment interest should not have been charged against NFO.

IV. STANDARD OF REVIEW

[1] In order to resolve NFO's first assignment of error, this court must interpret § 7-204 to determine whether BVC's waiver

clause was void or unenforceable. Questions of statutory interpretation require an appellate court to reach a conclusion independent of the decision made by the court below. *Schmidt v. State*, 255 Neb. 551, 586 N.W.2d 148 (1998).

[2] We must also determine whether it was reversible error to admit the waiver clause into evidence. To constitute reversible error in a civil case, the wrongful admission of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted. *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998).

[3] Regarding the prejudgment interest awarded to BVC and whether BVC's damages were liquidated, our scope of review is de novo. See, e.g., *Quantum Elec., Inc. v. Concept Dev., Inc.*, 237 Neb. 927, 468 N.W.2d 372 (1991) (mentioning that de novo review was conducted without explicitly setting forth scope of review for awards of prejudgment interest); *Northwestern Bell Tel. Co. v. Woodmen of the World Life Ins. Soc.*, 189 Neb. 30, 199 N.W.2d 729 (1972) (failing to set forth any standard of review for prejudgment interest awards but considering extensive evidence in record to decide whether such award was proper).

V. ANALYSIS

1. Waiver Clause Is Unenforceable

Although the question has not yet been addressed in Nebraska, we are persuaded that blanket waivers of liability in warehouse contracts—such as that in the written agreement between BVC and NFO—are unenforceable under § 7-204. There is no doubt that the contract containing the waiver clause at issue here is a warehouse contract. Compare Neb. Rev. Stat. § 88-526(6) (Reissue 1987) (defining "warehouseman") with Neb. U.C.C. § 7-102(1)(h) (Reissue 1992) (defining "warehouseman") and § 7-102(f) (defining "goods"). Hence, § 7-204 controls whether the waiver clause is enforceable.

In pertinent part, § 7-204 states:

> (1) A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise under like circumstances but unless otherwise

agreed he is not liable for damages which could not have been avoided by the exercise of such care.

(2) *Damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage, and setting forth a specific liability per article or item, or value per unit of weight, beyond which the warehouseman shall not be liable.*

(Emphasis supplied.)

[4,5] Statutory language is to be given its plain and ordinary meaning absent anything to the contrary; thus, an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998). Although official comments to the Uniform Commercial Code, Neb. U.C.C. §§ 1-101 through 10-104 (Reissue 1992 & Supp. 1993), are not binding, they are persuasive in matters of interpretation. *Omaha Pollution Control Corp. v. Carver-Greenfield*, 413 F. Supp. 1069 (D. Neb. 1976), *disapproved on other grounds, Mann v. Weyerhaeuser Co.*, 703 F.2d 272 (8th Cir. 1983). The stated purpose of § 7-204 in the official comment to that statute is to eliminate controversy surrounding contractual limitations on liability by setting forth conditions under which such could be done.

[6,7] Moreover, the components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *In re Invol. Dissolution of Battle Creek State Bank*, 254 Neb. 120, 575 N.W.2d 356 (1998). In setting out the purpose of the Uniform Commercial Code, § 1-102(3) declares that the provisions of those statutes "may be varied by agreement, except as otherwise provided in the code and except that the obligations of good faith, diligence, reasonableness and care . . . may not be disclaimed by agreement." Additionally, § 7-202(3) allows a warehouse keeper to insert in the receipt any terms that conform with "the provisions of the Uniform Commercial Code and do not impair [the warehouse keeper's] duty of care" as prescribed by § 7-204, and renders ineffective any contrary provisions. Taken together, these statutes reveal the legislative intent behind § 7-204, which was

to provide the sole mechanism by which a warehouse keeper could contractually diminish exposure to liability or limit damages for negligence in an agreement to store a customer's goods.

We are also impressed that the consensus approach of other jurisdictions is to void waivers of liability that do not strictly conform to § 7-204. See, *Butler Mfg. Co. v. Americold Corp.*, 835 F. Supp. 1274 (D. Kan. 1993) (striking down warehouseman's blanket waiver for ordinary negligence); *Fireman's Fund Am. Ins. Co. v. Capt. Fowler's Marina, Inc.*, 343 F. Supp. 347 (D. Mass. 1971) (voiding boat-storage agreement's blanket exculpatory clause); *Allstate Ins. Co. v. Winn. Co. Fair Ass'n*, 131 Ill. App. 3d 225, 475 N.E.2d 230, 86 Ill. Dec. 233 (1985) (reversing lower court's finding that provision waiving all liability was enforceable); *Hearst Corp. v. Bonded Services, Inc.*, 124 Misc. 2d 455, 476 N.Y.S.2d 733 (N.Y. Sup. 1984) (holding waiver of liability void for lack of opportunity to obtain increased valuation).

Nonetheless, other jurisdictions are quite willing to uphold damage-limiting clauses in warehouse contracts when such clauses conform to the terms of statutes very similar or identical to § 7-204. See, *International Nickel Co. v. Trammel Crow Distrib.*, 803 F.2d 150 (5th Cir. 1986) (upholding clause that limited damages to 100 times base storage rate for nickel); *Sanfisket, Inc. v. Atlantic Cold Stor. Corp.*, 347 So. 2d 647 (Fla. Dist. App. 1977) (upholding clause that limited damages to 50 cents per pound of shrimp); *Keefe v. Bekins Van & Storage Co.*, 36 Colo. App. 382, 540 P.2d 1132 (1975) (upholding clause limiting damages to 10 cents per pound per article of household goods); *Dunfee v. Blue Rock Van & Storage, Inc.*, 266 A.2d 187 (Del. Super. 1970) (upholding clause limiting damages to 60 cents per pound per article up to $1,000).

[8] Because the above approach is sensible and consistent with Nebraska's legislative intent, we hold that a warehouse contract may reasonably limit a warehouse keeper's damages by setting forth a specific liability per article, item, or unit of weight, but may not disclaim or waive liability entirely under § 7-204. BVC maintains that the written agreement with NFO complied with § 7-204 in this manner insofar as it set forth "a specific liability per article or item." In other words, BVC claims that the

phrase "lesser than grade #2 corn and moisture content higher than 15.0%" represents an article or item. The flaw in this reasoning is that BVC's waiver clause did not *limit damages* for such an article or item; instead, it *eliminated liability*—which is exactly what the plain language of § 7-204 prohibits. Therefore, the waiver clause in BVC's contract was unenforceable.

2. Admitting Waiver Clause Was Reversible Error

(a) NFO Preserved Error for Appeal

BVC argues that NFO did not properly object to admission of the waiver clause and that thus, the issue was not preserved for appeal. In support of this, BVC claims that NFO did not object when counsel for BVC made references to the waiver clause during opening and closing remarks. BVC also asserts that NFO failed to make clear the evidentiary grounds for the objections that were made.

[9,10] BVC is correct that a litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal. *Benzel v. Keller Indus.*, 253 Neb. 20, 567 N.W.2d 552 (1997); *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996). Moreover, a litigant must specify the grounds for such an objection at trial. See *Washa v. Miller*, 249 Neb. 941, 546 N.W.2d 813 (1996).

Opening and closing statements were not transcribed in the instant case and are not included in the record before us. What is in the record is NFO's argument at the hearing on its motion in limine to exclude the waiver clause as irrelevant. Beyond that, NFO objected to admission of the waiver clause at the very start of trial within 1 hour of arguing the motion in limine. NFO objected to admission of the waiver clause again when BVC first sought to adduce testimony and exhibits pertaining to the waiver clause. After being overruled, NFO asked for a continuing objection on the matter, which the trial court noted.

This series of motions, arguments, and objections made it abundantly clear that relevancy was the basis for the objection. We, therefore, conclude that NFO properly preserved the issue for appeal under these circumstances.

(b) Error Was Prejudicial

[11,12] A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion. See *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991). If a trial court erroneously admits evidence that unfairly prejudices a substantial right of the complaining litigant, such admission is an abuse of discretion and constitutes reversible error. See, *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998); *Westgate Rec. Assn. v. Papio-Missouri River NRD*, 250 Neb. 10, 547 N.W.2d 484 (1996).

[13,14] Our first step is to determine whether it was error to admit the waiver clause; if so, our next step is to decide if the error was prejudicial and reversible. In Nebraska, all relevant evidence is admissible unless there is some specific constitutional or statutory reason to exclude such evidence. Neb. Rev. Stat. § 27-402 (Reissue 1995). Relevant evidence is that which tends to make the existence of any fact of consequence more or less probable than it would be without the evidence. Neb. Rev. Stat. § 27-401 (Reissue 1995).

The facts of consequence in this case were (1) whether an enforceable written or oral contract existed between the parties, (2) whether the enforceable provisions of such a contract were breached and by whom, (3) whether NFO's corn was damaged while in BVC's custody and to what extent, and (4) whether negligence on the part of BVC was the proximate cause of such damage.

Had the waiver clause been enforceable under § 7-204, then the waiver clause might have been admissible under §§ 27-401 and 27-402. Indeed, such a clause would tend to prove the existence of an enforceable contractual provision. However, because we have determined that the waiver clause was unenforceable, it had no tendency to make any of the above facts of consequence more or less likely and was irrelevant. Just as § 27-402 makes all relevant evidence admissible, so too does it render all irrelevant evidence inadmissible. Hence, the clause was irrelevant under § 27-401 and inadmissible under § 27-402. The trial court abused its discretion in admitting the waiver clause into evidence.

Of course, the question at the crux of this matter is whether the error was prejudicial and reversible. In arguing that it was not prejudicial, BVC points out that NFO neither objected nor offered an alternative to jury instruction No. 10—which allowed the jury to find against BVC on NFO's negligence cause of action. In other words, BVC asserts that (1) instruction No. 10 allowed the jury to find against BVC on a negligence theory, thereby curing or undoing any prejudicial harm caused by the erroneous admission of the waiver clause, or (2) NFO's failure to object to instruction No. 10 or offer another instruction waived the error objected to at the evidentiary stage of trial.

In support of its argument, BVC cites *Keller v. Noble*, 229 Neb. 542, 428 N.W.2d 170 (1988). However, the *Keller* case does not stand for the proposition that a proper jury instruction will cure an otherwise reversible error committed during the evidentiary phase of a trial. On the contrary, *Keller* concerns waiver of an erroneous jury instruction by failing to object to it.

NFO counters that it had no duty to object to instruction No. 10 because the instruction was favorable to NFO. Moreover, NFO urges that it did not waive the error complained of at the evidentiary stage by failing to offer a jury instruction on the unenforceable nature of the waiver clause. NFO claims that offering such an instruction would have been fruitless, given the trial court's prior rulings on the admissibility of the waiver clause.

In the instant cause, the jury was not specifically instructed that the waiver clause was unenforceable or that they should disregard the clause. As such, the jury could easily have been confused or misled as to whether BVC could be held liable—even if BVC was negligent and such negligence caused the harm to NFO's corn.

[15] In the final analysis, the record does not disclose (and it is impossible to say) what effect, if any, the waiver clause had on the jury's verdict—even in light of instruction No. 10. Where it cannot be gleaned from the record that evidence wrongfully admitted did not affect the result of the trial unfavorably to the party against whom such evidence was admitted, reception of that evidence must be considered prejudicial error. *Westgate*

Rec. Assn. v. Papio-Missouri River NRD, 250 Neb. 10, 547 N.W.2d 484 (1996). We so conclude.

[16] In holding that it was prejudicial and reversible error to admit the waiver clause, we do not, however, undo the jury's entire verdict. The jury's verdict in favor of BVC on the breach of the written contract action is unaffected. Partial retrials are permissible if "it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Gasoline Prods. Co. v. Champlin Co.*, 283 U.S. 494, 500, 51 S. Ct. 513, 75 L. Ed. 1188 (1931). If the issues are "so interwoven . . . that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty," then a retrial on all interwoven issues is required. 283 U.S. at 500. See, also, e.g., *Burke v. Deere & Co.*, 6 F.3d 497 (8th Cir. 1993); *England v. Gulf & Western Mfg. Co.*, 728 F.2d 1026 (8th Cir. 1984); *Hallberg v. Brasher*, 679 F.2d 751 (8th Cir. 1982); *Slater v. KFC Corp.*, 621 F.2d 932 (8th Cir. 1980).

We note that NFO did not appeal the jury's finding that NFO was liable for the contractual demurrage charges; instead, NFO assigned as error the jury's finding that BVC was not liable for negligently damaging NFO's corn. Retrial is not necessary on the contract claim because the issue of BVC's alleged negligence is "so distinct and separable" from the contract claim that "a trial of it alone may be had without injustice." See *Gasoline Prods. Co. v. Champlin Co., supra*. NFO's liability on the demurrage charge is governed by the written contract, whereas BVC's alleged negligence in storing the corn is a completely separate issue based upon a separate set of facts. The inadmissibility of the waiver clause regarding liability has no bearing on the contract claim for demurrage charges. Therefore, we reverse only that portion of the judgment that found BVC not liable for negligently damaging NFO's corn and remand for a new trial on that cause of action consistent with this opinion.

3. Award of Prejudgment Interest Was Inappropriate

In analyzing whether the trial court's award of prejudgment interest to BVC was proper, it is important to recognize that the award pertains only to the demurrage charge in the written con-

tract. That is so because the jury did not find in favor of BVC's breach-of-an-oral-contract claim.

Awards of prejudgment interest are governed by Neb. Rev. Stat. § 45-103.02 (Reissue 1998). *Elson v. Pool*, 235 Neb. 469, 455 N.W.2d 783 (1990). Section 45-103.02 states in pertinent part:

> (1) . . . [I]nterest . . . shall accrue on the unpaid balance of unliquidated claims from the date of the plaintiff's first offer of settlement which is exceeded by the judgment until the rendition of judgment if all of the following conditions are met:
>
> (a) The offer is made in writing upon the defendant by certified mail, return receipt requested, to allow judgment to be taken in accordance with the terms and conditions stated in the offer;
>
> (b) The offer is made not less than ten days prior to the commencement of the trial;
>
> (c) A copy of the offer and proof of delivery to the defendant in the form of a receipt signed by the party or his or her attorney is filed with the clerk of the court in which the action is pending; and
>
> (d) The offer is not accepted prior to trial or within thirty days of the date of the offer, whichever occurs first.
>
> (2) . . . [I]nterest . . . shall accrue on the unpaid balance of liquidated claims from the date the cause of action arose until the rendition of judgment.

[17,18] We note that BVC did not comply with the written-offer requirements of § 45-103.02(1) for unliquidated claims. Thus, if BVC was entitled to prejudgment interest at all, BVC's claim must have been a liquidated one fitting within the provisions of § 45-103.02(2). Liquidated claims are those where there is no reasonable controversy as to the plaintiff's right to recover or as to the amount of such recovery. *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993). By contrast, unliquidated claims are those where the plaintiff's right to recover or the amount of such recovery is subject to a reasonable controversy. *A.G.A. Inc. v. First Nat. Bank*, 239 Neb. 74, 474 N.W.2d 655 (1991).

Assuming, without deciding, that there was no reasonable controversy surrounding BVC's claim, the record reveals no

indication of the precise date that BVC's cause of action arose. Conceivably, it could have been at three points: either (1) when NFO failed to timely dispatch the railcars, (2) when Burlington Northern Railroad billed BVC for the demurrage, or (3) when BVC learned that NFO was responsible for the demurrage charge and demanded compensation from NFO. We determine that the proper date for prejudgment interest to begin accruing on a liquidated claim under these circumstances is the date when BVC demanded such compensation from NFO.

The record shows that Burlington Northern Railroad billed BVC for the demurrage in March 1994, with a due date of April 8, and that BVC did not realize that the charge should be billed to NFO until sometime in March 1995. Beyond that, the record does not reveal the date that BVC requested reimbursement from NFO for the demurrage charge. As such, we can only speculate as to how the trial court determined that BVC was entitled to prejudgment interest from May 8, 1994. Because the record does not disclose when BVC's cause of action arose, the trial court erred in awarding BVC prejudgment interest from May 8. Thus, we reverse the trial court's award of prejudgment interest and remand for further proceedings consistent with this opinion.

VI. CONCLUSION

To summarize, we hold that blanket waivers of liability—as opposed to reasonable limitations on damages per article, item, or unit of weight—in warehouse contracts are void under § 7-204. Further, we conclude that it was prejudicial error to admit the unenforceable and irrelevant waiver clause into evidence in this cause. Finally, we determine that the trial court erred in awarding BVC prejudgment interest from May 8, 1994, as the record does not disclose the precise date when BVC's cause of action arose. We, therefore, affirm in part, and in part reverse, the judgment of the district court and remand for a new trial on NFO's counterclaim against BVC for negligence and for further proceedings on BVC's award of prejudgment interest consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

IRENE R. BARGMANN AND DAVID R. BARGMANN ET AL., APPELLANTS, V. THE STATE OF NEBRASKA, DEPARTMENT OF ROADS, AND THE CITY OF COLUMBUS, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEES.

600 N.W.2d 797

Filed October 1, 1999. Nos. S-98-282 through S-98-289.

1. **Judgments: Jurisdiction: Appeal and Error.** The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its own conclusions independent from the trial court.
2. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
5. **Final Orders: Appeal and Error.** An order is final if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
6. **Final Orders: Dismissal and Nonsuit: Negligence: Parties: Appeal and Error.** An order which effects a dismissal with respect to one of multiple defendants in a negligence action is a final, appealable order as to the party dismissed.
7. **Summary Judgment: Words and Phrases.** A partial summary judgment proceeding is not a special proceeding.
8. **Actions: Judgments: Final Orders: Appeal and Error.** Where multiple causes of action are alleged, an entry of judgment on one cause of action is a final, appealable order with respect to that cause of action, despite the pendency of other causes of action in the same suit.
9. **Actions: Words and Phrases.** A cause of action consists of the fact or facts which give one a right to judicial relief against another; a theory of recovery is not itself a cause of action.
10. **Actions: Pleadings.** Two or more claims in a petition arising out of the same operative facts and involving the same parties constitute separate legal theories, either of liability or damages, and not separate causes of action.
11. **Actions.** Whether more than one cause of action is stated depends mainly upon (1) whether more than one primary right or subject of controversy is presented, (2) whether recovery on one ground would bar recovery on the other, (3) whether the

same evidence would support the different counts, and (4) whether separate actions could be maintained for separate relief.

12. **Constitutional Law: Eminent Domain: Damages.** Article I, § 21, of the Nebraska Constitution provides that the property of no person shall be taken or damaged for public use without just compensation therefor.

13. ___: ___: ___. Nebraska's constitutional right to just compensation includes compensation for damages occasioned in the exercise of eminent domain and, therefore, is broader than the federal right, which is limited only to compensation for a taking.

14. ___: ___: ___. One whose property is damaged by the construction of a public improvement by the state or a subdivision thereof has been damaged for a public use within the meaning of article I, § 21, of the Nebraska Constitution.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Affirmed in part, and in part dismissed.

Warren R. Whitted, Jr., and Jennifer K. Woodward, of Lieben, Whitted, Houghton, Slowiaczek & Dougherty, P.C., for appellants.

Don Stenberg, Attorney General, and Jeffery T. Schroeder, for appellee State of Nebraska.

Stan A. Emerson and Matthew D. Dake, of Sipple, Hansen, Emerson & Schumacher, for appellee City of Columbus.

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

CONNOLLY, J.

The appellants, Irene R. Bargmann and David R. Bargmann and seven other landowners, brought the instant consolidated actions against the County of Platte, Nebraska (County), and against the appellees, the Nebraska Department of Roads (State) and the City of Columbus, Nebraska (City). In their operative petition, the appellants allege that the appellees allowed the construction of obstructions within a flood plain which caused their land to become flooded and damaged. As a result, the appellants claim that their properties have been taken for public use without just compensation in violation of article I, § 21, of the Nebraska Constitution and the Fifth Amendment to the U.S. Constitution. The district court granted the City's motion for summary judgment and the State's motion for partial summary judgment. We affirm the portion of the order granting the City's

motion for summary judgment and dismiss the appeal against the State due to the lack of a final, appealable order.

I. BACKGROUND

The appellants are a group of landowners in Platte County, Nebraska. The properties at issue are not within the City's corporate limits but are within the zoning jurisdiction of the City. In addition, the properties are located within the 100-year flood plain of the Loup and Platte Rivers. In March 1993, ice jams occurred on the Loup River near Columbus, Nebraska, forcing the river out of its banks. The floodwaters accumulated on the appellants' properties, causing damage. Following the flooding, the appellants filed a petition claiming that the appellees and the County allowed the construction of certain obstructions within the flood plain which caused the flooding of their properties to be much worse than it would have been had the obstructions not been built.

The alleged obstructions are the reconstruction of U.S. Highway 81 (highway) and the construction of a subdivision known as Whitetail Lake (subdivision). Both the highway and the subdivision are within 2 miles of the City and are within its zoning jurisdiction. The appellants allege that both the highway and the subdivision were constructed at an elevation in excess of the 100-year flood level and acted as a dam or levee which caused the floodwaters to accumulate on their properties.

The subdivision was built in the early 1980's. At that time, the City had in effect a flood plain ordinance requiring a permit from the City in order to engage in construction in the flood plain. The developers did not seek a permit under the ordinance. Instead, the developers obtained a permit from the State of Nebraska, Department of Water Resources (department). The record indicates that the department had authority to permit construction in the flood plain at the time the subdivision was constructed. However, an engineer who had been involved in flood plain studies of the area testified that the City could have stopped construction of the subdivision by refusing to grant a permit under its ordinance.

Following the issuance of the permit by the department, the City approved a special use permit issued to the developer to

extract dirt, gravel, and sand to create an internal lake within the subdivision. The first preliminary plat for the subdivision was approved by the city planning commission and the city council in the early 1980's. The city council, at various times, approved and accepted subdivision plats for each addition to the subdivision. There is no evidence that the State had any involvement in the construction of the subdivision. The State did not issue a permit regulating or authorizing construction of the subdivision, and the only record of permits issued by the State concerned permits for temporary access to a State right-of-way during the initial construction.

In February 1984, the City entered into a written agreement with the State regarding the highway construction. This agreement provided that "the construction or reconstruction of the aforesaid highway . . . shall be accomplished according to and in the manner provided by plans and specifications to be prepared by the State." The agreement provided that the City would share in financing that part of the project located within city limits. The City did not participate in the actual construction and did not select or supervise the construction contractor. Rather, the State selected and supervised the contractor.

The appellants allege that the actions of the County, the City, and the State constituted a taking of their properties for public use without just compensation under both the Nebraska and the U.S. Constitutions. In September 1997, the action against the County was dismissed with prejudice, and no appeal was taken. Thus, the County is not an appellee in this case. The City brought a motion for summary judgment, and the State brought a motion for partial summary judgment. The district court granted the State's motion for partial summary judgment to the extent that the State was not liable for any damage caused by the construction of the subdivision. On the same date, the district court granted the City's motion for summary judgment on the basis that any action of the City in "allowing" the construction of the subdivision could not constitute a taking as a matter of law. In addition, the district court determined that the City was not responsible for the design or construction of the highway project. The appellants filed this appeal, and the State filed a motion to dismiss based on a lack of jurisdiction.

II. ASSIGNMENTS OF ERROR

The appellants assign that the district court erred in sustaining the City's motion for summary judgment and in granting the State's motion for partial summary judgment.

III. STANDARD OF REVIEW

[1] The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its own conclusions independent from the trial court. *Eli's, Inc. v. Lemen*, 256 Neb. 515, 591 N.W.2d 543 (1999).

[2] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *NECO, Inc. v. Larry Price & Assocs.*, *ante* p. 323, 597 N.W.2d 602 (1999); *Fackler v. Genetzky*, *ante* p. 130, 595 N.W.2d 884 (1999).

[3] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999); *Woodard v. City of Lincoln*, 256 Neb. 61, 588 N.W.2d 831 (1999).

IV. ANALYSIS

1. JURISDICTION

The State contends we do not have jurisdiction because the appeal of the partial summary judgment is not a final, appealable order.

[4,5] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Charles Vrana & Son Constr. v. State*, 255 Neb. 845, 587 N.W.2d 543 (1998). An order is final if it affects a substantial right and (1) determines the action and prevents a judgment,

(2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered. *Charles Vrana & Son Constr. v. State, supra*; *O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998).

[6] An order which effects a dismissal with respect to one of multiple defendants in a negligence action is a final, appealable order as to the party dismissed. *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997); *Green v. Village of Terrytown*, 188 Neb. 840, 199 N.W.2d 610 (1972). In the instant case, the granting of the City's motion for summary judgment dismissed the appellants' case against it. Thus, the order granting the City's motion for summary judgment is a final, appealable order even though there are issues left to be determined in the case that affect other parties. However, this leaves the question as to whether the partial summary judgment order granted to the State is a final, appealable order.

[7] It is well settled that a partial summary judgment proceeding is not a special proceeding under part two of the above test. *Charles Vrana & Son Constr. v. State, supra*. For example, in *Charles Vrana & Son Constr.*, Vrana contracted with the Nebraska Department of Roads to perform a construction project and subsequently brought an action alleging that he was owed money from the State under the contract. The State counterclaimed, alleging that Vrana owed it money pursuant to both a liquidated damage provision and a disincentive provision in the contract. The district court granted Vrana's motion for partial summary judgment regarding the amount the State alleged Vrana owed under the disincentive provision, and the State appealed. We noted that the partial summary judgment proceeding was not made on summary application after judgment was rendered and that it did not determine the action and prevent a judgment because the order disposed of only one of the State's counterclaims and none of Vrana's claims. We also restated the rule that a partial summary judgment is not a special proceeding.

[8] In reaching our decision in *Charles Vrana & Son Constr.*, we quoted language from *O'Connor v. Kaufman, supra*, stating that partial summary judgment " 'merely resolves one or several of the issues involved in the entire action or the "main case." ' " 255 Neb. at 848, 587 N.W.2d at 546. Although it is clear from

Charles Vrana & Son Constr. that partial summary judgment is not a special proceeding, *Charles Vrana & Son Constr.* does not stand for the proposition that an order granting partial summary judgment is never a final, appealable order. Rather, we have stated on several occasions, including a recently decided case, that where multiple causes of action are alleged, an entry of judgment on one cause of action is a final, appealable order with respect to that cause of action, despite the pendency of other causes of action in the same suit. *Fackler v. Genetzky, ante* p. 130, 595 N.W.2d 884 (1999); *Fitzke v. City of Hastings*, 255 Neb. 46, 582 N.W.2d 301 (1998).

[9-11] The distinguishing factor between these cases and *Charles Vrana & Son Constr. v. State*, 255 Neb. 845, 587 N.W.2d 543 (1998), is that in *Charles Vrana & Son Constr.*, a distinct cause of action was not dismissed. Therefore, it was necessary in *Charles Vrana & Son Constr.* to consider whether the partial summary judgment was a special proceeding. However, when a distinct cause of action is dismissed, the order is final under the first part of the test as an order that affects a substantial right in an action and in effect determines the action and prevents a judgment. Thus, if the partial summary judgment order in the instant case acted to enter judgment on a distinct cause of action, we have jurisdiction to consider the partial summary judgment order on appeal. However, if the partial summary judgment acted to dismiss only a theory of recovery, there is not a final, appealable order. A cause of action consists of the fact or facts which give one a right to judicial relief against another; a theory of recovery is not itself a cause of action. *Lewis v. Craig*, 236 Neb. 602, 463 N.W.2d 318 (1990). Thus, two or more claims in a petition arising out of the same operative facts and involving the same parties constitute separate legal theories, either of liability or damages, and not separate causes of action. *Id.* Whether more than one cause of action is stated depends mainly upon (1) whether more than one primary right or subject of controversy is presented, (2) whether recovery on one ground would bar recovery on the other, (3) whether the same evidence would support the different counts, and (4) whether separate actions could be maintained for separate relief. *Fackler v. Genetzky, supra*; *Fitzke v. City of Hastings, supra.*

In the instant case, the appellants pled one cause of action that shared a common set of facts and sought the same relief from the County and the appellees. Essentially, the appellants pled a variety of circumstances that allegedly acted to cause damage to their properties, the combined effect of which they alleged was a taking of their properties. Thus, the effect of the granting of the State's motion for partial summary judgment was not to dismiss a separate and distinct cause of action. Rather, it prevented the appellants from seeking recovery from the State for any damages caused by the construction of the subdivision, which was simply one factual element or alternate theory of damages pled in the appellants' single cause of action. Accordingly, the order granting the State's motion for partial summary judgment did not have the effect of dismissing a separate and distinct cause of action and is not a final, appealable order.

Of further interest but not directly applicable in this case is Neb. Rev. Stat. § 25-705(6) (Cum. Supp. 1998), effective July 15, 1998. Section 25-705(6) is the same as Fed. R. Civ. P. 54(b) and provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Although § 25-705(6) does not affect the instant case because the order appealed from was entered before the effective date of the statute, the statute simplifies the issue and clears up many of the questions regarding final orders when there are multiple parties and claims.

2. CITY'S MOTION FOR SUMMARY JUDGMENT

The appellants contend that the City's approval of the plat for the subdivision and its failure to enforce the ordinance requiring a permit prior to construction in the flood plain constituted a regulatory taking of their properties. The appellants also contend that the City's involvement with the subdivision and the highway project constituted a physical taking of their properties.

[12,13] Article I, § 21, of the Nebraska Constitution provides that the "property of no person shall be taken or damaged for public use without just compensation therefor." The 5th Amendment to the U.S. Constitution, made applicable to the states through the 14th Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." See *Strom v. City of Oakland*, 255 Neb. 210, 583 N.W.2d 311 (1998). Nebraska's constitutional right to just compensation includes compensation for damages occasioned in the exercise of eminent domain and, therefore, is broader than the federal right, which is limited only to compensation for a taking. *Id.*

(a) Regulatory Taking

A review of case law shows that, generally, a regulatory taking occurs in the context of governmental regulation of the property allegedly taken. For example, a regulation may require that an owner change his or her property or that a particular use of the property be prohibited. See, e.g., *Strom v. City of Oakland, supra* (requirement that owner install erosion controls); *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994) (denial of property owner's request for permit). In this case, however, the appellants contend that it is the regulation of the subdivision, land that is owned by private third persons who are not parties to the action, that constitutes a taking. The district court referred to this as a "novel approach" and noted that it could find no authority to support the appellants' argument.

The appellants cite *Sheffet v. County of Los Angeles*, 3 Cal. App. 3d 720, 84 Cal. Rptr. 11 (1970), to support their contention that the approval of a subdivision plat can give rise to a finding that a regulatory taking occurred in the instant case. In *Sheffet*, the county was held liable in inverse condemnation for damages caused by an overflow of water onto the plaintiff's property

from public streets when the county had approved the subdivision and the drainage system. However, the county in *Sheffet* had done more than merely approve the subdivision plans. Rather, the county specifically accepted dedication of the streets, including specifically accepting liability for damages caused by the construction of the streets. Further, in *Ullery v. Contra Costa County*, 202 Cal. App. 3d 562, 248 Cal. Rptr. 727 (1988), the court specifically declined to extend *Sheffet* to allow a public entity to be held liable for inverse condemnation by virtue of the sole act of subdivision map approval. Accordingly, we find *Sheffet* to be unpersuasive. We agree with the district court that a regulatory taking could not have occurred under the facts presented in the instant case.

(b) Physical Taking

[14] The appellants next contend that the City's involvement with both the subdivision and the highway project constituted a physical taking of their properties. We have held that " '[o]ne whose property is damaged by the construction of a public improvement by the state or a subdivision thereof, has been damaged for a public use within the meaning of Article I, section 21, of the Constitution.' " *Strom v. City of Oakland*, 255 Neb. at 216, 583 N.W.2d at 316, quoting *Baum v. County of Scotts Bluff*, 169 Neb. 816, 101 N.W.2d 455 (1960). Thus, the issue is whether there is a question of fact regarding the City's involvement in constructing a public improvement that damaged the appellants' properties.

In *Steuben v. City of Lincoln*, 249 Neb. 270, 543 N.W.2d 161 (1996), homeowners sought compensation after water backed up against a railroad fill with a clogged culvert and flooded their property. The culvert was not owned, installed, or maintained by the city. However, the city had approved plats for development in the surrounding area. We stated that the homeowners had the burden of proving that the city's approval, development, and maintenance of the plats, a local park, and a golf course were the proximate cause of their damages. We then determined that there was no evidence that the city changed or altered a natural waterway, constructed a dam or embankment, or intentionally

directed water onto the homeowner's property. Thus, we held that the property was not taken by the city for a public purpose.

In the instant case, the only involvement of the City regarding the subdivision was the approval of plats and the issuance of a special use permit. The City was not involved in the construction, development, or maintenance of the subdivision. Rather, the construction, design, and maintenance were carried out by private, third parties. Likewise, the record shows no direct involvement of the City in the construction of the highway. Rather, the contract between the City and the State clearly states that the construction or reconstruction of the highway would be accomplished according to plans and specifications prepared by the State. There is no evidence that the City took part in any of the construction, design, or maintenance of the highway. Under these circumstances, we determine, as a matter of law, that the City has not taken the appellants' properties for a public purpose.

V. CONCLUSION

Due to the lack of a final order, we do not have jurisdiction to consider the district court's action in sustaining the State's motion for partial summary judgment, and dismiss the appeal as to that party. The appellants have failed to provide evidence that the City took part in the construction, design, or maintenance of either the subdivision or the highway project. Thus, we affirm the portion of the district court's order granting the City's motion for summary judgment.

AFFIRMED IN PART, AND IN PART DISMISSED.

JERRY LYNN CROSS, APPELLEE, V.
WILLIAM FRANK PERRETEN, APPELLANT.
600 N.W.2d 780

Filed October 1, 1999. No. S-98-425.

1. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.

2. **Judgments: Appeal and Error.** In connection with questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Paternity: Attorney Fees: Appeal and Error.** An award of attorney fees in a paternity action is reviewed de novo on the record to determine whether there has been an abuse of discretion by the trial judge. Absent such an abuse, the award will be affirmed.
4. **Paternity.** Paternity proceedings are purely statutory, and the courts can try such issues and make such orders in them as the statute contemplates, and none other.
5. **Paternity: Statutes.** The paternity statutes, which modify common law and must be strictly construed, do not contemplate a determination of legal or equitable issues in a paternity action disconnected from the determination of paternity pursuant to those statutes, except for the allowance of support, child-care expenses, visitation, and custody incidental thereto.
6. **Paternity: Child Support: Attorney Fees: Case Overruled.** Neb. Rev. Stat. §§ 43-512.04(5) and 43-1412(3) (Reissue 1998) specifically provide that attorney fees and costs are allowed in paternity and child support cases brought by a child's mother, father, guardian or next friend, the county attorney, or other authorized attorney. To the extent *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994), holds otherwise, it is overruled.

Appeal from the District Court for Saunders County: ALAN G. GLESS, Judge. Affirmed in part, and in part reversed and vacated.

Milissa Johnson-Wiles, of Frey & Hand, for appellant.

Becky J.W. Dias and John H. Sohl, of Edstrom, Bromm, Lindahl & Sohl, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

William Frank Perreten appeals from the March 30, 1998, order entered by the district court for Saunders County, which order, inter alia, declared William to be the father of the minor children Jessica L. Perreten, Chris W. Perreten, and Dani T. Perreten; awarded custody of the children to their natural mother, Jerry Lynn Cross, appellee; ordered William to pay child support; ordered William to pay $1,000 of Jerry's attorney fees; and divided the property and debts of Jerry and William. For his appeal, William challenges the jurisdiction of the district court in this paternity action to divide the property and debts of

the parties and the award of attorney fees to Jerry. For the reasons recited below, we conclude that the district court erred in its exercise of jurisdiction by hearing and deciding the property and debt issues, and we reverse and vacate that portion of the district court's order purporting to divide the property and debts of the parties. We affirm the award of attorney fees to Jerry incurred in connection with this paternity action.

STATEMENT OF FACTS

There are no factual disputes of a material nature between the parties in this case. Although they never married, William and Jerry lived together for 18 years. During their relationship, the couple had three children, Jessica, born May 18, 1979; Chris, born August 5, 1982; and Dani, born December 27, 1983. During this same period, William and Jerry together purchased certain real and personal property, including a house in Ashland, Nebraska. The parties also incurred certain joint debts, including the mortgage on the house. Ultimately, William and Jerry terminated their relationship.

On October 23, 1996, Jerry filed a petition in the district court for Saunders County. The petition contained six paragraphs which alleged, inter alia, that the parties were not married but that William was the father of Jessica, Chris, and Dani, and that Jerry should be awarded custody, care, and control of the children. In her prayer for relief, Jerry sought "the care custody and control of the minor children of the parties," with William to receive reasonable visitation rights; child support, medical expenses, and day-care expenses; and attorney fees. Jerry also prayed for an "equitable distribution" of the parties' joint property and debts acquired during their relationship. The petition did not identify separate causes of action between the paternity case and incidents thereto and the allegations seeking a division of property and debts.

In his answer, William admitted paternity of the children and requested relief similar to that requested in Jerry's petition. The court appointed counsel to represent William with respect to the child custody and visitation matters. At trial, William orally demurred to the allegations in the petition concerning the division of property and debts in the paternity action, claiming that

the trial court lacked jurisdiction over the issues involving property and debt division in this paternity action. The trial court concluded that under its general equity power, it had jurisdiction to determine all issues raised in the petition, and it overruled William's demurrer.

Trial was conducted at which the court first heard evidence concerning the child custody, support, and visitation issues. The trial was continued to a later date, at which time the parties offered evidence regarding their property and debts. At the continuation of the trial, William renewed his oral demurrer to the trial court's jurisdiction over the property and debt division issues, and the demurrer was again overruled.

Following the conclusion of the trial, the court entered its order. The order, inter alia, declared William to be the father of the three children; awarded custody of the children to Jerry, with reasonable visitation to William; ordered William to pay child support; ordered William to pay $1,000 toward Jerry's attorney fees; and divided property and debts between Jerry and William. William appeals.

ASSIGNMENTS OF ERROR

On appeal, William alleges the trial court erred (1) in overruling his demurrer and in determining in this paternity action that it had jurisdiction to hear and rule on the issue of the property and debts of the parties and (2) in ordering William to pay $1,000 of Jerry's attorney fees.

STANDARDS OF REVIEW

[1-3] In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Coburn v. Reiser*, 254 Neb. 495, 577 N.W.2d 289 (1998). In connection with questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Kratochvil v. Motor Club Ins. Assn.*, 255 Neb. 977, 588 N.W.2d 565 (1999). An award of attorney fees

in a paternity action is reviewed de novo on the record to determine whether there has been an abuse of discretion by the trial judge. Absent such an abuse, the award will be affirmed. *Morrill County v. Darsaklis*, 7 Neb. App. 489, 584 N.W.2d 36 (1998).

ANALYSIS

Denial of Demurrer.

William's demurrers challenged the trial court's authority to determine property rights in a paternity action. A demurrer is the proper method by which to challenge the trial court's exercise of jurisdiction. See Neb. Rev. Stat. § 25-806 (Reissue 1995). Improper exercise of jurisdiction may be raised at any time by any party or by the court sua sponte. See, similarly, *Big John's Billiards v. Balka*, 254 Neb. 528, 577 N.W.2d 294 (1998) (concluding that absence of subject matter jurisdiction may be raised at any time by any party or by court sua sponte). Thus, although William did not challenge the trial court's authority to divide the parties' property and debts until the time of trial, William did not waive his objections thereto.

[4] This court has long recognized that paternity proceedings "are purely statutory and the courts can try such issues and make such orders, in them, as the statute contemplates and none other." *Peters v. Killian*, 63 Neb. 57, 58, 87 N.W. 1049, 1050 (1901). At common law, the father of a child born out of wedlock had no legal obligation to support the child; that common-law rule was changed by legislative action. *Carlson v. Bartels*, 143 Neb. 680, 10 N.W.2d 671 (1943). Statutes which modify or abrogate the common law are to be strictly construed. *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999). This court has held that relief in paternity actions is limited to that provided in the statutes. See, *Paltani v. Creel*, 169 Neb. 591, 100 N.W.2d 736 (1960); *Timmerman v. Timmerman*, 163 Neb. 704, 81 N.W.2d 135 (1957).

The petition filed in this action lacks clarity. William argues the suit is a paternity action. In Jerry's brief on appeal, she claims the petition is a "general Petition" consisting of "four separate causes of action, one of which was paternity." Brief for appellee at 5. Both parties agree that a determination of paternity was fundamental to the resolution of the case. We read the

petition to be one seeking the establishment of paternity and the incidents thereto and conclude, as more fully explained below, that the trial court erred in exercising jurisdiction over the unrelated property and debt issues between the parties.

The parties admit and we agree that a determination of paternity was necessary to the resolution of the litigation. In this regard, we note that as part of her requested relief, Jerry sought an award of child support. We have observed: "A fundamental fact necessary to sustain an order of child support is paternity by the man judicially obligated to pay such support." *Younkin v. Younkin*, 221 Neb. 134, 143, 375 N.W.2d 894, 900 (1985). Thus, the trial court could not have entered a child support award absent a determination that William was the father of the children. See *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994). In its order, the trial court found William to be the father of Jessica, Chris, and Dani.

Pursuant to Neb. Rev. Stat. § 43-1401 et seq. (Reissue 1993, Cum. Supp. 1996 & Supp. 1997), paternity for children born out of wedlock may be established through a paternity action. The statutory framework allows either the mother, the father, a guardian or next friend, or the State to file suit for the determination of paternity. Section 43-1402 provides that the "father of a child whose paternity is established either by judicial proceedings or by acknowledgment as hereinafter provided shall be liable for its support to the same extent and in the same manner as the father of a child born in lawful wedlock is liable for its support." See, also, Neb. Rev. Stat. § 43-512.04 (Reissue 1998) (action for child support may be filed separately from divorce proceeding when paternity has been established in accordance with statute). Support includes education expenses. § 43-1401(3). It has also been held that child-care costs may be awarded as an incident to child support in a paternity action. *Dworak v. Fugit*, 1 Neb. App. 332, 495 N.W.2d 47 (1992). We have held that in "an action to establish paternity, issues of custody and visitation rights are incidental to the primary cause of action and fall within the general equity jurisdiction" of the district court. *Cox v. Hendricks*, 208 Neb. 23, 29, 302 N.W.2d 35, 38 (1981). Nowhere within the paternity statutes or the cases discussing those statutes, however, have we found authority for

the proposition that the parties to a paternity action may also include in the paternity suit as an incident thereto the unrelated issues of the division of property and debts arising from their cohabitation.

In the present case, the division of Jerry's and William's property and debts is not linked to the establishment of William's paternity and the concomitant rights and responsibilities to his children that arise as a result of his status as a parent. Rather, these property issues exist exclusive of the paternity statutes and are unaffected by any determination concerning paternity and the incidents thereto.

[5] Jerry argued at trial and the trial court concurred that the trial court's authority to consider the property issues arose from its general equitable powers. We do not agree. Nothing in the paternity statutes permits a trial court to consider issues unrelated to the question of paternity and the immediate incidents thereto. Our review of the paternity statutes, which modify common law and must be strictly construed, leads to the conclusion that such statutes do not contemplate a determination of legal or equitable issues in a paternity action disconnected from the determination of paternity pursuant to those statutes, except for the allowance of support, child-care expenses, visitation, and custody incidental thereto. See *Timmerman v. Timmerman*, 163 Neb. 704, 81 N.W.2d 135 (1957).

The trial court should grant a demurrer if any one of the grounds on which it is based is well founded. *Fox v. Metromail of Delaware*, 249 Neb. 610, 544 N.W.2d 833 (1996). We conclude that the trial court erred in dividing the property and debts of Jerry and William in this paternity case. The error committed by the trial court was an error in the exercise of jurisdiction. See *In re Interest of Jeremy T., ante* p. 736, 600 N.W.2d 747 (1999) (distinguishing between want of jurisdiction and error in exercise of jurisdiction). The trial court should have sustained William's demurrer and dismissed that portion of Jerry's paternity petition seeking a division of the property and debts of the parties.

We recently held in *Ryan v. Ryan, ante* p. 682, 600 N.W.2d 739 (1999), that a judgment can be vacated in part and upheld in part when a void portion of that judgment is sev-

erable from the valid portion. The term "severable" means that the valid portion of the judgment does not depend or rely on the void portion to stand on its own or to be carried out. *Id.* We determine the portion of the order dividing the parties' property and debts is severable from the remainder of the order pertaining to issues related to the children. Because the trial court erred in its exercise of jurisdiction by dividing the property and debts of the parties, we reverse and vacate the portion of the order and judgment dividing the property and debts of Jerry and William. The valid portions of the order pertaining to a determination of paternity, custody, visitation, and support are affirmed.

Award of Attorney Fees.

For his second assignment of error, William claims that the trial court abused its discretion in awarding Jerry $1,000 of the attorney fees which she sought in the paternity action. We find no merit to William's second assignment of error.

[6] Attorney fees are recoverable in Nebraska only when provided for by law or allowed by custom. *Zimmerman v. FirsTier Bank*, 255 Neb. 410, 585 N.W.2d 445 (1998). Sections 43-512.04(5) and 43-1412(3) specifically provide that attorney fees and costs are allowed in paternity and child support cases brought by a child's mother, father, guardian or next friend, the county attorney, or other authorized attorney. To the extent *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994), holds otherwise, it is overruled.

In a paternity action, attorney fees are reviewed de novo on the record to determine whether there has been an abuse of discretion by the trial judge. Absent such an abuse, the award will be affirmed. *Morrill County v. Darsaklis*, 7 Neb. App. 489, 584 N.W.2d 36 (1998); *State ex rel. Mooney v. Duer*, 1 Neb. App. 84, 487 N.W.2d 575 (1992). In the instant case, although there was much agreement between the parties, the issue of custody was contested, and the trial court, after hearing testimony from the children, awarded custody to Jerry. To this extent, the matter was protracted, and Jerry obtained a favorable result. Accordingly, we find no abuse of discretion by the trial court, and we affirm its award of $1,000 attorney fees to Jerry.

CONCLUSION

Based upon our obligation to review questions of law independent of the lower court's determination, we reverse the order of the trial court in this paternity action denying William's demurrer to that portion of the petition seeking a division of the parties' property and debts, and we order vacated that portion of the trial court's order dividing the property and debts of the parties. The remainder of the order is affirmed. Finding no abuse of discretion, we affirm the trial court's order directing William to pay Jerry's attorney fees in the amount of $1,000.

AFFIRMED IN PART, AND IN PART REVERSED AND VACATED.

STATE OF NEBRASKA, APPELLEE, V.
EDDIE R. ORTIZ, JR., APPELLANT.
600 N.W. 2d 805

Filed October 1, 1999. No. S-98-568.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Judgments: 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.** To the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the courts below.
3. **Search Warrants: Affidavits: Probable Cause: Proof: Time.** A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at that time.
4. **Probable Cause.** Probable cause to search is determined by a standard of objective reasonableness, that is, whether known facts and circumstances are sufficient to warrant a person of reasonable prudence in a belief that contraband or evidence of a crime will be found.

5. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" rule whereby the question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.
6. **Search and Seizure: Search Warrants: Probable Cause: Proof.** A search conducted pursuant to a search warrant supported by probable cause is generally considered to be reasonable, and it is a defendant's burden to prove that the search or seizure was unreasonable.
7. **Constitutional Law: Search and Seizure: Search Warrants: Affidavits: Probable Cause.** Where an affidavit in support of a search warrant is inadequate to establish probable cause, the search warrant is constitutionally defective. Where a search is conducted pursuant to a constitutionally defective warrant, the evidence obtained in the search must be excluded.
8. ___: ___: ___: ___: ___. Not every defect in an affidavit renders the warrant defective or the seizure made pursuant to the warrant unconstitutional. Although it may be necessary to excise certain matter from an affidavit, if the remainder of the affidavit is sufficient to establish probable cause, the warrant issued upon such remaining information in the affidavit will be proper and the results of the search pursuant to the warrant are constitutionally obtained.
9. **Constitutional Law: Search and Seizure.** In Nebraska, freedom from unreasonable searches and seizures is guaranteed by U.S. Const. amend. IV and Neb. Const. art. I, § 7.
10. ___: ___. The Fourth Amendment and Neb. Const. art. I, § 7, prohibit only unreasonable searches and seizures. These constitutional provisions do not protect citizens from all governmental intrusion, but only from unreasonable intrusions.
11. **Police Officers and Sheriffs: Search and Seizure: Probable Cause.** Reasonable suspicion, commonly required to support a seizure or detention, is a quantum of facts less than probable cause, commonly required to support a search. Where the police have reasonable suspicion, they may pursue their investigation either to confirm their suspicion or to dispel the suspicion that crime is afoot.
12. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure: Controlled Substances.** An individual's Fourth Amendment privacy interests may extend in a limited manner beyond the four walls of the home, depending on the facts, including some expectation of privacy to be free from police canine sniffs for illegal drugs in the hallway outside an apartment or at the threshold of a residence.
13. **Constitutional Law: Search and Seizure.** To determine whether an individual has an interest protected by the Fourth Amendment and Neb. Const. art I, § 7, one must determine whether an individual has a legitimate or justifiable expectation of privacy in the place subjected to canine scrutiny. Ordinarily, two inquiries are required. First, the individual must have exhibited an actual (subjective) expectation of privacy, and second, the expectation is one that society is prepared to recognize as reasonable.
14. ___: ___. Reasonable expectations of privacy vary according to the context of the case.
15. ___: ___. There is some measure of privacy at the threshold of an apartment dwelling.

16. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** That which a law enforcement officer detects using his or her unaided senses while lawfully present does not violate Fourth Amendment or Nebraska constitutional principles, because that which is voluntarily exposed to the general public and observable from an unprotected area without using sense-enhancing devices is not part of a person's private affairs.
17. ___: ___: ___. By using a canine to sniff for illegal drugs in a hallway outside an apartment, the police engage an investigative technique by which they are able to obtain information regarding the contents of a place that has traditionally been accorded a heightened expectation of privacy. While such an investigative technique may be minimally intrusive, it nevertheless implicates the Fourth Amendment and Neb. Const. art. I, § 7, and requires independent reasonable suspicion.
18. **Search and Seizure.** The investigative tool of the canine sniff at the threshold of a dwelling may be used where it is preceded by information amounting to reasonable, articulable suspicion.
19. **Search and Seizure: Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification which is more than an inchoate and unparticularized suspicion or hunch, but less than the level of suspicion required for a finding of probable cause.
20. **Police Officers and Sheriffs: Probable Cause.** Reasonable suspicion, like probable cause, depends upon both the content of information possessed by police and its degree of reliability. Both factors are considered in the totality of the circumstances that must be taken into account to evaluate whether reasonable suspicion exists.
21. **Police Officers and Sheriffs: Search Warrants: Affidavits.** When a search warrant is obtained on the strength of information received from an informant, the affidavit in support of the issuance of the warrant must set forth facts demonstrating the basis of the informant's knowledge of criminal activity. The affidavit must also either establish the informant's credibility or set forth a police officer's independent investigation of the information supplied by the informant.
22. **Search Warrants: Affidavits.** If an affidavit does not establish that an informant is reliable, a search warrant issued solely upon the information supplied by the informant is invalid.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Reversed and remanded for a new trial.

Glenn A. Shapiro, of Gallup & Schaefer, for appellant.

Don Stenberg, Attorney General, and Ron Moravec for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Eddie R. Ortiz, Jr., was convicted of two counts of unlawful possession with intent to deliver controlled substances and sentenced accordingly. Ortiz appeals from the trial court's order admitting evidence over his objection, which evidence Ortiz claims was obtained in violation of U.S. Const. amend. IV and Neb. Const. art. I, § 7.

As explained more fully below, the canine sniff for illegal drugs which was conducted at the threshold to Ortiz' apartment where Ortiz had a legitimate expectation of some measure of privacy violated the Fourth Amendment and Neb. Const. art. I, § 7. Although a canine may be deployed to test for illegal drugs in some cases, doing so at the threshold of a dwelling on less than reasonable, articulable suspicion is improper. In this case, the information obtained by the alert of the canine must be excised from the affidavit in support of the search warrant. The residue of the affidavit did not amount to probable cause for the issuance of a search warrant, and the contraband seized pursuant to the defective search warrant must, therefore, be suppressed.

We conclude on the facts of this case that the search of Ortiz' apartment was constitutionally flawed and that the contraband recovered should have been excluded. We reverse, and remand for a new trial consistent with this opinion.

II. STATEMENT OF FACTS

Sometime during the early evening of August 7, 1997, Omaha police received a telephone call from a concerned citizen (C/C) who told police that she or he "knew of" Ortiz and alleged that Ortiz "has been active in distributing cocaine from his apartment within the past year." Police were given Ortiz' address and a general physical description of Ortiz by C/C. The record indicates that at the time the call was received, Ortiz was not a suspect.

Police verified that Ortiz had lived at the address given by the caller for about 2 years. The police checked their internal records, which showed that Ortiz had a prior conviction in 1991 for possession of a controlled substance, for which he had been sentenced to a 6-month term of imprisonment, and that a concurrent charge had been dismissed. The police records also

showed that Ortiz was charged in early 1994 with possession of marijuana and hashish with intent to deliver but that the charges were dropped.

At about 8:45 p.m. on the same evening, police officers took Pogo, a police dog specially trained to detect the scents of marijuana, cocaine, cocaine base, methamphetamine, amphetamine, and heroin into the hallway outside Ortiz' apartment to perform a canine sniff of the area. The officers ran Pogo in the hallway outside Ortiz' apartment, and Pogo "alerted" by the door to Ortiz' apartment.

On August 8, 1997, officers applied for and obtained a "no-knock" daytime search warrant which entitled them to search the interior of Ortiz' apartment. The affidavit and application for search warrant submitted by the police officers read, in pertinent part, as follows:

> That the following are the grounds for issuance of a search warrant for said property and the reasons for the Affiant's belief, to-wit:
>
> On Thursday, 7 August 1997 in the evening hours, Affiant Officer LANG was contacted by a concerned citizen, hereafter referred to as the C/C. The C/C advised that he/she knew of an individual by the name of Eddie ORTIZ, described as an Hispanic male, mid-twenties, with a small build, who resides at 809 South 70th Street, Apt. #6. The C/C stated that ORTIZ is active in distributing cocaine from his apartment. The C/C stated that ORTIZ has been active in distributing cocaine from his apartment within the past year. The C/C who provided this information did not request any type of monetary compensation for providing this information.
>
> . . . .
>
> On Thursday, 7 August 1997 at approximately 2045 hours, Officers KUNZE, LANG, and HENRY of the Narcotics Unit went to the address of 809 South 70th Street, Apt. 6. Officer HENRY is the drug canine handler of POGO who was utilized at the address to detect the presence of narcotics. Officer HENRY ran POGO by the apartment door at which time POGO alerted to the presence of narcotics. Officer HENRY advised that POGO

made a positive alert for the presence of narcotics from Apartment #6.

Another paragraph in the affidavit, not repeated here, described Pogo's training, the adequacy of which is not relevant to our resolution of the appeal. The affidavit also included the results of the officers' records check and the fact that Ortiz had resided at the apartment since July 1, 1995.

Based on the affidavit offered by police, on August 8, 1997, a Douglas County Court judge issued a warrant authorizing the officers to search Ortiz' apartment for cocaine and related paraphernalia, cash, and weapons. Shortly thereafter, the police officers executed the warrant. Within Ortiz' apartment, the officers found one-quarter of an ounce of cocaine and $6,300 in a kitchen drawer, 4 ounces of marijuana and $11,000 in a freezer, and a notebook containing records of suspected drug transactions.

Ortiz was not present when the officers searched his apartment. After the officers concluded the search, they left a business card with a telephone number at which they could be reached. The police kept Ortiz' apartment under surveillance for an unspecified period, but Ortiz did not appear, and the police subsequently abandoned the surveillance.

Ortiz voluntarily presented himself to police on August 18, 1997. He was charged with possession of cocaine with intent to deliver, a Class II felony in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1995) (count I), possession of marijuana with intent to deliver, a Class III felony in violation of § 28-416(1)(a) (count II), and possession of money/currency used to facilitate the distribution of illegal narcotics, a Class IV felony in violation of § 28-416(16) (count III).

Ortiz filed a motion to suppress all of the evidence seized from his apartment, claiming, inter alia, that the search warrant was not supported by probable cause. The district court for Douglas County overruled the motion on November 6, 1997, finding that the affidavit police submitted in support of the search warrant adequately described Pogo's training and reliability as a drug-sniffing canine and that Pogo's alert in the hallway outside of Ortiz' apartment door provided police with probable cause to obtain the search warrant.

On December 23, 1997, the charges against Ortiz were tried to the court on stipulated facts, with a standing objection by Ortiz to all of the evidence seized from his apartment. The prosecution subsequently withdrew count III, the charge of possession of funds used to facilitate the distribution of illegal drugs. The trial court found Ortiz guilty of counts I and II. On June 3, 1998, Ortiz was sentenced to a term of 3 to 5 years' imprisonment on count I and a term of 2 to 3 years' imprisonment on count II, to be served consecutively.

III. ASSIGNMENT OF ERROR

Restated, Ortiz claims on appeal that the trial court erred in admitting into evidence the items seized from his apartment as a result of the police search.

IV. 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. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999). To the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the courts below. *Id.*

V. ANALYSIS

1. Probable Cause to Issue Search Warrant

[3,4] A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. *State v. Johnson, supra.* "Probable cause" sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. *State v. Craven*, 253 Neb. 601, 571 N.W.2d 612 (1997). Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a find-

ing of probable cause at that time. *State v. Johnson, supra.* Probable cause to search is determined by a standard of objective reasonableness, that is, whether known facts and circumstances are sufficient to warrant a person of reasonable prudence in a belief that contraband or evidence of a crime will be found. *State v. Craven, supra.*

[5,6] In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" rule whereby the question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause. *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996). As a general rule, an appellate court is restricted to consideration of the information and circumstances found within the four corners of the affidavit. *State v. Johnson, supra.* A search conducted pursuant to a search warrant supported by probable cause is generally considered to be reasonable, and it is a defendant's burden to prove that the search or seizure was unreasonable. *State v. Swift*, 251 Neb. 204, 556 N.W.2d 243 (1996).

[7,8] Where an affidavit in support of a search warrant is inadequate to establish probable cause, the search warrant is constitutionally defective. *State v. Johnson, supra.* Where a search is conducted pursuant to a constitutionally defective warrant, the evidence obtained in the search must be excluded. *State v. Fitch*, 255 Neb. 108, 582 N.W.2d 342 (1998), relying on *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). However, not every defect in an affidavit renders the warrant defective or the seizure made pursuant to the warrant unconstitutional. Although it may be necessary to excise certain matter from an affidavit, if the remainder of the affidavit is sufficient to establish probable cause, the warrant issued upon such remaining information in the affidavit will be proper and the results of the search pursuant to the warrant are constitutionally obtained. *United States v. Karo*, 468 U.S. 705, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984); *United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985), *cert. denied, Fisher v. United States*, 474 U.S. 819, 106 S. Ct. 66, 88 L. Ed. 2d 54, *reversed in part on other grounds* Nos. 97 CIV. 3250 (MP), 97 CIV. 3784 (MP), SS

83 CR. 150 (MP), 97 CIV. 3785 (MP), 1998 WL 283346 (S.D.N.Y. June 1, 1998); *U.S. v. Tarazon-Silva*, 960 F. Supp. 1152 (W.D. Tex. 1997), *aff'd* 166 F.3d 341 (5th Cir. 1998). See, similarly, *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993), *disapproved on other grounds, State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999) (noting that inaccuracy of description of quantity of contraband contained in package in affidavit did not render search warrant invalid).

The affidavit submitted by police in the instant case to obtain a warrant to search Ortiz' apartment consisted of two principal components: the results of the canine sniff by Pogo, the trained police dog, in the hallway outside Ortiz' apartment door and a description of the call police received from C/C, coupled with further facts supplied by the police. We address each component below.

2. EXPECTATION OF PRIVACY AT THRESHOLD OF DWELLING AND REQUIREMENT OF REASONABLE SUSPICION TO DEPLOY CANINE TO SNIFF FOR ILLEGAL DRUGS AT THRESHOLD OF DWELLING

It has been observed that the right of privacy associated with the home under the Fourth Amendment is "one of the unique values of our civilization." *McDonald v. United States*, 335 U.S. 451, 453, 69 S. Ct. 191, 93 L. Ed. 153 (1948). The U.S. Supreme Court recently noted:

> "In 1604, an English court made the now-famous observation that 'the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose.' *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K. B.)."

Wilson v. Layne, 526 U.S. 603, 119 S. Ct. 1692, 1697, 143 L. Ed. 2d 818 (1999). The Court continued: "The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home." *Id.* The right to be free from unreasonable searches and seizures of the home is substantial, and it has been said to be the " 'chief evil against which the wording of the Fourth Amendment is directed.' " *Welsh v. Wisconsin*, 466 U.S. 740, 748, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984) (quoting *United States v. United States District Court*, 407 U.S. 297, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972)).

[9,10] In Nebraska, freedom from unreasonable searches and seizures is guaranteed by U.S. Const. amend. IV and Neb. Const. art. I, § 7. *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996). The Fourth Amendment and Neb. Const. art. I, § 7, prohibit only unreasonable searches and seizures. These constitutional provisions do not protect citizens from all governmental intrusion, but only from unreasonable intrusions. *State v. Ranson*, 245 Neb. 71, 511 N.W.2d 97 (1994).

The leading case regarding canine sniffs is *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983), in which it was concluded that the evidence of cocaine involved therein should be suppressed. In *Place*, the U.S. Supreme Court considered the federal Fourth Amendment implications of the use of a drug detection dog to sniff luggage in an airport. After Place arrived at a New York airport, he refused to voluntarily allow police to search his two suitcases. The officers allowed Place to leave, but took his luggage to a separate location for a drug detection dog to sniff. The dog alerted aggressively to one of Place's suitcases. At this point, approximately 90 minutes had elapsed from the officers' initial contact with Place. It was a Friday afternoon, and rather than immediately seeking a search warrant, the officers held Place's suitcases over the weekend and applied for a search warrant the following Monday morning. When police executed the warrant and searched Place's suitcases, they found 1,125 grams of cocaine.

The Court in *Place* stated that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. The Court in *Place* observed that a canine sniff is sui generis in that the canine alert is limited to the existence of contraband and that the sniff is not highly intrusive. The *Place* Court determined that the canine sniff of the luggage did not, by itself, violate the Fourth Amendment. *Id.* The *Place* Court concluded, however, that because the police detained the luggage for a lengthy period and failed to diligently pursue the investigation, the cocaine discovered in Place's luggage pursuant to the search warrant should have been suppressed.

In analyzing the facts of the case, the *Place* Court observed that a seizure of Place's luggage might be justified within the exception to the Fourth Amendment in *Terry v. Ohio*, 392 U.S.

1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), where police possess a reasonable suspicion based upon specific and articulable facts that illegal narcotics are present and the investigative detention is properly limited in scope. The *Place* Court stated that the canine sniff was not a search under the Fourth Amendment, and we have similarly concluded in *State v. Morrison,* 243 Neb. 469, 500 N.W.2d 547 (1993), that a canine sniff of a package sent by express mail was not a search but was, nevertheless, proper because it was preceded by facts amounting to reasonable suspicion.

[11] Reasonable suspicion, commonly required to support a seizure or detention, *Alabama v. White*, 496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990), is a quantum of facts less than probable cause, commonly required to support a search, *United States v. Sokolow*, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989). See, also, *State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999). Where the police have reasonable suspicion, they may pursue their investigation either to confirm their suspicion or to dispel the suspicion that crime is afoot. *Terry v. Ohio, supra.*

Following *United States v. Place, supra*, in canine sniff cases in a variety of settings such as canine sniffs of luggage, packages, and public warehouses, the majority of courts have approved of the admission of evidence gained by the use of a canine sniff if the canine sniff evidence was obtained based on a reasonable, articulable suspicion. See *State v. Waz*, 240 Conn. 365, 692 A.2d 1217 (1997) (cases collected). For example, in the context of a canine sniff of the corridor of a storage locker facility, the Pennsylvania Supreme Court, referring to the canine sniff as a "search" under Pennsylvania's constitution, stated:

> We believe that there is a Fourth Amendment middle ground applicable to the investigations conducted by police handlers of narcotics detection dogs. On the one hand, much of the law enforcement utility of such dogs would be lost if full blown warrant procedures were required before a canine sniff could be used; but on the other, it is our view that a free society will not remain free if police may use this, or any other crime detection device, at random and without reason. Accordingly, we hold that a

> narcotics detection dog may be deployed to test for the presence of narcotics . . . where:
>
> (1) the police are able to articulate reasonable grounds for believing that drugs may be present in the place they seek to test; and
>
> (2) the police are lawfully present in the place where the canine sniff is conducted.
>
> Our holding is based in part, on considerations not dissimilar to those stated in *United States v. Place:* a canine sniff-search is inherently less intrusive upon an individual's privacy than other searches such as wiretapping or rummaging through one's luggage; it is unlikely to intrude except marginally upon innocent persons; and an individual's interest in being free from police harassment, annoyance, inconvenience and humiliation is reasonably certain of protection if the police must have a reason before they may . . . utilize a narcotics detection dog.

Com. v. Johnston, 515 Pa. 454, 465-66, 530 A.2d 74, 79 (1987).

With respect to canine sniffs in hallways adjoining residential quarters, the type of sniff which is the subject of the instant case, numerous courts have held that a canine sniff intrudes into an area where an individual has a reasonable expectation of privacy and that a canine sniff in a residential hallway must be supported by at least a reasonable suspicion based on articulable facts. Thus, for example, in *People v. Dunn*, 77 N.Y.2d 19, 26, 564 N.E.2d 1054, 1058, 563 N.Y.S.2d 388, 392 (1990), *cert. denied* 501 U.S. 1219, 111 S. Ct. 2830, 115 L. Ed. 2d 1000 (1991), New York's highest court, in a case involving a warrantless canine sniff in an apartment hallway, concluded a canine sniff was a search under the state's constitution and stated as follows: "Given the uniquely discriminate and nonintrusive nature of such an investigative device, as well as its significant utility to law enforcement authorities, we conclude that it may be used without a warrant or probable cause, provided that the police have a reasonable suspicion that a residence contains illicit contraband." The *Dunn* court added: "To hold otherwise, we believe would raise the specter of the police roaming indiscriminately through the corridors of public housing projects with trained dogs in search of drugs . . . . Such an Orwellian notion would be

repugnant under our State Constitution . . . ." *Id.* at 25, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392.

The above-quoted material from *People v. Dunn, supra*, recognized that "we cannot forgive the requirements of the Fourth Amendment in the name of law enforcement [and] it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home . . . are invaded." *Berger v. New York*, 388 U.S. 41, 62-63, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967).

For the sake of completeness, we note that some courts have held that there is no legitimate privacy expectation in a residential apartment hallway and that thus, canine sniffs do not implicate the Fourth Amendment. See, e.g., *Brown v. U.S.*, 627 A.2d 499 (D.C. 1993); *State v. Taylor*, 763 S.W.2d 756 (Tenn. Crim. App. 1988). At the other end of the spectrum, some courts have stated that there is a heightened expectation of privacy in a residential apartment hallway, *United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985), *cert. denied, Fisher v. United States*, 474 U.S. 819, 106 S. Ct. 66, 88 L. Ed. 2d 54, *reversed in part on other grounds* Nos. 97 CIV. 3250 (MP), 97 CIV. 3784 (MP), SS 83 CR. 150 (MP), 97 CIV. 3785 (MP), 1998 WL 283346 (S.D.N.Y. June 1, 1998), and thus a canine sniff may not proceed in the absence of probable cause. See, similarly, *State v. Dearman*, 92 Wash. App. 630, 962 P.2d 850 (1998) (holding that probable cause is required prior to canine sniff outside residential garage).

[12] We agree with the courts which conclude an individual's Fourth Amendment privacy interests may extend in a limited manner beyond the four walls of the home, depending on the facts, including some expectation of privacy to be free from police canine sniffs for illegal drugs in the hallway outside an apartment or at the threshold of a residence, and that a canine sniff under these circumstances must be based on no less than reasonable, articulable suspicion. As described more fully below, under the facts of this case, we conclude that, given the legitimate expectation of some measure of privacy in the hallway, the canine sniff for illegal drugs which lacked reasonable suspicion violated the Fourth Amendment and Neb. Const. art. I, § 7. Our reasoning is similar to that in *Katz v. United States*, 389

U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), in which the U.S. Supreme Court reasoned that given the legitimate expectation of privacy in a telephone booth, the placement of a monitoring device on the outside thereof violated the Fourth Amendment's proscription against unreasonable searches and seizures. See, similarly, *McDonald v. United States*, 335 U.S. 451, 69 S. Ct. 191, 93 L. Ed. 153 (1948) (reasoning that trespass by police officers into rooming house violated privacy of home, requiring suppression of seized evidence).

3. Application of Law to This Case

(a) Existence of Expectation of Privacy in This Case

In the instant case, we recognize that the canine sniff was not conducted inside the apartment; however, the information gained by the canine alert as to the existence of contraband inside the apartment emanated from inside the apartment and was detected outside at its threshold. In this regard, it has been held that "[i]ndiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight." *United States v. Karo*, 468 U.S. 705, 716, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984). It has also been observed that the reach of the Fourth Amendment "cannot turn upon the presence or absence of a physical intrusion into any given enclosure," *Katz v. United States*, 389 U.S. at 353; that the Fourth Amendment forecloses a distinction between " 'worthy' " and " 'unworthy' " objects which are the subject of investigation, *United States v. Ross*, 456 U.S. 798, 822, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982); and that "[t]hose suspected of drug offenses are no less entitled to [Fourth Amendment] protection than those suspected of nondrug offenses," *United States v. Karo*, 468 U.S. at 717.

In connection with assessing the expectation of privacy in Ortiz' hallway for Fourth Amendment and Nebraska constitutional purposes, we note that the " 'Fourth Amendment protects *people, not places*.' " (Emphasis in original.) *State v. Havlat*, 222 Neb. 554, 558, 385 N.W.2d 436, 439 (1986), quoting *Katz v. United States, supra*. See, also, *State v. Ramaekers*, 257 Neb. 391, 597 N.W.2d 608 (1999). As noted above in *Katz*, the elec-

tronic device affixed to the outside of a telephone booth was determined to violate the Fourth Amendment because the user of the telephone booth had a legitimate expectation of privacy upon closing the door to the telephone booth and placing a call. It has been stated: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz v. United States*, 389 U.S at 351-52. In *Katz*, Justice Stewart, writing for the majority, cautioned that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'" 389 U.S. at 350. Justice Harlan, concurring, said the extent of Fourth Amendment protection is determined by reference to a place. *Katz v. United States*, 389 U.S. at 361. The principles enunciated in *Katz* have long been relied upon in our jurisprudence. *State v. Havlat, supra.* Because the situs of the canine sniff in this case is the threshold to Ortiz' apartment, we must make reference to the adjoining dwelling in our analysis of privacy in this appeal.

[13] In cases such as the one before us, to determine whether an individual has an interest protected by the Fourth Amendment and Neb. Const. art I, § 7, one must determine whether an individual has a legitimate or justifiable expectation of privacy in the place subjected to canine scrutiny. Ordinarily, two inquiries are required. First, the individual must have "'exhibited an actual (subjective) expectation of privacy,'" and second, "the expectation is one that 'society is prepared to recognize as "reasonable."'" *Hudson v. Palmer*, 468 U.S. 517, 525 n.7, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984). This two-part inquiry has been adopted and utilized by this court. See, *State v. Ramaekers, supra*; *State v. Merrill*, 252 Neb. 510, 563 N.W.2d 340 (1997). The "ultimate question" is whether one's claim of privacy from governmental intrusion is reasonable in light of all the surrounding circumstances. *Hudson v. Palmer, supra.* See, also, *Minnesota v. Olson*, 495 U.S. 91, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990) (apparently combining *Hudson v. Palmer* two-part inquiry into one).

[14] Reasonable expectations of privacy vary according to the context of the case, *O'Connor v. Ortega*, 480 U.S. 709, 107 S.

Ct. 1492, 94 L. Ed. 2d 714 (1987). It has been observed: "Legitimation of expectation of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas v. Illinois*, 439 U.S. 128, 144 n.12, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). There can be little doubt, and the cases confirm, see, e.g., *Wilson v. Layne*, 526 U.S. 603, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999), that a home, including an apartment home, is considered by both occupants and society to be entitled to greater privacy than objects of a less intimate nature, such as a storage locker, *Com. v. Johnston*, 515 Pa. 454, 530 A.2d 74 (1987); or of a more transient nature, such as a package entrusted to the postal service, *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993), *disapproved on other grounds, State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999); or a vehicle, *State v. Pellicci*, 133 N.H. 523, 580 A.2d 710 (1990). See, also, *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996). In this regard, we note that case law recognizes that there is a greater degree of privacy expected in the home than in a hotel or a motel. See *Commonwealth v. Panetti*, 406 Mass. 230, 547 N.E.2d 46 (1989).

In assessing the privacy interest in the apartment hallway, we must evaluate whether, under the circumstances, the area of the hallway should be placed under the home's " 'umbrella' of Fourth Amendment protection." *United States v. Dunn*, 480 U.S. 294, 301, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987) (defining, inter alia, curtilage). In this regard, it should be noted that given the undisputed fact that the officers went to the hallway outside Ortiz' apartment on one occasion solely to deploy Pogo, in analyzing this case, we are not obliged to speculate as to whether the police might have been lawfully present in the apartment hallway unaccompanied by the canine whose purpose in being there was to detect illegal drugs.

[15] We recognize, as noted earlier in this opinion, that the authorities are split as to whether an occupant has a reasonable expectation of privacy in the hallway outside his or her apartment. We agree with the courts which hold that there is some measure of privacy at the threshold of an apartment dwelling. For example, in *People v. Killebrew*, 76 Mich. App. 215, 218,

256 N.W.2d 581, 583 (1977), it was stated that "[g]enerally, a hallway shared by tenants in a private multi-unit dwelling is not a public place. It is a private space intended for the use of the occupants and their guests, and an area in which the occupants have a reasonable expectation of privacy." For the sake of completeness, we note that under the case law, the degree of privacy society is willing to accord an apartment hallway may depend on the facts, such as whether there is an outer door locked to the street which limits access, e.g., *People v. Trull*, 64 Ill. App. 3d 385, 380 N.E.2d 1169 (1978); the number of residents using the hallway, e.g., *United States v. Fluker*, 543 F.2d 709 (9th Cir. 1976); the number of units in the apartment complex, e.g., *People v. Killebrew, supra*; and the presence or absence of no-trespassing signage, e.g., *State v. Taylor*, 763 S.W.2d 756 (Tenn. Crim. App. 1988).

[16] Where the police unaccompanied by a canine are merely pursuing an investigation, it has been held that they may go to the stairway leading to an apartment, *State v. Breuer*, 577 N.W.2d 41 (Iowa 1998), or walk around to the rear of a defendant's home, *United States v. Anderson*, 552 F.2d 1296 (8th Cir. 1977), notwithstanding an occupant's expectation of some measure of privacy in these locations and that that which an officer observes in plain view while lawfully pursuing an investigation is not protected by the Fourth Amendment. We have recently observed that "Objects, falling within the plain view of an officer, who has the right to be in the position to have such view, does not constitute a search." *State v. Ramaekers, ante* p. 391, 397, 597 N.W.2d 608, 613 (1999). See, also, *State v. Pope*, 239 Neb. 1009, 480 N.W.2d 169 (1992). To the foregoing we add: That which a law enforcement officer detects using his or her unaided senses while lawfully present does not violate Fourth Amendment or Nebraska constitutional principles, because that which is voluntarily exposed to the general public and observable from an unprotected area without using sense-enhancing devices is not part of a person's private affairs. See *State v. Dearman*, 92 Wash. App. 630, 962 P.2d 850 (1998) (holding, inter alia, that canine sniff of residential garage was search under Washington constitution). It has also been observed: "What can be heard by the naked ear, when the ear is where it

has a right to be, is not protected by the Fourth Amendment." *United States v. Agapito*, 620 F.2d 324, 331 (2d Cir. 1980), *cert. denied* 449 U.S. 834, 101 S. Ct. 107, 66 L. Ed. 2d 40.

[17] In contrast to the officers' observations obtained by plain view, the use of a canine such as occurred in this case is "not a mere improvement of [the officers'] sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument." *United States v. Thomas*, 757 F.2d 1359 at 1367 (2d Cir. 1985), *cert. denied, Fisher v. United States*, 474 U.S. 819, 106 S. Ct. 66, 88 L. Ed. 2d 54, *reversed in part on other grounds* Nos. 97 CIV. 3250 (MP), 97 CIV. 3784 (MP), SS 83 CR. 150 (MP), 97 CIV. 3785 (MP), 1998 WL 283346 (S.D.N.Y. June 1, 1998). Like the electronic surveillance equipment in *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), the results of which surveillance were suppressed as obtained in violation of the Fourth Amendment, the information "originate[d] from inside a private area and travel[ed] beyond its perimeters," *People v. Price*, 54 N.Y.2d 557, 565, 431 N.E.2d 267, 271, 446 N.Y.S.2d 906, 910 (1981) (Meyer, J., concurring) unexposed to all except those with supersensitive detection devices. See 1 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 2.2(f) (3d ed. 1996). By using a canine to sniff for illegal drugs in a hallway outside Ortiz' apartment, the police have engaged an investigative technique by which they are able to obtain information regarding the contents of a place that has traditionally been accorded a heightened expectation of privacy. See *People v. Dunn*, 77 N.Y.2d 19, 564 N.E.2d 1054, 563 N.Y.S.2d 388 (1990), *cert. denied* 501 U.S. 1219, 111 S. Ct. 2830, 115 L. Ed. 2d 1000 (1991). While such an investigative technique may be minimally intrusive, it nevertheless implicates the Fourth Amendment and Neb. Const. art. I, § 7, and requires independent reasonable suspicion. *Id.* The canine sniff for illegal drugs at the threshold of a dwelling is an investigative tool which may be used to build a case of probable cause for issuance of a search warrant if there is reasonable suspicion to take the canine to the location of the test.

(b) Lack of Reasonable Suspicion to Deploy the Canine in This Case

[18] The canine sniff for illegal drugs in this case transpired in a location in which Ortiz had a legitimate expectation of some measure of privacy, and therefore, the intrusion is subject to the Fourth Amendment and Neb. Const. art. I, § 7, and we have concluded that the officers needed at a minimum reasonable suspicion before proceeding with the canine sniff. The investigative tool of the canine sniff at the threshold of a dwelling may thus be used where it is preceded by information amounting to reasonable, articulable suspicion. As detailed below, we determine that the officers lacked reasonable suspicion to take Pogo into the hallway outside Ortiz' apartment door in this case.

[19,20] With respect to the existence of reasonable suspicion, we have explained that reasonable suspicion entails some minimal level of objective justification which is more than an inchoate and unparticularized suspicion or hunch, but less than the level of suspicion required for a finding of probable cause. *State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999). Reasonable suspicion, like probable cause, depends upon both the content of information possessed by police and its degree of reliability. Both factors are considered in the totality of the circumstances that must be taken into account to evaluate whether reasonable suspicion exists. *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992), relying on *Alabama v. White*, 496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990). We have said with respect to certain investigations that for officers to have reasonable suspicion, they must have a reasonable belief that a crime has been or is about to be committed. *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996); *State v. Hicks*, 241 Neb. 357, 488 N.W.2d 359 (1992), *cert. denied* 507 U.S. 1000, 113 S. Ct. 1625, 123 L. Ed. 2d 183 (1993); *State v. Thomas, supra.*

A review of decisions of other courts regarding canine sniffs, albeit in nonresidential settings, is helpful in illustrating the types of facts which amount to reasonable suspicion sufficient to justify a canine sniff. Common threads in such cases as *U.S. v. Mondello*, 927 F.2d 1463 (9th Cir. 1991), *McGahan v. State*, 807 P.2d 506 (Alaska App. 1991), and *Com. v. Johnston*, 515 Pa. 454, 530 A.2d 74 (1987), and other cases in which reasonable

suspicion has been found to justify a canine sniff for contraband, are a police officer's personally observing suspicious conduct or, in the alternative, investigating incriminating as opposed to innocuous facts or receiving incriminating information from an established reliable informant.

We examine in the instant case whether the police had at least reasonable, articulable suspicion to bring Pogo into the hallway outside of Ortiz' apartment to conduct the canine sniff, which sniff is subject to the Fourth Amendment and the Nebraska Constitution. If the police were in possession of information amounting to reasonable suspicion when the canine sniff was conducted, the results of the sniff can be considered in evaluating the existence of probable cause for the issuance of the search warrant. *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993), *disapproved on other grounds, State v. Johnson, supra*; *State v. Staten*, 238 Neb. 13, 469 N.W.2d 112 (1991); *State v. Chronister*, 3 Neb. App. 281, 526 N.W.2d 98 (1995). If, however, the police did not have at least reasonable, articulable suspicion to proceed to the hallway outside Ortiz' apartment for the purpose of running Pogo in the hallway outside Ortiz' door, evidence of Pogo's reaction cannot be considered in assessing the existence of probable cause to issue the search warrant, and if the remainder of the information in the affidavit does not amount to probable cause, the warrant is defective and the fruits of the search must be suppressed. See, e.g., *State v. Fitch*, 255 Neb. 108, 582 N.W.2d 342 (1998) (holding, in reliance on *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), that evidence directly produced by unconstitutional search, as well as evidence indirectly derived from unconstitutional search, must be suppressed).

The record indicates that police officers brought Pogo to Ortiz' apartment building for the purpose of performing a canine sniff on the same evening in which they had earlier received the anonymous call from C/C alleging that Ortiz had been actively distributing cocaine from his apartment "within the past year." This information from C/C was an uncorroborated allegation from an anonymous source whose reliability was unknown to police. The caller reported activity "within the past year" but stated no exigent circumstance that demanded immediate action

from police. The officers did not conduct a meaningful investigation. The police verified innocuous information which had been supplied by C/C and did a criminal records check which revealed a 6-year-old conviction and charges dropped more than 3 years prior to enlisting Pogo and his handler to perform a canine sniff in the hallway outside Ortiz' apartment. Prior to receiving C/C's call, police had no suspicion that Ortiz was presently engaged in criminal conduct. The officers made no observations of Ortiz or of the proposed location of the canine sniff prior to deploying Pogo. The information provided by the anonymous C/C coupled with the verification of inconclusive facts did not amount to a quantum of facts or to the degree of reliability which amounted to reasonable suspicion. See *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992). Based on the foregoing, we determine that the officers did not have reasonable suspicion to go to the hallway outside of Ortiz' apartment for the purpose of running Pogo outside of Ortiz' apartment to detect illegal drugs.

The information resulting from the alert was not obtained in a manner consistent with the Fourth Amendment and Neb. Const. art. I, § 7. The information gained by virtue of Pogo's sniff outside Ortiz' apartment was not constitutionally obtained, and such information cannot be considered as a basis for obtaining a search warrant. We must, therefore, excise the information generated by Pogo's alert in the hallway from the affidavit and examine the remainder of the affidavit for the existence of probable cause. The remainder of the affidavit consists of the information supplied by C/C, coupled with some additional facts noted above.

(c) Evaluation of Information in Affidavit Other Than Canine Alert for Probable Cause: Reliability and Sufficiency of Information Supplied by C/C and Other Facts

To have the evidence seized pursuant to the search warrant suppressed, Ortiz must show that there was not a sufficient residue of information in the affidavit amounting to probable cause to support the warrant without consideration of the fact of the improperly obtained canine alert. In addition to the positive

canine alert, the affidavit before the issuing judge consisted of the information supplied by C/C and the address and records check of Ortiz.

[21,22] When a search warrant is obtained on the strength of information received from an informant, the affidavit in support of the issuance of the warrant must set forth facts demonstrating the basis of the informant's knowledge of criminal activity. The affidavit must also either establish the informant's credibility or set forth a police officer's independent investigation of the information supplied by the informant. *State v. Lytle*, 255 Neb. 738, 587 N.W.2d 665 (1998), *disapproved in part on other grounds, State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999); *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994), *disapproved in part on other grounds, State v. Johnson, supra*; *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992), *disapproved in part on other grounds, State v. Johnson, supra*. This is so because without information regarding the informant's credibility, "'[t]he magistrate would have no way of ascertaining whether this tip was rumor, speculation, vendetta, reprisal, or gossip.'" *State v. Lytle*, 255 Neb. at 749, 587 N.W.2d at 672, quoting with approval *State v. Valley*, 252 Mont. 489, 830 P.2d 1255 (1992). If an affidavit does not establish that an informant is reliable, a search warrant issued solely upon the information supplied by the informant is invalid. *State v. Lytle, supra*.

As set forth above in the passage excerpted from the police affidavit submitted in order to obtain the warrant, C/C's name was not made known to the magistrate nor did the affidavit indicate that C/C was known to the police officers or had provided reliable information to them in the past. On appeal, the State characterizes C/C as a citizen informant whose tip was presumptively reliable. This characterization is incorrect because the affidavit submitted in support of the application for a search warrant does not identify C/C as a citizen informant, which is a special status which must be affirmatively alleged. See, *State v. Lytle, supra*; *State v. Utterback, supra*. Although the affidavit stated that C/C did not request payment for the information given to police, this fact, without more, does not establish that the tipster is a reliable citizen informant. See *State v. Utterback, supra*.

The affidavit detailed no statement by C/C against his or her penal interest which might have tended to increase the likelihood that the information supplied by C/C was true. See *id.* The affidavit did not indicate how or why C/C knew that Ortiz sold cocaine from his apartment. The affidavit did not state whether and when C/C had been inside the apartment, purchased cocaine from Ortiz, or been present during a drug sale by Ortiz. See, *State v. Lytle, supra*; *State v. Utterback, supra.*

The affidavit did recite that police had confirmed that Ortiz lived at the address provided by C/C and that Ortiz' appearance matched the general description supplied by C/C. Ortiz' address and physical description are neutral facts which do not, without more, imply criminality. See, *State v. Flores, supra*; *State v. Utterback, supra.* Corroboration of this information did not generate enough information to establish probable cause that Ortiz had committed, or was about to commit, a crime. *Id.*

The affidavit included information from police records that Ortiz had a prior conviction in 1991 and that Ortiz had been arrested in 1994, but that these charges were dropped. The information regarding Ortiz' drug-related criminal history may be considered relevant information which could be properly included by police in the affidavit to demonstrate probable cause. *State v. Hodge and Carpenter*, 225 Neb. 94, 402 N.W.2d 867 (1987), *disapproved in part on other grounds, State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999). However, without proof of present criminal activity, the information about Ortiz' past criminal activity lacks temporal significance and did not by itself create probable cause to believe that Ortiz was currently engaged in the same genre of criminal conduct or any criminal conduct which had led to his prior conviction. See, *State v. Johnson, supra*; *State v. Reeder*, 249 Neb. 207, 543 N.W.2d 429 (1996), *cert. denied* 519 U.S. 1006, 117 S. Ct. 506, 136 L. Ed. 2d 397.

In this case, the permissible information contained in the affidavit submitted in support of issuing a search warrant, consisting of the information supplied by C/C, Ortiz' history, and certain innocent details of Ortiz' life, failed to demonstrate a totality of circumstances that established probable cause. We cannot say that the "totality of the circumstances," see *Illinois v.*

Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), without consideration of the canine alert, provided a sufficient basis for the issuance of the search warrant. Because it was issued without probable cause, the search warrant was constitutionally defective. The State has not asked that we consider the good faith exception under *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), and, accordingly, we do not engage in such an analysis.

(d) Outcome of This Case

The evidence seized pursuant to a defective warrant must be suppressed. *State v. Fitch*, 255 Neb. 108, 582 N.W.2d 342 (1998). In sum, the trial court's rulings denying the motion to suppress and admitting the challenged evidence were erroneous, and the judgment is reversed, and the cause is remanded for a new trial.

VI. CONCLUSION

The Fourth Amendment embodies the centuries-old principle of respect for the privacy of the home. Under the federal and Nebraska Constitutions, a canine sniff for illegal drugs conducted at the threshold of a dwelling detects information regarding the contents inside the home, and an individual has a legitimate expectation of privacy inside the home even as to these unworthy contents. Under the Fourth Amendment and Neb. Const. art. I, § 7, an occupant has a legitimate expectation of some measure of privacy in the hallway immediately outside his or her apartment or at the threshold of his or her home. Given such constitutional protection, before a drug-detecting canine can be deployed to test the threshold of a home, the officers must possess at a minimum reasonable, articulable suspicion that the location to be tested contains illegal drugs.

We have concluded in the instant case that due to the absence of reasonable, articulable suspicion, it was improper for the police to go to the threshold of Ortiz' residence for the sole purpose of deploying a canine to sniff for the existence of illegal drugs inside the home. In this case, an anonymous tip, inter alia, did not provide reasonable, articulable suspicion that would constitutionally justify a canine sniff investigation immediately outside an individual's dwelling. The result of the canine alert

must be disregarded in evaluating the sufficiency of the affidavit in support of the search warrant, and the residue of the affidavit did not amount to probable cause to issue a search warrant.

There was no probable cause to justify issuance of the warrant to search Ortiz' apartment. The search warrant was constitutionally defective. Because the fruits of the unconstitutional search should have been excluded, the trial court erred in overruling Ortiz' motion to suppress the evidence seized pursuant to the search and in admitting that evidence at trial. The trial court's ruling denying the motion to suppress was error and the ruling admitting the challenged evidence was error, and thus, the judgment of the district court is reversed, and the cause is remanded for a new trial consistent with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

CONNOLLY, J., concurring

I concur in the result but disagree with the conclusion of the majority that a canine sniff performed outside an apartment for the purpose of detecting drugs located inside that apartment may be performed without a warrant based on reasonable suspicion. I would hold that the use of a canine at the threshold of a dwelling to detect an item found inside that dwelling constitutes a search, thus triggering the protection of the Fourth Amendment. Due to the heightened expectation of privacy one has in his or her dwelling, I would apply the standard principle that absent only a few narrowly prescribed exigent circumstances, the search of a dwelling must be made pursuant to a warrant based on probable cause.

The issues in the instant case are (1) whether a canine sniff of the exterior of a dwelling that is utilized to detect the presence of contraband inside that dwelling constitutes a search or seizure and if so, (2) whether the search was reasonable, i.e, whether the limited intrusive nature of the search and the fact that it can detect only contraband act to lower the standard from probable cause to reasonable suspicion.

WHETHER THE FOURTH AMENDMENT IS IMPLICATED

The majority fails to conclusively state how the protections of the Fourth Amendment apply to Ortiz. As the majority correctly

states, the Fourth Amendment and Neb. Const. art. I, § 7, prohibit only unreasonable searches and seizures. Obviously, if no search or seizure occurred, Ortiz could not claim the protections of the Fourth Amendment, and the inquiry would end. See, e.g., *U.S. v. Colyer*, 878 F.2d 469 (D.C. Cir. 1989) (canine sniff was not search and therefore neither reasonable suspicion nor probable cause was required). Because it is clear that a seizure did not take place in the instant case where there was nothing tangible taken or detained by the police, I focus my inquiry only on whether a search occurred. *United States v. Karo*, 468 U.S. 705, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984). See, generally, *State v. Cox*, 247 Neb. 729, 529 N.W.2d 795 (1995) (discussing relation of property interests to determination of whether seizure has occurred).

As the majority stated, this court has traditionally relied on the principles enunciated in *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), when considering whether Fourth Amendment protections are involved. See, also, *State v. Havlat*, 222 Neb. 554, 385 N.W.2d 436 (1986) (discussing *Katz*). A person's right to invoke the protection of the Fourth Amendment as to unreasonable searches and seizures depends not upon a property right in the invaded place, but upon whether the person who claims protection of the Fourth Amendment has a legitimate expectation of privacy in the invaded place. *Katz, supra*; *State v. Harms*, 233 Neb. 882, 449 N.W.2d 1 (1989). Although the Fourth Amendment protects people, not places, one cannot understand an individual's privacy expectations without reference to a place. *Katz, supra* (Harlan, J., concurring). Thus, we have held that " '[o]wnership and possessory rights in "places" are still important in determining whether or not a particular person has a legitimate expectation of privacy in a particular place.' " *Harms*, 233 Neb. at 888, 449 N.W.2d at 5.

I concede there is a split of authority regarding whether a canine sniff constitutes a search. Relying on the dicta in *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983), which stated that a canine sniff of luggage that was detained in a public airport did not constitute a search within the meaning of the Fourth Amendment, the federal courts over-

whelmingly hold that canine sniffs are not searches. See *State v. Waz*, 240 Conn. 365, 292 A.2d 1217 (1997) (citing federal cases). We have also previously relied on *Place* to determine that a canine sniff of an express mail package did not constitute a search. *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993), *disapproved on other grounds, State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999). In addition to *Place*, *United States v. Jacobsen*, 466 U.S. 109, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984), made it clear that some types of police techniques such as field tests and dog sniffs are not protected as searches under the Fourth Amendment because of the limited nature of the intrusion. *Jacobsen* further indicated that if a police technique reveals only the presence or absence of contraband, the Court does not view the technique used to be a search.

State courts are also divided on the issue. Some courts conclude, usually on the basis of their state constitution, that canine sniffs constitute searches. However, other courts apply the reasoning of *Place* and *Jacobsen* to conclude that canine sniffs do not constitute a search. The reasoning of *Place* and *Jacobsen* is not without criticism, some of which I find relevant to the instant case.

First, as Justice Brennan noted in his dissent in *Jacobsen*, when the focus is on the nature of the item sought and revealed through the use of a dog sniff, the resulting theory is that individuals have no reasonable expectation of privacy due to the fact that they are carrying contraband. As Justice Brennan stated, this is contrary to the "fundamental principle that '[a] search prosecuted in violation of the Constitution is not made lawful by what it brings to light.' " *Jacobsen*, 466 U.S. at 140, quoting *Byars v. United States*, 273 U.S. 28, 47 S. Ct. 248, 71 L. Ed. 520 (1927). Such a focus also ignores the principles articulated in *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), in which the Court held that Katz had a legitimate expectation of privacy in his telephone conversation regardless of the illegality of the content of that conversation. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible

to the public, may be constitutionally protected." *Katz*, 389 U.S. at 351-52.

I agree that a dog sniff is undisputably less intrusive than a "full-blown" search due to its ability to identify only the presence or absence of contraband. However, as illustrated by Justice Brennan's dissent in *Jacobsen* and this court's reliance on the principles enunciated in *Katz*, this distinction alone should not be the deciding factor when considering whether a sniff constitutes a search. Were this to become the deciding factor, the court would act to foreclose any consideration of the circumstances under which the sniff was conducted and "may very well [pave] the way for technology to override the limits of law in the area of criminal investigation." *Jacobsen*, 466 U.S. at 137-38 (Brennan, J., dissenting). See, also, Hope Walker Hall, *Sniffing Out the Fourth Amendment:* United States v. Place—*Dog Sniffs—Ten Years Later*, 46 Maine L. Rev. 151 (1994). To the extent that a few cases appear to consider the ability of canine sniffs to detect only contraband as the deciding factor without considering other circumstances, I find the reasoning of those cases to be unpersuasive. See, *U.S. v. Reed*, 141 F.3d 644 (6th Cir. 1998); *U.S. v. Lingenfelter*, 997 F.2d 632 (9th Cir. 1993); *U.S. v. Colyer*, 878 F.2d 469 (D.C. Cir. 1989).

More important, the U.S. Supreme Court left unclear whether canine sniffs do not constitute searches only when conducted in areas such as airports, where the expectation of privacy on the part of passengers is already lowered. See Hall, *supra*. This is an important distinction because as one author has noted, the large majority of federal court decisions address dog sniffs in the context of luggage or other public areas outside of the defendant's personal residence. Such cases require only a plain application of the dicta in *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983). However, when a sniff occurs in the context of an area where there is a heightened expectation of privacy, the Second Circuit, along with many state courts, concludes that such sniffs do constitute searches. See Hall, *supra* (listing cases). I find the reasoning of these cases to be convincing.

In *United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985), the Second Circuit held that a canine sniff conducted at the thresh-

old of an apartment constituted a search of that apartment under the U.S. Constitution, requiring a warrant based upon probable cause. Specifically, the court held:

> Here the defendant had a legitimate expectation that the contents of his closed apartment would remain private, that they could not be "sensed" from outside his door. Use of the trained dog impermissibly intruded on that legitimate expectation. The Supreme Court in *Place* found only "that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment." . . . Because of [the defendant's] heightened expectation of privacy inside his dwelling, the canine sniff at his door constituted a search.

Thomas, 757 F.2d at 1367. Thus, the *Thomas* court stated:

> It is one thing to say that a sniff in an airport is not a search, but quite another to say that a sniff can *never* be a search. The question always to be asked is whether the use of a trained dog intrudes on a legitimate expectation of privacy.

Id. at 1366.

Other federal circuits have reconciled the holding of *Thomas* by noting that the issues in the cases they had under consideration did not involve an area *such as a dwelling* where the expectation of privacy is heightened. I believe this implicitly acknowledges that there may be some instances in which a canine sniff might be considered a search. See, e.g., *U.S. v. Stone*, 866 F.2d 359 (10th Cir. 1989) (distinguishing *United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985), on basis of heightened expectation of privacy); *U.S. v. Whitehead*, 849 F.2d 849, 857 (4th Cir. 1988) (distinguishing sleeping car on train from dwelling in *United States v. Thomas, supra*, and stating, "*Place* obviously did not sanction the indiscriminate, blanket use of trained dogs in all contexts"), *abrogated in part on other grounds, Gozlon-Peretz v. United States*, 498 U.S. 395, 111 S. Ct. 840, 112 L. Ed. 2d 919 (1991); *U.S. v. Thomas*, 787 F. Supp. 663 (E.D. Tex. 1992) (placing dog inside trunk and passenger compartment of vehicle constituted invasion into area where there was expecta-

tion of privacy). See, also, Hope Walker Hall, *Sniffing Out the Fourth Amendment:* United States v. Place*—Dog Sniffs—Ten Years Later*, 46 Maine L. Rev. 151 (1994) (discussing cases). This distinction has been noted by state courts as well. See, *State v. Young*, 123 Wash. 2d 173, 867 P.2d 593 (1994) (noting that private residences were not involved in prior cases where Washington appellate courts approved warrantless dog sniffs); *State v. Dearman*, 92 Wash. App. 630, 962 P.2d 850 (1998) (dog sniff of garage of private residence required warrant based on probable cause).

Although a canine sniff for narcotics may be less intrusive in relation to other investigatory methods and will disclose only the presence or absence of narcotics, it remains a way of detecting the contents of a private, enclosed space. Through the use of a dog, officers are able to obtain information about what is contained within a dwelling that they could not obtain utilizing their own senses. "Consequently, the officer's use of a dog is not a mere improvement of their sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument." *Thomas*, 757 F.2d at 1367. See, also, *Dearman*, 92 Wash. App. at 635, 962 P.2d at 853 ("using a narcotics dog goes beyond merely enhancing natural human senses and, in effect, allows officers to '"see through the walls" of the home'"); *State v. Pellicci*, 133 N.H. 523, 580 A.2d 710 (1990) (canine sniff of vehicle is search because dog discerned something not otherwise apparent to officers through their own senses).

The majority in the instant case never addresses whether they consider the canine sniff conducted at the threshold of Ortiz' apartment to be a search. Rather, the majority states that Ortiz had some expectation of privacy in the hallway and applies a reasonable suspicion standard to determine whether the sniff was reasonable. I disagree with this reasoning. As illustrated by *United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985), *Dearman, supra*, and others, the dog in the instant case was not used to locate contraband in the hallway. Rather, it was used to determine whether there was contraband *inside* Ortiz' apartment. As the second part of this concurrence illustrates, the location of the dog in attempting to determine the contents of the

apartment may be a consideration when determining whether the search was reasonable, but it does not change the fact that the officers used the canine to locate something inside a private dwelling. Thus, it is Ortiz' expectation of privacy in his apartment that is at issue. Under the facts of the instant case, I agree with the reasoning of *Thomas* and other authorities that a canine sniff at the threshold of an apartment constitutes a search of that apartment, thus involving the Fourth Amendment. Accordingly, I would hold that the canine sniff in the instant case constituted a search.

WHETHER CANINE SNIFF OF DWELLING REQUIRES WARRANT

The canine sniff in the instant case constituted a search, thus the next issue to be determined is whether that search was reasonable. I agree with the majority to the extent that they determine the search was unreasonable. However, I disagree with their reasoning that a canine sniff may be performed in an apartment hallway for the purpose of detecting contraband inside the dwelling without a warrant based on reasonable, articulable suspicion. Although I recognize that such a warrantless search may be appropriate in circumstances where the expectation of privacy is lower, I believe a search of a dwelling must be conducted pursuant to a warrant issued on the basis of probable cause.

Although the majority recognizes that there is a greater expectation of privacy in a dwelling than in objects of a less intimate or transient nature, the majority nevertheless balances the interests of the individual and the government to conclude that a warrantless intrusion based on reasonable suspicion was the appropriate standard. I disagree with this analysis for two reasons. First, the analysis ignores the principle that searches and seizures without a warrant are presumptively unreasonable. See *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). Second, even if a balancing of interests is considered when a canine sniff occurs in circumstances involving a dwelling, I believe the interests of the privacy of the individual outweigh the government's interest in utilizing a canine sniff of a dwelling on anything less than a standard of probable cause.

It cannot be denied that " ' "[f]reedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." ' " *Payton*, 445 U.S. at 587. As such,

> [t]he Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511. [T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Payton, 445 U.S. at 589-90. Accordingly, we have held that a warrantless search must be strictly confined by the exigencies which justify its initiation. *State v. Illig*, 237 Neb. 598, 467 N.W.2d 375 (1991), citing *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). *United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985), and *State v. Dearman*, 92 Wash. App. 630, 962 P.2d 850 (1998), both concluded that a canine sniff of an area which involved a heightened expectation of privacy constituted a search and, therefore, required a warrant based on probable cause. This view is supported by *Arizona v. Hicks*, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987), in which the U.S. Supreme Court was unwilling to expand the plain view doctrine to allow for a warrantless "cursory inspection" or something less than a "full-blown search" within a home on the basis of reasonable suspicion. 480 U.S. at 328. The Court stated: "We are unwilling to send police and judges into a new thicket of Fourth Amendment law, to seek a creature of uncertain description that is neither a 'plain view' inspection nor yet a 'full-blown search.' " 480 U.S. at 328-29.

In the context of canine sniffs, it has been suggested that the area or object searched should be a determining factor in deciding whether a dog sniff must be supported by a warrant based on probable cause. For example, a search of a home or person should receive the greatest level of protection. However, a search of luggage at an airport is necessarily less intrusive because the privacy expectations of passengers are lowered and thus might be permissible based on reasonable suspicion. See Kenneth L. Pollack, *Stretching the* Terry *Doctrine to the Search for Evidence of Crime: Canine Sniffs, State Constitutions, and the Reasonable Suspicion Standard*, 47 Vand. L. Rev. 803 (1994).

Courts that have adopted a reasonable suspicion standard have done so on the basis that under the facts presented, the search was reasonable due to a diminished expectation of privacy in the thing searched, the importance of the law enforcement interests at stake, and the minimal intrusiveness of the dog sniff. *U.S. v. Whitehead*, 849 F.2d 849 (4th Cir. 1988). As a result, most of the cases that adopt a standard of reasonable suspicion involve canine sniffs that occurred in areas outside of an individual's residence and where expectations of privacy were lower. See, e.g., *U.S. v. Whitehead, supra* (passenger train sleeping compartment); *Pooley v. State*, 705 P.2d 1293 (Alaska App. 1985) (checked airline luggage); *People v. May*, 886 P.2d 280 (Colo. 1994) (express mail package); *People v. Unruh*, 713 P.2d 370 (Colo. 1986) (safe in police custody); *State v. Waz*, 240 Conn. 365, 292 A.2d 1217 (1997) (U.S. mail parcel); *State v. Pellicci*, 133 N.H. 523, 580 A.2d 710 (1990) (automobile); *Com. v. Johnston*, 515 Pa. 454, 530 A.2d 74 (1987) (rented storage locker in public area). Other courts, however, indicate that the higher standard of probable cause would be applied in cases involving the search of a dwelling where the expectation of privacy was higher. See *U.S. v. Whitehead, supra* (holding that reasonable suspicion standard applied because train sleeping compartment was not analogous to higher expectation of privacy of hotel room). See, also, *State v. Waz, supra* (distinguishing sniff of mail parcel from heightened expectation of privacy seen in *Thomas*); *U.S. v. Roby*, 122 F.3d 1120, 1126 (8th Cir. 1997) (Heaney, J., dissenting) ("[w]hile the use of trained dogs to detect narcotics is justifiable in airports or other public

areas . . . it should not be extended to permit governmental intrusion into the privacy of a hotel room").

Of particular interest is a pair of cases from the Supreme Court of Pennsylvania which illustrate the reasoning behind requiring a warrant based on probable cause when a dwelling or person is the object of the search but perhaps allowing a warrantless search based on reasonable suspicion when the privacy interests are lessened. The majority in the instant case relies on, and provides a lengthy quote from, the Pennsylvania case *Johnston, supra*. In *Johnston*, the Supreme Court of Pennsylvania determined that a canine sniff of a public storage locker did not constitute a search under the U.S. Constitution but did constitute a search under the state constitution. The court then stated that it was unwilling to apply a balancing of interests in order to determine whether a sniff constituted a search because when making that determination, the balance had been struck by the Fourth Amendment itself. However, the court did find the balancing inquiry appropriate in determining whether the canine sniff search necessarily involved the "full-blown" warrant requirements of the Fourth Amendment. The court stated that much of the law enforcement utility of dogs would be lost if "full-blown" warrant procedures were required but also recognized that there had to be some restraint on the use of them. The court then concluded that under the facts of the case, the warrantless search of the locker was permissible because the officers had articulated a reasonable suspicion that drugs might be located in the storage locker and the officers were lawfully situated when they conducted the search.

Although the majority opinion provides a lengthy quote from *Johnston, supra*, it does not cite the later Pennsylvania case of *Com. v. Martin*, 534 Pa. 136, 626 A.2d 556 (1993). In *Martin*, a warrantless canine sniff search was conducted on a satchel carried by an individual. The court stated that the "middle ground" approach taken in *Johnston* was appropriate in that case because the police intrusion was minimal, because the police intrusion was directed solely at contraband drugs, and because much of the utility of the drug detection dogs would be lost if a warrant was required. *Martin*, 534 Pa. at 136, 626 A.2d at 560. The court then noted, however, that the protection of the privacy interest

one has in their person is a principal object of Fourth Amendment protection. Based on this heightened privacy interest, the court held that in order to conduct a canine sniff search on a person, the police must have probable cause to believe that the search will uncover contraband and that any further search of the person beyond that allowed by *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), must be pursuant to a warrant, although police could detain the subject for a reasonable time while they sought the warrant. The court further stated:

> We are mindful that government has a compelling interest in eliminating the flow of illegal drugs into our society, and we do not seek to frustrate the effort to rid society of this scourge. But all things are not permissible even in the pursuit of a compelling state interest. The Constitution does not cease to exist merely because the government's interest is compelling. A police state does not arise whenever crime gets out of hand. In fact, all today's holding requires is what police should themselves insist on: probable cause to believe that a crime has been committed or contraband is to be found before there is a police intrusion, beyond that permitted by *Johnston* and *Terry*, into one's person. [A] free society cannot remain free if police may use drug detection dogs or any other crime detection device without restraint. The restraint which we today impose on the use of drug detection dog searches of persons is modest enough, in light of our constitutional mandate.

Martin, 534 Pa. at 145, 626 A.2d at 161. Thus, it is clear that the Pennsylvania Supreme Court, when dealing with cases involving a heightened expectation of privacy, requires probable cause.

I believe a rule allowing the warrantless canine search of an apartment based on reasonable suspicion is illogical and improper. Justifications stated by the court in *Com. v. Johnston*, 515 Pa. 454, 530 A.2d 74 (1987), and most others for the adoption of a reasonable suspicion standard are (1) in cases involving searches of public places or items such as luggage that are in transit, there is a diminished expectation of privacy in those items; (2) the concern that the utility of drug-detecting dogs will be lost if warrant procedures are required; and (3) the nature of the search is not intrusive, i.e., it does not require the opening of

the object or the entrance to the place being searched and can detect only contraband.

In the instant case, the expectation of privacy is heightened because it involves a residence. The protection of the privacy expectation an individual has of their person and in their dwelling are the core protections of the Fourth Amendment. The majority appears to recognize this but moves away from the issue by referring to Ortiz' expectation of privacy in the hallway. I believe this reasoning is flawed. As previously discussed, the search in the instant case was not a search of the hallway. It was a search specifically aimed at contents *inside* Ortiz' apartment. Additionally, the difference between a public area, or an item in transit, and the hallway of an apartment building is significant. While it is shared by residents of the building and their guests, it does not experience the traffic of an airport or other public area. The existence of a semipublic hallway should not limit the expectation of privacy a person has in their apartment. As one justice has stated, "I do not believe that the Fourth Amendment protects only those persons who can afford to live in a single-family residence with no surrounding common space." *U.S. v. Roby*, 122 F.3d 1120, 1127 (8th Cir. 1997) (Heaney, J., dissenting).

Next, little of the utility of drug detection dogs is lost by requiring a warrant prior to the canine sniff search of a dwelling, although this is a serious concern in cases of airport security and items being sent in the mail. For example, the expectation of privacy in luggage is lower than the expectation of privacy in a dwelling, while the police interests in utilizing canines to detect contraband in luggage is quite high due to the transient nature of the object searched. When a transient item is at issue, officers simply do not have the time or opportunities necessary to observe the owner of the luggage to the point where probable cause could be established. Thus, the use of a canine is of great utility to officers in cases with facts such as those in *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983), but is only one of a number of available investigative tools when a dwelling is concerned.

Finally, although a canine sniff is certainly less intrusive than a "full-blown" search, it is in error to rely on this factor in cases

involving core Fourth Amendment protections. Standing alone, this factor is not strong enough to justify allowing a warrantless canine sniff of a dwelling based on reasonable suspicion. To so hold would be tantamount to stating that the protections of the Fourth Amendment become lessened due to advances in investigative procedures. This is a position that I am not willing to subscribe to. Therefore, I concur in the result.

DENISE D. ELSTUN, APPELLANT AND CROSS-APPELLEE, V. MICHAEL D. ELSTUN, APPELLEE AND CROSS-APPELLANT.

600 N.W. 2d 835

Filed October 8, 1999. No. S-97-892.

1. **Injunction.** A protection order pursuant to Neb. Rev. Stat. § 42-924 (Reissue 1993) is analogous to an injunction.
2. **Judgments: Appeal and Error.** The grant or denial of a protection order is reviewed de novo on the record.
3. ___: ___. In a de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court. However, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.
5. ___. As a general rule, a moot case is subject to summary dismissal.
6. **Moot Question: Appeal and Error.** An appellate court may review an otherwise moot case if it involves a matter affecting the public interest, or when other rights or liabilities may be affected by its determination.
7. ___: ___. The public interest exception to the rule precluding consideration of issues on appeal due to mootness requires a consideration of the public or private nature of the question presented, desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.
8. **Judges: Witnesses: Due Process.** Neb. Rev. Stat. § 27-614(1) (Reissue 1995) gives judges the right to call witnesses, but it also gives parties the right to cross-examine such witnesses.
9. **Trial: Appeal and Error.** A ruling regarding the extent, scope, and course of a cross-examination rests within the discretion of the trial court and will not be disturbed absent an abuse of that discretion.

Petition for further review from the Nebraska Court of Appeals, INBODY and MUES, Judges, and BUCKLEY, District Judge, Retired, on appeal thereto from the District Court for Lancaster County, STEVEN D. BURNS, Judge. Judgment of Court of Appeals affirmed in part, and in part reversed.

Jennifer A. Huxoll, of Legal Services of Southeast Nebraska, for appellant.

Dennis R. Keefe, Lancaster County Public Defender, and Shawn Elliott for appellee.

Mark J. Young for amicus curiae Nebraska Domestic Violence and Sexual Assault Coalition.

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

MCCORMACK, J.

NATURE OF CASE

Denise D. Elstun applied for a protection order against her husband, Michael D. Elstun. The trial court issued an ex parte protection order that same day. A hearing was subsequently held with both parties present wherein the trial court extended the protection order for 1 year. Denise appealed on grounds not relevant here, and Michael cross-appealed, asserting that the trial court (1) erred in continuing the ex parte protection order, (2) denied him his due-process rights to a fair hearing before an impartial decisionmaker, and (3) erred in not providing him with court-appointed counsel. The Nebraska Court of Appeals affirmed the trial court's order. Michael now petitions this court for further review.

BACKGROUND

On June 23, 1997, Denise, acting pro se, applied for a protection order against Michael, pursuant to Neb. Rev. Stat. § 42-924 (Reissue 1993), by filling out a preprinted application and affidavit form. In the application, Denise described three incidents which she claimed justified issuance of a protection order.

The trial court issued an ex parte protection order that same day, prohibiting Michael from entering Denise's residence. The

protection order contained a notice section advising Michael that a hearing was set for June 30, 1997, at which time he would have an opportunity to show cause why the protection order should not be extended for 1 year. Michael appeared at the June 30 hearing, pro se, and acknowledged receipt of the protection order. Denise also appeared at the June 30 hearing, represented by counsel.

The trial court asked Denise whether the affidavit and application were correct. Denise responded that they were. The trial court then had Michael sworn and questioned him about the incidents described in the application. When the trial court completed its questioning, counsel for Denise asked leave to question Michael, but the request was denied.

The trial court then called Denise, had her sworn, and questioned her about the incidents described in the application and affidavit. When the trial court finished questioning Denise and Michael, counsel for Denise requested an opportunity to "ask a few clarifying questions." That request was denied. The trial court held that "[b]ased on the evidence that's been provided at the hearing here, I will extend the protection order, as it is currently limited in the Ex Parte Protection Order, for one year . . . ." Denise's counsel then requested leave to "ask a question," but that request was denied, and the parties were excused.

Denise filed a motion for new trial, which was overruled. Subsequently, Denise filed a written motion to expand the scope of the protection order entered on June 30, 1997. The motion was denied. On August 18, Denise filed a notice of appeal from the June 30 order entering the protection order and from the denial of her motion for new trial. On September 5, Denise filed a notice of appeal from the order denying her motion to expand the protection order. Michael cross-appealed, asserting that the trial court (1) erred in continuing the ex parte protection order, (2) denied him his due process rights to a fair hearing before an impartial decisionmaker, and (3) erred in not providing him with court-appointed counsel.

The Court of Appeals affirmed the trial court's order. See *Elstun v. Elstun*, 8 Neb. App. 97, 589 N.W.2d 334 (1999). Michael now petitions this court for further review. Denise did not challenge the decision of the Court of Appeals.

ASSIGNMENTS OF ERROR

Michael assigns that the Court of Appeals erred in finding that (1) there was sufficient evidence to justify the trial court's issuance of the protection order; (2) Michael was not denied due process of law when he was not permitted a reasonable opportunity to refute or defend against this action, to confront and cross-examine adverse witnesses, and to present evidence and was denied a hearing before an impartial decisionmaker; and (3) Michael did not have a right to court-appointed counsel in the protection order proceedings.

SCOPE OF REVIEW

[1-3] A protection order pursuant to § 42-924 is analogous to an injunction. See *State v. McKee*, 253 Neb. 100, 568 N.W.2d 559 (1997). Accordingly, the grant or denial of a protection order is reviewed de novo on the record. See *Robertson v. School Dist. No. 17*, 252 Neb. 103, 560 N.W.2d 469 (1997). In such de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court. However, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Village of Brady v. Melcher*, 243 Neb. 728, 502 N.W.2d 458 (1993).

ANALYSIS

[4,5] Before we can reach the merits of this case, we must first decide whether this case is moot. A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation. *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999). As a general rule, a moot case is subject to summary dismissal. *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994).

The trial court entered the protection order on June 30, 1997, and it was to remain in effect for a period of 1 year from the date of the order. Therefore, the protection order expired on June 30, 1998. Once the order has expired, neither Michael nor Denise is

affected by it, and the protection order issues before this court as they relate to Michael and Denise are moot.

[6,7] However, there are exceptions to the mootness doctrine, and we agree with the Court of Appeals' determination that this is one such exception. An appellate court may review an otherwise moot case if it involves a matter affecting the public interest, *Bamford v. Upper Republican Nat. Resources Dist.*, 245 Neb. 299, 512 N.W.2d 642 (1994), *cert. denied* 513 U.S. 874, 115 S. Ct. 201, 130 L. Ed. 2d 131, or when other " 'rights or liabilities . . . may be affected by its determination,' " *Miller v. Dixon*, 176 Neb. 659, 663, 127 N.W.2d 203, 205 (1964) (quoting 5 Am. Jur. 2d *Appeal and Error* § 766 (1962)). The public interest exception to the rule precluding consideration of issues on appeal due to mootness requires a consideration of the public or private nature of the question presented, desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem. *Bamford v. Upper Republican Nat. Resources Dist., supra*, citing *Koenig v. Southeast Community College*, 231 Neb. 923, 438 N.W.2d 791 (1989).

Protection orders entered pursuant to § 42-924 are ordinarily limited to a 1-year period, meaning that persons in the position of these parties will seldom be able to get an appeal heard and reviewed quickly enough to make the result meaningful. Because of the 1-year timeframe for protection orders, such cases will almost always be moot by the time an appeal is heard. However, as the Court of Appeals found, the issue raised in this appeal—the proper disposition of applications for protection orders—is a matter affecting the public interest. Accordingly, this case falls within an exception to the mootness doctrine, and a decision on the merits is appropriate.

In his petition for further review, Michael assigned three errors. We granted Michael's petition for further review on a limited basis, which was to address the cross-examination issue. We will not address Michael's other assignments of error in this opinion, and thereby affirm the Court of Appeals' determinations in respect to the other issues unaddressed herein. See *Elstun v. Elstun*, 8 Neb. App. 97, 589 N.W.2d 334 (1999).

Michael asserts that he was denied due process of law at the June 30, 1997, hearing because he was not permitted a reasonable opportunity to refute or defend against the action, to confront and cross-examine adverse witnesses, and to present evidence and was denied a hearing before an impartial decisionmaker.

The Court of Appeals found:

> [T]he record does not show that Mike requested that additional evidence be admitted, that additional questions be asked, or that Denise be cross-examined. The record instead shows that he was provided an ample and unfettered opportunity to present his version of the facts. There being no showing of prejudicial error, we accordingly reject this assignment of error.

Id. at 106, 589 N.W.2d at 341.

[8] The Court of Appeals seems to have overlooked Neb. Rev. Stat. § 27-614(1) (Reissue 1995), which provides that "[t]he judge may, on his own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called." The Court of Appeals did note in its analysis of one of Denise's assignments of error that § 27-614 allows a trial court on its own motion to call and interrogate witnesses. The Court of Appeals failed to mention, however, that subsection (1) of § 27-614 specifically provides that all parties are entitled to cross-examine witnesses called by the trial judge.

The trial judge first called Michael to testify and, at the conclusion of the questioning, refused to allow Denise's counsel to cross-examine Michael. The trial judge then called Denise to testify and refused to give Denise's counsel an opportunity to examine Denise after the trial judge's interrogation. The denial of Denise's counsel's requests certainly chilled any thoughts Michael might have had, as pro se, to cross-examine Denise. As such, Michael's rights to cross-examine Denise under § 27-614 were violated.

[9] While we hold that under § 27-614(1) parties have the right to cross-examine witnesses called by a judge, we also note that a ruling regarding the extent, scope, and course of the cross-examination rests within the discretion of the trial court and will not be disturbed absent an abuse of that discretion. *Rahmig v.*

Mosley Machinery Co., 226 Neb. 423, 412 N.W.2d 56 (1987); *Nixon v. Harkins*, 220 Neb. 286, 369 N.W.2d 625 (1985).

CONCLUSION

Michael was not given an opportunity to cross-examine Denise after the trial judge called her as a witness and questioned her. As such, Michael's statutory right under § 27-614(1) to cross-examine witnesses called by a judge was violated. We accordingly affirm in part and in part reverse the judgment of the Court of Appeals affirming the judgment of the district court.

AFFIRMED IN PART, AND IN PART REVERSED.

STATE OF NEBRASKA, APPELLEE, V. DAVID W. RIEGER, ALSO KNOWN AS DAVID W. RIEGER, JR., APPELLANT.

600 N.W.2d 831

Filed October 8, 1999. No. S-97-1150.

1. **Judgments: Jurisdiction: Appeal and Error.** The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusion independent from the trial court.
2. **Judgments: Jurisdiction: 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.
3. **Judgments: Jurisdiction: Appeal and Error.** As a necessary incident to an appellate court's power to determine that it lacks jurisdiction over the merits of an appeal because the order appealed from was entered by a court lacking subject matter jurisdiction and was thus void, an appellate court has the power and duty to vacate the void order and, if appropriate, remand the cause for further proceedings.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and MUES, Judges, on appeal thereto from the District Court for Douglas County, THEODORE L. CARLSON, Judge. Judgment of Court of Appeals affirmed.

James J. Regan for appellant.

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

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

STEPHAN, J.

David W. Rieger appealed his conviction and sentence on charges of robbery and being a habitual criminal. The Nebraska Court of Appeals determined that the trial court lacked jurisdiction to sentence Rieger because of the pendency of an appeal from the denial of his motion for discharge, which appeal was filed after he was convicted but before he was sentenced. It therefore vacated the sentence, dismissed the appeal, and remanded the cause for resentencing. *State v. Rieger*, 8 Neb. App. 20, 588 N.W.2d 206 (1999). We granted the State's petition for further review, which presents the single issue of whether the Court of Appeals had jurisdiction to vacate and remand. We conclude that it did and therefore affirm.

BACKGROUND

On July 10, 1995, Rieger was charged with robbery in a complaint filed in the county court for Douglas County. On July 23, 1996, Rieger, who was then incarcerated at the federal penitentiary in Leavenworth, Kansas, mailed a request for final disposition of the robbery charge to the Douglas County Attorney, pursuant to the Agreement on Detainers, Neb. Rev. Stat. § 29-759 (Reissue 1995). On July 30, a deputy Douglas County Attorney certified that he had received that request. On September 25, following a preliminary hearing, Rieger was bound over to the district court for Douglas County for trial.

On May 12, 1997, an amended information was filed which added a habitual criminal charge to the robbery charge. Subsequently, on August 5, Rieger filed a motion to discharge, alleging that he had not been brought to trial within 180 days of his request for final disposition as required by § 29-759, article III. A hearing on the motion to discharge was held on August 18. The court overruled Rieger's motion on that same date and immediately began the jury trial. Rieger did not object to the

commencement of trial or file a notice of appeal with respect to the denial of his motion to discharge at that time.

On August 19, 1997, the jury found Rieger guilty of robbery. An enhancement hearing was held on August 22, and the district court determined that Rieger was a habitual criminal. On September 16, Rieger filed a notice of appeal from the order of August 18 overruling his motion to discharge. That appeal was docketed in the Court of Appeals as case No. A-97-976.

On October 8, 1997, the district court sentenced Rieger to a term of 20 to 40 years' incarceration with credit for time served. This sentence was imposed over Rieger's objection that the district court lacked jurisdiction to do so because of his pending appeal from the order overruling his motion to discharge. On November 4, Rieger commenced this appeal from his conviction and sentence.

In a memorandum opinion filed May 15, 1998, in case No. A-97-976, the Court of Appeals held against Rieger on his appeal from the denial of his motion for discharge, stating that he had failed to follow the procedures required by the Agreement on Detainers and therefore did not trigger the 180-day period required by that agreement.

On August 26, 1998, the Court of Appeals issued an order to show cause why the instant appeal should not be dismissed for lack of jurisdiction and the matter remanded for resentencing. In its response, the State argued that because Rieger failed to appeal before trial was held, he waived any objection he had to the speedy trial issue under the Agreement on Detainers, and that thus, his first appeal was improper and resentencing was not necessary. On January 5, 1999, the Court of Appeals held in a published opinion that the order overruling Rieger's motion to discharge was a final, appealable order and that the district court was divested of jurisdiction when Rieger perfected his appeal from that order. *State v. Rieger*, 8 Neb. App. 20, 588 N.W.2d 206 (1999). It therefore vacated the sentence, dismissed the appeal for lack of jurisdiction, and remanded the cause for resentencing.

ASSIGNMENT OF ERROR

In the State's petition for further review, it does not contest the determination that the order denying Rieger's motion to dis-

charge was appealable or that the district court lacked jurisdiction to sentence Rieger because of the pendency of the appeal from such order. However, it asserts that the Court of Appeals erred in vacating the sentence and remanding the cause for resentencing because "[a] court which lacks of jurisdiction in a matter may not grant relief." Memorandum brief of appellee in support of petition for further review at 1.

STANDARD OF REVIEW

[1] The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusion independent from the trial court. *State v. Meese, ante* p. 486, 599 N.W.2d 192 (1999).

ANALYSIS

After determining that the trial court lacked jurisdiction to sentence Rieger, the Court of Appeals concluded:

> Moreover, the law is that without the sentence, there is no final order. Without a final order, the appellate court lacks jurisdiction. . . . Although jurisdiction is not present in this court, we do have the authority, and the duty, to vacate the sentence which was handed down without jurisdiction by the district court. . . . Therefore, we vacate the sentence and remand the cause to the district court for resentencing. Because we lack jurisdiction, we do not address Rieger's claims that the trial court erred with respect to certain evidentiary matters.

(Citations omitted.) *State v. Rieger*, 8 Neb. App. at 25, 588 N.W.2d at 210.

In reaching this conclusion, the Court of Appeals relied on *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997), wherein it determined that a sentencing order which was not preceded by a valid judgment of conviction did not result in a final, appealable order. Although in *Engleman*, the Court of Appeals concluded that under these circumstances it lacked appellate jurisdiction, it reasoned that it could not merely dismiss the appeal, because sentences, including one of imprisonment, had been imposed. Citing authority for the general proposition that imposing a sentence upon an invalid judgment of

conviction constitutes a violation of the accused's right to due process of law, *Engleman* concluded:

> To sentence a defendant without a finding by the court that he or she is guilty obviously affects a substantial right of the defendant, and to leave this uncorrected would damage the integrity of the judicial process. Thus, we reach this error under the plain error doctrine, even though it was not raised in the district court. Because no judgment of guilt has been rendered against Engleman, the county court improperly sentenced Engleman, and the sentences imposed are null and void.

5 Neb. App. at 492, 560 N.W.2d at 857. On this basis, the Court of Appeals vacated Engleman's sentence, dismissed the appeal, and remanded the cause for resentencing.

The State argues that jurisdiction over a case is a prerequisite to the exercise of any type of appellate review, including plain error review, and that the Court of Appeals erred in concluding that it could employ plain error review and grant relief in this case after acknowledging the absence of appellate jurisdiction. The State cites no authority for this proposition.

[2] It is undisputed that on the date the district court imposed sentence, it was divested of subject matter jurisdiction because of the pendency of the timely and proper appeal from its order denying discharge. We have characterized a ruling by a district court made in the absence of subject matter jurisdiction as "void ab initio," *Big John's Billiards v. Balka*, 254 Neb. 528, 531, 577 N.W.2d 294, 296 (1998), and "a nullity," *State v. Dvorak*, 254 Neb. 87, 90, 574 N.W.2d 492, 494 (1998). However, 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. *State v. Dvorak, supra*; *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997). This well-settled rule precluded the Court of Appeals from considering any error with respect to the merits of the case, whether assigned or under the plain error doctrine, once it determined that the district court was "without jurisdiction to sentence Rieger," *State v. Rieger*,

8 Neb. App. 20, 25, 558 N.W.2d 206, 210 (1999). However, it is clear that the Court of Appeals based its disposition solely upon its determination of the jurisdictional issue. Thus, the question before us is whether the Court of Appeals had the power to vacate the sentence and remand the cause for resentencing as an incident to its determination that it lacked jurisdiction to consider the merits of the appeal because the district court lacked jurisdiction to enter the order from which the appeal was taken.

State v. Dvorak, supra, is instructive. In that case, the State had appealed to the district court from an order of the county court granting the defendant's motion to set aside her conviction for reckless driving. The district court initially reversed the order of the county court, but then affirmed upon the defendant's motion to reconsider. The State perfected an appeal to this court.

We determined that because there was no statute or rule permitting a district court to entertain a motion to reconsider in an appeal from county court pursuant to Neb. Rev. Stat. § 25-1901 (Reissue 1995), the district court's exercise of subject matter jurisdiction over the motion for reconsideration was improper. We held that the first order

> was the district court's final disposition of the appeal and that the district court was divested of jurisdiction over the matter upon that order. A ruling made in the absence of subject matter jurisdiction is a nullity. . . . Accordingly, the district court's [second] order . . . is void, and this court is without jurisdiction to review the merits of the appeal [from the second order].
>
> *For the foregoing reasons, the decision of the district court is reversed and the cause remanded with direction to reinstate the conviction.*

(Citations omitted.) (Emphasis supplied.) *State v. Dvorak*, 254 Neb. at 90-91, 574 N.W.2d at 494.

[3] Although the State is critical of the holding in *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997), which was cited and followed by the Court of Appeals in the present case, the State does not urge reversal of our holding in *Dvorak*. Were we to adopt the rule which the State urges in this case, we would establish the curious jurisprudence that an appellate court has the power to reinstate a conviction which it finds to have been

set aside by a void order, as we did in *Dvorak*, yet lacks the power to vacate a sentence imposed pursuant to an equally void order, as the Court of Appeals did in *Engleman* and the present case. We know of no authority which would obligate an appellate court to leave in effect an order which it determines to be void ab initio on jurisdictional grounds. Such a result would defy fairness and logic and, as the Court of Appeals correctly observed in *Engleman*, would inflict damage on the integrity of the judicial process. We therefore hold that as a necessary incident to an appellate court's power to determine that it lacks jurisdiction over the merits of an appeal because the order appealed from was entered by a court lacking subject matter jurisdiction and was thus void, an appellate court has the power and duty to vacate the void order and, if appropriate, remand the cause for further proceedings. Accordingly, we conclude that the Court of Appeals did not err in its disposition of this matter, and its judgment is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DANIEL L. OWENS, APPELLANT.
601 N.W. 2d 231

Filed October 8, 1999. No. S-98-080.

1. **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.
2. **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.
3. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the 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.
4. **Self-Defense.** The justification of the use of force in self-defense is a statutorily defined affirmative defense in Nebraska.

5. ___. The excuse of self-defense is applied to the threatening behavior of another person, not to a generalized group of actors.
6. **Criminal Law: Statutes.** It is a fundamental principle of statutory construction that penal statutes are to be strictly construed.
7. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error indicative of a probable miscarriage of justice.
8. **Witnesses: Impeachment: Rules of Evidence: Prior Statements.** Neb. Rev. Stat. § 27-613 (Reissue 1995) permits the introduction of evidence concerning prior inconsistent statements by a witness, subject to the limitation that the witness being impeached must be given an opportunity to explain or deny the prior inconsistent statement, and the opposite party must have the opportunity to interrogate the witness about the prior inconsistent statement. Further, the statement sought to be impeached cannot be about a collateral or immaterial matter.
9. **Convictions: Evidence: Appeal and Error.** Where the evidence is cumulative and there is other competent evidence to support the conviction, the improper admission or exclusion of evidence is harmless beyond a reasonable doubt.

Petition for further review from the Nebraska Court of Appeals, MUES and INBODY, Judges, and BUCKLEY, District Judge, Retired, on appeal thereto from the District Court for Sarpy County, RONALD E. REAGAN, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

James Walter Crampton for appellant.

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

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

HENDRY, C.J.

INTRODUCTION

Daniel L. Owens was tried and found guilty of second degree murder, discharging a firearm at an occupied vehicle, and use of a weapon to commit a felony. The Nebraska Court of Appeals reversed Owens' convictions and remanded the cause for a new trial. *State v. Owens*, 8 Neb. App. 109, 589 N.W.2d 867 (1999). In its opinion, the Court of Appeals determined that under *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981), Owens was entitled to a self-defense instruction regarding all "the other occupants of the Jeep." *Owens*, 8 Neb. App. at 116, 589 N.W.2d at

872. The Court of Appeals also determined that the district court erred in not allowing testimony regarding a prior inconsistent statement made by Jennifer Jaderborg, Owens' former girl friend. The State petitioned for further review of the decision of the Court of Appeals, which this court granted.

FACTUAL BACKGROUND

On June 18, 1997, Joel Kudym, Karen Zarp (Zarp), Jason Zarp, and Jeremy Jesionowicz were driving north in a Jeep Cherokee on Highway 50, between Louisville and Springfield, Nebraska. The four teenagers were returning home to Springfield after a trip to Louisville to get "Slushies" for Jason Zarp and Jesionowicz. Kudym, Zarp's boyfriend, was driving. Kudym and Zarp were sitting in the front of the Jeep, and Jesionowicz and Jason Zarp were sitting in the back.

As they turned onto Highway 50 to go home, they noticed a blue Ford Escort. The teenage passenger in the Escort, Owens, was seated in the right front passenger's seat and was throwing lit bottle rocket fireworks out his window. His girl friend, Jaderborg, was driving. Owens had been to a shooting range for target practice earlier in the evening and had an FEG Hungary 380 automatic pistol in the Escort with him.

Zarp called the 911 emergency service to report that the passenger in the Escort was throwing fireworks onto the highway. During the 911 call, Zarp believed the dispatcher told her to stay behind or follow the Escort. She told Kudym to follow the Escort, which he did for approximately 6 to 11 miles. The Jeep never touched the Escort. The distance between the two vehicles varied, but the Jeep basically stayed within sight of the Escort. Owens, noticing that the Jeep seemed to be following them, took out his gun and placed it in his lap.

As the Jeep followed the Escort, Kudym and Zarp were talking and listening to the radio in the front seat, while Jesionowicz and Jason Zarp were talking in the back. As they approached a red light at the intersection of Interstate 80 and Highway 50, the Jeep moved over into the right-hand lane, intending to turn right. The four teenagers had decided to stop following the Escort and return home.

The two vehicles stopped at the light with the back passenger's seat of the Jeep, where Jesionowicz was sitting on the left-hand side, even with the Escort's front passenger's seat, where Owens was sitting. There were no cars in front of the Jeep or the Escort. According to the testimony of Zarp, Jason Zarp, Jesionowicz, and Jennifer Levenhagen, the driver of a car stopped directly behind the Escort at the intersection, no one yelled or waved at the Escort and no one attempted to get out of the Jeep. When Jesionowicz looked over at the Escort, he saw a gun being pointed at the Jeep by Owens. Jesionowicz grabbed at Zarp and Jason Zarp to pull them down.

Owens shot into the Jeep three times. According to Owens' testimony, he first shot into the rear window of the cargo area because "[n]obody was back there." The rear cargo window shattered. He then shot two more times into the front of the vehicle. Owens testified that "I figured if I could scare the driver he would take off." One of these shots struck the door panel behind the front passenger's seat. The other shot struck Kudym in the side of his head.

After the shots were fired, the Jeep began moving because Kudym's foot was on the gas pedal. Jesionowicz reached over from the back and steered the Jeep, while Zarp pulled on the emergency brake. They eventually managed to stop the Jeep. The Escort drove off. Despite emergency medical efforts, Kudym died from severe head injuries.

Owens was arrested and charged with second degree murder, shooting at an occupied structure or vehicle, and use of a firearm to commit a felony. At trial, Owens testified that he was concerned for his safety when the Jeep began following them. His concern increased when the Jeep pulled up next to him at the intersection. According to Owens, Jesionowicz was yelling at him and flashing what Owens believed were gang signs. The other occupants of the car were "looking at [him] mean." Owens said he saw Jesionowicz reach under his seat for something, which Owens thought could be a gun. Then Owens thought Jesionowicz reached for the door handle to get out of the Jeep. The Jeep's door was never opened. Owens testified that he did not intend to shoot anyone.

Jaderborg, Owens' former girl friend, testified that she noticed the Jeep following them. She did not see any exchange at the intersection between Jesionowicz and Owens before the gunshots, except that Jesionowicz called out to Owens and asked if he wanted to start something. Jaderborg further stated that after he fired the three shots, Owens said, "I think I saw some glass break. I hope I shot someone." They then drove off.

When the instructions were reviewed prior to submission to the jury, the defense objected to instruction No. 9. The instruction read in part as follows: "The defendant acted in self defense if: (1) Joel Kudym threatened death or serious bodily harm."

The defense attorney requested that the instruction be corrected to read that "the occupants of the Jeep Cherokee" threatened death or serious bodily harm, rather than limiting the instruction just to the actions of Kudym. This request was denied. The State did not object to the giving of a self-defense instruction. The jury found Owens guilty of all charges, and judgment was rendered accordingly.

ASSIGNMENTS OF ERROR

The State asserts in its petition for further review, rephrased, that the Court of Appeals erred in (1) determining that a proper instruction on self-defense must direct the jury to consider the threatening actions of people other than the actual victim in determining whether the use of force was justified and (2) determining that the testimony of Laura Carey regarding a prior inconsistent statement made by Jaderborg was erroneously excluded.

STANDARD OF REVIEW

[1] 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. Garza*, 256 Neb. 752, 592 N.W.2d 485 (1999).

[2] In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Sanchez, ante* p. 291, 597 N.W.2d 361 (1999).

ANALYSIS

SELF-DEFENSE INSTRUCTION

[3] The State asserts that no error occurred when the trial court refused Owens' tendered instruction on self-defense. 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. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999); *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999). We determine that the self-defense instruction tendered by Owens was not a correct statement of the law.

[4] The justification of the use of force in self-defense is a statutorily defined affirmative defense in Nebraska. *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997); Neb. Rev. Stat. § 28-1416(1) (Reissue 1995). Under the language of Neb. Rev. Stat. § 28-1409(1) (Reissue 1995), "[T]he use of force upon or toward another person is justifiable when the actor believes such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by *such other person* on the present occasion." (Emphasis supplied.)

[5,6] The language of § 28-1409(1) makes clear that the excuse of self-defense is applied to the threatening behavior of "another person," not to a generalized group of actors. Merely identifying a group of possible assailants, such as "the occupants of the Jeep Cherokee," and directing the jury to consider whether anyone in this group threatened the defendant, impermissibly broadens the application of § 28-1409. It is a fundamental principle of statutory construction that penal statutes are to be strictly construed. *State v. Garza, supra*. See, also, *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998). Thus, the instruction as tendered by Owens was not a correct statement of the law. See *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998).

The Court of Appeals found that the instruction offered by Owens was warranted, notwithstanding the language of § 28-1409, based on our holding in *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981). In *Duis*, David Moss and Craig Duis became involved in an altercation in the parking lot of a restaurant, consisting mostly of name-calling. Duis drove off, firing three shots in the direction of Moss as he left. Duis claimed that he shot at Moss because he believed Moss was reaching for a weapon. The shots fired by Duis at Moss struck Moss' friend, Allan Ray Veasley, once in the thigh. No one else was injured.

Duis intended to shoot Moss but accidentally shot Veasley. Duis was then charged with the intentional assault of Veasley under a theory of transferred intent. The theory of transferred intent allows Duis' intent to assault Moss to "transfer" to the shooting of Veasley. See *State v. Morrow*, 237 Neb. 653, 467 N.W.2d 63 (1991). At Duis' trial, the jury was instructed on the issue of self-defense. They rejected Duis' claim of self-defense and found him guilty of assault in the second degree.

Duis appealed, asserting that the self-defense instruction given to the jury was flawed. The instruction was essentially a direct quote of § 28-1409, and did not identify either Moss or Veasley as the person who threatened Duis. We recognized the doctrine of transferred self-defense implicit in *Duis* by stating, "Undoubtedly, it would have been more precise had the instruction explained to the jury that if the defendant was justified in using force toward Moss, he was justified in the force employed, which mistakenly struck the actual victim." 207 Neb. at 856, 301 N.W.2d at 590. Just as transferred intent allowed Duis to be prosecuted for an intentional assault on Veasley, transferred self-defense allowed Duis to raise a claim of self-defense based on Moss' actions.

In *Duis*, we determined that the instruction given to the jury was correct because it was taken directly from the statute and because the defendant did not offer an alternative instruction. Nowhere in *Duis* do we expand § 28-1409 to allow a claim of self-defense against a general group of actors present when the incident took place.

In finding that Owens was entitled to an instruction on self-defense regarding the "occupants of the Jeep Cherokee," the

Court of Appeals incorrectly applied *Duis*. The facts presented in the instant case do not involve transferred intent, as did *Duis*. There is no evidence that Owens intended to shoot Jesionowicz but instead hit Kudym accidentally. Owens never testified that he intended to shoot Jesionowicz, and all three shots were aimed either behind or in front of Jesionowicz.

Owens was prosecuted, tried, and convicted by the jury of second degree murder as a result of Kudym's death. Notwithstanding Owens' claim that he did not intend to shoot Kudym, the jury found otherwise. By Owens' being charged with causing Kudym's death intentionally but without premeditation, see Neb. Rev. Stat. § 28-304(1) (Reissue 1995), it is clear that under the facts presented by this record the "other person" referred to in § 28-1409(1) was Kudym. Instruction No. 9 was, therefore, a correct statement of the law, and the trial court did not err in refusing Owens' proposed instruction. *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981), does not expand the scope of § 28-1409 beyond threats raised by "another person" so as to entitle a defendant to a self-defense instruction covering, as Owens claims, the actions of "the occupants of the Jeep Cherokee."

[7] We do not reach the issue of whether Kudym's actions in following the Escort and pulling up beside it provided sufficient evidence to have even warranted a self-defense instruction. The State did not object to the giving of a self-defense instruction at trial. Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error indicative of a probable miscarriage of justice. *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

Prior Inconsistent Statement

The State also asserts that the Court of Appeals incorrectly determined that it was error to refuse to let Laura Carey, Owens' mother, testify that Jaderborg had told Carey that Owens said, "I hope I didn't shoot somebody" as they drove off. At trial, Jaderborg testified that Owens had said, "I hope I shot somebody" as they drove off. The defense sought to elicit the testi-

mony from Carey as evidence of Jaderborg's prior inconsistent statement.

[8] Neb. Rev. Stat. § 27-613(2) (Reissue 1995) permits the introduction of evidence concerning prior inconsistent statements by a witness, subject to the limitation that the witness being impeached must be given an opportunity to explain or deny the prior inconsistent statement, and the opposite party must have the opportunity to interrogate the witness about the prior inconsistent statement. Further, the statement sought to be impeached cannot be about a collateral or immaterial matter. *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988).

Jaderborg's testimony regarding Owens' statement was clearly material in that it reflected on Owens' state of mind at the time of the shooting. Carey's testimony would have been that Jaderborg had previously made an inconsistent statement on the same fact. The Court of Appeals correctly determined that the trial court erred in refusing to admit Carey's testimony for the limited purpose of impeaching Jaderborg. However, the Court of Appeals did not address whether the evidentiary error was harmless or prejudicial.

In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

[9] The record demonstrates that Owens was able to introduce the same evidence Carey was not permitted to offer. During his own testimony, Owens stated that he said, "I hope I didn't shoot somebody" as they drove off. Further, issues of Jaderborg's credibility were properly laid before the jury during Jaderborg's cross-examination. The defense questioned Jaderborg about several inconsistencies between her statements to officers at the time of the incident and her testimony at trial. The defense also questioned her about her own interest in avoiding prosecution for accessory to a felony charges. Finally, the jury was specifically instructed to "closely examine" Jaderborg's testimony in light of her possible motives to be untruthful. Any prejudice which could have resulted from Owens' inability to impeach Jaderborg regarding her testimony as to what Owens said is harmless beyond a reasonable doubt. Carey's testimony was at

best cumulative of Owens' own testimony and, further, the issue of Jaderborg's credibility was aggressively attacked before the jury during her cross-examination. Where the evidence is cumulative and there is other competent evidence to support the conviction, the improper admission or exclusion of evidence is harmless beyond a reasonable doubt. *State v. Hartmann*, 239 Neb. 300, 476 N.W.2d 209 (1991).

While the trial court erred in excluding Carey's testimony concerning Jaderborg's prior inconsistent statement, we determine that this error was harmless beyond a reasonable doubt. *State v. Sanchez, supra.*

CONCLUSION

The jury was properly instructed on the issue of self-defense in determining whether Owens was justified in shooting and killing Kudym. Additionally, the trial court's evidentiary ruling regarding Carey's testimony was harmless beyond a reasonable doubt. Accordingly, we reverse the judgment of the Court of Appeals and remand the cause to the Court of Appeals with directions to reinstate the judgment of the district court on all charges.

REVERSED AND REMANDED WITH DIRECTIONS.

EDWARD G. HAJENGA, APPELLEE, V.
CHIN G. HAJENGA, APPELLANT.
601 N.W.2d 528

Filed October 15, 1999. No. S-98-326.

1. **Divorce: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
2. **Evidence: Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
3. ___: ___. When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witness and accepted one version of the facts rather than another.
4. **Child Support: Rules of the Supreme Court.** Paragraph C of the Nebraska Child Support Guidelines requires that when child support orders deviate from the

guidelines, a trial court must state the reasons for the deviation in the decree or order or, alternatively, it must complete a worksheet 5 and file it in the court file.

5. ___: ___. Paragraph C of the Nebraska Child Support Guidelines requires that the decree or order state the amount of support that would have been required under the guidelines absent the deviation.
6. ___: ___. In general, child support payments should be set according to the Nebraska Child Support Guidelines, established pursuant to Neb. Rev. Stat. § 42-364.16 (Reissue 1998).
7. **Child Support: Rules of the Supreme Court: Presumptions.** Neb. Rev. Stat. § 42-364.16 (Reissue 1998) provides that child support shall be established in accordance with the Nebraska Child Support Guidelines unless a court finds that one or both parties have produced sufficient evidence to rebut the presumption that the application of the guidelines will result in a fair and equitable child support order.
8. **Child Support: Rules of the Supreme Court.** A trial court may deviate from the Nebraska Child Support Guidelines in an individual case if the application of the guidelines would be unjust or inappropriate.
9. **Child Support.** In determining the amount of a child support award, a trial court must consider the status, character, and situation of the parties and attendant circumstances, including the financial condition of the parties and the estimated cost of support of the children.
10. ___. It may be appropriate for a trial court to consider subsequent children of a party in determining child support.
11. **Child Support: Rules of the Supreme Court: Proof.** A party requesting a deviation from the Nebraska Child Support Guidelines based upon an obligation to support offspring of a subsequent relationship bears the burden of providing evidence regarding the obligation, including the income of the other parent of the child of the subsequent relationship.
12. **Divorce: Property Division.** Generally, the division of property in a dissolution case is based on equitable principles, and its purpose is to divide the marital assets equitably.
13. **Property Division.** The ultimate test for determining the appropriateness of the division of property is reasonableness as determined by the facts of each case.
14. ___. The division of property is not subject to a precise mathematical formula.
15. **Divorce: Property Division.** In dividing property upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties; (2) the duration of the marriage; (3) the history of contributions to the marriage, including contributions to the care and education of the children and interruption of personal careers or educational opportunities; and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party, the polestar being fairness and reasonableness as determined by the facts of each case.
16. **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.
17. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it

uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed in part, and in part reversed and remanded.

J. Bruce Teichman and Sam Houston, of Feller & Teichman, P.C., for appellant.

Steven M. Watson, P.C., of Marks Clare & Richards, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Chin G. Hajenga appeals from the decree of dissolution of marriage entered in the district court for Douglas County, Nebraska. Chin claims inadequacy in the amount of child support which Edward G. Hajenga was ordered to pay and error in dividing the marital assets. On our own motion, we removed the matter to this court pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals.

BACKGROUND

Edward and Chin were married on April 6, 1987. During the course of their marriage, the couple had three children. In April 1996, Edward moved out of the family residence. A month later, Edward moved in with Robin Taylor, a mother with custody of three minor children. Edward and Robin subsequently had a child of their own. Edward and Robin's child, as well as Robin's other three children, reside with Edward and Robin.

On April 29, 1996, Edward filed a petition of dissolution of marriage against Chin in the district court. The petition requested that the trial court equitably distribute the property and debts of the parties; award Chin the temporary and permanent care, custody, and control of the three minor children of the parties; and establish a schedule of visitation rights and child support payments. At trial, Edward asked the trial court, in

determining his child support obligation, to take into consideration the fact that he has a fourth child that he supports. In regard to the property and debts of the parties, Edward testified that after he moved out of the family residence, he had to borrow money from his mother and that he had to pay this money back to his mother.

The trial court entered a decree of dissolution of marriage awarding Chin the care, custody, and control of the minor children and found that the Nebraska Child Support Guidelines did not apply in this case. The trial court ordered Edward to pay $630 per month in child support. The trial court also distributed the property and debts of the parties and in doing so, treated the money Edward owed his mother as a marital debt and used it in determining the division of the parties' property and debts.

Chin filed a motion for new trial, which was overruled. Chin timely appealed.

ASSIGNMENTS OF ERROR

Chin assigns, renumbered and restated, that the trial court erred in (1) deviating from the guidelines; (2) not stating that one or both parties had produced sufficient evidence to rebut the presumption that the guidelines should be applied and in not stating the specific grounds for the deviation from the guidelines or, alternatively, in not completing a "Deviations to Child Support Guidelines Worksheet 5"; (3) not stating the amount of support that would have been required under the guidelines absent the deviation; (4) not specifying in its order the amount of child support owed by Edward when one or more children no longer qualify for child support; and (5) making a determination that Edward owed his mother $20,000 to $25,000 and that this was a marital debt to be included in calculating an equitable division of the parties' property and debts.

SCOPE OF REVIEW

[1-3] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995); *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995). In a review de

novo on the record, we reappraise the evidence as presented by the record and reach our own independent conclusions with respect to the matters at issue. *Tyler v. Tyler*, 253 Neb. 209, 570 N.W.2d 317 (1997); *Thiltges v. Thiltges, supra.* When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witness and accepted one version of the facts rather than another. *Thiltges v. Thiltges, supra*; *Jirkovsky v. Jirkovsky, supra.*

ANALYSIS

CHILD SUPPORT

Chin first claims that the trial court erred in deviating from the guidelines. Chin further argues that because the trial court deviated from the guidelines, paragraph C of the guidelines required the trial court to state in the decree that it found that one or both parties had produced sufficient evidence to rebut the presumption that the guidelines should be applied and to state the reason the trial court deviated from the guidelines or that alternatively, the trial court should have completed worksheet 5. In addition, Chin alleges that the decree should have stated the amount of support that would have been required under the guidelines absent the deviation.

Paragraph C of the guidelines states:

> The child support guidelines shall be applied as a rebuttable presumption. All orders for child support obligations shall be established in accordance with the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied. All stipulated agreements for child support must be reviewed against the guidelines and, if a deviation exists and is approved by the court, specific findings giving the reason for the deviation must be made. *Findings must state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines.* Deviations must take into consideration the best interests of the child. *In the event of a deviation, the reason for the deviation shall be contained in the findings portion of the decree or order; or worksheet*

5 should be completed by the court and filed in the court file. Deviations from the guidelines are permissible under the following circumstances:

1. when there are extraordinary medical costs of either parent or child;

2. when special needs of a disabled child exist;

3. if total net income exceeds $10,000 monthly, child support for amounts in excess of $10,000 monthly may be more but shall not be less than the amount which would be computed using the $10,000 monthly income unless other permissible deviations exist;

4. for juveniles placed in foster care; or

5. whenever the application of the guidelines in an individual case would be unjust or inappropriate.

All orders for child support, including modifications, must include a basic income and support calculation worksheet 1, and if used, worksheet 2 or 3.

(Emphasis supplied.)

[4,5] We interpret paragraph C of the guidelines to require that when child support orders deviate from the guidelines, a trial court must state the reasons for the deviation in the decree or order or that alternatively, it must complete worksheet 5 and file it in the court file. While paragraph C provides that either stating the reason for the deviation in the decree or order or completing worksheet 5 is sufficient, we encourage trial courts to do both. In addition, paragraph C requires that the decree or order state the amount of support that would have been required under the guidelines absent the deviation.

In the present case, the trial court's decree states that the guidelines do not apply in the instant case, but fails to state the reason for the deviation, and the trial court did not complete a worksheet 5. The trial court also failed to state the amount of support that Edward would have been required to pay under the guidelines.

The most logical explanation for the trial court's deviation is that it must have considered the support Edward provides for the child he fathered with Robin. However, even in cases such as this where a possible reason for the deviation can be discerned from the record, the reason still remains a guess or is speculation on

our part. We will not speculate as to why a trial court did what it did. While we refuse to come to any conclusion as to why the trial court in the instant case deviated from the guidelines, we will discuss whether a trial court can consider a party's subsequent child in determining child support for purposes of remand.

[6-8] In general, child support payments should be set according to the guidelines established pursuant to Neb. Rev. Stat. § 42-364.16 (Reissue 1998). *Knippelmier v. Knippelmier*, 238 Neb. 428, 470 N.W.2d 798 (1991). Section 42-364.16 provides that child support shall be established in accordance with the guidelines unless a court finds that one or both parties have produced sufficient evidence to rebut the presumption that the application of the guidelines will result in a fair and equitable child support order. *Knippelmier v. Knippelmier, supra.* Thus, the trial court may deviate from the guidelines in an individual case if the application of the guidelines would be unjust or inappropriate.

The guidelines are not to be applied with blind rigidity:

> [A] trial judge does not satisfy his duty to equitably determine child support by blindly following suggested guidelines. The Nebraska Child Support Guidelines are, by their very nature, simply guidelines. . . . The court may deviate from the guidelines where one or both parties have provided sufficient evidence to rebut the presumption that the guidelines should be applied. Thus, the guidelines offer flexibility and guidance, with the understanding that not every child support scenario will fit neatly into the calculation structure.

Czaplewski v. Czaplewski, 240 Neb. 629, 631, 483 N.W.2d 751, 752 (1992).

[9] In determining the amount of a child support award, a trial court must consider the status, character, and situation of the parties and attendant circumstances, including the financial condition of the parties and the estimated cost of support of the children. *Knippelmier v. Knippelmier, supra*; *Formanack v. Formanack*, 234 Neb. 325, 451 N.W.2d 250 (1990).

This court dealt with the issue of a parent's financial obligation to more than one family in *Czaplewski v. Czaplewski, supra.* The mother in *Czaplewski* contended that the trial court ought not have considered the fact that her ex-husband now has

another child from a subsequent marriage to support. The court noted that the guidelines' worksheet 1, the basic net income and support calculation, provides as a deduction that amount in " '[c]hild support previously ordered for children not of this marriage.' " *Id.* at 631, 238 N.W.2d at 752. The court then held that in keeping with the spirit of the guidelines, the trial court was correct in factoring into the child support calculations the father's offspring of his subsequent marriage. *Czaplewski v. Czaplewski, supra.*

[10,11] Based on *Czaplewski v. Czaplewski, supra*, it may be appropriate for a trial court to consider subsequent children of a party in determining child support. We reiterate, however, that when a trial court deviates from the guidelines, it must set forth the reasons in the order or complete a worksheet 5. The party requesting the deviation from the Nebraska Child Support Guidelines based upon an obligation to support offspring of a subsequent relationship bears the burden of providing evidence regarding the obligation, including the income of the other parent of the child of the subsequent relationship.

We note that a worksheet 1 needs to be prepared using the incomes of the parties in the case at hand, as required under paragraph C of the guidelines. In the present case, worksheet 1 was not prepared with the decree.

Chin next alleges that the trial court neglected to make a finding of the amount of child support to be paid by Edward when one or more children no longer qualify for child support.

Paragraph H of the guidelines state:

> If there is more than one child, the court's order should specify the amount of child support due for the children, with the amount recalculated and reduced as the obligation to support terminates for each child. The amount due for each possibility should be calculated separately from table 1. . . . The order should direct that child support continue only until each child reaches majority under Nebraska law, becomes emancipated, becomes self-supporting, marries, or dies, or until further order of the court.

In the decree, the trial court ordered:

> The Child Support Guidelines do not apply, therefore, the Petitioner shall pay child support for the benefit of the

three minor children of the parties in the amount of $630 per month commencing on the 1st day of February, 1998, and continuing thereafter with a like amount until the first of the following events occur as to any child: death, marriage, emancipation, joining the Armed Forces, reaching the age of majority under the laws of the State of Nebraska, or further Order of the Court.

This language does not meet the requirements of paragraph H, as it does not recalculate and reduce the amount of support due as the obligation to support terminates for each child.

Property Division

Chin also claims that the trial court did not equitably divide the property and debts of the parties because the trial court took into account debts that Edward owed his mother. Chin contends there was no credible evidence presented of the payments made to Edward by his mother or that the money allegedly received had to be paid back.

[12-14] Generally, the division of property in a dissolution case is based on equitable principles, and its purpose is to divide the marital assets equitably. *Black v. Black*, 221 Neb. 533, 378 N.W.2d 849 (1985). The ultimate test for determining the appropriateness of the division of property is reasonableness as determined by the facts of each case. *Venter v. Venter*, 249 Neb. 712, 545 N.W.2d 431 (1996); *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995). The division of property is not subject to a precise mathematical formula. *Thiltges v. Thiltges, supra*; *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994).

[15] In dividing property upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties; (2) the duration of the marriage; (3) the history of contributions to the marriage, including contributions to the care and education of the children and interruption of personal careers or educational opportunities; and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party, the polestar being fairness and reasonableness as determined by the facts of each case. Neb. Rev. Stat. § 42-365

(Reissue 1998); *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998); *Reichert v. Reichert, supra.*

At the dissolution hearing, Edward testified that he had borrowed money from his mother in order to pay off some debts. Edward also testified that he was required to pay back to his mother the money he had borrowed. Following this testimony, Edward's counsel offered into evidence an exhibit showing a schedule of $34,809.88 Edward had borrowed from his mother from April 1996 to September 1997. No objection was made by Chin's counsel, and the exhibit was received. Chin's counsel did not question Edward about the validity of the loans, nor did he offer any evidence to rebut that the debt was a valid marital debt. At a later point in Edward's testimony, Edward's attorney asked him how much money he must pay back to his mother, and he responded, "It's got to be over 20,000 or 25." On cross-examination, Edward was also asked how much he had borrowed from his mother since the separation in April 1996, and he responded, "[I]t's in the mid-twenties, I am sure."

The trial court found that "[Edward] allegedly owes his mother approximately $20,000 to $25,000 for living expenses advanced during the pendency of this litigation which he shall pay his mother and he shall indemnify and hold [Chin] harmless thereon." Under a de novo review, when evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witness and accepted one version of the facts rather than another. *Thiltges v. Thiltges, supra*; *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995). We conclude that the trial court did not abuse its discretion in taking into account money Edward owed his mother when it divided the property and debts of the parties.

VISITATION

[16,17] Neither party assigned or argued that there was error in the visitation portion of the decree. 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. *Fiscel v. Beach*, 254 Neb. 678, 578 N.W.2d 52 (1998); *Miller v. Brunswick*, 253 Neb. 141, 571 N.W.2d 245 (1997). Plain error exists where there is an error, plainly evident

from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Fiscel v. Beach, supra*; *Miller v. Brunswick, supra.*

The trial court ordered that Edward's visitation would be increased at the discretion of the family therapist. The trial court specifically ordered:

> [Edward] shall have visitation with the minor children of the parties on every other Saturday from noon to 5:00 p.m. This time shall be extended at the recommendation of Dr. Sharon Cannon. . . .
>
> [Edward's] visitation shall increase on Saturday to eight (8) hours as determined by Dr. Cannon. [Edward] shall have standard alternate weekend overnight visitation with the three minor children upon the recommendation of Dr. Sharon Cannon.

In *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980), we held that a trial court's order placing in a psychologist the authority to effectively determine visitation and to control the extent and time of such visitation was not the intent of the law and was an unlawful delegation of the trial court's duty. We concluded that such delegation could result in the denial of proper visitation rights of the noncustodial parent. We further held:

> The responsibility of the trial court to determine questions of custody and visitation of minor children according to their best interests is an independent responsibility and cannot be controlled by the agreement or stipulation of the parties. *Lautenschlager v. Lautenschlager*, 201 Neb. 741, 272 N.W.2d 40 (1978). The reasoning in that case can be extended to third parties without violating the principle involved.

Deacon v. Deacon, 207 Neb. at 201, 297 N.W.2d at 762.

We find that the trial court wrongfully abdicated its duty by giving the therapist authority to adjust Edward's visitation, and thereby committed plain error.

CONCLUSION

The trial court erred in deviating from the guidelines and not stating the reasons for the deviation or, alternatively, in not completing a worksheet 5. The trial court also erred in not stating the amount of child support that Edward would have been required to pay under the guidelines and in not specifying the amount of child support owed by Edward when one or more of the children no longer qualified for child support. The trial court did not err in determining that the money Edward owed his mother was a marital debt. The trial court further erred in allowing Edward's visitation to be determined by a therapist.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

DEBBIE A. HAUSMAN, APPELLANT, V. GARAN J. COWEN AND HEARTFIELD STONE CONSTRUCTION GROUP, INC., A NEBRASKA CORPORATION, ALSO KNOWN AS HEARTFIELD STONE CO., APPELLEES.

601 N.W.2d 547

Filed October 15, 1999. No. S-98-333.

1. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the appellant was prejudiced by the court's refusal to give the tendered instruction, (2) the tendered instruction is a correct statement of the law, and (3) the tendered instruction is warranted by the evidence.
2. **Jury Instructions: Appeal and Error.** In reviewing a claim of prejudice from instructions given or refused, the instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal.
3. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
4. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of discretion. A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred.
5. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on

appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.

6. **Jury Instructions: Pleadings: Evidence.** Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Daniel B. Cullan and Paul W. Madgett, of Cullan & Cullan, for appellant.

Patrick G. Vipond and Raymond E. Walden, of Lamson, Dugan & Murray, for appellees.

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

MILLER-LERMAN, J.

NATURE OF CASE

The automobile of Debbie A. Hausman, appellant, was struck from behind by a van driven by Garan J. Cowen while in the course of his employment with Heartfield Stone Construction Group, Inc. (Heartfield). The van was owned by Heartfield, a Nebraska corporation. Hausman sued Cowen and Heartfield, collectively referred to as "Cowen," to recover damages for injuries Hausman alleged she sustained as a result of the collision. At trial, Hausman sought a $2,000,000 award, and the jury awarded Hausman $10,000 in damages. Hausman appeals the verdict, claiming that the trial court erroneously refused to give her proposed instruction No. 19 and erred in denying her motion for new trial. We affirm.

STATEMENT OF FACTS

On August 11, 1989, Hausman's Camaro automobile was struck from the rear by a van driven by Cowen in the course of his employment for Heartfield. The collision occurred at a stoplight at the intersection of 42d and F Streets in Omaha, Nebraska. Trial evidence conflicted regarding the force of the impact. Some witnesses testified the impact was a small bump or jolt which occurred at 2 to 3 miles per hour. In contrast, Hausman testified that Cowen's van hit her car with "tremen-

dous force." It was undisputed that the cost to repair damage to Hausman's car caused by the collision was $214.91.

Hausman did not request or receive medical care at the scene of the collision, and she continued on her way to work as a waitress at Johnny's Cafe. Three days later, she sought treatment from David Von Kerens, a chiropractor.

Hausman testified that after the accident, she suffered neck pain "like somebody was stabbing me in the neck with a stake all the time," eye pain and extreme sensitivity to light, mental "fog," and loss of memory, including loss of reading skills. Hausman also testified she experienced nausea and vomiting, facial skin discoloration, facial twitching and a sensation of tightness, nearly total loss of the use of her arms, a painful feeling that her lower back was "jammed," and depression. Medical records introduced into evidence showed that Hausman additionally complained to treatment providers that as a result of the collision, she suffered irregular menses, disrupted functioning of her thyroid gland, linguistic impairment causing her to speak backward, hair loss, dry skin, a 1-inch growth in height, and a weight gain of approximately 80 pounds. Hausman testified that her injuries were so severe and persistent that "[t]his pain just kept eating at me and eating at me, and I broke down." Hausman testified that she stopped working in August 1991 because she felt she could no longer perform the tasks required of her as a waitress and as a supermarket cashier.

During the period of August 1989 through September 1993, Hausman sought and received treatment from numerous health care professionals, including three psychologists; two chiropractors; and at least nine medical doctors, including two neurologists, two orthopedic specialists, an internist, a vascular surgeon, an otolaryngologist, and a pain-control specialist. Following commencement of litigation, at Cowen's request, Hausman was additionally examined by an orthopedic surgeon, a psychologist, and a psychiatrist. None of the treatment providers could discern an anatomical basis for the symptoms and severity of pain that Hausman described. At least three of Hausman's health care providers, and both of the mental health professionals designated by Cowen, suggested that Hausman would benefit from mental health counseling to address her

complaints. Records from many of the health care providers described unusual and dramatic behavior by Hausman, including wearing two pairs of sunglasses at the same time, exaggerated groaning during examinations, and markedly inconsistent descriptions of her physical symptoms.

Hausman continuously received chiropractic treatment from Von Kerens from August 1989 through the time of trial in January 1998, seeing him up to six times per week. In October 1993, Hausman sought care from Horst G. Blume, a neurosurgeon in Sioux City, Iowa. Blume diagnosed injury to Hausman's lumbar spine and the disks of Hausman's cervical spine, which he believed were caused by the motor vehicle collision with Cowen. By the time of trial, Blume had performed four fusion surgeries on Hausman's back. Hausman testified that she considered these surgeries essential to her recovery, stating that "[Blume] saved my life. I would have been dead."

On August 9, 1993, Hausman filed suit against Cowen in the district court for Douglas County seeking damages for injuries Hausman alleged she suffered as a result of the collision. Hausman's claims were tried to a jury January 20 through 29, 1998. She presented evidence that her special damages totaled more than $146,000, including charges by Von Kerens of $12,434.80 and charges by Blume of $67,354.75. Hausman offered expert witness testimony from Von Kerens and Blume regarding the cause and extent of her injuries. Von Kerens and Blume also testified that their charges, as well as the charges of every other health care professional whom Hausman consulted, were fair and reasonable.

Cowen denied that the damages claimed by Hausman were proximately caused by the collision and denied that the charges for Hausman's health care were fair or reasonable. At trial, Cowen presented expert witness testimony that all of the medical treatment rendered by Blume and most of the chiropractic treatment provided by Von Kerens were unnecessary and unreasonable.

Cowen presented the testimony of at least two expert witnesses that Hausman had a somatoform disorder, a condition explained in a psychiatric evaluation report authored by Terry Davis, M.D., in which "there are physical symptoms suggesting

a physical disorder, but for which no demonstrable organic cause can be found, and which appear linked to psychological factors or conflicts."

Cowen presented evidence with respect to Hausman's prior and successive injuries exclusive of this collision. There was evidence that Hausman was involved in a separate automobile accident with another motorist on January 3, 1990, after her collision with Cowen.

At trial, Hausman offered proposed instruction No. 19, which Hausman purportedly based on Restatement (Second) of Torts § 457 (1965). The proposed instruction No. 19 submitted by Hausman read as follows:

> If you find that the Plaintiff has suffered personal injury by reason of Defendants' negligence and if you find that the Plaintiff used reasonable care and diligence in securing competent physicians and surgeons for treating her injury, you may also find that the Defendants are liable for any additional harm and expense caused the Plaintiff by the negligence, mistake, or lack of skill of her attending physicians and surgeons.

The trial court refused to give this instruction, commenting: "I think as an abstract statement of the law, I think you're right, but I don't think the evidence gives rise to an inference of negligence or that the guy was mistaken or that his fusions and whatever were performed unskillfully. I'm not going to give that instruction." The trial court directed a verdict in Hausman's favor, finding Cowen negligent in causing the collision. Thus, the only issue submitted to the jury was the amount of damages to be awarded to Hausman.

In closing arguments, Hausman's counsel requested that the jury award Hausman $2,000,000. The jury rendered a general verdict awarding Hausman $10,000. Hausman timely moved for a new trial, which was denied. Hausman appeals.

ASSIGNMENTS OF ERROR

Hausman claims that the trial court erred in refusing to give the proposed jury instruction No. 19. Hausman also claims that the trial court erred in overruling her motion for new trial.

STANDARDS OF REVIEW

[1,2] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the appellant was prejudiced by the court's refusal to give the tendered instruction, (2) the tendered instruction is a correct statement of the law, and (3) the tendered instruction is warranted by the evidence. *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998). In reviewing a claim of prejudice from instructions given or refused, the instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal. *Cobb v. Sure Crop Chem. Co.*, 255 Neb. 625, 587 N.W.2d 355 (1998).

[3] On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Gallner v. Gallner, ante* p. 158, 595 N.W.2d 904 (1999).

[4] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of discretion. A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred. *Phillips v. Industrial Machine, ante* p. 256, 597 N.W.2d 377 (1999).

[5] The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Jones v. Meyer*, 256 Neb. 947, 594 N.W.2d 610 (1999).

ANALYSIS

Refusal of Proposed Jury Instruction No. 19.

In a negligence action, a plaintiff must establish a duty of the defendant not to injure the plaintiff, a breach of that duty, proximate causation, and damages. *Koltes v. Visiting Nurse Assn.*, 256 Neb. 740, 591 N.W.2d 578 (1999). On appeal, Hausman argues that at trial she met her burden of proof as to all the elements of a negligence action. In particular, she argues that she established that all of her injuries were proximately caused by the collision

with Cowen, that all of the medical treatment she received was reasonably necessary, and that all charges therefor were fair and reasonable. Hausman claims that her ability to present her claim to the jury was prejudiced by the trial court's refusal to give the jury her proposed instruction No. 19, which would have instructed jurors that if they found Hausman to have exercised reasonable diligence in securing competent medical care providers, "you may also find that the Defendants are liable for any additional harm and expense caused the Plaintiff by the negligence, mistake, or lack of skill of her attending physicians and surgeons."

Hausman claims that her proposed instruction No. 19 correctly represents the rationale of Restatement (Second) of Torts § 457 (1965). Hausman urges this court to expressly adopt § 457 as a basis for a jury instruction. Section 457 at 496 states:

> If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner.

Courts in some jurisdictions have specifically adopted § 457 to allow recovery of damages for additional bodily harm sustained in the course of medical treatment reasonably sought by a plaintiff as a result of initial injuries proximately caused by the defendant. See, e.g., *Dungan v. Ford*, 632 So. 2d 159 (Fla. App. 1994); *Edwards v. Sisler*, 691 N.E.2d 1252 (Ind. App. 1998); *Weems v. Hy-Vee Food Stores, Inc.*, 526 N.W.2d 571 (Iowa App. 1994); *Kemper National v. Smith*, 419 Pa. Super. 295, 615 A.2d 372 (1992); *Rine by and through Rine v. Irisari*, 187 W. Va. 550, 420 S.E.2d 541 (1992). Courts that have adopted § 457 have expressly determined that in order to establish a claim for damages under § 457, a plaintiff must prove that additional harm was suffered due to the negligence of health care providers, and the underlying negligence is the commencement of the causal chain. Failure of proof on either issue bars recovery under § 457. See, *Avery v. Ward*, 326 Ark. 830, 934 S.W.2d 516 (1996); *Madrid v. Safeway Stores, Inc.*, 709 P.2d 950 (Colo. App. 1985); *Gonzalez v. Leon*, 511 So. 2d 606 (Fla. App. 1987); *Ichelson v.*

Wolfe Clinic, P.C., 576 N.W.2d 308 (Iowa 1998); *Younger v. Marshall Industries, Inc.*, 618 So. 2d 866 (La. 1993); *Dauzat v. Canal Ins. Co.*, 692 So. 2d 739 (La. App. 1997); *Peters v. Ballard*, 58 Wash. App. 921, 795 P.2d 1158 (1990), *review denied* 115 Wash. 2d 1032, 803 P.2d 325.

Cowen's defense at trial and position on appeal was generally that Hausman failed to prove that her claimed injuries were proximately caused by the collision with Cowen and that in any event, she failed to prove that the damages she claimed, including charges for all her medical care, were necessary or reasonable. In particular, with respect to Hausman's proposed instruction No. 19, Cowen argues that the evidence shows that Hausman did not suffer additional harm or expense caused by the negligence, mistake, or lack of skill of Hausman's medical care providers. Thus, Cowen argues, there is no basis in the record to give Hausman's proposed instruction No. 19, an instruction based on Restatement (Second) of Torts § 457 (1965). We agree with Cowen that the evidence does not support the giving of proposed instruction No. 19.

It is readily apparent from the record that Hausman failed to establish the additional injury prerequisite to the giving of an instruction based on § 457 and that the trial court correctly refused to give proposed instruction No. 19. Hausman attributed all of her injuries and medical care necessitated thereby to the collision with Cowen, but she presented no evidence that she sustained "any additional harm" as indicated in proposed instruction No. 19 or "additional bodily harm" from any health care provider, including Von Kerens and Blume, as indicated in § 457. To the contrary, Hausman testified that she obtained beneficial relief from the chiropractic adjustments by Von Kerens and the surgical treatment provided by Blume. Hausman testified unequivocally that the surgeries performed by Blume "have been permanent improvement and not temporary improvement" and that she received treatment from Von Kerens up to six times per week because "I'd go see him, and he would adjust something and, you know, I'd get a little relief."

Consistent with Hausman's testimony, the trial court refused Hausman's proposed instruction No. 19 because the trial court

found that "I don't think the evidence gives rise to an inference of negligence or that the [health care professional] was mistaken or that his fusions and whatever were performed unskillfully." There is no evidence in the voluminous trial record to suggest that Hausman suffered "additional bodily harm" within the meaning of § 457, and accordingly, there was no evidence to support giving proposed instruction No. 19.

[6] Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence. *Everts v. Hardcopf-Bickley, ante* p. 151, 595 N.W.2d 911 (1999). This is so because instructions on matters not at issue in the litigation improperly distract the jury from its efforts to answer legitimate factual questions raised during the trial. *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997). Given the absence of proof that Hausman suffered additional harm or additional bodily harm as a result of medical care rendered to her after the collision, the trial court did not err in refusing Hausman's proposed instruction No. 19. Hausman's first assignment of error is without merit.

Denial of Motion for New Trial.

After the jury rendered its $10,000 verdict, Hausman filed a motion for new trial alleging, inter alia, "[e]rror in the assessment of the amount of recovery." On appeal, Hausman argues that it was "undisputed and uncontested" that she suffered at least a soft-tissue injury and that in awarding her only $10,000, "the jury had to disregard the undisputed evidence and the instructions on damages provided by the Court." Brief for appellant at 42.

The amount of damages to be awarded is a determination solely for the fact finder, and its findings will not be disturbed on appeal if they are supported by evidence and bear a reasonable relationship to the elements of the damages proved. *Jones v. Meyer*, 256 Neb. 947, 594 N.W.2d 610 (1999). In addition, the valuation of complaints of a subjective nature, such as those present in the instant case, is for the jury to determine. *Macholan v. Wynegar*, 245 Neb. 374, 513 N.W.2d 309 (1994). In this case, the jury was presented with a plethora of expert opinions. Those which Hausman offered supported her injury and damages

claims, while evidence introduced by Cowen disputed, inter alia, the necessity and reasonableness of Hausman's care and the charges therefor.

Our review of the trial record leads us to conclude that there is evidence therein which supports the jury's verdict. The jury, as the finder of fact in this case, was not required to accept the opinion of any expert witness as binding upon it. Determining the weight to be given expert testimony is uniquely within the province of the fact finder, and the jury, as the trier of fact, was entitled to resolve conflicts in the evidence and to determine the weight and credibility to be given to the witnesses' testimony. *Jones v. Meyer, supra.*

Hausman argues that Cowen conceded in closing arguments that Hausman could have suffered minor short-term soft-tissue strain as a result of the collision, and, therefore Hausman claims Cowen admitted the necessity and reasonableness of all of Hausman's medical care and costs. We disagree. Comments by counsel in closing arguments are not evidence. *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985). In the instant case, Cowen clearly contested the necessity of Hausman's medical care and Hausman's damages and offered experts of his own whose testimony put in doubt Hausman's claimed damages. Cowen's comment in closing argument is not an admission that Hausman was entitled to all the damages she sought.

The directed verdict regarding Cowen's negligence in causing the collision and the fact that in closing argument Cowen may have conceded that Hausman could have sustained minor temporary soft-tissue strain in the collision are not factors that relieved Hausman from her burden of proof to establish the existence and causation of her injuries, the necessity and reasonableness of the treatment she received for them, and the charges therefor. See *Jones v. Meyer, supra.*

The amount of the verdict in this case was a matter uniquely within the jury's province as the finder of fact. The verdict is supported by evidence in the record, and the trial court did not abuse its discretion in denying Hausman's motion for new trial. Hausman's second assignment of error is without merit.

CONCLUSION

We find no error committed by the trial court. The order of the trial court entered on the jury's verdict is, therefore, affirmed.

AFFIRMED.

KATHRYN M. DUELING, APPELLEE, V. ROY B. DUELING, APPELLANT.

601 N.W.2d 516

Filed October 15, 1999. No. S-98-402.

1. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification and which was not contemplated when the prior order was entered.
2. **Modification of Decree: Child Support: Rules of the Supreme Court: Presumptions: Time.** Application of the Nebraska Child Support Guidelines which would result in a variation by 10 percent or more, upward or downward, of the current child support obligation, due to financial circumstances which have lasted 3 months and can reasonably be expected to last for an additional 6 months, establishes a rebuttable presumption of a material change of circumstances.
3. **Child Support: Rules of the Supreme Court: Words and Phrases.** The Nebraska Child Support Guidelines provide that in calculating the amount of support to be paid, the court must consider the total monthly income, defined as the income of both parties derived from all sources, except all means-tested public assistance benefits and payments received for children of prior marriages.
4. **Child Support: Rules of the Supreme Court: Presumptions.** The Nebraska Child Support Guidelines are to be applied as a rebuttable presumption, and any deviation from the guidelines must take into consideration the best interests of the children.
5. ___: ___: ___. All orders for child support shall be established in accordance with the provisions of the Nebraska Child Support Guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the application of the guidelines will result in a fair and equitable child support order.
6. ___: ___: ___. Based upon the language of Neb. Rev. Stat. § 42-364.16 (Reissue 1998) and the Nebraska Child Support Guidelines promulgated pursuant thereto, it is clear that all income from employment, whether full time or part time, must be included in the initial calculation, which then becomes a rebuttable presumption of appropriate support. A parent who believes that the inclusion of certain income would be unjust or inappropriate may rebut the presumption by offering evidence in support of his or her position that a deviation from the guidelines is warranted for that reason. A determination of whether to include income from a second job should be made on a case-by-case basis, in the context of whether deviation from the guidelines by exclusion of such income is necessary to achieve a fair and equitable child support order.

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

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

Kathy Pate Knickrehm and David L. Herzog, of Herzog & Herzog, for appellee.

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

STEPHAN, J.

Roy B. Dueling appeals from an order of the district court for Douglas County that modified his child support obligation. He contends that the district court erred in considering income from his second job in making its calculations. We find no error and therefore affirm the judgment of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

Roy and Kathryn M. Dueling were married on June 9, 1978, in Omaha, Nebraska. During their marriage they had two children, born July 5, 1979, and October 10, 1984. The marriage was dissolved by a decree entered by the district court for Douglas County on January 31, 1992. The court granted custody of the minor children to Kathryn with reasonable rights of visitation to Roy. Under the decree, Roy was required to pay child support in the amount of $268.40 per month until each of the children reached majority, died, or became emancipated. He was also required to pay $165 per month, representing his share of child-care expenses.

On March 14, 1997, Roy filed an application to modify the decree by eliminating the provision requiring him to pay child-care expenses, asserting a substantial change of circumstances in that the children no longer required day-care services. Kathryn filed an answer denying this allegation and a cross-petition alleging that the original child support was "insufficient and not in conformity with the Nebraska Supreme Court Guidelines and should be modified as a matter of fact and as a matter of law." She also sought other affirmative relief not pertinent to this appeal. In his reply, Roy admitted that Kathryn was the custodial

parent but denied the remaining allegations contained in the cross-petition.

The evidence adduced at a hearing on December 23, 1997, reflects that Roy worked 40 hours per week at what he characterized as his "permanent job" with Ralston Public Schools and 24 hours per week at his "part-time job" with Oriental Trading Company. His total monthly income from both jobs was $2,338.72, of which $1,464.72 was derived from his full-time employment with Ralston Public Schools. At the time of the hearing, he had held the part-time position for approximately 6 years. The record reflects no intention or desire on Roy's part to terminate either his part-time or full-time employment. Kathryn is employed by Physicians Mutual Insurance Company on a full-time basis with gross monthly earnings of $1,248.02.

The district court modified the decree by eliminating the requirement that Roy pay the "child care expense" in the amount of $165 per month and increasing his child support obligation to $605.88 per month, with a reduction to $421.74 per month when the older child reaches majority. This child support increase was based on Roy's income from both his permanent job and his part-time job. In explaining this ruling from the bench, the court stated:

> I realize the law is somewhat different. I think the circumstances are such here that he's held a part-time job for so long that the $900 a month that he's earning, that it should be - and I am considering it - as part of his gross income for the purpose of determining child support.

Roy perfected this appeal which we transferred to our docket on our own motion.

STANDARD OF REVIEW

Modification of a dissolution decree is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999).

ASSIGNMENT OF ERROR

Roy contends, restated, that the district court erred in considering income from his part-time job in calculating his child support obligation.

ANALYSIS

[1,2] A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification and which was not contemplated when the prior order was entered. *Rauch v. Rauch, supra*; *Swenson v. Swenson*, 254 Neb. 242, 575 N.W.2d 612 (1998). Paragraph Q of the Nebraska Child Support Guidelines provides:

> Application of the child support guidelines which would result in a variation by 10 percent or more, upward or downward, of the current child support obligation, due to financial circumstances which have lasted 3 months and can reasonably be expected to last for an additional 6 months, establishes a rebuttable presumption of a material change of circumstances.

At the direction of the trial court, both parties submitted affidavits containing the basic net income and support calculations pursuant to the Nebraska Child Support Guidelines, which included the income from Roy's full-time and part-time employment. Roy's calculation reflects that his monthly share of support would be $605.88. According to Kathryn's computation, Roy's monthly share of support was $610. Roy also submitted an affidavit calculating his share of support based solely upon the income from his full-time employment, which resulted in a monthly support share of $356.72. Each of these calculations results in a monthly support amount which exceeds the original child support award by more than 10 percent, and there is evidence from which it can be inferred that the parties' financial circumstances reflected in such computations had existed for 3 months and could reasonably be expected to last for an additional 6 months. Thus, a rebuttable presumption of a material change of circumstances exists pursuant to paragraph Q of the child support guidelines.

Roy does not challenge the existence of a material change of circumstances warranting an increase in his child support obligation, but, rather, contends that the amount of the increase is excessive. Based upon our holding in *Stuczynski v. Stuczynski*, 238 Neb. 368, 471 N.W.2d 122 (1991), Roy asks that we reverse "for a calculation based upon Appellant's full-time job only." Brief for appellant at 6. In *Stuczynski*, the parties filed a petition for dissolution in July 1987 and the decree was entered November 28, 1988. The husband worked full time during the marriage and in November 1987, after the dissolution petition was filed, secured an additional, part-time position to help meet expenses incident to the separation, including employment training for his wife. The husband testified that he was tired of working 70 hours per week as required by the two jobs and did not wish to continue doing so after dissolution of the marriage.

We held:

> [A] party obligated to furnish child support is not required to undertake two separate employments when the party has one full-time job. A spouse with a full-time job, which job also furnishes substantial overtime, may not be required to work at a second job to furnish child support. If the earnings in such a second job are included in the calculation of the amount of child support due from the worker, the next result is a court requirement that the worker continue indefinitely at these two jobs to satisfy the court order.

Id. at 372, 471 N.W.2d at 125. We determined that under the facts presented, the district court abused its discretion in including income from the husband's second job in calculating his child support obligation, noting that inclusion of such income would not result in " 'a fair and equitable child support order.' " *Id.* at 373, 471 N.W.2d at 126.

[3-5] The issue we must resolve in this case is whether *Stuczynski* establishes a bright line rule that a parent's income from a second job can never be considered in calculating his or her child support obligation. We conclude that it does not, for such a rule could permit a parent who works two jobs to pay less child support than one who derives the same income from the same number of hours worked for a single employer or from self-employment. The Nebraska Child Support Guidelines provide

that in calculating the amount of support to be paid, the court must consider the "Total Monthly Income," defined as the "income of both parties derived from all sources, except all means-tested public assistance benefits and payments received for children of prior marriages." Nebraska Child Support Guidelines, paragraph D; Neb. Rev. Stat. § 42-364.16 (Reissue 1998). The guidelines are to be applied as a rebuttable presumption, and any deviation from the guidelines must take into consideration the best interests of the children. Nebraska Child Support Guidelines, paragraph C; § 42-364.16. Additionally, all orders for child support shall be established in accordance with the provisions of the guidelines "unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the application of the guidelines will result in a fair and equitable child support order." § 42-364.16. See, also, *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998). Deviations are permissible under circumstances enumerated in the guidelines, including, "whenever the application of the guidelines in an individual case would be unjust or inappropriate." Nebraska Child Support Guidelines, paragraph C(5).

[6] Based upon the language of § 42-364.16 and our child support guidelines promulgated pursuant thereto, it is clear that all income from employment, whether full time or part time, must be included in the initial calculation, which then becomes a rebuttable presumption of appropriate support. A parent who believes that the inclusion of certain income would be unjust or inappropriate may rebut the presumption by offering evidence in support of his or her position that a deviation from the guidelines is warranted for that reason. A determination of whether to include income from a second job should be made on a case-by-case basis, in the context of whether deviation from the guidelines by exclusion of such income is necessary to achieve a fair and equitable child support order. Relevant considerations include the previous history of employment, the qualifications for the second job, the extent to which the parent may be under employed in the primary job, the health of the individual, the needs of the family, the rigors of the primary job and the sec-

ond job, and all other circumstances. See *Cochran v. Cochran*, 14 Va. App. 827, 419 S.E.2d 419 (1992).

While we stated in *Stuczynski v. Stuczynski*, 238 Neb. 368, 471 N.W.2d 122 (1991), that it would be unfair to *require* a noncustodial parent to work 70 hours a week against his or her will in order to meet a child support obligation, it does not necessarily follow that when a parent freely chooses to work more than the traditional 40-hour week over an extended period of time, his or her total income should not be considered in calculating a child support obligation. In the present case, Roy made no showing that he took the second job only for a specific, limited reason. Rather, he testified that he had held the job for 5 or 6 years prior to the modification hearing. He offered no evidence or testimony to establish that the second job was burdensome or that he did not wish to continue working the number of hours necessitated by the two jobs. Because the evidence in this case does not establish that inclusion of income from both jobs would result in an unfair or inequitable child support order, the presumption that income from both jobs should be included in determining Roy's child support obligation was not rebutted.

Kathryn submitted a motion and affidavit after argument requesting an award of attorney fees pursuant to Neb. Ct. R. of Prac. 9F (rev. 1996). We hereby award the sum of $1,000 for attorney fees in this court.

CONCLUSION

The district court did not err in considering the income from Roy's part-time job, as well as his full-time employment, in calculating his child support obligation pursuant to the Nebraska Child Support Guidelines. The record contains insufficient evidence to rebut the presumption that the obligation thus determined was fair and equitable. Accordingly, we affirm the judgment of the district court and award Kathryn attorney fees of $1,000 for services performed on appeal.

AFFIRMED.

CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE, V. BERNARD J. MORELLO, APPELLANT, AND DOUGLAS COUNTY, NEBRASKA, A POLITICAL SUBDIVISION, AND JULIE M. HANEY, DOUGLAS COUNTY TREASURER, APPELLEES.

602 N.W.2d 1

Filed October 15, 1999. No. S-98-636.

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. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to hear appeals from nonfinal orders.
4. **Summary Judgment: Final Orders.** Whether a partial summary judgment is a final, appealable order depends upon its effect.
5. **Final Orders: Appeal and Error.** An order is final if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on a summary application in an action after judgment is rendered.
6. **Final Orders: Words and Phrases.** When no further action of the court is required to dispose of a pending case, the order is final.
7. **Estoppel.** The doctrine of judicial estoppel provides that inconsistent claims against different parties may be barred.

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

David A. Domina and Eric M. Johnson, of Domina Law, P.C., for appellant.

James S. Jansen, Douglas County Attorney, and Patrick T. Bloomingdale for appellees Douglas County and Julie M. Haney.

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

WRIGHT, J.

NATURE OF CASE

The district court granted partial summary judgment in favor of Douglas County and the Douglas County Treasurer, Julie M. Haney (collectively referred to as "County"), against Bernard J. Morello. The cause arose from an eminent domain proceeding that was initiated by the City of Omaha, which is not a party to this appeal. In such proceeding, the city had condemned an interest in tracts 24A and 24B (the tracts), in which both the County and Morello claimed fee simple title. The city condemned both Morello's and the County's interests, and following an award to the County by the board of appraisers, the city appealed, alleging an excessive award. Morello answered and counterclaimed that the award was inadequate. The County answered and cross-appealed against Morello, alleging that the County was the owner in fee simple of the tracts which were the subject of the condemnation by the city.

The issue presented is whether the County held the tracts in fee simple title at the time of the condemnation and was therefore entitled to the proceeds of the award. Morello appeals from the partial summary judgment in favor of the County.

SCOPE 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. *NECO, Inc. v. Larry Price & Assocs., ante* p. 323, 597 N.W.2d 602 (1999).

[2] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Hagelstein v. Swift-Eckrich, ante* p. 312, 597 N.W.2d 394 (1999).

FACTS

TAX FORECLOSURE

On June 10, 1988, the County initiated a tax foreclosure proceeding which included an action against Father Flanagan's

Boys' Home (Boys Home) for delinquent taxes on the tracts. The tax foreclosure included many parcels of real estate upon which taxes owing to the County had not been paid. The record shows that the Douglas County Treasurer offered the tracts for sale pursuant to Neb. Rev. Stat. § 77-1801 et seq. (Reissue 1986 & Cum. Supp. 1988). Numerous parcels of real estate, including the tracts, were offered but were not sold and were subject to foreclosure, as required by Neb. Rev. Stat. § 77-1918 (Reissue 1986). Subsequently, on October 24, the Boys Home executed and delivered to the County a quitclaim deed to the tracts in question. On November 10, the Douglas County District Court entered a decree of foreclosure involving various real estate in the case County of Douglas v. Gamara Chevalle Limited Partnership, et al., filed at docket 233, No. 2455, and through the County's inadvertence, the tracts were not removed from the foreclosure proceedings.

On April 19, 1989, the County recorded the quitclaim deed it had received from the Boys Home. An order of sheriff's sale was entered concerning the tracts, and on July 26, the sheriff's return to order of sale was entered, and the Land Reutilization Commission (LRC) was the highest bidder on the tracts at $206.62.

On August 30, 1991, a motion to confirm the sale was filed, and on September 12, an order confirming the sale was entered. Subsequently, a sheriff's deed was delivered to the LRC on October 1, and the LRC delivered a special warranty deed to Morello on October 30.

CONDEMNATION PROCEEDINGS

Eminent domain proceedings were initiated by the city on July 23, 1996, to condemn the interests of the County and Morello as to the tracts. The final report of the appraisers, filed on September 6, awarded $56,500 for tract 24A and $3,500 for tract 24B. The city appealed to the district court, alleging that the award was excessive. Morello counterclaimed that the award was inadequate. The County filed an answer and cross-appeal, alleging that the County was entitled to the award.

The County moved for partial summary judgment, alleging ownership of the tracts. The district court granted partial

summary judgment in favor of the County as to ownership of the tracts, and Morello appealed.

The following is a summary of the significant dates and events involved herein:

06/10/88	County filed foreclosure petition in district court (Gamara Chevalle Limited Partnership, et al. proceeding).
10/24/88	Boys Home executes and delivers to County quitclaim deed regarding tracts.
11/10/88	Decree of foreclosure entered by district court, including tracts.
04/19/89	County records quitclaim deed from Boys Home to tracts.
06/20/89	District court requested to enter order for sheriff's sale of subject property.
07/26/89	Property sold to LRC.
08/30/91	County files motion to confirm sale of subject property to LRC.
09/12/91	District court enters order confirming sale.
10/01/91	Sheriff's deed to LRC is executed and delivered.
10/30/91	Special warranty deed executed by LRC in sale to Morello.
07/23/96	City files condemnation action seeking to condemn interests of both County and Morello.
09/06/96	Final report of appraisers filed, awarding $56,500 for tract 24A and $3,500 for tract 24B.
01/16/97	Morello files answer and counterclaim.
01/21/97	County files answer and cross-appeal.
06/11/98	District court enters partial summary judgment in favor of County, finding that County remained titleholder of tracts and that "by law, Defendant Douglas County and Defendant Haney are the rightful recipients of the eminent domain proceedings for Tracts 24A and 24B."

ASSIGNMENTS OF ERROR

In summary, Morello claims that the district court erred in granting partial summary judgment to the County, therein

finding that the County held fee simple title to the tracts and that Morello did not hold fee simple title to the tracts.

ANALYSIS

[3] We briefly address the question of jurisdiction over this appeal. We must first determine whether the district court's order granting the County's motion for partial summary judgment was a final, appealable order. For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to hear appeals from nonfinal orders. *Bargmann v. Nebraska Dept. of Roads, ante* p. 766, 600 N.W.2d 797 (1999).

[4,5] Whether a partial summary judgment is a final, appealable order depends upon its effect. *Larsen v. Ralston Bank*, 236 Neb. 880, 464 N.W.2d 329 (1991). An order is final if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on a summary application in an action after judgment is rendered. *Charles Vrana & Son Constr. v. State*, 255 Neb. 845, 587 N.W.2d 543 (1998).

[6] The district court's ruling on the motion for partial judgment determined whether Morello or the County had fee simple title to the tracts. This ruling affected a substantial right of Morello and as such would dispose of the merits of the case as to Morello. When no further action of the court is required to dispose of a pending case, the order is final. *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997). Therefore, the partial summary judgment in this instance was a final, appealable order.

We next consider the effect of the conveyance of the tracts to the County by the Boys Home. The County asserts that no interest in the tracts passed to the LRC by the sheriff's deed because prior to the sale of the tracts at the foreclosure sale, the County obtained fee simple title from the Boys Home. The County's argument is premised on its claim that the district court had no jurisdiction over the County in the foreclosure proceedings because jurisdiction in a foreclosure is dependent upon the existence of delinquent taxes. The County contends that if the taxes

are no longer delinquent, there is no jurisdiction that would support the foreclosure.

The County relies upon *Mack v. Luebben*, 215 Neb. 832, 341 N.W.2d 335 (1983). There, Luebben paid the back taxes prior to sale, but a tax deed was mistakenly issued by the treasurer's office to Mack. We held that the tax deed was void and that where taxes have actually been paid at the time of sale, the defect is jurisdictional. A purchaser at a tax sale which is void because the taxes have been paid does not therefore acquire title under a void deed. *Id.*

Morello claims that the transfer of the tracts from the Boys Home to the County did not discharge the existing tax liens. He asserts that such discharge is a legal impossibility according to Neb. Rev. Stat. § 77-1737 (Reissue 1996), which provides in part: "No county or township board, city council, or village trustees shall have the power to release, discharge, remit, or commute any portion of the taxes assessed or levied against any person or property within their respective jurisdictions for any reason whatever." Morello argues that since the County failed to offer any evidence to show that the delinquent taxes were paid at the time the petition was filed or at the time the order confirming the sale of the property to the LRC was entered, the taxes remained unpaid and delinquent throughout the foreclosure proceedings. He asserts that the taxes remained delinquent until the sale was made to the LRC pursuant to Neb. Rev. Stat. § 77-3212 (Reissue 1996).

Morello also disputes the County's argument that any tax on the property was negated for the reason that the County could not owe taxes to itself. He relies upon our decision in *County of Madison v. School District No. 2*, 148 Neb. 218, 27 N.W.2d 172 (1947). The question presented in *County of Madison* was whether the tax liens on the real estate in question were discharged because the real estate had been purchased by the school district, a political subdivision. We determined that part of the lien was not discharged or extinguished and that the school district took the real estate subject to the tax liens to the same extent as would a private purchaser. We stated: "If we were to hold that the lien of the tax was dissolved and extinguished merely because the property subsequently became the property

of the school district, we would, by judicial decision, be approving in effect that which the Constitution and the statute prohibit." *Id.* at 225, 27 N.W.2d at 176.

In *County of Madison*, the school district was not the only political subdivision that was a beneficiary of the taxes involved. We held that under these circumstances, there could be no merger of the lesser estate in a greater estate. Dissolving the tax lien under those circumstances would have the effect of taking the property of one unit of government and handing it to another. Therefore, title to the property passed to the school district subject to the burden of the tax and until the tax was discharged.

The next question is whether the record discloses sufficient facts for us to determine whether the cause presently before us is controlled by our decision in *County of Madison* or is distinguishable on the facts. At oral argument, both parties agreed that the only taxes involved in the foreclosure proceeding were taxes due and owing to the County, and the record so indicates. Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *NECO, Inc. v. Larry Price & Assocs., ante* p. 323, 597 N.W.2d 602 (1999). Since the County was the only political subdivision to which the estate taxes were payable, no school district or other political subdivision had an interest in the real estate tax and the case is distinguishable from *County of Madison.*

Here, the Boys Home executed and delivered a quitclaim deed to the County on October 24, 1988. The property was foreclosed on November 10, and the deed was subsequently recorded on April 19, 1989. The quitclaim deed issued by the Boys Home was sufficient to transfer ownership of the tracts to the County.

Recording of a deed is not, in the absence of a statute, essential to its validity for the transition of title as between the parties to the deed. Recording is not necessary or essential to convey title as between the parties. Unless required by recording acts, the interest in real property is legally and effectively transferred by the delivery of a deed or other document of conveyance even

if the document is not recorded. See, 14 James H. Backman, Powell on Real Property § 82.01[3] (1999). See, also, *Kramer v. Dorsch*, 173 Neb. 869, 115 N.W.2d 457 (1962) (upon delivery, deed becomes operative where such was intention of parties); *Brooks v. Brooks*, 105 Neb. 235, 180 N.W. 41 (1920) (title under deed passes at time of delivery).

Recording acts may be called upon to protect subsequent parties who have no notice of the unrecorded instrument, but the instrument is duly enforceable between the parties who have notice to the transaction. The purpose of the recording act is to protect subsequent bona fide purchasers from unrecorded instruments, not to invalidate a transaction between the parties who entered into it. When the Boys Home executed and delivered the quitclaim deed to the County, title and ownership of the tracts passed to the County. The recording of the County's deed on April 19, 1989, gave notice to all subsequent purchasers of the County's interest in the tracts.

Having concluded that the quitclaim deed properly transferred the Boys Home's interest in the tracts to the County, we next address whether the taxes were merged in the fee simple title to the County. 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. *Hagelstein v. Swift-Eckrich, ante* p. 312, 597 N.W.2d 394 (1999). We conclude that § 77-1737 does not prevent the taxes from merging in the fee simple title on conveyance of the tracts to the County. When the tracts, with taxes owing to the County, were conveyed to the County, there was nothing more for the County to receive. Such conveyance did not result in a commutation of any portion of the taxes assessed, in violation of § 77-1737.

The facts herein are distinguishable from those in *County of Madison v. School District No. 2*, 148 Neb. 218, 27 N.W.2d 172 (1947), in which we held that there could be no merger of the lesser estate in the greater estate under circumstances where the county sought to foreclose delinquent tax liens against the school district (another political subdivision which owned and was using the property). In *County of Madison*, one portion of the taxes was due to the state, another due to the county, and

another due to the school district. Thus, our decision in *County of Madison* that the tax lien was not dissolved and extinguished when the property was acquired by the school district does not apply. Here, the County was the only beneficiary of the taxes involved.

[7] Finally, we address Morello's claim that the County is judicially estopped from asserting that the tracts could not be sold at the foreclosure sale. The doctrine of judicial estoppel provides that inconsistent claims against different parties may be barred. In *Melcher v. Bank of Madison*, 248 Neb. 793, 798, 539 N.W.2d 837, 842 (1995), we stated: "The doctrine of judicial estoppel holds that one who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding." We conclude that this assignment of error has no merit. An estoppel argument may not be raised against the County under these circumstances. The tracts, which were sold at the foreclosure sale, should not have been offered for sale. The County admits that it erroneously allowed the tracts to remain on the list of property to be sold even though it had already obtained title to the tracts. Once the County obtained title to the tracts, the deed executed under the foreclosure proceedings to the LRC was void, and the subsequent deed from the LRC to Morello was also void.

Unless otherwise permitted by statute, a county may convey its interest in real property through the procedures found at Neb. Rev. Stat. § 23-107.01 (Reissue 1997), which requires counties to declare real property to be surplus and not needed for county purposes and to declare the fair market value before allowing the real property to be sold to the highest bidder at public sale. Since the County owned the tracts in question at the time the sheriff's deed was conveyed to the LRC, the foreclosure as to the tracts was void. The fact that the foreclosure proceedings mistakenly included these tracts did not divest the County's interest in them. The County's deed to the tracts was of record prior to the sale of the property to the LRC, and the County was not estopped from asserting its interest in the eminent domain proceedings.

CONCLUSION

Having considered Morello's assignments of error and finding them to be without merit, we affirm the judgment of the district court for the reasons stated herein.

AFFIRMED.

AMERITAS LIFE INSURANCE CORP., APPELLEE, V. M. BERRI BALKA, TAX COMMISSIONER, APPELLEE, AND R.J. NUERNBERGER, LANCASTER COUNTY TREASURER, AND LANCASTER COUNTY, NEBRASKA, APPELLANTS.

601 N.W.2d 508

Filed October 15, 1999. No. S-98-648.

1. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, this court must reach an independent conclusion irrespective of the determination made by the court below.
2. ___: ___. In connection with statutory construction, in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
3. **Statutes: Taxes: Penalties and Forfeitures: Interest.** Interest imposed on an unpaid tax is a penalty. Statutes imposing penalties are to be strictly construed.
4. **Statutes: Appeal and Error.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Gary E. Lacey, Lancaster County Attorney, and Michael E. Thew for appellants.

Norman Krivosha and David M. Williams for appellee Ameritas Life Insurance Corp.

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

MILLER-LERMAN, J.

NATURE OF CASE

R. J. Nuernberger, Lancaster County treasurer, and Lancaster County, Nebraska, appeal the order of the district court for

Lancaster County dated April 30, 1998, granting the summary judgment motion of Ameritas Life Insurance Corp. (Ameritas), appellee, and entering orders thereon, in which the court concluded that the Employment and Investment Growth Act (the Act), Neb. Rev. Stat. § 77-4101 et seq. (Supp. 1987), did not provide for interest on personal property taxes recaptured under the Act and that therefore, Ameritas owed no such interest. For the reasons recited below, we affirm.

STATEMENT OF FACTS

There are no factual disputes of a material nature among the parties in this case. In 1987, the Nebraska Legislature enacted L.B. 775, the Act, the goals of which were "to encourage new businesses to relocate to Nebraska, retain existing businesses and aid in their expansion, promote the creation and retention of new jobs in Nebraska, and attract and retain investment capital in the State of Nebraska." § 77-4102(2). The Act offered prescribed economic incentives, including tax benefits to businesses that made certain levels of capital investment and created certain numbers of new jobs in Nebraska. A business wishing to receive the benefits of the Act was required to apply to the Department of Revenue, detailing in the application the proposed project. If the Department of Revenue was satisfied that the application met the Act's requirements, the Tax Commissioner, on behalf of the state, would enter into an agreement with the business, which agreement described the project, the incentives available to the business, and the conditions the business was required to meet in order to receive the benefits. § 77-4104.

On September 1, 1987, Ameritas, under its former name of Bankers Life Insurance Company of Nebraska, entered into such an agreement (the Agreement) with the Department of Revenue. The specific terms of the Agreement are not relevant to the resolution of the instant appeal. In summary, the Agreement provided, inter alia, for Ameritas to invest at least $10 million and create at least 100 new jobs, in exchange for which Ameritas would receive incentives, including a personal property tax exemption on certain personal property Ameritas acquired during the 15-year period following the execution of the Agreement.

Consistent with § 77-4107, the Agreement also provided, in subsection (10), that if Ameritas did not meet its agreed-upon levels of investment and employment, all or a portion of the personal property tax exemption would be recaptured or disallowed. Subsection (10) is silent on the payment of interest.

In November or December 1992, Ameritas, recognizing that it would not meet the agreed-upon levels of development, inquired about the possibility of paying some or all of the previously exempted personal property tax. Ameritas was told, however, that the Lancaster County treasurer would not accept any such payments unless Ameritas agreed to amend the Agreement. Ameritas did not agree to an amendment.

On August 2, 1995, the Tax Commissioner notified Ameritas and Lancaster County tax officials that Ameritas had failed to meet its obligations under the Agreement and that as a result, all of the personal property taxes which had been exempted, $246,283.62, would be recaptured. On August 25, the treasurer of Lancaster County, the county where the previously exempted personal property was located, requested Ameritas pay to the county the recaptured personal property taxes in the amount noted above, together with interest computed at the rate of 14 percent per annum as of September 8. The interest which Lancaster County claimed was due was as follows:

1988	$ 2,560.78
1989	$35,749.06
1990	$28,747.06
1992	$17,626.57
1993	$10,311.11
1994	$ 2,693.45

Although Ameritas disputed its obligation to pay interest upon the recaptured personal property taxes prior to notice of recapture, it nevertheless paid the principal amount of the recaptured personal property taxes to the Lancaster County treasurer's office. On the same day, Ameritas also posted with the Lancaster County sheriff's office a cash bond in the amount of $104,583.73, representing an amount equal to the amount of interest allegedly due by that time. Thereafter, Ameritas filed the instant declaratory judgment action, naming as parties M. Berri Balka, the then current Tax Commissioner; Nuernberger; and

Lancaster County. In its amended petition, Ameritas sought, inter alia, an order declaring that the named defendants were not entitled to retroactive interest on personal property taxes recaptured pursuant to § 77-4107.

Following the filing of cross-motions for summary judgment and an evidentiary hearing, the trial court ruled in favor of Ameritas and against Balka, Nuernberger, and Lancaster County, concluding, inter alia, that the Act did not provide for interest on recaptured personal property taxes and that recaptured personal property taxes are not "delinquent" tax payments for purposes of Neb. Rev. Stat. § 45-104.01 (Reissue 1998), which statutory section sets forth the rate of interest assessed against delinquent taxes. Ameritas' motion for summary judgment was granted, and the summary judgment motions of Balka, Nuernberger, and Lancaster County were denied and orders entered accordingly. Nuernberger and Lancaster County appealed.

ASSIGNMENTS OF ERROR

On appeal, Nuernberger and Lancaster County claim the trial court erred in concluding that (1) personal property taxes recaptured pursuant to § 77-4107 are not subject to interest and (2) such taxes are not delinquent tax payments for purposes of § 45-104.01.

STANDARDS OF REVIEW

A declaratory judgment action is the proper judicial proceeding to determine a party's rights and obligations under a particular statute. Neb. Rev. Stat. § 25-21,150 (Reissue 1995); *Hooper v. City of Lincoln*, 183 Neb. 591, 163 N.W.2d 117 (1968).

[1] To the extent that an appeal calls for statutory interpretation or presents questions of law, this court must reach an independent conclusion irrespective of the determination made by the court below. *Miller v. M.F.S. York/Stormor, ante* p. 100, 595 N.W.2d 878 (1999); *Kratochvil v. Motor Club Ins. Assn.*, 255 Neb. 977, 588 N.W.2d 565 (1999); *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999).

ANALYSIS

Initially, we note that Balka has not appealed the grant of Ameritas' motion for summary judgment or the denial of his

motion for summary judgment and has not submitted a brief in the instant appeal. In the instant appeal, Nuernberger and Lancaster County ask this court to construe provisions of Nebraska's tax statutes so as to permit the assessment of retroactive interest on personal property taxes recaptured pursuant to § 77-4107. This appeal is thus resolved on the basis of statutory construction. The dispositive question in this appeal is whether interest may be imposed on personal property taxes recaptured under § 77-4107. We conclude that interest may not be so imposed, and we, therefore, affirm.

[2] In connection with statutory construction, 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). We recently stated: "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. Woods*, 255 Neb. 755, 764, 587 N.W.2d 122, 128 (1998). In considering the meaning of a statute, this court will, if possible, discover the legislative intent from the language of the statute and give it effect. *Cass Constr. Co. v. Brennan*, 222 Neb. 69, 382 N.W.2d 313 (1986). This court will not read a statute as if open to construction as a matter of course. *Id.*

Section 77-4107 provides, in pertinent part, as follows:

> (1) If the taxpayer fails either to meet the required levels of employment or investment for the applicable project by the end of the sixth year after the end of the year the application was submitted for such project . . . all or a portion of the incentives set forth in the Employment and Investment Growth Act shall be recaptured or disallowed.
>
> (2) The recapture or disallowance shall be as follows:
>
> (a) In the case of a taxpayer who failed to meet the required levels within the required time period, all reduction in the personal property tax because of the Employment and Investment Growth Act shall be recaptured . . . .
>
> . . . .

(4) Any personal property tax that would have been due except for the exemption allowed under the Employment and Investment Growth Act, to the extent *it becomes due* under subdivision(2)(a) of this section, shall be considered an *underpayment* of such tax and *shall be immediately due and payable* to the county in which the property is located.

(5) Notwithstanding any other limitations contained in the laws of this state, collections of any taxes deemed to be underpayments by this section shall be allowed for a period of ten years after the signing of the agreement or three years after the end of the entitlement period, whichever is later.

(Emphasis supplied.)

By its terms, § 77-4107 does not provide for the assessment of interest on recaptured underpayments. Section 77-4107(5), quoted above, which discusses the time limit for collecting "taxes deemed to be underpayments [under § 77-4107(4)]," makes no mention of interest on such underpayments. The term "interest" does not appear in the Act, except in § 77-4106(e) and Neb. Rev. Stat. § 77-4108.01 (Cum. Supp. 1998), both of which provide, inter alia, that interest is not allowable on certain refunds paid to taxpayers under the Act. Neither section is relevant to the instant appeal. Section 77-4108.01 is further inapplicable for the reason that it did not become operative until April 15, 1998. With respect to statutory meaning, the Act provides that "[a]ny term shall have the same meaning as used in Chapter 77, article 27." § 77-4103(1). "Underpayment" is not defined in article 27; however, Neb. Rev. Stat. § 77-2790(3) (Reissue 1996) states that "[i]f any taxpayer fails to pay all or any part of an installment of any tax due, he or she shall be deemed to have made an underpayment . . . ."

It has long been recognized in Nebraska that interest on a tax is in the nature of a penalty. *Tukey v. Douglas County*, 133 Neb. 732, 277 N.W. 57 (1938). In *Tukey*, the plaintiff sought a declaratory judgment that a statute waiving the interest on certain delinquent taxes was unconstitutional. In our opinion affirming the trial court's decision that the statute was constitu-

tional, we discussed the distinction between interest in general and interest on taxes. We stated:

> [I]t must be borne in mind that the various impositions made by legislative authority for failure to pay taxes when due, whether designated as interest, penalties, costs, or anything else, are in fact penalties and not debts, and are in reality no part of the tax. . . . ". . . 'In passing, it may be noted that when interest is charged on a delinquent tax it is not regarded as interest in the sense that it is a consideration for the forebearance of money, but it is deemed to be a penalty; and when interest, so called, is charged, it is sustained on the theory that it is a means to insure prompt payment of the tax and it is not a part of the tax. . . .' . . ."

133 Neb. at 734-35, 277 N.W. at 58 (quoting with approval *Livesay v. DeArmond*, 131 Or. 563, 284 P. 166 (1930), quoting *Colby v. City of Medford*, 85 Or. 485, 167 P. 487 (1917)). In *Tukey*, we further stated:

> *A tax is not a debt, and, as a result, does not bear interest, in the absence of a statute.* Clearly, if the collection of interest, costs or any other penalty is dependent upon the existence of a statute, such penalties cannot be collected if the statute has been repealed or a statute enacted that waives or remits them.

(Emphasis supplied.) 133 Neb. at 737, 277 N.W. at 59. See, also, *School District of the City of Omaha v. Adams*, 147 Neb. 1060, 1063, 26 N.W.2d 24, 26 (1947) (observing that "[i]nterest does not inhere in a tax as a legal incident" and that tax does not bear interest in absence of statute).

In our analysis of this case, we find no ambiguity in the language of § 77-4107, and we hold that the Act does not impose interest on personal property taxes recaptured under the Act where, as in this case, the application and Agreement were dated prior to January 1, 1988. By its terms, § 77-4107 does not impose the assessment of retroactive interest on the recaptured underpaid amounts. Instead, when requiring the repayment of such an underpaid personal property tax when "it becomes due" under § 77-4107(2)(a), § 77-4107(4) provides, inter alia, that if the taxpayer fails to comply with the terms of the agreement, the tax that "would have been due," except for the exemption of the

Act, "shall be immediately due and payable." The Act recognizes, by its use of the phrases "it becomes due," "would have been due," and "shall be immediately due and payable," that the taxes were not, in fact, due in the past and did not become due and payable until the project fell into recapture as determined by the Tax Commissioner.

The Act does not utilize "judicial jargon, technical terminology, or words with mysterious meaning," *State v. Turner*, 218 Neb. 125, 130, 354 N.W.2d 617, 621 (1984), which make comprehension of its terms beyond the grasp of ordinary intelligence. The Act is straightforward. The Act describes the payment as becoming due now, in the present, not as having been due in the past or past due. Nothing in § 77-4107 imposes interest on recaptured personal property taxes or suggests or implies a late or delinquent payment upon which the penalty of interest could logically be assessed in the absence of clear language that interest shall be imposed.

As further support for our conclusion that § 77-4107 does not provide for the retroactive assessment of interest on recaptured personal property taxes, we note that other, earlier enacted provisions in the Nebraska statutes, when discussing the "underpayment" of taxes, do specifically provide for interest on the underpaid amount. For example, Neb. Rev. Stat. § 57-717(2) (Reissue 1984), addressing the oil and gas severance tax, states:

> If the Tax Commissioner is not satisfied with the return or returns of the tax or the amount of tax required to be paid to the state by any person, he or she may compute and determine the amount required to be paid upon the basis of the facts contained in the return or returns or upon the basis of any information within his or her possession or which may come into his or her possession. One or more deficiency determinations of the amount due for one or more than one period may be made. *To the amount of the deficiency determination for each period shall be added a penalty equal to ten per cent thereof.* In making a determination, the Tax Commissioner may offset overpayments for any period, together with interest on the overpayments, against underpayments for any period, against penalties, and *against interest on the underpayments. The interest on*

> *underpayments and overpayments shall be computed in the manner set forth in this section.*

(Emphasis supplied.) We also observe that Neb. Rev. Stat. § 77-2709(1) (Reissue 1986), concerning sales and use taxes, contains language similar to § 57-717(2) quoted above.

In determining the meaning of a statute, the applicable rule is that when the Legislature enacts a law affecting an area which is already the subject of other statutes, it is presumed that it did so with full knowledge of the preexisting legislation. *White v. State*, 248 Neb. 977, 540 N.W.2d 354 (1995). Although the Legislature provided for interest on underpaid taxes in other, earlier adopted enactments in the tax area, when it enacted the Act in question, the Legislature did not provide in § 77-4107 for the imposition of retroactive interest on underpayments. It will be presumed that the Legislature knowingly did not so provide; and even if by oversight, it is not the office of this court to legislate into existence interest on recaptured personal property taxes where none is required under the language of the Act.

[3] As we have observed, interest imposed on an unpaid tax is a penalty. Statutes imposing penalties are to be strictly construed. *Misle v. Miller*, 176 Neb. 113, 125 N.W.2d 512 (1963). We have stated: "Since a penalty statute is to be strictly construed, the courts will not interpolate conditions omitted by the Legislature or extend the language used by implication. The courts must assume that the Legislature intended to do what it did." *Bachus v. Swanson*, 179 Neb. 1, 4, 136 N.W.2d 189, 192 (1965). Faced with legislative silence in § 77-4107 regarding the imposition of interest on recaptured personal property taxes, we will not "supply that which is not there," *State v. Woods*, 255 Neb. 755, 764, 587 N.W.2d 122, 128 (1998), and we, therefore, conclude that § 77-4107 does not authorize the imposition of interest on personal property taxes recaptured under that section.

Despite the absence of authority in § 77-4107 to impose interest, Nuernberger and Lancaster County would have this court interpret § 45-104.01, which specifies the interest rates to be assessed on delinquent taxes, as requiring the imposition of interest upon the personal property tax recaptured in this case under § 77-4107. We do not agree with the interpretation of § 45-104.01 urged by Nuernberger and Lancaster County.

Section 45-104.01 provides as follows: "Unless otherwise specifically provided, the interest rate assessed on delinquent payments of any taxes or special assessments owing to any political subdivision of the State of Nebraska shall be assessed at a rate of fourteen percent per annum." This statutory provision does not mandate the assessment of interest on delinquent taxes; rather, it sets the rate at which such interest will be assessed. Further, § 45-104.01 provides for the assessment of interest upon "delinquent" taxes, and as stated above, nowhere within § 77-4107 is the recaptured tax identified as "delinquent." The recaptured tax under § 77-4107(4) is considered "immediately due and payable," thereby indicating the taxes have become presently due, are not past due, and are not delinquent.

[4] In support of the argument that interest should be imposed on the personal property tax recaptured under § 77-4107, Nuernberger and Lancaster County refer this court to portions of the Act's legislative history. In order for this court to inquire into a law's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous. *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997). In the absence of ambiguity, courts must give effect to statutes as they are written. *Id.* If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. We determine that § 77-4107 is unambiguous and that therefore, it is unnecessary to resort to the Act's legislative history as an aid to its interpretation.

As additional support for the proposition that retroactive interest can be imposed upon recaptured personal property taxes pursuant to § 77-4107, Nuernberger and Lancaster County refer this court to Revenue Ruling 29-93-1, issued by the Tax Commissioner on February 12, 1993, after the initial passage of L.B. 775 and after the Agreement was entered into on September 1, 1987. The revenue ruling provides, in summary, that personal property taxes exempted pursuant to the Act may not be paid until the taxpayer requests an amendment to the project agreement or the project has fallen into recapture. According to the revenue ruling, interest accrues on the recaptured personal property taxes from the date the taxes would have been due had they

not been exempt. Contrary to the arguments of Nuernberger and Lancaster County, we determine that this revenue ruling is neither instructive nor applicable to the instant case.

First, the meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the administrative agency. *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995) (citing *Sunrise Country Manor v. Neb. Dept. of Soc. Servs.*, 246 Neb. 726, 523 N.W.2d 499 (1994)). Second, while we agree that an administrative agency's interpretation of a statute may be helpful to this court when reaching its independent conclusion concerning the meaning of a statute, this court has long held: " 'Resort to contemporaneous construction of a statute by administrative bodies is neither necessary nor proper where the language used is clear, or its meaning can be ascertained by the use of intrinsic aids alone.' " *City of Lincoln v. First Nat. Bank*, 146 Neb. 221, 229, 19 N.W.2d 156, 160 (1945) (quoting *Miller v. Iowa-Nebraska Light & Power Co.*, 129 Neb. 757, 262 N.W. 855 (1935)). Accord *Vanous v. City of Omaha*, 148 Neb. 685, 28 N.W.2d 560 (1947). As stated above, we find no ambiguity in the statute and, therefore, no need to resort to the construction of the statute given by the Tax Commissioner. Third, Nuernberger and Lancaster County claim the revenue ruling is applicable to this case because it was issued pursuant to the Tax Commissioner's authority as contained in Neb. Rev. Stat. § 77-4111 (Cum. Supp. 1988) to "adopt and promulgate all rules and regulations necessary to carry out the purposes of the Employment and Investment Growth Act." However, § 77-4111 was added to the Act in 1988, after the date the Agreement was signed, and Neb. Rev. Stat. § 77-4112(1) (Reissue 1996) specifically provides that "[f]or all applications filed prior to January 1, 1988, the provisions of the Employment and Investment Growth Act as they existed immediately prior to such date shall apply." Thus, at the time Ameritas filed its application, the terms of the Act did not empower the Tax Commissioner to issue rules and regulations and the Act did not impose interest on personal property taxes recaptured under § 77-4107. An amendment to a statute that affects substantive rather than procedural rights has no retroactive effect. *Jackson v. Branick Indus.*, 254 Neb. 950,

581 N.W.2d 53 (1998) (stating that principle is well established that statute covering substantive matters in effect at time of occurrence governs, not later-enacted statutes). In view of the above, we do not rely on Revenue Ruling 29-93-1, nor is it applicable to the facts of this case.

CONCLUSION

We conclude that the language of § 77-4107 is unambiguous. We conclude that the provisions of neither § 77-4107 nor § 45-104.01 provide for the imposition of interest on personal property taxes recaptured pursuant to § 77-4107 in this case in which the application was filed prior to January 1, 1988, and the Agreement dated September 1, 1987.

Having considered the statutes in question in accordance with our obligation to reach an independent conclusion irrespective of that of the trial court, we affirm the trial court's order in this declaratory judgment action granting the summary judgment motion of Ameritas and entering orders accordingly.

AFFIRMED.

ANN KENNEDY ELSOME, APPELLEE, V.
PAUL T. ELSOME, APPELLANT.
601 N.W.2d 537

Filed October 15, 1999. No. S-98-730.

1. **Modification of Decree: Appeal and Error.** Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.
2. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. When evidence is in conflict, 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 over another.
3. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower court.
4. **Child Support: Taxes.** Where the evidence establishes that a self-employed parent pays self-employment taxes, such payments are available to that parent as a deduction under paragraph E of the Nebraska Child Support Guidelines.

5. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification and which was not contemplated when the prior order was entered.
6. **Modification of Decree: Divorce: Child Custody.** If trial evidence establishes a joint physical custody arrangement, courts will so construe it, regardless of how prior decrees or court orders have characterized the arrangement.
7. **Child Custody: Child Support: Proof: Appeal and Error.** Where a party proves that joint physical child custody exists, it is error for a trial court to refuse to apply a joint custody calculation to determine child support.

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

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

Anne M. Breitkreutz and Thomas J. Nack, of Hotz & Weaver, for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Paul T. Elsome appeals the order of the district court for Douglas County modifying the amount of his monthly child support obligation. For the reasons stated below, we reverse and remand with directions.

II. STATEMENT OF FACTS

Paul and his former wife, Ann Kennedy Elsome, were divorced by a decree entered March 10, 1997. All terms of the dissolution, including division of the marital estate, alimony, child custody, support, and related expenses were stipulated to by the parties, and the trial court approved the stipulation in the decree of dissolution.

Two daughters were born to Paul and Ann during their marriage. These children were approximately 7 years and 2½ years of age, respectively, when the decree was entered. The stipulation which the court approved in its decree included the parties' agreement to "joint legal custody" of both children. The

stipulation did not designate either Paul or Ann as the primary physical custodial parent of their daughters, but instead contained a detailed shared custody arrangement based upon 14-day cycles which generally provided that the children spend 4 days every week with Ann and the following 3 days every week with Paul. As a result, Paul had physical custody of the children approximately 42 percent of the time, and Ann had physical custody of the children approximately 58 percent of the time.

When the decree was entered, Paul was unemployed. To meet living expenses, the family was drawing from a $100,000 severance payment Paul had received when his job was eliminated as a result of his employer's acquisition by another business. Ann was self-employed as a consultant, earning a gross income of less than $2,000 per month. Both Paul and Ann were actively seeking full-time employment, and they stipulated that either party could pursue modification after July 1, 1997, approximately 4 months after the entry of the decree, or earlier if either party obtained full-time employment or had an increase in income.

Paul and Ann agreed in the stipulation that Paul would pay Ann $1,100 per month for child support, an amount which the parties explicitly acknowledged in the stipulation was less than Ann would have received under the Nebraska Child Support Guidelines if she had primary physical custody of both children, but more than if the joint physical custody worksheet contained in the guidelines had been used. Paul and Ann agreed that they would divide the cost of child care necessitated by their respective employment on a pro rata basis based upon each party's income. In addition, the parties agreed, inter alia, that Paul and Ann would share all costs for the children's activities and that Paul would pay for tuition and uniforms for each child to attend a Catholic school from kindergarten through the eighth grade, so long as Paul's annual gross income exceeded $100,000. The stipulation and decree contained an expressly nonmodifiable provision for alimony paid by Paul to Ann in the amount of $350 per month for 36 months.

Less than 2 weeks after the decree was entered, Ann commenced employment with First Data Resources at an annual salary of $58,000. Paul accepted a position shortly thereafter

with Interactive Medicine as an independent contractor at an annual compensation of $120,000.

Ann filed a petition to modify the decree on July 9, 1997. In her petition, she requested modification of custody designating her as the children's sole legal and physical custodian and increased child support from Paul. In his responsive pleading, Paul affirmatively alleged that he regularly had the children in his physical custody for substantial amounts of time, in accordance with the decree, and denied that a material change in circumstances had occurred to justify either a modification of custody or an increase in his child support obligation. Paul cross-petitioned to reduce his child support obligation and eliminate his alimony payments to Ann. In her answer and reply to Paul's allegations, Ann did not specifically dispute the amount of time the children were in Paul's physical custody. At the modification trial, Ann admitted that Paul correctly represented the fact of his physical custody of the children at approximately 40 percent of the time, as had been specified by the stipulation and decree.

The parties' respective motions for modification were tried on January 13, 1998. In support of her request to increase Paul's child support obligation, Ann introduced calculations into evidence based on the sole custody worksheet contained in the guidelines. Ann's worksheet did not contain copies of her tax returns to document her income as required by paragraph D of the guidelines. Ann did, however, provide the court with current pay stubs reflecting employment compensation. Ann offered no documentation regarding Paul's income. According to Ann's sole custody calculations, she and Paul had a combined net monthly income of $9,751.79. Ann argued that Paul's child support payments should be increased to $1,292.85 per month and that this amount should be in addition to preexisting obligations created in the decree for child care, school activities, and educational costs.

The child support calculations which Paul offered at trial were based on the joint custody worksheet contained in the guidelines. On his worksheet, Paul claimed that the parties' combined net monthly income was $8,741.53. Paul's child support worksheet contained no pay stubs, tax records, or other independent documentation of his income or Ann's income as

required by paragraph D of the guidelines. Paul testified that his gross receipts from Interactive Medicine were $10,000 per month as reflected on his worksheet, a figure which Ann did not dispute. Paul introduced exhibit 17 into evidence, a letter from Interactive Medicine stating that Interactive Medicine considered Paul an independent contractor and that Interactive Medicine neither paid nor contributed to the payment of any employment tax for which Paul was legally liable due to the monies Paul received from the company. Paul testified that he paid a self-employment tax, which was treated as a deduction on his child support worksheet. As an independent contractor, Paul paid an amount essentially equivalent to the entire sum of contributions required by the Federal Insurance Contributions Act (FICA). Paul asserted that his self-employment taxes were therefore substantially greater than the employee's portion of FICA would have been if Interactive Medicine treated him as an employee and contributed the employer's portion of sums due under FICA.

Trial evidence offered by Paul and by Ann regarding the amount of time each parent had the children in his or her physical custody differed only slightly from the stipulated physical custody arrangements which the trial court had approved in the original decree of dissolution in March 1997. Undisputed evidence at the modification trial established that the children were in Paul's physical custody 38 to 40 percent of the time and that they spent approximately 60 to 62 percent of their time in Ann's physical custody. Paul and Ann each testified that he or she believed the other to be a good parent.

At the conclusion of the modification trial, the trial court orally announced from the bench its findings regarding child custody and alimony and subsequently memorialized those findings as well as additional findings regarding child support in a written order filed June 15, 1998. In both its oral pronouncement and written order, the trial court denied Ann's request to modify custody of the children, leaving intact the terms of the original decree granting Paul and Ann joint legal custody of their children, with alternating physical custody. In an oral colloquy at the end of trial, as well as in its written order, the court also denied Paul's request to eliminate his alimony payments to Ann.

As to the parties' respective motions to modify child support, the trial court made no comment in its oral pronouncement. In its written order, the trial court modified the support previously ordered. Notwithstanding its determination that the parties should continue joint legal custody, the trial court relied on Ann's sole custody worksheet support calculation and determined that Paul's monthly child support obligation, according to the guidelines, was $1,292.85 per month. In its written order, the trial court stated as its sole explanation for deviation that it would reduce that amount to $950 per month "to accommodate the substantial amounts of time the children spend with Respondent [Paul]." The court's written order did not include a reason for the court's reliance on the sole custody worksheet rather than the joint custody worksheet or further elaboration on the deviation therefrom. The record does not contain a separate worksheet utilized by the trial court quantifying its means and method justifying an amount of child support or a deviation from what the court had determined was otherwise the proper amount of monthly support under the guidelines.

With respect to the FICA issue, the trial court made no comment from the bench, and the trial court's written order was also silent.

Neither the trial court's oral or written orders effected changes upon Paul's obligations for educational and activity expenses for the children, and the court also left undisturbed the provisions of the decree pertaining to division of child-care costs.

Paul appeals.

III. ASSIGNMENTS OF ERROR

Paul claims, restated, that the trial court erred in failing to deduct from his gross income the entire amount of the self-employment tax he paid as an independent contractor to arrive at Paul's net income available for child support. Paul also claims that the trial court erred in failing to utilize worksheet 3, the joint custody child support worksheet provided in the guidelines, to calculate the child support obligation in this case.

IV. STANDARD OF REVIEW

[1,2] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is

reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court. *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999). In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. When evidence is in conflict, 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 over another. *Id.*

[3] On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower court. *Gallner v. Gallner, ante* p. 158, 595 N.W.2d 904 (1999).

V. ANALYSIS

1. Deductibility of Self-Employment Taxes

Paul claims that in connection with the calculation of child support, he was entitled to a deduction from gross income for the entire amount of self-employment taxes he was obliged to pay as an independent contractor. Although the trial court did not explicitly rule on Paul's self-employment tax contention, by its adoption of Ann's calculation which did not show Paul's actual self-employment tax obligation, we understand the trial court's order to be an implicit rejection of Paul's argument.

Paragraph E of the guidelines provides, in pertinent part: "**Deductions.** The following deductions should be annualized to arrive at monthly net income: . . . 2. **FICA.** Social security deductions, or any other mandatory contributions in lieu of social security deductions." FICA contributions or a mandatory contribution in lieu of Social Security are deductible for Nebraska Child Support Guidelines purposes. The self-employment tax is for the most part in lieu of Social Security. See 33 Am. Jur. 2d *Federal Taxation* § 620 (1999). In a conventional employer-employee relationship, an employer withholds and deposits the employee's portion of the taxes, and the employer must also pay an employer's contribution in a matching amount for the benefit of the employee. See, e.g., Internal Revenue Service, U.S. Dept. of Treasury, Pub. No. 15, Circular E, Employer's Tax Guide (1999). A self-employed person is liable

for self-employment taxes in an amount roughly equivalent to the employee's and employer's contributions in a conventional employment relationship, subject to FICA. See, 26 U.S.C. § 1401 (1994); 33 Am. Jur. 2d, *supra.*

[4] Paragraph E of the guidelines provides that a FICA or Social Security payment deducted from a parent's gross monthly wages, or other mandatory contribution made in lieu thereof, should be deducted from the parent's gross monthly income in calculating net income available for child support. Neither paragraph E nor any other provision of the guidelines limits the amount of contributions which may be deducted from a parent's gross income in calculating child support pursuant to paragraph E. Accordingly, we conclude that where the evidence establishes that a self-employed parent pays self-employment taxes, such payments are available to that parent as a deduction under paragraph E.

In other jurisdictions, the cases or guidelines provide that if a parent introduces evidence that establishes that he or she has paid both the employee and employer portions of mandatory FICA contributions, other mandatory payments made in lieu thereof, or self-employment taxes, the entire sum paid by the parent may be properly deducted from gross income to arrive at net income for purposes of calculating child support. See, e.g., *Borowenski v. Borowenski*, No. CN95-10296, 1997 WL 878437 (Del. Fam. Sept. 22, 1997); *In re Marriage of Anderson*, 400 N.W.2d 84 (Iowa App. 1986); *Marriage of Gainey*, 89 Wash. App. 269, 948 P.2d 865 (1997).

[5] A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification and which was not contemplated when the prior order was entered. *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999). Evidence of a material change in circumstances warranting modification must be proved at trial and contained in the record on appeal. *Swenson v. Swenson*, 254 Neb. 242, 575 N.W.2d 612 (1998). At trial, Paul introduced exhibit 17, which established that Interactive Medicine treated Paul as an independent contractor. Paul's testimony was in accord with exhibit 17. At the time of trial, Paul had been associated with Interactive Medicine

for under a year and income tax returns for the calendar year 1997 were not yet due. Notwithstanding paragraph D of the guidelines, given the foregoing timing of relevant events, Paul adequately established that he was entitled to the self-employment tax deduction, and the trial court's implicit rejection of Paul's claim was error.

2. Trial Court's Use of Sole Custody Worksheet to Calculate Support in Joint Custody Case

In the original decree of dissolution, the trial court approved the parties' stipulation whereby Paul had physical custody of the children approximately 40 percent of the time and Ann had physical custody the remainder of the time, and the court awarded Paul and Ann "joint legal custody" of both of their children. As noted above, at trial on the parties' respective motions for modification, Paul presented uncontroverted evidence that he had physical custody of both children 38 to 40 percent of the time, and he requested that the trial court calculate child support using worksheet 3, the joint custody worksheet included in the guidelines. The trial court failed to do so and instead adopted child support figures based on Ann's sole custody worksheet and deviated therefrom, stating in the written order that the deviation was "to accommodate the substantial amounts of time the children spend with Respondent [Paul]." On appeal, Paul claims that he presented sufficient evidence to prove that he had both joint legal and joint physical custody of his children and that the trial court erred in failing to use a joint physical custody formula to calculate Paul's child support obligation. We agree.

(a) Definitions of Joint Legal Custody and Joint Physical Custody

Neb. Rev. Stat. § 42-364(5) (Reissue 1998) allows a trial court to order shared or joint custody of minor children when, inter alia, both parents agree to such an arrangement and "[i]n that event, each parent shall have equal rights to make decisions in the best interests of the minor child in his or her custody." Section 42-364(5) does not define "joint custody" as either legal or physical joint custody, nor do other Nebraska statutes.

Many, if not most, states that have defined joint custody differentiate between joint legal custody and joint physical custody. In *Pascale v. Pascale*, 140 N.J. 583, 595-96, 660 A.2d 485, 491 (1995), the New Jersey Supreme Court noted:

> In common parlance, the term "joint custody" can mean the sharing of both physical and legal custody of children, or the sharing of legal custody, but not physical or residential custody, between divorced parents. . . . Therefore, we reaffirm that "[p]roperly analyzed, joint custody is comprised of two elements—legal custody and physical custody," and find it important to break down the term "joint custody" into legal and physical custody in reviewing a court's determination of child support.

Quoting *Beck v. Beck*, 86 N.J. 480, 432 A.2d 63 (1981). See, also, *Van Driel v. Van Driel*, 525 N.W.2d 37 (S.D. 1994).

Joint legal custody has been generally defined as joint "'authority and responsibility for making "major" decisions regarding the child's welfare,'" *Pascale v. Pascale*, 140 N.J. at 596, 660 A.2d at 491. See, also, *State of Cal. ex rel. Struck v. Struck*, 526 N.W.2d 500 (S.D. 1995). In contrast, joint physical custody has been described as "joint 'responsib[ility] for "minor" day-to-day decisions' and the exertion of continuous physical custody by both parents over a child for significant periods of time." *Pascale v. Pascale*, 140 N.J. at 596, 660 A.2d at 491-92, relying on *Beck v. Beck, supra*. Some states numerically quantify, by statute or by case law, the amount of time a child spends in the custody of a parent in order to determine if there is joint physical custody. See, *Wright v. Gregorio*, 855 P.2d 772 (Alaska 1993); *Gomez v. Gomez*, 119 N.M. 755, 895 P.2d 277 (1995); *Southwell and Spettel*, 119 Or. App. 366, 851 P.2d 599 (1993); *Udy v. Udy*, 893 P.2d 1097 (Utah App. 1995); *Ewing v. Ewing*, 21 Va. App. 34, 461 S.E.2d 417 (1995); *Cranston v. Cranston*, 879 P.2d 345 (Wyo. 1994).

[6] In the instant case, the decree provided that Paul and Ann each had "joint legal custody" of both of their children, but neither party was designated primary physical custodian of the children. Ann admitted that since the entry of the decree, Paul physically had the children in his care 38 to 40 percent of the time, and she did not dispute that he provided them with all

aspects of their daily needs including shelter, clothing, food, toys, and emotional care during those periods. Other courts have held that if trial evidence establishes a joint physical custody arrangement, courts will so construe it, regardless of how prior decrees or court orders have characterized the arrangement, and we agree with this approach. See, *Tweeton v. Tweeton*, 560 N.W.2d 746 (Minn. App. 1997); *Grage and Grage*, 128 Or. App. 409, 876 P.2d 350 (1994); *State of Cal. ex rel. Struck v. Struck, supra*; *Udy v. Udy, supra*. Accordingly, on this record, we determine that Paul proved that in addition to joint legal custody, he shared joint physical custody of both children with Ann.

(b) Use of Joint Physical Custody Worksheet

Ann offered the trial court a sole custody child support calculation using worksheet 1 from the guidelines. Paul offered a joint physical custody child support calculation using worksheet 3 from the guidelines. The trial court used Ann's sole custody worksheet and found that Paul's monthly support obligation according to the sole custody guidelines should be approximately $1,292.85 per month, and reduced this monthly amount to $950.

Paragraph L of the guidelines, entitled "Joint Physical Custody," provides in its entirety as follows: "When a specific provision for joint physical custody is ordered, support may be calculated using worksheet 3." Paul claims that because he established that he shared joint physical custody of his children with Ann, the trial court erroneously failed to use worksheet 3 to calculate child support, and that the use of the joint physical custody worksheet would yield a lower child support award. In response, Ann argues that the term "may" in paragraph L indicates that use of the joint physical custody worksheet is permissive or discretionary unless such construction would be inconsistent with the manifest legislative intent. See *State ex rel. Fick v. Miller*, 255 Neb. 387, 584 N.W.2d 809 (1998).

Pursuant to paragraph A of the guidelines, the purpose of the guidelines is "to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes" and, as stated in paragraph C of the guidelines, to do so in a way that is not unjust or inappropriate.

Paragraph L, referring the court and parties to the use of worksheet 3 in cases of joint physical custody, is but one section of the guidelines. Components of a series or collection of provisions pertaining to the same subject matter which are in pari materia may be conjunctively considered so that different provisions are consistent, harmonious, and sensible. See, e.g., *Willers v. Willers*, 255 Neb. 769, 587 N.W.2d 390 (1998) (conjunctively construing statutes regarding child support). Where possible, effect should be given to all provisions of a statute or regulation. *Cox Cable of Omaha v. Nebraska Dept. of Revenue*, 254 Neb. 598, 578 N.W.2d 423 (1998). Taking all the guidelines and worksheets together, it is clear that the most appropriate worksheet to be used in a case of joint physical custody is worksheet 3, which is designed for that purpose. Accordingly, trial courts are directed to employ worksheet 3 in cases of joint physical custody unless a sound reason not to do so is established by the record, in which case the trial court shall indicate in the findings portion of the child support decree or order or on worksheet 5 the reason why worksheet 3 was not used.

[7] Courts in other jurisdictions have held that where a party proves that joint physical child custody exists, it is error for a trial court to refuse to apply a joint custody calculation to determine child support. See, e.g., *Wright v. Gregorio*, 855 P.2d 772 (Alaska 1993); *Gomez v.* Gomez, 119 N.M. 755, 895 P.2d 277 (N.M. App. 1995); *Grage and Grage*, 128 Or. App. 409, 876 P.2d 350 (1994); *Udy v. Udy*, 893 P.2d 1097 (Utah App. 1995); *Pharo v. Pharo*, 19 Va. App. 236, 450 S.E.2d 183 (1994). We agree and determine that using the joint custody worksheet, where it is justified by a proven joint physical custody arrangement, facilitates the trial court's determination of an appropriate amount of child support commensurate with each parent's income according to the guidelines. In addition, the court may still deviate from the guidelines' amount of support if trial proof demonstrates that such deviation is appropriate and supported by competent evidence. See Nebraska Child Support Guidelines, paragraph C. See, also, *DeTevis v. Aragon*, 104 N.M. 793, 727 P.2d 558 (N.M. App. 1986) (holding that joint physical custody does not necessarily imply equal division of

financial responsibility for children's welfare, particularly when financial circumstances of parents are disparate).

In this case, joint physical custody was established and the trial court rejected Ann's request to modify joint custody to sole custody awarded to her. Under these facts, it was incongruous for the trial court to use the sole custody worksheet submitted by Ann as the basis for its child support order rather than the joint custody worksheet. The trial court erred in failing to use the guidelines' joint custody worksheet 3 to calculate Paul's child support obligation. This error amounted to an abuse of discretion because, although the evidence overall is thin, given the undisputed gross incomes of the parties and the undisputed percentages of the parties' physical custody of the children, the use of the joint physical custody worksheet as compared to the sole custody worksheet would have yielded a significantly different child support order entered against Paul.

Based on the foregoing, we reverse the trial court's order modifying Paul's child support obligation and remand the cause to the trial court for a rehearing that includes the receipt of evidence to permit calculation of child support using the guidelines' joint custody worksheet. Because the best interests of the children are controlling in matters involving child support, see § 42-364 and *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991), and of necessity, there needs to be a child support order made in this case, our direction provides for the receipt of additional evidence upon remand.

Upon remand, the trial court is reminded that deviations are to be ordered with explicitness. As noted above, the trial court relied on the sole custody support worksheet proffered by Ann to determine support, did not supply its own worksheet, and deviated downward with a brief comment.

Neb. Rev. Stat. § 42-364.16 (Reissue 1998) provides that support shall be set following the guidelines unless a basis for deviation is established. See, also, *Bondi v. Bondi*, 255 Neb. 319, 586 N.W.2d 145 (1998). Paragraph C of the guidelines provides, in pertinent part:

> All orders for child support obligations shall be established in accordance with the provisions of the guidelines unless the court finds that one or both parties have produced

> sufficient evidence to rebut the presumption that the guidelines should be applied. All stipulated agreements for child support must be reviewed against the guidelines and, if a deviation exists and is approved by the court, specific findings giving the reason for the deviation *must* be made. Findings must state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines. . . . In the event of a deviation, the reason for the deviation shall be contained in the findings portion of the decree or order; or worksheet 5 should be completed by the court and filed in the court file.

(Emphasis supplied.)

In *Baratta v. Baratta*, 245 Neb. 103, 105, 511 N.W.2d 104, 105 (1994), this court stated that "it would be extremely helpful to the reviewing court if the trial judge somehow would incorporate into the record his or her worksheet which was employed in arriving at a child support amount." We observe that the absence of explanations for deviations exists both in appeals from initial dissolution decrees, see *McCall v. McCall*, 1 Neb. App. 373, 496 N.W.2d 8 (1992), and in appeals in modification cases, see *Lebrato v. Lebrato*, 3 Neb. App. 505, 529 N.W.2d 90 (1995). Recently, in *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999), we reiterated the mandate of paragraph C of the guidelines that the trial court explain in the findings portion of its order the basis for the court's deviation from the guidelines, if any, in calculating support or, alternatively, to complete and file worksheet 5. We repeat this admonition.

VI. CONCLUSION

We conclude that for child support calculation purposes a self-employed parent may deduct self-employment taxes. We further determine that the evidence in this case established that Paul and Ann share joint physical custody of their children and that the trial court erred in failing to use the joint custody worksheet. We remand the cause to the trial court for recalculation of child support consistent with this opinion and the guidelines and consistent with the evidence to be introduced at a rehearing of this matter.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. RICHARD E. LESSLEY, APPELLANT.

601 N.W.2d 521

Filed October 15, 1999. No. S-98-1004.

1. **Rules of Evidence: Appeal and Error.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
2. **Sexual Assault: Evidence: Proof.** Under the rape shield law, evidence of a complainant's prior sexual behavior is inadmissible unless it tends to prove one of the two explicitly stated exceptions, i.e., source of physical evidence or consent.
3. **Trial: Evidence.** The concept of "opening the door" is a rule of expanded relevancy which authorizes admitting evidence which otherwise would have been irrelevant in order to respond to (1) admissible evidence which generates an issue or (2) inadmissible evidence admitted by the court over objection.
4. **Trial: Evidence: Rebuttal Evidence.** The "opening the door" rule is most often applied to situations where evidence adduced or comments made by one party make otherwise irrelevant evidence highly relevant or require some response or rebuttal.
5. **Trial: Evidence.** "Opening the door" is simply a contention that competent evidence which was previously irrelevant is now relevant through the opponent's admission of other evidence on the same issue.
6. **Trial: Witnesses: Appeal and Error.** The denial of a defendant's right of confrontation is subject to harmless error analysis.
7. **Criminal Law: Trial: Juries: Appeal and Error.** In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
8. **Criminal Law: Trial: Evidence: Appeal and Error.** An erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that error was harmless beyond a reasonable doubt.

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

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

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

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

MCCORMACK, J.

NATURE OF CASE

Richard E. Lessley appeals his conviction for first degree sexual assault. Lessley challenges an evidentiary ruling which excluded him from presenting evidence of the victim's sexual past, and he challenges his sentence as being excessive. On our own motion, we removed this matter to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. We reverse the judgment and remand the cause for a new trial.

BACKGROUND

Lessley was charged with first degree sexual assault as a result of an allegation by Lessley's coworker, M.B., that Lessley subjected her to anal intercourse, without her consent, on November 23, 1997. Lessley admitted to having sex with M.B., but alleged it was consensual.

Prior to trial, Lessley motioned to present evidence of M.B.'s past sexual conduct. The trial court overruled the motion. Lessley made an offer of proof that Joseph Eck, a coworker of M.B.'s and Lessley's, would testify M.B. told Eck that she has anal intercourse with males and does so to avoid becoming pregnant.

At trial, M.B. testified that on November 23, 1997, she was employed by Wells Fargo Guard Service as a security guard and was working the 8 a.m. to 4 p.m. shift at First National Bank in Omaha, Nebraska. M.B. testified that she had been a security guard at this location for about 3 weeks. At about 3:25 p.m., M.B. was on the ninth floor of the bank building and received a radio call to come down to the first floor. M.B. went to the first floor, where Lessley asked her to take him to the ninth floor because he wanted to watch a football game before his 4 p.m. shift as a security guard began. The ninth floor could be accessed only by the use of a keycard, which M.B. had because she was still on duty and Lessley did not have because he was not yet on duty. M.B. took Lessley to the ninth floor, where they watched a football game on television. Approximately 10

minutes later, Lessley wanted to go up to the 13th floor, which also could be accessed only by a keycard. M.B. and Lessley took the elevator to the 13th floor, and M.B. used the keycard to gain access to the floor. Lessley then led M.B. into one of the offices located on that floor. M.B. went over to a window and was looking out when Lessley approached her from behind and subjected her to anal intercourse without her consent.

During the State's opening statement, the State informed the jury that M.B. is a lesbian. M.B. was asked on direct examination whether she had gotten comfortable enough with her coworkers that she would discuss intimate personal matters with them, such as sex or sexual preferences. M.B. responded that she would never talk about any of her sexual ideas or sexual preferences with her coworkers. This exchange then followed:

Q: Did they know you were a lesbian?
A: Not that I know of.
Q: Is it possible they could have known you were gay?
A: It's a possibility.
Q: You are a practicing lesbian?
A: I am a practicing lesbian.
Q: That's your lifestyle, right?
A: Yes, it is.

M.B. further testified on direct examination that the wind was knocked out of her during the encounter and that she had "never, ever engaged in anything like that." In addition, M.B. was asked if she recalled whether Lessley ejaculated during the incident, and she responded, "I would not know, sir, due to the fact I'm a lesbian and we don't do that."

On cross-examination of M.B., defense counsel asked M.B. if it was true that she told Eck she has anal intercourse with men. M.B. responded, "I do not." Defense counsel then asked, "[t]hat you do so so that you don't get pregnant?" and M.B. responded, "I did not say that." The State did not object to such questioning.

At the end of the State's case in chief, Lessley renewed his motion to present evidence of M.B.'s past sexual conduct, arguing that M.B.'s testimony that she is a lesbian shows a greater likelihood that the incident at issue was not consensual and that Lessley should be allowed to confront his accuser. Lessley also argued that because M.B. denied making any statements about

prior anal intercourse with males, he should be allowed to impeach her on that statement. The trial court overruled the motion, finding that evidence of M.B.'s past sexual behavior is immaterial and irrelevant and barred by the rape shield law, Neb. Rev. Stat. § 28-321 (Reissue 1995).

During the defense's case in chief, Lessley again made an offer of proof that Eck would testify that M.B. told him she has anal intercourse with males and that she does so to avoid becoming pregnant. Lessley argued that he should be allowed to present this testimony due to the facts that M.B. testified she is a lesbian and that she denied making the statement to Eck about having anal intercourse with males. The trial court renewed its finding excluding any evidence of M.B.'s past sexual behavior. At the completion of Lessley's evidence, Lessley again renewed the motion to present evidence of M.B.'s past sexual behavior. The trial court again overruled the motion. After the State informed the trial court that it did not have any rebuttal evidence to offer, Lessley again renewed the motion, and it was again overruled.

After a jury instruction conference, Lessley once again renewed the motion to present evidence of past sexual behavior and again made an offer of proof in support of the motion, which was overruled.

A jury found Lessley guilty of first degree sexual assault. After a presentence investigation, Lessley was sentenced to 7 to 10 years' incarceration, with credit for 270 days previously served.

STANDARD OF REVIEW

[1] In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility. *State v. Sanchez, ante* p. 291, 597 N.W.2d 361 (1999). Where, as here, the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *Id.*

ASSIGNMENTS OF ERROR

Lessley assigns that (1) the trial court erred in overruling his motion to present evidence of the victim's past sexual behavior and (2) the sentence imposed by the trial court was excessive.

ANALYSIS

Nebraska's rape shield law, § 28-321(2), provides in part that evidence of a sexual assault victim's past sexual behavior shall not be admissible unless such evidence is:

> (a) Evidence of past sexual behavior with persons other than the defendant, offered by the defendant upon the issue whether the defendant was or was not, with respect to the victim, the source of any physical evidence, including but not limited to, semen, injury, blood, saliva, and hair; or (b) evidence of past sexual behavior with the defendant when such evidence is offered by the defendant on the issue of whether the victim consented to the sexual behavior upon which the sexual assault is alleged if it is first established to the court that such activity shows such a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent.

[2] Stated briefly, the statutory purpose was to protect rape victims from grueling cross-examination concerning their previous sexual behavior, which often elicited evidence of questionable relevance to the case being tried. *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997); *State v. Schenck*, 222 Neb. 523, 384 N.W.2d 642 (1986). Under the rape shield law, evidence of a complainant's prior sexual behavior is inadmissible unless it tends to prove one of the two explicitly stated exceptions, i.e., source of physical evidence or consent. *State v. Sanchez, supra*; *State v. Earl, supra*.

It is clear that the evidence Lessley sought to present at trial does not fit within either of the two exceptions found in the statute. Although the proffered evidence did relate to past sexual behavior with persons other than Lessley, it was not offered to prove the source of any physical evidence. The second exception under the rape shield law deals with evidence of past sexual behavior with Lessley. This exception does not apply to the

proffered testimony of Eck. Lessley does not argue that the evidence fits within one of these exceptions, but, rather, contends that the evidence is admissible because its exclusion would violate his right to confrontation under the Sixth Amendment to the U.S. Constitution. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . ."

Lessley argues that M.B.'s past sexual history was not an issue raised by him, but, rather, the State raised the issue of M.B.'s homosexuality during its direct examination of M.B., thereby "opening the door." Lessley asserts that the State's reason for eliciting this testimony is clear: If the jury hears that M.B. has sexual relationships only with women, the possibility that she would consent to sex with Lessley becomes less likely. Lessley argues that once M.B. testified she is a lesbian, the State should not have been allowed to hide behind § 28-321 and claim that any rebuttal evidence is barred by that statute. Lessley argues that once the door is opened in relation to M.B.'s sexual orientation, Lessley must have an opportunity to rebut that testimony with relevant evidence.

[3-5] The concept of "opening the door" is a rule of expanded relevancy which authorizes admitting evidence which otherwise would have been irrelevant in order to respond to (1) admissible evidence which generates an issue or (2) inadmissible evidence admitted by the court over objection. *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999), citing *Clark v. State*, 332 Md. 77, 629 A.2d 1239 (1993). The rule is most often applied to situations where evidence adduced or comments made by one party make otherwise irrelevant evidence highly relevant or require some response or rebuttal. *State v. Harrold, supra*, citing *Pool v. Superior Court*, 139 Ariz. 98, 677 P.2d 261 (1984). "Opening the door" is simply a contention that competent evidence which was previously irrelevant is now relevant through the opponent's admission of other evidence on the same issue. *State v. Harrold*, 256 Neb. at 855, 593 N.W.2d at 318, quoting *Clark v. State, supra.*

Lessley relies on *People v. Murphy*, 919 P.2d 191, 195 (Colo. 1996), where the court determined that although the rape shield

statute bars evidence of a rape victim's sexual orientation and past sexual conduct, the defense may still introduce such evidence if the prosecution makes the evidence relevant by " 'opening the door' " to the evidence. In *People v. Murphy, supra*, the male defendant was charged with sexual assault for performing sadistic homosexual acts against the male victim without the victim's consent. The defendant's defense was that the encounter with the victim was consensual. At trial, the prosecutor informed the jury in his opening statement that the victim had a common-law wife and a daughter. The victim also testified to those facts and stated that his encounter with the defendant was " 'sick and abnormal.' " *Id.* at 193. When the prosecutor asked the victim why he was not aroused by the encounter with the defendant, the victim responded " 'I'm not that kind.' " *Id.*

Prior to cross-examining the victim, defense counsel moved for permission to ask the victim about his homosexual tendencies and the victim's prior sexual contact with another man, arguing that the prosecutor's opening statement and the victim's testimony had opened the door to such cross-examination. The trial court denied the defendant's motion, concluding that the issue of sexual orientation was not relevant.

Upon review by the Colorado Supreme Court, the court determined that although Colorado's rape shield statute bars evidence of a rape victim's sexual orientation and past sexual conduct, the defense may still introduce such evidence if the prosecution makes the evidence relevant by "opening the door" to the evidence. *Id.* The court ultimately concluded that the testimony concerning the victim's common-law wife and his child and statements made amounting to denials of a homosexual preference did not meet the threshold for "opening the door" to otherwise inadmissible evidence. *Id.* However, the Colorado Supreme Court's holding was based on grounds not present in the case at hand. The court's holding was based on its determination that the record reflected that the defendant was allowed to rebut any inference of heterosexuality created by the testimony, despite the trial court's refusal to admit evidence of the victim's sexual orientation as shown by his past sexual conduct. *Id.* At trial, the defendant was allowed to present an expert witness who rebutted any inference that a person who has been married is neces-

sarily heterosexual by testifying that it is not uncommon for homosexuals to be married and have children. In addition, the court determined that the defense made an insufficient offer of proof and thus did not meet the requirements of the rape shield statute. *Id.*

Another factually similar case to the one at hand is *State v. Williams*, 21 Ohio St. 3d 33, 487 N.E.2d 560 (1986), where the defendant appealed his conviction on two counts of rape, alleging that the trial court erred in finding inadmissible evidence of the victim's reputation as a prostitute and evidence of a witness' prior sexual relations with the victim.

At trial, the victim testified that she did not have sex with men because she was "gay." On cross-examination, the defense was allowed to ask the victim whether her testifying that she was gay was offered for the purpose of inferring that she would not voluntarily have sex with a male person. The victim responded that that was the intended purpose. Later during the trial, the defense presented a male witness who attempted to testify about his prior sexual relations with the victim. The State objected, and the evidence was stricken from the record. Defense counsel then proffered the testimony of the witness concerning his prior sexual activity with the victim and the victim's reputation as a prostitute.

The Supreme Court of Ohio concluded that the probative value of the proffered testimony outweighed the interest the State had in its exclusion. *Id.* The court held:

> The contested issue in this case is *consent* . . . . The victim testified on direct examination that she *never* consents to sex with men. The testimony proffered by [defendant] directly refutes this contention. [T]his evidence is submitted for more than mere impeachment of a witness' credibility. . . . [T]he proffered evidence has a more important purpose, which is to negate the implied establishment of an element of the crime charged.

Id. at 36, 487 N.E.2d at 562-63.

Lessley argues that when M.B. testified she is a lesbian, she "opened the door" in relation to her past sexual behavior, and that Lessley's right to confrontation was violated when he was not given the opportunity to rebut that testimony. This court has

not decided a case in which evidence inadmissible under § 28-321 was found to be admissible on constitutional grounds. This theory of admissibility was argued in *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997), but we did not reach the constitutional issue in that case. In *State v. Sanchez, ante* p. 291, 597 N.W.2d 361 (1999), we concluded that there may be circumstances in which the accused's constitutional right to confrontation would require admission of evidence concerning a victim's prior sexual behavior which would be inadmissible under the rape shield law. We conclude that such circumstances are present in the case at hand. The only issue in this case was whether the encounter between M.B. and Lessley was consensual. Whether intended by the State or not, M.B.'s testimony on direct examination regarding her sexual preference and experience permitted the jury to draw an inference that she did not consent to sexual relations with Lessley. The evidence proffered by the defense would have made this critical inference less probable. The trial court's exclusion of this evidence was error because it materially impaired Lessley's Sixth Amendment right to confront his accuser on the dispositive issue of consent.

[6-8] The denial of a defendant's right of confrontation is subject to harmless error analysis. *Olden v. Kentucky*, 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); *State v. Johnson*, 255 Neb. 865, 587 N.W.2d 546 (1998). In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *State v. Johnson, supra*; *State v. Buechler*, 253 Neb. 727, 572 N.W.2d 65 (1998). An erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that error was harmless beyond a reasonable doubt. *State v. Johnson, supra*; *State v. Buechler, supra.* We cannot conclude that the trial court's error was harmless beyond a reasonable doubt. The trial court's refusal to permit Lessley to present evidence of M.B.'s sexual past when the State opened the door to such testimony constituted reversible error that entitles Lessley to a new trial.

Because we are remanding for a new trial, we need not address whether Lessley's sentence was excessive.

CONCLUSION

The prosecution "opened the door" in relation to M.B.'s past sexual behavior when it elicited testimony from M.B. that she is a lesbian and had never previously engaged in the type of sexual act which she accused Lessley of committing against her will. The testimony created an inference that M.B. would not consent to anal intercourse with Lessley. Lessley's right to confrontation was violated when he was not allowed to rebut the inference that M.B.'s testimony created.

REVERSED AND REMANDED FOR A NEW TRIAL.

ROGER KNUDSEN, APPELLEE, V.
MUTUAL OF OMAHA INSURANCE CO., APPELLANT.
601 N.W.2d 725

Filed October 22, 1999. No. S-98-204.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing an order of summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. ___: ___. In reviewing an order granting a motion for summary judgment, the question is not how a factual issue is to be decided, but, instead, whether any real issue of material fact exists.
4. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
5. **Summary Judgment: Jurisdiction: Appeal and Error.** Generally, the denial of a motion for summary judgment is not a final, appealable order. However, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just.

6. **Pretrial Procedure.** Generally, the control of discovery is a matter for judicial discretion.

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

Patrick G. Vipond and Michael S. Degan, of Lamson, Dugan & Murray, for appellant.

Robert V. Broom, of Broom, Johnson & Clarkson, for appellee.

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

WRIGHT, J.

NATURE OF CASE

When Mutual of Omaha Insurance Company (Mutual) terminated disability benefits it had been paying to Roger Knudsen, he sued to obtain reinstatement of the benefits. Both parties moved for summary judgment, and the district court granted summary judgment in favor of Knudsen on the issue of liability. The court then awarded damages for past benefits to Knudsen in the amount of $52,000. On February 19, 1998, the court modified its order by awarding benefits to Knudsen so long as he continued to be disabled. Subsequently, on March 6, the court awarded Knudsen attorney fees in the amount of $18,350, and Mutual appeals.

SCOPE 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. *NECO, Inc. v. Larry Price & Assocs.*, *ante* p. 323, 597 N.W.2d 602 (1999).

[2] In reviewing an order of summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evi-

dence. *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999).

[3] In reviewing an order granting a motion for summary judgment, the question is not how a factual issue is to be decided, but, instead, whether any real issue of material fact exists. *NECO, Inc. v. Larry Price & Assocs., supra.*

FACTS

Knudsen worked for Metropolitan Utilities District (MUD), and on the date of his disability, he held the position of automotive analyst. On August 5, 1983, Knudsen was placed on disability as the result of a job-related injury he suffered to his right eye. The injury caused triple vision and severe headaches that prevented Knudsen from performing his job.

At the time Knudsen was placed on disability leave, he was insured under a group policy issued by Mutual. The policy defined the term "total disability" as follows:

> TOTAL DISABILITY — a physical or mental inability to work because of an illness or accidental injury. You are totally disabled during your first 12 months of disability only if you are unable to perform the duties of your occupation; and if you do not receive pay for performing any other job. After 12 months you are totally disabled if you are unable to perform for pay any job for which you are reasonably fitted by education, training or experience.

After the initial 12-month period, Mutual determined that Knudsen was still totally disabled within the meaning of the policy because the severity of his condition rendered him unable to perform for pay any job for which he was reasonably fitted by education, training, or experience. This determination was based upon the opinion of Dr. Jack Lewis, Knudsen's personal physician, who opined that the triple vision and constant headaches suffered by Knudsen would prevent him from almost any future employment. Mutual continued to pay Knudsen total disability benefits from 1984 through 1993. During this period, Knudsen was required to submit periodic reports from his personal physician regarding the state of his current condition and prognosis. Throughout this period, Lewis continually rated Knudsen as totally disabled with no prospect of improvement.

In 1993, Mutual referred Knudsen to Dr. Kathryn Hodges, an ophthalmologist. Hodges conducted an examination of Knudsen on September 29 and concluded that he no longer suffered from triple vision, as he had lost all vision in his right eye. Additionally, she concluded that Knudsen was not totally disabled by his vision deficit and that his condition should not prevent him from reentering the work force.

On October 15, 1993, Mutual determined that Knudsen's condition no longer met the definition of a total disability within the meaning of the policy. In furtherance of this belief, Mutual ordered an occupational assessment (OASYS) study in order to obtain a sample of occupations available to an automotive mechanic with vision limited to one eye. The OASYS study compares job qualifications with known physical impairment to find occupational matches. The OASYS study concluded that Knudsen was qualified for several occupations in the automotive field. Mutual then terminated Knudsen's benefits.

Knudsen subsequently initiated this action for reinstatement of benefits. Both parties filed motions for summary judgment, and the district court granted partial summary judgment in favor of Knudsen on the issue of liability and denied Mutual's motion for summary judgment. On February 6, 1998, the court granted Knudsen's motion for summary judgment on the issue of damages and awarded damages in the amount of $52,000 plus taxable costs and attorney fees. On February 19, the court entered an order modifying its order of February 6 to state that " 'so long as the plaintiff continues to be disabled, as previously determined by the Court, he is entitled to all applicable future benefits under the disability policy issued by the defendant.' " On March 6, the court entered an order granting Knudsen attorney fees totaling $18,350. Mutual timely appeals.

ASSIGNMENTS OF ERROR

Mutual asserts that the district court erred in (1) granting summary judgment in favor of Knudsen in light of Mutual's evidence disputing his contention that he has a total disability within the meaning of the policy; (2) not granting summary judgment in favor of Mutual, because Knudsen failed to produce sufficient evidence to meet his burden of establishing that he

was totally disabled within the meaning of the policy; (3) precluding Mutual from obtaining discovery of Knudsen's Social Security records; (4) awarding prospective damages in an action at law for breach of contract; and (5) awarding excessive attorney fees to Knudsen.

ANALYSIS

[4] We first address whether Knudsen was entitled to judgment as a matter of law. In reviewing an order of summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999). 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. *Nicholson v. General Cas. Co. of Wis.*, 255 Neb. 937, 587 N.W.2d 867 (1999).

[5] Generally, the denial of a motion for summary judgment is not a final, appealable order. However, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just. *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999). Since both parties moved for summary judgment, we review the evidence to see if we may determine the controversy or direct further proceedings.

In support of his motion for summary judgment, Knudsen offered his deposition and affidavit; the deposition of Gary Suing, an employee of MUD; and the affidavit of Lewis.

In his deposition, Knudsen stated that he no longer suffered from triple vision and that he believed he was capable of performing automotive mechanic work. He admitted that he would return to his former occupation at MUD if MUD would hire him. His former position as an automotive analyst did not require him to operate heavy equipment. Knudsen also admitted he has not

applied for any job since 1984, but that other than being blind in one eye, he is able-bodied and healthy. He regularly mows his lawn and performs routine chores around the house. He tunes up his car as needed, is able to drive without difficulty, and has taken several long-distance trips without incident.

Suing testified that Knudsen was not able to return to work as an automotive mechanic. However, it was his opinion that Knudsen was capable of performing several jobs for which he was qualified based on his education, training, or experience.

Lewis stated in his deposition that he was an internist and that he deferred to the opinions and diagnoses of an ophthalmologist when questioned regarding visual improvement. He did not disagree with the testimony contained in the affidavits of Hodges and Dr. William Schlichtemeier. The only impairment he felt might limit Knudsen was his ability to operate certain types of machinery. Lewis conceded that he had no knowledge or basis for determining which types of machinery Knudsen would be required to operate or whether he could or could not operate a particular piece of equipment. Lewis clarified that all opinions he had given regarding Knudsen's disability were directed solely to the question of whether Knudsen was capable of returning to work in his former occupation at MUD and not whether he was fit to return to any work for which he was reasonably qualified.

The evidence offered by Knudsen did not establish that he is entitled to judgment as a matter of law that he is unable to perform for pay any job for which he is reasonably fitted by education, training, or experience. Therefore, the district court erred in granting summary judgment in favor of Knudsen.

We next address Mutual's motion for summary judgment. Mutual offered the testimony of Hodges and Schlichtemeier. Hodges, an ophthalmologist, conducted an examination of Knudsen on September 29, 1993. Hodges' examination revealed that Knudsen's cataract had progressed to the extent that he was totally blind in his right eye. Because of the blindness, Knudsen no longer suffered from triple vision in that eye. Hodges determined that Knudsen's left eye had perfect vision and that Knudsen was in otherwise good health. Hodges reported that in her opinion, Knudsen was no longer totally disabled, and he was

cleared to reenter the work force with appropriate depth perception limitations. Hodges opined that Knudsen could return to certain areas in the field of automotive mechanics that did not rely heavily on depth perception.

Schlichtemeier had previously treated Knudsen, and after reviewing Knudsen's medical records and the report issued by Hodges, he concluded that since Knudsen was no longer suffering from triple vision or severe headaches, there no longer existed any physical impairment which would prevent Knudsen from returning to work. Schlichtemeier noted Knudsen was a healthy, able-bodied adult who suffered from blindness in one eye but had perfect vision in the other. Schlichtemeier testified that he had treated many single-sighted patients and was aware of several others who were employed full time in a variety of fields. He stated that after reviewing the job requirements furnished by Knudsen's former employer, it was his opinion that Knudsen would not be physically impaired from performing any of the requirements or duties of an automotive analyst as defined by MUD.

Mutual also offered evidence of an OASYS study it had conducted. The study compared Knudsen's single-sighted disability with his education and training as an automotive mechanic against a field of 1,868 occupations. The study identified 18 occupational matches for Knudsen in several different career fields, including automotive mechanics.

In reviewing an order granting a motion for summary judgment, the question is not how a factual issue is to be decided, but, instead, whether any real issue of material fact exists. *NECO, Inc. v. Larry Price & Assocs.*, *ante* p. 323, 597 N.W.2d 602 (1999).

Knudsen's work experience was limited to the field of automotive mechanics. We conclude that there exists a material question of fact whether Knudsen can perform for pay any job for which he is reasonably fitted by education, training, or experience, and therefore, the district court correctly denied Mutual's motion for summary judgment.

We next address whether the district court erred in precluding Mutual from discovering Knudsen's Social Security records. When Mutual learned that Knudsen had sought disability status

in order to obtain Social Security benefits and had been denied benefits, Mutual sought to obtain discovery of information regarding the Social Security. Knudsen was requested to produce any documents relating to his claim and to request his counsel to allow Mutual access to Knudsen's Social Security records. Knudsen objected on the ground that the request for information regarding his Social Security claim was "not relevant to the instant action and . . . not designed to lead to the discovery of relevant evidence." Mutual filed a motion to compel, and following a hearing on the matter, the court sustained Knudsen's objection on the ground that the materials were not relevant to the case.

[6] Generally, the control of discovery is a matter for judicial discretion. *State ex rel. Acme Rug Cleaner v. Likes*, 256 Neb. 34, 588 N.W.2d 783 (1999). Therefore, the question is whether the district court abused its discretion in denying Mutual access to Knudsen's Social Security records on the ground that such records were not relevant to the case.

Neb. Ct. R. of Discovery 26 (rev. 1996) controls our decision in this matter. Under rule 26(b)(1), the standard is not whether a discovery request inquires into matters which are not relevant or otherwise admissible in the trial of the matter, but whether the request is "reasonably calculated to lead to the discovery of admissible evidence." See, also, *State ex rel. Acme Rug Cleaner v. Likes, supra*. We determine that Knudsen's Social Security file may contain admissions, medical findings, or other determinations that might reasonably lead to the discovery of admissible evidence. Therefore, upon retrial of this matter, the district court shall permit Mutual to inquire into Knudsen's Social Security hearing and matters related thereto.

CONCLUSION

Having concluded that there is a material issue of fact which prevents summary judgment as a matter of law in favor of either party, we reverse the judgment of the district court, including its award of attorney fees, and remand the cause for further proceedings in accordance with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

JAMES J. STUMPF, CHAPTER 7 TRUSTEE ON BEHALF OF THE CHAPTER 7 BANKRUPTCY ESTATE OF DENNIS SELZER AND WANDA SELZER, APPELLANT, V. NINTENDO OF AMERICA, INC., AND NINTENDO CO., LTD., APPELLEES.

601 N.W.2d 735

Filed October 22, 1999. No. S-98-376.

1. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.
2. **Judges: Words and Phrases.** An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Trial: Evidence: Appeal and Error.** An appellate court gives wide latitude to the trial judge in determining the admissibility of evidence because the trial judge is in the best position to assess the impact and effect of evidence based upon what the trial judge perceives from the live proceedings of a trial, while the appellate court can review only a cold record.
4. **Evidence.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.
5. **Trial: Insurance: Motions for Mistrial.** It is not every casual or inadvertent reference to an insurance company in the course of trial that will necessitate a mistrial. Whether the disclosure is such as to constitute error depends essentially upon the facts and circumstances peculiar to the case under consideration.
6. **Evidence.** Evidence which suggests a decision on an improper basis is unfairly prejudicial.
7. **Trial: Insurance.** Any reference to insurance where its presence or absence is tangential to the facts at issue should be carefully scrutinized.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Reversed and remanded for a new trial.

Thomas A. Grennan, of Gross & Welch, P.C., for appellant.

Brian D. Nolan and Amy Sherman LaFollette, of Nolan, Roach, Olson, Fieber & Lautenbaugh, for appellees.

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

GERRARD, J.

NATURE OF CASE

This is a products liability action in which the plaintiff, James J. Stumpf, a trustee on behalf of the chapter 7 bankruptcy estate of Dennis Selzer and Wanda Selzer, sued the defendants, Nintendo of America, Inc., and Nintendo Co., Ltd. (hereinafter jointly referred to as "Nintendo"), for damage from a house fire allegedly caused by a rechargeable battery pack manufactured by Nintendo. This case presents an evidentiary issue: Did the trial court abuse its discretion in overruling Stumpf's motion in limine to exclude all references to Farm Bureau Insurance Company (Farm Bureau) and specifically by permitting one of Nintendo's witnesses, Colin Moss, to disclose that he worked for Farm Bureau? We answer this question in the affirmative and, accordingly, reverse, and remand for a new trial.

BACKGROUND

In December 1991, the Selzers purchased a Nintendo "Game Boy" video game and a Nintendo rechargeable battery pack. A fire severely damaged the Selzer home on January 10, 1992. The Selzers had an insurance policy with Farm Bureau, and on January 11, a Farm Bureau adjuster, Moss, visited the scene of the fire. Later, Moss hired Kenneth Ward to investigate the cause of the fire, and Ward hired James Belina as a consultant. The Selzers filed a products liability action, and Moss, Ward, and Belina testified at trial.

At trial, the cause of the fire was disputed. Stumpf's expert witness, Ward, opined that the Nintendo rechargeable battery pack caused the fire. Belina, another expert for Stumpf, stated that the overheating of the battery pack could have caused a fire. Nintendo's witness, Ron Liem, did not attribute the cause of the fire to the Nintendo battery pack.

Stumpf filed a motion in limine and made several arguments outside the presence of the jury to exclude any mention of the Selzers' insurance coverage through Farm Bureau. Specifically, Stumpf requested that if Nintendo called Moss as a witness, Moss should be identified only as a representative of the Selzers, not as an employee of Farm Bureau. Nintendo wanted to call

Moss to expose Moss' involvement, which had allegedly hampered the investigation, and any possible bias by Ward and Belina because of previous relationships with Moss. Although the motion in limine was overruled, the trial court did restrict the examination of Moss, stating:

> I've had a chance to review the deposition of Mr. Moss and I'm going to limit it this way, because I don't know how you can steer around that area of danger that will result in the jury getting information on payment by an insurance company, insurance coverage, so that they get that idea.
>
> So this is the limitation for when you call Mr. Moss. He can be called to the stand. You can ask who he's employed by and how long. You can ask did he hire Mr. Kenneth Ward, ask him when he was hired or — when he was hired to do the investigation. You can ask did he hire Mr. Belina, and when that was. You can ask him when he first had notice of any loss by the Selzers for the fire. You can ask how many times he's hired Mr. Ward, and in the deposition it says one time. You can ask him, to his knowledge, how many times that he knows he's been hired by Farm Bureau at any other times, because he indicated that other persons have hired him.
>
> . . . You can go into that, that's about the extent, so that you don't get in the area other than hiring the person, how many times he has, and why he waited. So if you keep those in line, well, then you'll steer clear of any error that will cause this to mistrial.

Under these restrictions, Moss testified, in relevant part, as follows:

> Q. Would you state your name for the record, please?
>
> A. Colin Moss.
>
> Q. Mr. Moss, where are you employed?
>
> A. I work for Farm Bureau Insurance Company of Nebraska.
>
> Q. And how long have you been employed there?
>
> A. Eighteen years.
>
> Q. When was your first notice as to this occurrence?
>
> A. The morning after the fire, that Saturday morning.

Q. And, subsequently, did you hire a Mr. Ken Ward?

A. Yes, I did.

Q. And did you hire Mr. Belina?

A. Not directly, but I approved Mr. Ward's hiring of him, yes.

Q. And had you hired either of these gentlemen in the past?

A. Mr. Ward had worked on one arson fire for me previously, yes.

Q. Okay. Now, when you said you were first aware of it, on what date?

A. It would be the Saturday morning after. The fire was on Friday evening, January whatever. January 11th.

Q. And you were on the site or on the premises at that time, weren't you?

A. Well, when — my first knowledge of it, no. I was the agent who came to it.

Pursuant to the jury verdict, a judgment was entered in favor of Nintendo and against Stumpf. It is from this judgment that Stumpf appeals.

STANDARD OF REVIEW

[1,2] The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *Deuth v. Ratigan*, 256 Neb. 419, 590 N.W.2d 366 (1999). An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *State v. Krutilek*, 254 Neb. 11, 573 N.W.2d 771 (1998); *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997).

ASSIGNMENT OF ERROR

Stumpf's sole assignment of error is that the trial court abused its discretion in denying his motions to exclude evidence that Moss was affiliated with Farm Bureau from which the jury could infer that the Selzers were compensated for their loss by insurance.

ANALYSIS

[3] As a general rule, we give wide latitude to the trial judge in determining the admissibility of evidence because he or she is in the best position to address the impact and effect of evidence based upon what the trial judge perceives from the live proceedings of a trial, while we can review only a cold record. See *State v. Dixon*, 240 Neb. 454, 482 N.W.2d 573 (1992). Nonetheless, in the instant cause, we are called upon to decide whether the district court abused its discretion when the court determined that the probative value of disclosing Moss' employment with Farm Bureau was not substantially outweighed by the prejudicial effect of injecting insurance into the proceeding.

[4,5] Neb. Rev. Stat. § 27-403 (Reissue 1995) provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Clearly, not every mention of insurance is inadmissible or unfairly prejudicial. "It is not every casual or inadvertent reference to an insurance company in the course of trial that will necessitate a mistrial. Whether the disclosure is such as to constitute error depends essentially upon the facts and circumstances peculiar to the case under consideration." 21B John Alan Appleman & Jean Appleman, Insurance Law and Practice § 12834 at 471-73 (1980).

[6,7] Evidence, however, which suggests a decision on an improper basis is unfairly prejudicial. *State v. Perrigo*, 244 Neb. 990, 510 N.W.2d 304 (1994). The prejudice that potentially resulted from disclosing Moss' employment with Farm Bureau is that the jury was at least inferentially informed that the Selzers' losses were covered by insurance. As noted in 21B Appleman & Appleman, *supra*, § 12841 at 573-79:

> Generally the fact that one or more of the litigants is insured is inadmissible. Accordingly, the fact that the plaintiff has insurance of any type, which might be beneficial to him, is irrelevant. Such insurance generally does not adhere to the benefit of the tortfeasor.
>
> Where a suit is brought in the name of an individual to recover for the destruction of property, evidence has been

> held inadmissible to show that the plaintiff had been indemnified for such loss by some insurance company, even though, in fact, the present proceeding is by way of subrogation for the benefit of the company which so indemnified him . . . .

While we recognize that property insurance rather than liability insurance is at issue in this cause, any reference to insurance where its presence or absence is tangential to the facts at issue should be carefully scrutinized. See, e.g., *Delicious Foods Co. v. Millard Warehouse*, 244 Neb. 449, 507 N.W.2d 631 (1993); *Patterson v. Swarr, May, Smith & Anderson*, 238 Neb. 911, 473 N.W.2d 94 (1991); *Kresha v. Kresha*, 216 Neb. 377, 344 N.W.2d 906 (1984); *Motis v. Manning*, 200 Neb. 593, 264 N.W.2d 844 (1978).

In *Patterson v. Swarr, May, Smith & Anderson*, 238 Neb. at 917, 473 N.W.2d at 99, a legal malpractice action, an attorney's admission was received into evidence that the attorney had " 'really screwed this thing up. . . . Sue the "h" out of us and we got insurance and get yourself a lawyer.' " The trial court overruled the defendants' motion for mistrial, judgment was entered, and the defendants' motion for a new trial was sustained because of the reference to insurance. We considered the prejudicial effect of the reference to insurance under a Neb. Rev. Stat. § 27-411 (Reissue 1995) analysis and concluded that the trial court did not err in granting a new trial. Importantly, we noted that the reference to insurance added nothing to the admission:

> Severing the statement that the defendants had insurance, [the attorney's] statement reads: "Ron, we have really screwed this thing up. . . . Sue the 'h' out of us . . . and get yourself a lawyer." The fact that the defendants had insurance adds nothing to [the attorney's] admission of fault. Therefore, its only purpose was to inject into the trial the prejudicial fact that the defendants had insurance.

238 Neb. at 918, 473 N.W.2d at 99.

Similarly, the fact that Moss worked for Farm Bureau has little or no probative value but much prejudicial effect under a § 27-403 analysis. Nintendo argues that its primary purpose in calling Moss was to show agency (that Moss was working on behalf of the Selzers), control (that Moss, as the Selzers' agent,

had control of the fire scene), and bias or prejudice (of the Selzers' expert witnesses, who were working specifically upon the orders of Moss for the Selzers' benefit). The evidence presented at trial, however, is of little probative value on the primary issues of bias and control, to wit:

Q. Would you state your name for the record, please?

A. Colin Moss.

Q. Mr. Moss, where are you employed?

A. I work for Farm Bureau Insurance Company of Nebraska.

Q. And how long have you been employed there?

A. Eighteen years.

Q. When was your first notice as to this occurrence?

A. The morning after the fire, that Saturday morning.

Q. And, subsequently, did you hire a Mr. Ken Ward?

A. Yes, I did.

Q. And did you hire Mr. Belina?

A. Not directly, but I approved Mr. Ward's hiring of him, yes.

Q. And had you hired either of these gentlemen in the past?

A. Mr. Ward had worked on one arson fire for me previously, yes.

Moreover, Nintendo's purported purpose to show Moss' control or the expert witnesses' alleged bias could easily have been accomplished without reference to insurance. As Stumpf suggested in his argument at the motion in limine hearing, this purpose could have been achieved by merely indicating that Moss was Selzers' representative and that Ward had been hired by Moss one prior time.

The case of *Foulk v. Kotz*, 138 Ariz. 159, 673 P.2d 799 (Ariz. App. 1983), provides an excellent example of how a party may reveal potential bias without injecting the prejudicial fact that one of the parties had insurance coverage. In *Foulk v. Kotz*, the trial court restricted the plaintiffs' cross-examination of a defense witness, an insurance adjuster. The witness-adjuster had taken a statement of Foulk's in which Foulk acknowledged he may have caused his own injury. The plaintiffs alleged the restriction on cross-examination to be error. In a pretrial ruling,

the trial court disallowed any questions regarding the witness' affiliation with insurance, but did allow him to be referred to as a "representative of the defense" who was hired by the defendants to investigate the plaintiffs' claim. *Id.* The Arizona Court of Appeals held, "The trial court properly concluded that the probative value of evidence of insurance was substantially outweighed by the danger of unfair prejudice. As the [plaintiffs] argue, the fact that he was employed by the [plaintiffs] permitted the [defendants] to argue the credibility of the witness Winn." *Id.* at 161, 673 P.2d at 801.

Likewise, in the instant case, Moss' alleged control or the expert witnesses' potential bias could have been exposed without injecting the factor of insurance had the trial judge restricted counsel to referring to Moss as the Selzers' representative rather than as an employee of Farm Bureau. After a review of the record, we can conclude only that the minimal probative value of Moss' testimony was substantially outweighed by the unnecessary prejudice injected into this trial by the reference to Farm Bureau. The reference to insurance was neither casual nor inadvertent in this matter. There is a substantial risk that once the jury learned that the Selzers' loss was likely covered by property insurance, the jury decided the issue of Nintendo's liability on the improper basis that the Selzers themselves suffered no great damage. See *Delicious Foods Co. v. Millard Warehouse*, 244 Neb. 449, 507 N.W.2d 631 (1993). Thus, we determine that the trial court abused its discretion in failing to exclude evidence that Moss was affiliated with Farm Bureau and that this error prejudiced Stumpf's right to a fair trial.

CONCLUSION

For the foregoing reasons, we conclude that the district court abused its discretion in permitting Moss to disclose his employment with Farm Bureau and that this disclosure prejudiced Stumpf's right to a fair trial. We, therefore, reverse the judgment and remand this cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

VICKIE J. SPULAK, NOW KNOWN AS VICKIE J. MAW, DOING BUSINESS AS BROADWAY CAFE & LOUNGE, APPELLANT, V. TOWER INSURANCE COMPANY, INC., A WISCONSIN CORPORATION, APPELLEE.

601 N.W.2d 720

Filed October 22, 1999. No. S-98-513.

1. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **Insurance: Contracts: Pleadings.** Generally, exclusions in insurance policies are treated as affirmative defenses and therefore must be specifically pled.
3. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independent of the determination made by the lower court.
4. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded for a new trial.

Daniel R. Fridrich and Denzel R. Busick, of Luebs, Leininger, Smith, Busick, Johnson, Baack, Placzek & Steele, for appellant.

Anne K. Burnett, Betty L. Egan, and J. Joseph McQuillan, of Walentine, O'Toole, McQuillan & Gordon, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Vickie J. Spulak, now known as Vickie J. Maw (Maw), doing business as Broadway Cafe & Lounge (Cafe & Lounge), sued Tower Insurance Company, Inc. (Tower), for breach of an insurance contract. Maw alleged that Tower breached the contract by refusing to pay for damages arising out of a fire that occurred at the Cafe & Lounge on January 16, 1991. Tower alleged that the fire was intentionally set by Maw's ex-husband, Frank Spulak (Spulak), and that Spulak was Maw's partner or agent in the operation of the business or a person to whom the property was

entrusted. After trial, the jury returned a verdict generally in favor of Tower and against Maw.

SCOPE OF REVIEW

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

FACTS

From the fall or early winter of 1989 until January 1991, Maw and Spulak operated the Cafe & Lounge in Fullerton, Nebraska. During that time, Maw and Tower entered into a multiperil insurance contract that covered the Cafe & Lounge against loss by fire. On January 16, 1991, a fire occurred at the Cafe & Lounge and caused extensive damage to the property.

Maw filed a proof of loss with Tower and made a claim for damages. Tower denied the claim on various grounds, including that (1) Tower believed Spulak intentionally set fire to the building and (2) because Spulak was a partner or agent in the business or one to whom the insured property was entrusted, coverage was excluded under the terms of the policy. In response, Maw alleged that the policy contained exclusions that were not permitted by law.

The cause was tried to a jury in September 1994, and the jury returned a verdict in favor of Tower. Maw appealed, arguing that the district court erred when it failed to sustain a demurrer ore tenus made by Maw on the first day of trial. The basis for the demurrer was that the policy exclusion relied upon by Tower as an affirmative defense was not valid because it did not conform to the 1943 Standard Fire Insurance Policy of the State of New York (1943 New York fire policy) or was not otherwise approved by the director of the Nebraska Department of Insurance. We reversed the judgment because there was no evidence that the policy provision in question had been approved by the Director of Insurance and thus the demurrer ore tenus should have been sustained. See *Spulak v. Tower Ins. Co.*, 251 Neb. 784, 559 N.W.2d 197 (1997).

On remand, both Maw and Tower moved for summary judgment on the issue of whether the Director of Insurance had approved the exclusion relied upon by Tower. The district court overruled Maw's motion and sustained Tower's motion for summary judgment.

The exclusion language in question, which the district court referred to as "form CP 10 30 07 88," provides at exclusion B(2):

> We will not pay for loss or damage caused by or resulting from any of the following:
>
> . . . .
>
> h. Dishonest or criminal act by you, any of your partners, employees, directors, trustees, authorized representatives or anyone to whom you entrust the property for any purpose:
>
> (1) Acting alone or in collusion with others; or
>
> (2) Whether or not occurring during the hours of employment.
>
> This exclusion does not apply to acts of destruction by your employees; but theft by employees is not covered.

The district court found that on July 14, 1988, the Director of Insurance approved the language of form CP 10 30 07 88; that this language was in effect for policies issued on or after November 1, 1988; and that Insurance Services Office, Inc. (ISO), was authorized to file the amendment to the policy on behalf of Tower.

The district court determined there were no genuine issues of material fact with respect to approval of the policy language in question and that such language was applicable to the parties. Thus, the district court overruled Maw's motion for summary judgment, sustained Tower's motion for summary judgment in part in accordance with the above findings, and overruled Maw's demurrer ore tenus.

On September 29, 1997, Maw filed a second motion for summary judgment, claiming the insurance contract was ambiguous. The district court overruled Maw's motion, concluding that there were no inconsistent exclusions within the language of the policy and that the policy was not ambiguous. At trial, Maw's motion for a directed verdict was overruled, the matter was

submitted, and the jury entered a verdict in favor of Tower on February 18, 1998. Maw filed a motion for judgment notwithstanding the verdict or, in the alternative, motion for new trial, which was also overruled, and Maw timely appealed.

ASSIGNMENTS OF ERROR

Maw asserts that the district court erred in (1) sustaining Tower's motion for summary judgment and overruling her motion for summary judgment by holding that the B(2)(h) exclusion in Tower's fire insurance policy, form CP 10 30 07 88, had lawfully been approved by the Director of Insurance; (2) overruling Maw's motion for summary judgment asking the court to find that Tower's insurance policy was ambiguous; (3) sustaining Tower's oral motion in limine, which prevented Maw's counsel from commenting in closing arguments about an applicable exclusion in Tower's insurance policy; (4) failing to instruct the jury that it could find that Spulak was an employee of the Cafe & Lounge; (5) overruling Maw's motion for directed verdict made at the close of Tower's case in chief and renewed at the close of Maw's rebuttal evidence; and (6) overruling Maw's motion for judgment notwithstanding the verdict or, in the alternative, motion for new trial.

ANALYSIS

We first address Maw's claim that the district court erred in finding that the exclusion in Tower's policy, form CP 10 30 07 88, had lawfully been approved by the Director of Insurance. This issue presents a question of law. On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Hittle, ante* p. 344, 598 N.W.2d 20 (1999).

In summary, Maw's position is that (1) the Director of Insurance had no statutory authority to approve the exclusion on July 14, 1988, and (2) ISO, which filed the form on behalf of Tower, was not statutorily authorized to do so. Tower argues that Maw failed to raise this defense in her pleadings and that therefore we should not address this issue.

[2] Generally, exclusions in insurance policies are treated as affirmative defenses and therefore must be specifically pled.

Kansas-Nebraska Nat. Gas Co., Inc. v. Hawkeye-Security Ins. Co., 195 Neb. 658, 240 N.W.2d 28 (1976). In *Spulak v. Tower Ins. Co.*, 251 Neb. 784, 559 N.W.2d 197 (1997), we stated that the insurer bears the burden of establishing as an affirmative defense that an event falls within an exclusionary clause. When Maw asserted that the exclusion in form CP 10 30 07 88 failed to comply with Neb. Rev. Stat. § 44-501 (Reissue 1998), Tower had the burden to establish that the exclusion in form CP 10 30 07 88 was approved by the Director of Insurance. *Spulak, supra.* Maw's reply, which denied Tower's allegation that the exclusion had been approved, placed the matter at issue, and therefore, the matter is properly before us.

Section 44-501(11) provides: "The Director of Insurance may approve any form of policy with variations in terms and conditions from the standard policy provided for in this section." Maw asserts that the district court erred in relying upon § 44-501(11) because § 44-501(11), which became effective August 25, 1989, did not apply retroactively and that therefore the Director of Insurance did not have statutory authority to approve the exclusion on July 14, 1988.

[3] The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independent of the determination made by the lower court. *Allied Mut. Ins. Co. v. Action Elec. Co.*, 256 Neb. 691, 593 N.W.2d 275 (1999). The district court erred in concluding that the Director of Insurance had statutory authority to approve the provisions of form CP 10 30 07 88. Section 44-501(11) was not in effect at the time the Director of Insurance purported to approve the amendment to the policy in 1988, and we decline to hold that the director's purported approval in 1988 became valid when § 44-501(11) went into effect on August 25, 1989.

Tower argues that § 44-501(6) (Reissue 1988) was the fundamental equivalent of § 44-501(11) because the Director of Insurance could approve changes in the policy under this section. Maw asserts that § 44-501(6) did not give the Director of Insurance authority to approve insurance policies and forms on July 14, 1988. Maw contends that § 44-501(6) did not allow the Director of Insurance to approve forms which varied from the

terms of the 1943 New York fire policy because the director was allowed to approve forms that had " 'an unspecified basis as to coverage' " or provided " 'for an indivisible premium' " only. Brief for appellant at 21. Maw claims that since the exclusion was more restrictive of coverage, it did not meet the requirement of § 44-501(6) that the policy be the substantial equivalent of the minimum provisions of the 1943 New York fire policy.

The applicable version of § 44-501(6) provided:

> The Director of Insurance may approve any form of policy which includes . . . coverage against the peril of fire and substantial coverage against other perils, without complying with the provisions of this section; *Provided,* such policy with respect to the peril of fire includes provisions which are the substantial equivalent of the minimum provisions of the standard policy herein provided for; *and provided further,* the policy is complete as to all its terms without reference to any other document.

In relying upon § 44-501(6), the district court concluded that the Director of Insurance had authority prior to 1989 to approve such policy variations.

[4] 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. *Allied Mut. Ins. Co. v. Action Elec. Co., supra.* Section 44-501(6) permitted the Director of Insurance to approve those policies which were the "substantial equivalent of the minimum provisions of the standard policy [1943 New York fire policy]."

Prior to the adoption of form CP 10 30 07 88, the existing 1943 New York fire policy stated as to exclusions: "[T]his Company shall not be liable for loss occurring (a) while the hazard is increased by any means within the control or knowledge of the insured . . . ." In *Keene Coop. Grain & Supply Co. v. Farmers Union Ind. Mut. Ins. Co.*, 177 Neb. 287, 294, 128 N.W.2d 773, 779 (1964), we stated that "[a] provision in a fire insurance policy against an increase in hazard is generally considered to relate to a change in the use of the property and not to prohibit the making of necessary repairs to the property." The exclusion relied upon by the insurance company was the same

as the one found in the 1943 New York fire policy. In *Keene Coop. Grain & Supply Co.*, we considered whether the plaintiff increased the risk in violation of the policy by making repairs to a grain storage tank.

In *Webster Enterprises, Inc. v. Selective Insurance Co.*, 125 N.C. App. 36, 479 S.E.2d 243 (1997), the defendant insurance company relied upon this precise exclusion in an attempt to deny coverage to the plaintiff. In determining whether the exclusion was applicable, the court noted that the phrase "increase of hazard," with respect to the fire insurer's coverage defense, denoted a change in circumstances existing at the inception of the policy. More specifically, it encompassed only new uses which would increase a risk or hazard insured against, and not a continuation of former or customary use or change in risk without increase of hazard. It contemplated an alteration which would materially and substantially enhance the hazard.

In *Majtan v. Madison Mut. Ins. Co.*, 249 A.D.2d 867, 672 N.Y.S.2d 458, 459 (1998), while interpreting the same policy exclusion, the court stated: "An increase in the hazard insured against 'takes place when a new use is made of the property, or when its physical condition is changed from that which existed when the policy was written, and the new use or changed condition increases the risk assumed by the company.' " The court found that abandonment and disrepair were factors which could increase the hazard.

Thus, in *Keene Coop. Grain & Supply Co.*, we interpreted the provision " 'while the hazard is increased by any means within the control or knowledge of the insured' " to relate to a change in the use of the property. *Id.* at 294, 128 N.W.2d at 779. Such interpretation is in accord with other jurisdictions which have considered this provision of the 1943 New York fire policy relating to the phrase "hazard is increased."

When form CP 10 30 07 88 was added to the policy, it created an exclusion to coverage based upon dishonest or criminal acts by the insured or any of the insured's partners, employees, directors, trustees, authorized representatives, or anyone to whom the insured had entrusted the property for any purpose. As we interpret the policy independently from the determination of the district court, this exclusion had the effect of reducing the

fire insurance coverage under the terms of the 1943 New York fire policy. Therefore, since the exclusion had the effect of reducing the coverage, the exclusion was not the substantial equivalent of the minimum provisions of the 1943 New York fire policy and the Director of Insurance could not approve the change in the policy under § 44-501(6).

CONCLUSION

We conclude as a matter of law that the policy exclusion relied upon by Tower was not legally approved by the Director of Insurance and that form CP 10 30 07 88 is not applicable to the policy in question. Since we reverse the judgment and remand the cause for a new trial, it is not necessary to address Maw's other assignments of error.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. KAMIL H. AL-ZUBAIDY, APPELLANT.

602 N.W.2d 8

Filed October 22, 1999. No. S-98-901.

1. **Judgments: Speedy Trial: Appeal and Error.** Ordinarily, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Supreme Court: Appeal and Error.** The construction of a mandate issued by the Supreme Court presents a question of law on which the Supreme Court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Supreme Court: Judgments: Appeal and Error.** Any mandate of the Supreme Court should be construed in connection with the opinion of the court when the mandate states that judgment should be entered in conformity with the judgment and opinion of the court.
4. **Supreme Court: Courts: Judgments: Appeal and Error.** When the Supreme Court grants a petition for further review, the opinions of both the Court of Appeals and the Supreme Court are to be considered, when necessary, to construe the nature and terms of the judgment as issued in the operative mandate to the lower court; this is so whether or not copies of the opinions are attached to the mandate so long as the opinions appear in the published reports.
5. **Appeal and Error.** Consideration of plain error occurs at the discretion of an appellate court, and a party who fails to properly assign an error on further review does so at its peril.

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

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch for appellant.

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

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

GERRARD, J.

PROCEDURAL BACKGROUND

In November 1995, pursuant to a jury verdict, Kamil H. Al-Zubaidy was convicted of attempted first degree murder (count I), second degree assault (count III), and two counts of use of a weapon in the commission of those felonies (counts II and IV). Al-Zubaidy appealed his convictions to the Nebraska Court of Appeals, claiming that the district court erred in not instructing the jury that the offense of attempted murder in the second degree was a lesser-included offense of attempted murder in the first degree and in failing to allow extrinsic evidence to impeach Seana Brown, a witness at Al-Zubaidy's first trial. A detailed description of the facts leading to Al-Zubaidy's initial convictions may be found in *State v. Al-Zubaidy*, 5 Neb. App. 327, 559 N.W.2d 774 (1997), *rev'd* 253 Neb. 357, 570 N.W.2d 713.

The Court of Appeals concluded that although attempted murder in the second degree is a lesser-included offense of attempted murder in the first degree, the evidence presented at Al-Zubaidy's trial did not warrant such an instruction. See *id.* The Court of Appeals also affirmed the exclusion of extrinsic evidence offered to impeach Seana Brown, and Al-Zubaidy's convictions were affirmed on all four counts. *Id.*

Al-Zubaidy petitioned this court for further review, asserting that the Court of Appeals erred by not reversing the attempted first degree murder conviction (count I) and the accompanying use of a weapon conviction (count II), due to the district court's failure to instruct the jury on the lesser-included offense of attempted second degree murder, and in concluding that there

was no evidence presented which required such an instruction. We granted further review on this issue and reversed Al-Zubaidy's convictions for attempted murder in the first degree and use of a weapon in the commission thereof on the ground that the district court had erroneously failed to instruct the jury on the lesser-included offense of attempted murder in the second degree, and remanded the cause for a new trial. *State v. Al-Zubaidy*, 253 Neb. 357, 570 N.W.2d 713 (1997) (*Al-Zubaidy I*).

The Court of Appeals' opinion, dated January 14, 1997, had affirmed Al-Zubaidy's convictions for the second degree assault of Seana Brown (count II) and the related charge of use of a weapon to commit the assault (count IV). On further review, Al-Zubaidy did not assign any error to the Court of Appeals regarding the affirmance of the assault and related use of a weapon convictions, and our November 21, 1997, opinion dealt solely with Al-Zubaidy's convictions for attempted murder in the first degree (count I) and the related use of a weapon charge (count II). See *Al-Zubaidy I*.

After analyzing the attempted-murder instruction issue, the concluding paragraph in *Al-Zubaidy I* stated:

> We hold, in accord with *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993), that attempted second degree murder is a lesser-included offense of attempted first degree murder. We disagree, however, with the Court of Appeals, which affirmed the trial court's failure to instruct the jury as to the lesser-included charge of attempted second degree murder. The trial court should have so instructed, and its failure to do so was prejudicial error. We, therefore, reverse, and remand for a new trial.
>
> REVERSED AND REMANDED FOR A NEW TRIAL.

Al-Zubaidy I, 253 Neb. at 365, 570 N.W.2d at 718.

On January 21, 1998, the clerk of this court issued a mandate to the Court of Appeals stating, in pertinent part:

> [T]he judgment which you rendered has been reversed and remanded for a new trial by the Supreme Court.
>
> NOW, THEREFORE, you shall, without delay, proceed to issue a mandate to the trial tribunal directing it to enter

> judgment *in conformity with the judgment and opinion of this court.*

(Emphasis supplied.)

Accordingly, on the same date, the Court of Appeals issued a mandate to the district court stating, in pertinent part: "[T]he judgment which you rendered has been reversed and remanded for a new trial by the Supreme Court. NOW, THEREFORE, you shall, without delay, proceed to enter judgment *in conformity with the judgment and opinion of the Supreme Court.*" (Emphasis supplied.)

Thereafter, on remand to the district court, during pretrial proceedings and upon oral motion of the State, the district court was asked to limit the retrial to counts I and II of the original information. It was the position of the State that the substance of the *Al-Zubaidy I* opinion revealed that only the convictions for attempted first degree murder and, of necessity, the accompanying weapons offense were reversed by this court and that the convictions for second degree assault and its accompanying weapons offense that had been affirmed by the Court of Appeals remained as valid judgments. Al-Zubaidy asserted that the mandate to the district court said that "the judgment which [the district court] rendered has been reversed and remanded for a new trial" and that the district court had no authority other than to retry all four counts of the original information.

The district court reviewed the charges in the original information and the opinions of both the Court of Appeals and this court in *Al-Zubaidy I*, and entered an order on July 7, 1998, that Al-Zubaidy's retrial would be limited to counts I and II of the original information. As a part of the same order, the district court found that Al-Zubaidy stood convicted of the original second degree assault charge (count III) and the accompanying use of a weapon charge (count IV).

On July 9, 1998, Al-Zubaidy entered into a plea agreement whereby count I was amended to first degree assault of victim Ann Brown and count II was dismissed in exchange for a plea of no contest to the first degree assault charge. Al-Zubaidy entered a plea of no contest, and the district court convicted him of first degree assault and sentenced him to a term of not less than 10 years' nor more than 10 years' imprisonment to be

served consecutively to any sentence that Al-Zubaidy was serving. As part of the plea agreement, neither party waived any rights that they had with regard to whether counts III and IV remained valid convictions.

On July 28, 1998, Al-Zubaidy filed a motion to discharge with respect to the charges of assault in the second degree and use of a weapon to commit the assault (counts III and IV) on the ground that these counts had been reversed and remanded for a new trial by the concluding paragraph in *Al-Zubaidy I* and the mandate issued by this court. Al-Zubaidy's motion was based on his contention that since the prosecution failed to pursue a trial on these charges within the 6-month statutory time limit, he was entitled to an absolute discharge thereon. See Neb. Rev. Stat. § 29-1208 (Reissue 1995).

Based on the same reasoning from the July 7, 1998, order, the district court found that Al-Zubaidy stood convicted of counts III and IV and denied his motion to discharge. It is from this order that Al-Zubaidy appeals.

ASSIGNMENTS OF ERROR

Al-Zubaidy assigns, consolidated and restated, that the district court erred in finding (1) that it had the authority to interpret the mandate issued by this court as affirming his convictions as to counts III and IV and (2) that Al-Zubaidy should not be discharged from counts III and IV on speedy trial grounds. Al-Zubaidy further asserts that the State waived any objection it may have had to the mandate as written in *Al-Zubaidy I*.

SCOPE OF REVIEW

[1,2] In construing a mandate, or in determining what was decided by an appellate court, the opinion of the appellate court should be examined when the mandate states that judgment should be entered in conformity with the judgment and opinion of the appellate court. See *State ex rel. Johnson v. Hash*, 145 Neb. 405, 16 N.W.2d 734 (1944). Ordinarily, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Ward, ante* p. 377, 597 N.W.2d 614 (1999). However, the construction of a mandate

issued by this court presents a question of law on which we are obligated to reach a conclusion independent of the determination reached by the court below. See *Fuchs v. Parsons Constr. Co.*, 172 Neb. 719, 111 N.W.2d 727 (1961).

ANALYSIS

Al-Zubaidy first claims that the district court erred in interpreting the mandate issued by this court in *Al-Zubaidy I* as affirming the assault charge and the use of a weapon to commit the assault charge (counts III and IV). Al-Zubaidy asserts that, regardless of the substance of the Court of Appeals' opinion or our opinion in *Al-Zubaidy I*, the mandate to the district court says that "the judgment which [the district court] rendered has been reversed and remanded for a new trial" and that the district court has no authority other than to retry all four counts in the instant case. That, quite simply, is not the law.

[3,4] We have long held that any mandate of this court should be construed in connection with the opinion of the court when the mandate states that judgment should be entered in conformity with the judgment and opinion of the court. See, *Fuchs v. Parsons Constr. Co., supra*; *State ex rel. Johnson v. Hash, supra*; *Elliott v. Gooch Feed Mill Co.*, 147 Neb. 612, 24 N.W.2d 561 (1946). Quite logically, when we grant a petition for further review, the opinions of both the Court of Appeals and the Supreme Court are to be considered, when necessary, to construe the nature and terms of the judgment as issued in the operative mandate to the lower court. This is so whether or not copies of the opinions are attached to the mandate so long as the opinions appear in the published reports. See *Fuchs v. Parsons Constr. Co., supra*. The reasoning behind the rule is clear: The law is not to be practiced in a vacuum.

Al-Zubaidy argues that because the operative mandate does not state that this judgment was reversed and the cause remanded as to counts I and II only, all four counts must be retried. Al-Zubaidy cites to cases which stand for the proposition that once a cause is remanded from an appellate court with specific directions, the court to which the mandate is directed has no power to do anything but to obey the mandate. Furthermore, Al-Zubaidy points out that no judgment or order

different from, or in addition to, that directed by the appellate court can have any effect, even though it may be such as the appellate court ought to have directed. While these propositions are not inaccurate, they are inapposite to the case at bar.

Without belaboring the facts as set forth above, we briefly restate that Al-Zubaidy had been convicted of attempted first degree murder, second degree assault, and two counts of use of a weapon in the commission of those felonies. Thereafter, Al-Zubaidy appealed his convictions to the Court of Appeals, and the Court of Appeals affirmed his convictions on all four counts. Al-Zubaidy then petitioned this court for further review, asserting that the Court of Appeals erred by not reversing the attempted first degree murder conviction, and the accompanying use of a weapon conviction, due to the district court's failure to instruct the jury on the lesser-included offense of attempted second degree murder, and in concluding that there was no evidence presented which required such an instruction. We granted further review on this issue and reversed Al-Zubaidy's convictions for attempted murder in the first degree and use of a weapon in the commission thereof on the ground that the district court had erroneously failed to instruct the jury on the lesser-included offense of attempted murder in the second degree. *Al-Zubaidy I*.

[5] While our concluding paragraph in *Al-Zubaidy I* could have been clearer in its instructions on remand to the lower court, the substance of the relief requested by Al-Zubaidy and the substance of the relief granted are crystal clear when the opinions of the Court of Appeals and this court are examined in conjunction with the mandate issued to the district court. On further review, Al-Zubaidy requested reversal on counts I and II, and that was the judgment entered by this court in *Al-Zubaidy I*. In spite of the clear language of the opinion, Al-Zubaidy argues that all four counts were before this court and thus considered in the opinion, because we could have potentially invoked the plain error doctrine as to any of the four counts. Al-Zubaidy ignores, however, the principle that consideration of plain error occurs at the discretion of an appellate court, and a party who fails to properly assign an error on further review does so at its peril. *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998). We

have made it clear that absent plain error, our review on a petition for further review is restricted to matters assigned and argued in the briefs. See *id.* Al-Zubaidy's convictions on counts III and IV had been affirmed by the Court of Appeals, and these convictions were neither considered nor reversed in our opinion. *Al-Zubaidy I.*

Our mandate to the Court of Appeals and the mandate of the Court of Appeals to the district court directed the lower court to "enter judgment *in conformity with the judgment and opinion of the Supreme Court.*" (Emphasis supplied.) See *State ex rel. Johnson v. Hash*, 145 Neb. 405, 16 N.W.2d 734 (1944). The district court, after reviewing the opinions of both the Court of Appeals and this court in *Al-Zubaidy I*, determined that there was nothing to "interpret" from the mandate and ordered that Al-Zubaidy's retrial would be limited to counts I and II of the original information. Upon independent consideration, we conclude that the district court was correct in this determination as a matter of law. We further conclude that the district court correctly determined that Al-Zubaidy stood convicted of the original second degree assault charge (count III) and the accompanying use of a weapon charge (count IV).

Therefore, the district court did not err when it denied Al-Zubaidy's motion to discharge counts III and IV on speedy trial grounds. Al-Zubaidy's original convictions and sentences stand with regard to the second degree assault charge (count III) and the accompanying use of a weapon charge (count IV). We need not consider any other assigned error.

CONCLUSION

Because the district court correctly denied Al-Zubaidy's motion to discharge with respect to counts III and IV of the instant cause, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CALVIN J. WHITE, APPELLANT.

601 N.W.2d 731

Filed October 22, 1999. No. S-98-1105.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Actions: Appeal and Error.** The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit.
3. **Appeal and Error.** The law-of-the-case doctrine applies with even greater force when an appellate court remands a cause to an inferior tribunal. The lower court is without power to take action inconsistent with the judgment of the appellate court. It is fundamental law that the last utterance of the appellate court determines the law of the case, and upon remand for another trial subsequent to the appeal, the trial court is bound to follow the law as stated by the appellate court.
4. **Speedy Trial: Indictments and Informations.** Pursuant to Neb. Rev. Stat. § 29-1207 (Reissue 1995), every person indicted or informed against for any offense must be brought to trial within 6 months, as computed in § 29-1207.
5. **Speedy Trial: New Trial: Collateral Attack: Appeal and Error.** In the case of a retrial following an appeal or a collateral attack, a new 6-month clock begins to run from the date of the mandate on remand. The date of the mandate on remand is the date on which the district court first takes action pursuant to the mandate.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Bradley T. Kalkwarf, Fillmore County Public Defender, for appellant.

Don Stenberg, Attorney General, and Barry Waid for appellee.

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

MCCORMACK, J.

NATURE OF CASE

This case is an appeal from the trial court's decision to reinstate appellant Calvin J. White's 1992 convictions and sentences for second degree murder and use of a firearm to commit a felony. White's original convictions were reversed on a

postconviction proceeding in 1996 because the jury instructions at his trial had failed to list malice as an element of second degree murder, and the cause was remanded for a new trial. Prior to the new trial, our decision in *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998), held that malice was not an element of second degree murder. The State then moved for a reinstatement of White's original convictions and sentences. The trial court granted the motion, and White appeals. The appeal is before this court as a case in which life imprisonment has been imposed.

BACKGROUND

White was tried in 1992 on a first degree murder charge arising from the death of Patricia Cool. White was convicted of second degree murder as a lesser-included offense, for which he was sentenced to life imprisonment. White also received a 10-year sentence of imprisonment for use of a firearm in connection with the killing. White has already served his sentence for an automobile theft conviction arising from the same incident, and that conviction and sentence are not a part of this appeal. This court affirmed the convictions and sentences in *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993) (*White I*).

White subsequently filed a motion for postconviction relief on the grounds that *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), had found malice to be an element of second degree murder and that the jury instructions in his trial had not listed malice as an element of second degree murder. In accordance with *State v. Myers, supra*, this court reversed White's convictions and sentences and *remanded the cause for a new trial. State v. White*, 249 Neb. 381, 543 N.W.2d 725 (1996) (*White II*). The mandate ordering such action was issued by this court on April 12, 1996, and filed in the trial court on April 16, 1996. The trial court's docket sheet reflects that it acted on the mandate when, on May 23, 1996, it ordered that "[i]n response to the SC mandate . . . the prosecution will file a new information and an arraignment will be had at ten o'clock, a.m., on June 13, 1996."

The State filed a new information charging White with first degree felony murder as well as second degree murder. At this point, White took an interlocutory appeal to this court alleging that he had already been acquitted of first degree murder by the

jury in his first trial and that the State could not again charge him with first degree murder merely by changing the theory to felony murder. This court agreed in *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998) (*White III*), and remanded the cause for further proceedings.

Shortly before the new trial was to begin, this court decided *State v. Burlison, supra*, which reversed *State v. Myers, supra*, and its progeny, including *White II*, on the issue of malice as a necessary element of second degree murder. The State made a motion for the reinstatement of White's original convictions and sentences for second degree murder and use of a firearm to commit a felony, which the trial court granted.

White had also made a motion for discharge from custody on the ground of denial of the right to a speedy trial. The trial court denied this motion in light of its reinstatement of White's convictions and sentences.

ASSIGNMENTS OF ERROR

White assigns that the trial court erred in granting the State's motion to reinstate the 1992 convictions and sentences, in denying White's motion for discharge from custody, and in retroactively applying an unforeseeable construction of a state law, thereby depriving White of due process of law.

STANDARD OF REVIEW

[1] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999); *Divis v. Clarklift of Nebraska*, 256 Neb. 384, 590 N.W.2d 696 (1999).

ANALYSIS

LAW-OF-THE-CASE DOCTRINE

[2] The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit. *State v. Carter*, 255 Neb. 591, 586 N.W.2d 818 (1998).

State v. Thompson, 69 Neb. 157, 95 N.W. 47 (1903), concerned a mortgage foreclosure in favor of the plaintiff and a

mandate from the Supreme Court directing the lower court to enter a judgment in favor of the plaintiff. On remand, the lower court had allowed other parties claiming an interest to intervene and had refused to enter the order directed by the mandate. We held that the district court must obey the mandate and could not allow intervention. We noted that if the mandate was not followed, then the mandates of the Supreme Court would furnish a basis for a retrograde movement, rather than stand as a monument of the progress made in successful steps in litigation.

In this case, the mandate of this court in *White II* was that the motion for postconviction relief was granted and that we reversed the judgment of the trial court and remanded the cause for a new trial on the second degree murder and use of a firearm to commit a felony charges, in accordance with our opinion.

In *White III*, we reversed the order of the trial court (overruling White's plea in bar that he could not be charged with first degree murder after having been found guilty of second degree murder) and remanded the cause to the trial court for further proceedings consistent with our opinion.

Neither of these explicit directions as set out in *White II* and *White III* have, as yet, been carried out by the trial court. While the trial judge was obviously concerned about the trauma to Cool's mother, who had witnessed White shoot Cool, from having to testify in another trial, together with the additional cost and expense to the taxpayers in this effort, the trial court failed to implement the mandate. The trial court did not have the authority to reinstate its prior judgment of convictions and sentences that the appellate court had reversed and remanded for a new trial. The only option available to a party to obtain review of a mandate is to have the appellate court which issued the mandate review the decision, and not to have the inferior court review the mandate and decide whether or not the inferior court should follow the mandate.

[3] We are persuaded by the reasoning of the Michigan case of *People v Russell*, 149 Mich. App. 110, 385 N.W.2d 613 (1985). In that case, the defendant was convicted on his plea of guilty of armed robbery, and the appellate court reversed, and remanded for a new trial. On remand, the trial court reinstated

the conviction and sentence, and the defendant appealed. The Michigan Court of Appeals held:

> The law of the case doctrine applies with even greater force when an appellate court remands a case to an inferior tribunal. The lower court is "without power" to take action inconsistent with the judgment of the appellate court. . . .
>
> "'"It is fundamental law that the last utterance of an appellate court determines the law of the case, and upon remand for another trial subsequent to the appeal, the trial court is bound to follow the law as stated by an appellate court. . . ."'"

Id. at 114-15, 385 N.W.2d at 615-16.

As stated by the Michigan court, if an appellate court has remanded after judgment, a lower court has no similar authority because if it could and should exercise it, the lower court would really be reviewing and revising the action of a superior court, which would be absurd.

In the instant case, the State, in its motion to reinstate the convictions and sentences of *White I*, which the trial court improvidently granted, has asked the trial court to ignore the mandate of *White II*. The trial court's decision granting this motion was in error.

We reverse the decision of the trial court granting the State's motion to reinstate the convictions and sentences of White, and remand the cause for the new trial which was directed by the mandate in *White II*. In this retrial, the law as established in *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998), shall apply.

WHITE'S MOTION FOR DISCHARGE

[4] White further argues that the failure of the trial court to grant his motion for discharge was erroneous. Pursuant to Neb. Rev. Stat. § 29-1207 (Reissue 1995), every person indicted or informed against for any offense must be brought to trial within 6 months, as computed in § 29-1207. White asserts that the 6-month clock began to run on December 20, 1994, when the trial judge set a hearing on his postconviction relief motion and stated that " '[t]he week of March 20, 1995, is hereby saved for a second trial . . . .' " Supplemental brief for appellant at 5.

White characterizes this order as the granting of a new trial for purposes of the speedy trial statute.

[5] However, § 29-1207(3) states that in the case of a retrial following an appeal or a collateral attack, a new 6-month clock begins to run from the date of the mandate on remand. The date of the mandate on remand is the date on which the district court first takes action pursuant to the mandate. *State v. Kinser*, 256 Neb. 56, 588 N.W.2d 794 (1999). The first action of the trial court following the remand was a meeting with counsel on May 23, 1996. Thus, the 6-month clock began to run on that date.

White's filing of the plea in bar on June 13, 1996, that led to *White III*, stopped the clock with 21 days having elapsed. The clock began running again as soon as the trial court regained jurisdiction over White's case by taking some action following our remand in *White III*. See *State v. Ward, ante* p. 377, 597 N.W.2d 614 (1999). The trial court's first action following remand apparent from the record is an order filed August 20, 1998.

The clock would have started again on that date but for White's filing of the motion for discharge from custody that preceded the court's order and is a subject of this appeal. Because White's filing of a motion stopped the clock before it could restart, no time has elapsed off the clock since the filing of White's plea in bar on June 13, 1996.

Therefore, we conclude that White's second assignment of error, denial of his motion for discharge from custody, is without merit.

CONCLUSION

The mandate of *White II* ordering a new trial has not been fulfilled. The trial court failed to take into account the mandate and lacks the authority to reinstate the convictions and sentences of *White I*, and the order of the trial court doing this is hereby vacated, and the cause is remanded to the trial court for the new trial as directed in our previous mandate.

The decision of the trial court overruling White's motion for discharge of custody is hereby affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

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